OPINIONS OF THE ATTORNEY-GENERAL FROM JANUARY 10, 1917, TO JANUARY 8, 1918.

1.

STATE BOARD OF PUBLIC BUILDINGS—FORCE AND EFFECT OF ACT CREATING SAME—MEMBERSHIP ON SAID BOARD—ITS DUTIES—DUTIES OF ADJUTANT GENERAL IN REGARD TO PUBLIC BUILDINGS.

The act providing for a state board of public buildings is still in force and effect and is not obsolete, due to its special nature.

Membership on said board ceases at the same time that the terms of office cease in the bodies from which the members are appointed; and this though the members should be re-elected or reappointed to the bodies from which they were originally appointed.

There is no conflict between the provisions of this act and the provisions of the act found on page 319 *of the* 105-106 *Year Book, which has to do with the duties of the adjutant general. The duties of the board are special and limited. The duties of the adjutant general are general and continuous.*

COLUMBUS, OHIO, January 13, 1917.

HON. GEORGE H. WOOD, *Adjutant General, Columbus, Ohio.*

DEAR SIR:—In accordance with your oral communication of recent date, I am rendering you an opinion in reference to an act passed by the eighty-first general assembly to provide for the appointment of a state board of public buildings.

> "1. Is said act still in full force and effect, or has it become obsolete, due to the fact that it is of a special nature?"

It is my opinion that this act is still in full force and effect and that the members of said board have the authority to proceed further in carrying out the provisions of the same. There are many cases having a bearing upon this question which might be cited with profit.

In Homer v. Commonwealth, 106 Pa. St. 221, the court held in the syllabus:

> "An act of assembly cannot be repealed by non-user. It can be repealed only by express provision of a subsequent law, or by a clause of such subsequent law so positively repugnant to its provisions that the two cannot stand together, or be consistently reconciled."

In its opinion on page 226 the court holds:

> "It was long ago settled that an act of parliament cannot be repealed by *non-user*. That this is also the rule in this state accords with reason

and the absence of authority to the contrary. The settled rule is, that a statute can be repealed only by express provision of a subsequent law or by necessary implication."

In 1 Bland Ch. (Md.) 550, Snowden v. Snowden, the court lays down the law in the syllabus as follows:

"The express provisions of a constitutional act of assembly cannot become obsolete and are of superior authority to any usage or adjudged case whatever."

In the opinion at page 556 the court say:

"No judge or court, either of first or last resort, can have any right to legislate; and there can be no difference between the power to declare an act of assembly obsolete, and the power to enact a new law. The power to repeal and to enact are of the same nature."

I merely cite the following cases without quoting:

72 Ia. 348.
26 Wash. 405.

Further in answer to above query, it is plainly evident, from the authority given to the board and the duties imposed upon them in said act, that their authority and duties are not at an end. In section 4 they are empowered:

"to inspect and cause to be made or to procure surveys, measurements and drawings of the state house, judiciary building and state house grounds, for the purpose of determining whether alterations in or additions to the state house or the judiciary building, or in or to both of them, and improvements and embellishments of the state house grounds can be made."

In the same section they are to determine:

"(b) Whether improvements or changes can be made in the state house and judiciary building to provide for a more economical and efficient conduct of the business of the state and to promote the health and welfare of the officers and employes therein.

"(c) Whether repairs are needed for the proper preservation of the state house and judiciary building.

"(d) Whether the state house grounds can be improved and embellished in a manner to make them conform to and more nearly express the function and dignity of the state of Ohio."

Under section 5 of said act the board is authorized and empowered, under subdivision 1 of said section, to proceed with additions to or alterations in or repair of the state house, judiciary building or other building or buildings which may be acquired for the use of the state, and under subdivision 2 of said section to proceed with the improvement and embellishment of the state house grounds.

In view of all the above, I am of the opinion that said law is still in full force and effect.

"2. Does the term of office upon the board of public buildings of those members appointed from the general assembly and the Ohio board of ad-

ministration cease when said members cease to be members of the general assembly and the Ohio board of administration, or is the membership upon said board of public buildings continuous and indefinite?"

Section 1 of said act provides that the board of public buildings shall be composed of seven members; that not more than four of them shall be of the same political faith; that the adjutant general is *ex officio* a member; that the governor in appointing the members of said board must appoint two members from each branch of the general assembly and two from the Ohio board of administration. From this it is evident that this board is to have a certain complexion; that there is a limitation upon the membership of the board; that it was the intention of the legislature that two members of the board should be members of the house of representatives, two should be members of the senate and two should be members of the Ohio board of administration. Or in other words, the board of public buildings must from time to time be composed of the adjutant general *ex officio,* two members from each branch of the general assembly and two members from the Ohio board of administration.

Hence, it is my opinion, if a member of the board of public buildings cease to be a member of the general assembly or of the Ohio board of administration, due to the expiration of his term, removal or resignation, that he at the same time ceases to be a member of the board of public buildings, this for the reason that he no longer has the qualifications for membership on said board. It is my opinion that he ceases to be a member for all time. And the mere fact that he might be re-elected for another term in the general assembly or be reappointed on the board of administration, would not reinstate him upon the board of public buildings. Vacancies on the board of public buildings would be filled in the same manner and with the same limitations as set out in item one of said act.

"3. Do the provisions of the act creating a state board of public buildings and the duties imposed upon said board conflict with the provisions of the act relative to the duties of the adjutant general, which act is found on page 319 of the 105-106 Year Book?"

It is my opinion that there is no conflict of duties to be performed by said board and the adjutant general. The only part of the duties of the adjutant general, as set forth in said act, that could in any way conflict with the duties of the board of public buildings, is found in section 146 G. C. as follows:

"Sec. 146. * * He shall have the supervision and control of * * the grounds and appurtenances thereof and all work or materials required in or about them. * * *"

These duties are general; they are continuous; they extend from year to year. The adjutant general takes the buildings and the grounds as they are or as they may be put by the law-making body or its agents, and exercises supervision over them. He has no authority to erect buildings or make general and costly repairs upon the same. While on the other hand the duties of the board are special, are limited. They take one general survey of the whole situation in order to enable them to ascertain what ought to be done, if anything. When this is ascertained by the board, they do the work necessary to be done to the buildings or to the grounds. Then the general oversight of the property and the grounds as they leave them passes to the adjutant general.

From this it is my opinion that there is no conflict between the two provisions.

Respectfully,

JOSEPH MCGHEE,

Attorney-General.

2.

APPROVAL, LEASE FOR CERTAIN CANAL LANDS, CITY OF MASSILLON, OHIO, TO JACOB WISE.

COLUMBUS, OHIO, January 18, 1917.

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

DEAR SIR:—I acknowledge receipt of your communication of January 2, 1917, transmitting to me for examination a lease of certain canal lands in the city of Massillon, Ohio, to Jacob J. Wise, said lands being valued at two hundred dollars.

I find that this lease has been executed according to the provisions of the statutes governing the leasing of canal lands, and am, therefore, returning the same with my approval endorsed thereon.

Respectfully,
JOSEPH MCGHEE,
Attorney-General.

3.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE, VILLAGE OF SOUTH NEWBURGH, CUYAHOGA COUNTY, OHIO.

COLUMBUS, OHIO, January 18, 1917.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

> "RE:—Bonds of the village of South Newburgh, Cuyahoga county, Ohio, in anticipation of the collection of special assessments for sewer construction purposes, in the sum of $29,875.00, being one bond of $875.00 and twenty-nine bonds of one thousand dollars each."

I have examined the transcript of council and other officers of the village of South Newburgh relative to the above bond issue, also the bond and coupon form attached, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds drawn in accordance with the form submitted and executed by the proper officers will, upon delivery, constitute valid and binding obligations of the village of South Newburgh.

Respectfully,
JOSEPH MCGHEE,
Attorney-General.

4.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE, VILLAGE OF SOUTH NEWBURGH, CUYAHOGA COUNTY, OHIO.

COLUMBUS, OHIO, January 18, 1917.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of the village of South Newburgh, Cuyahoga county, Ohio, in anticipation of the collection of special assessments for the construction of a sewer in Turney road, in the amount of $19,208.96, being one bond of $208.96 and nineteen bonds of one thousand dollars each."

I have examined the transcript of the proceedings of council and the other officers of the village of South Newburgh relative to the above bond issue, also the bond and coupon form attached, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds drawn in accordance with the form submitted and executed by the proper officers will, upon delivery, constitute valid and binding obligations of the village of South Newburgh.

Respectfully,
JOSEPH MCGHEE,
Attorney-General.

5.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE, MAPLE HEIGHTS VILLAGE SCHOOL DISTRICT, CUYAHOGA, COUNTY, OHIO.

COLUMBUS, OHIO, January 18, 1917.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of Maple Heights village school district, Cuyahoga county, Ohio, in the sum of $25,000.00, being fifty bonds of $500.00 each."

I have examined the transcript of the proceedings of the board of education and other officers of Maple Heights village school district relative to the above bonds, also the bond and coupon form attached, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds when drawn and properly executed will, upon delivery, constitute valid and binding obligations of the said school district.

Respectfully,
JOSEPH MCGHEE,
Attorney-General.

6.

MUNICIPAL CORPORATION—INTERPRETATION OF SECTION 12912 G. C. IN REGARD TO ONE YEAR CLAUSE THEREOF—STREET INSPECTOR—OFFICER OF MUNICIPAL CORPORATION MAY ACT AS SAME WITHIN ONE YEAR AFTER TERM EXPIRES—WHEN FORMER DIRECTOR OF PUBLIC SERVICE MAY ACT AS STREET INSPECTOR.

The one year provision of Section 12912 G. C. serves merely as a prohibition against an officer described therein acting as commissioner, architect, superintendent or engineer in work undertaken or prosecuted by such corporation or township within one year after his term had expired.

A position of street inspector is not one of the prohibited positions under said one year provision of said section.

A former director of public service may act as street inspector within one year after his term of office expires, no matter whether his compensation is paid by the city or the contractor, or paid by the city and afterwards deducted from the estimate allowed the contractor on his contract.

COLUMBUS, OHIO, January 20, 1917.

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

GENTLEMEN:—Under date of January 9, 1917, you submitted to me for my opinion the following request:

"In view of the provisions of section 12912, General Code:

"(1) May a former director of public service of a municipality, within one year after the term for which he was appointed. legally act as inspector on street improvement work if his compensation is paid by the city and borne by the city?

"(2) May a former director of public service of a municipality, within one year after the term for which he was appointed, legally act as inspector on street improvement work if his compensation is paid by the contractor and borne by the contractor?

"(3) May a former director of public service of a municipality, within one year after the term for which he was appointed, legally act as inspector on street improvement work if his compensation is paid by the city and later deducted in payments for work made by the city to the contractor, and therefore borne by the contractor?"

Section 12912 G. C. reads as follows:

"Section 12912. Whoever, being an officer of a municipal corporation or member of the council thereof or the trustee of a township, is interested in the profits of a contract, job, work or services for such corporation or township, or acts as commissioner, architect, superintendent or engineer, in work undertaken or prosecuted by such corporation or township during the term for which he was elected or appointed, or for one year thereafter, or becomes the employe of the contractor of such contract, job, work, or services while in office, shall be fined not less than fifty dollars nor more than one thousand dollars or imprisoned not less than thirty days nor more than six months, or both, and forfeit his office."

In order to determine the proper answers to your questions it will be necessary first to ascertain what meaning the expression, "during the term for which he was elected or appointed, or for one year thereafter," has with respect to the rest of said section.

This department has considered the bearing of this portion of said section heretofore and its interpretation of same is set forth in an opinion rendered by Hon. U. G. Denman, Attorney-General, under date of January 21, 1910, to Hon. L. C. Barker, city solicitor, Galion, Ohio, found in the report of the Attorney-General for the years 1910-1911, at page 1033, and cited with approval by Hon. Timothy S. Hogan, Attorney-General, in an opinion rendered on March 7, 1914, to Hon. William B. James, city solicitor, Bowling Green, Ohio, found in the report of the Attorney-General for that year at page 386, which is as follows:

> "It will be noted with respect to the original act that the subject 'no member of the council or any officer of the corporation' is repeated; in fact the entire structure of the original section indicates clearly that the portion thereof which follows the parenthesis is absolutely separate and distinct from that which precedes and that it would have been proper grammatically to have placed a period at the division point. This conclusion eliminates one of the possible meanings suggested and indicates clearly that the phrase 'during the term for which he was elected or appointed, or for one year thereafter' does not modify the verb 'is interested.'"

Hon. Timothy S. Hogan, Attorney-General of Ohio, considered same further in an opinion rendered May 27, 1912, to Hon. James L. Leonard, city solicitor, Mt. Vernon, Ohio, found in the report of the Attorney-General for that year, at pages 1744-1745, as follows:

> "The purpose of this section is to prevent an officer of a municipality from having any interest in the profits of any contract or work done for the city. It specifically prohibits such officer from acting as commissioner, architect, superintendent or engineer, in work undertaken by the municipality during the term for which he was elected or appointed and for one year thereafter. The statute seeks to prevent any officer from securing any interest in any contract with the municipality, so that he might not be tempted to use his official position to further the interests of a contractor or of himself.
>
> "It is not the purpose of the statute to prevent an officer from holding another office in the village or city, at the expiration of the term of his first office, even though the second office has duties which pertain to work undertaken by the municipality. Likewise this section does not prevent an officer resigning a position in the city government and accepting appointment to another office in the service of the city."

It has always been considered by this department that the one year provision served merely as a prohibition against such officer acting as commissioner, architect, superintendent or engineer in work undertaken or prosecuted by such corporation within one year after his term had expired.

Inasmuch as one holding a position of street inspector cannot be considered a commissioner, architect, superintendent or engineer, and being of the same opinion on the one year provision of said section, as this department has held heretofore, I can see no objection to a former service director acting as a street inspector within the one year period, no matter whether his compensation is paid

by the city or contractor, or paid by the city and afterwards deducted from the estimate allowed the contractor on his contract.

Respectfully,
JOSEPH MCGHEE,
Attorney-General.

7.

SCHOOLS—INTERPRETATION OF SECTION 7735 G. C. IN REGARD TO NOTICE REQUIRED THEREIN—TUITION FOR NON-RESIDENT PUPILS.

Tuition for non-resident pupils, provided for by section 7735 G. C. is not an obligation against the school district of the residence of such pupils until after notice of such attendance is filed with the board of education of such district.

Notice must be given to the board of education of a school district in which pupils reside before tuition for such pupils attending school in another district, as provided by section 7735 G. C. becomes an obligation against the district of the residence of such pupils.

COLUMBUS, OHIO, January 22, 1917.

HON. BENTON G. HAY, *Prosecuting Attorney, Wooster, Ohio.*

DEAR SIR:—I acknowledge the receipt of your letter of January 6, 1917, wherein you request my opinion upon the following state of facts:

> "Suppose pupils in Plain township attend school in Chester township, the school in Plain township being more than a mile and a half from their residence, but the school in Chester township less than a mile and a half from their residence.
>
> "There was no agreement between the boards and the Chester township board did not notify the Plain township board of such attendance by said pupils until about a year after such pupils commenced to go to school in Chester township. Can the Chester township board collect tuition for such past year, the demand having been made at the end thereof and not at the beginning?"

General Code section 7735 provides as follows:

> "When pupils live more than one and one-half miles from the school to which they are assigned in the district where they reside, they may attend a nearer school in the same district, or if there be none nearer therein, then the nearest school in another school district, in all grades below the high school. In such cases the board of education of the district in which they reside must pay the tuition of such pupils without an agreement to that effect. *But a board of education shall not collect tuition for such attendance until after notice* thereof has been given to the board of education of the district where the pupils reside. Nothing herein shall require the consent of the board of education of the district where the pupils reside, to such attendance."

You will note that under the provisions of the above section no agreement of the several boards is necessary to be made, but the board of education of the

district where such pupils are in attendance shall not *collect* tuition for such attendance until after notice thereof has been given to the board of education where the pupils reside.

The first question to be determined, then, is the effect of the requirement of notice. Notice in its legal sense, is the information given of some act done, or the interpellation by which some act is required to be done. Whenever the giving of notice is a condition precedent to the right to recover, no liability attaches until such notice is given. It is held in Moore vs. Given, 39 O. S. 661, that where a statute requires notice to be given, actual notice alone will satisfy such requirement. So that until the Plain township board of education gave actual notice to the Chester township board of education of such attendance by said pupils, no liability existed against said Chester township board.

Our position, however, is fortified also by an opinion of former Attorney-General Timothy S. Hogan, rendered April 22, 1912, to Hon. R. H. Sutphen, prosecuting attorney of Defiance county, and found in the reports of the Attorney-General for the year 1912, at page 1273, wherein the following language is used:

> "While it is true that the statute says 'shall not collect tuition for such attendance,' yet from a reading of the entire section and the fact that it does not require any agreement or consent from the board of education of the district in which the pupil resides, I am of the opinion that the liability to pay for such attendance will not attach until the notice provided for in the section (7735) has been given, I do not believe that the section means that the notice merely establishes a right to collect for tuition of pupils who have attended prior to the giving of such notice as it would seem to me that the object of the notice, since no contract is necessary, is to fix the time when the obligation for the tuition commences."

I agree with the above holding and adopt the same as a part of my opinion, in answer to your question.

To answer your question specifically, then, I am of the opinion that the Chester township board cannot collect the tuition from such Plain township board for such past year because of the want of notice.

Respectfully,
JOSEPH MCGHEE,
Attorney-General.

8.

OFFICER OHIO NATIONAL GUARD—ON RETIRED LIST—ELIGIBLE TO MEMBERSHIP ON STATE ARMORY BOARD.

An officer of the Ohio National Guard on the retired list is eligible to membership on State armory board.

COLUMBUS, OHIO, January 22, 1917.

HON. GEORGE H. WOOD, *Adjutant General, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter of January 15th, wherein you inquire as follows:

> "Section 5254, Revised Statutes, provides that the 'armory board shall consist of four officers of the Ohio National Guard' and, at present, I

desire a ruling from your department as to whether a retired officer of the national guard is eligible as a member of the armory board.

"Section 5201 makes a provision for the retirement of an officer and provides, further, that 'the commander-in-chief may detail officers so retired on various duties.'

"As Colonel Bryant, one member of the armory board, is now on the retired list, and Lieutenant-Colonel Rieger, another member of the armory board, has made application to be placed on the retired list, the above question becomes a serious one, as an answer in the negative would make it necessary for the governor to appoint two members to fill the vacancies."

Section 5254 of the General Code provides:

"The State armory board shall consist of four officers of the Ohio national guard to be appointed by the governor, by and with the consent of the senate, each of whom shall serve four years. * * *"

There is nothing in the above provision which states that the officers so appointed shall be from the active list. The only requirement in the statute is that they shall be officers of the Ohio national guard.

Section 5201 of the General Code, to which you call my attention, provides as follows:

"Any commissioned officer who has served as a member of the national guard for a period of ten years, five of which have been as a commissioned officer, at his own request may be placed upon the retired list, which shall be kept in the office of the adjutant general. * * * The commander-in-chief may detail officers so retired upon duty other than in the command of troops, and when so detailed, they shall receive like pay and allowance as officers on the active list detailed or employed under like conditions."

It appears from the above section that an officer on the retired list is still an officer of the Ohio national guard and as such, subject to detail.

In view of the fact that section 5254 G. C. does not provide that the members of the State armory board shall be chosen from the officers of the Ohio national guard on active duty, I am of the opinion that an officer of the Ohio national guard on the retired list is eligible as a member of the State armory board.

Respectfully,
JOSEPH McGHEE,
Attorney-General.

9.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE, VILLAGE OF BEDFORD, SCHOOL DISTRICT, CUYAHOGA COUNTY, OHIO.

COLUMBUS, OHIO, January 23, 1917.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of the village of Bedford school district, Cuyahgoa county, Ohio, in the amount of $50,000.00 for the purpose of erecting a

new school building in said school district, being twenty bonds of $500.00 each and forty bonds of $1,000.00 each."

I have examined the transcript of the proceedings of the board of education and other officers of the said village school district relative to the above described bonds, also the bond and coupon form attached, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds when properly drawn and executed by the proper officers will, upon delivery, constitute valid and binding obligations of the Bedford village school district.

Respectfully,
JOSEPH MCGHEE,
Attorney-General.

10.

APPROVAL—TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE—VILLAGE OF BREWSTER, STARK COUNTY, OHIO.

COLUMBUS, OHIO, January 23, 1917.

Industrial Commission of Ohio, Columbus, Ohio.
GENTLEMEN:—

"RE:—Bonds of the village of Brewster, Stark county, Ohio, in the amount of $3,000.00 to complete the sanitary sewer system of said village, being three bonds of $1,000.00 each."

I have examined the transcript of proceedings of the council and other officers of the village of Brewster relative to the above bond issue, also the bond and coupon form attached, and I find the same regular and in conformity with the provisions of the General Code.

I am of opinion that said bonds when properly drawn and executed by the proper officers will, upon delivery, constitute valid and binding obligations of said village.

Respectfully,
JOSEPH MCGHEE,
Attorney-General.

11.

TOWNSHIP TRUSTEES—TOWNSHIP TREASURER PERSONALLY RESPONSIBLE FOR POSTAGE USED IN COMMUNICATING WITH TOWNSHIP BANK DEPOSITORY.

Township trustees cannot legally reimburse a township treasurer for money expended by him for postage used in communicating with the township bank depository in the performance of his duties as such public official.

COLUMBUS, OHIO, January 24, 1917.

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

GENTLEMEN:—Under date of January 8, 1917, you request my opinion on the following:

> "If a township treasurer does a portion of his transactions with the bank, or banks, which have the custody of the township funds, by mail, is there any authority of law under which the township trustees can reimburse him for moneys expended for postage?"

Section 3318 G. C. reads as follows:

> "Sec. 3318. The treasurer shall be allowed and may retain as his fees for receiving, safe keeping and paying out moneys belonging to the township treasury, two per cent of all moneys paid out by him upon the order of the township trustees."

The above section provides for the compensation of a township treasurer and specifies what services are to be rendered by him in return for said compensation.

It is a well known principle of law, sustained by a long line of authorities, that a public official is not entitled to compensation for services rendered, unless such compensation is fixed by statute, and then only for the particular duties specified. This principle applies to a township treasurer, as held in Debolt v. Trustees, 7 O. S. 237.

Said section 3318 contains the only provisions in the Code relating to compensation of a township treasurer for performing his general duties as such official. Under the provisions of this section said treasurer receives compensation for the receiving, safe keeping and paying out of township funds.

It is my opinion that any dealings that the treasurer might have with the township bank depository would be a part of the duties of receiving, safe keeping and paying out township funds, for which he is entitled to a two per cent fee. If the township treasurer found it necessary to use the mails in communicating with the bank depository, he should pay for the postage required, out of the two per cent allowed him by law.

Hence, for the reasons given above, I am of the opinion that the township trustees cannot legally reimburse a township treasurer for money expended by him for postage used in communicating with the township bank depository in the performance of his duties as such public official.

Respectfully,
JOSEPH MCGHEE,
Attorney-General.

12.

APPROVAL, RESOLUTION FOR IMPROVEMENT OF STEUBENVILLE-CAMBRIDGE ROAD IN JEFFERSON COUNTY.

COLUMBUS, OHIO, January 27, 1917.

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

DEAR SIR:—I have your communication of January 23, 1917, transmitting to me, for examination, final resolution, in duplicate, relating to the following road improvement:

Jefferson county, Steubenville-Cambridge road, section "K," I. C. H. No. 26, Petition No. 2538.

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

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

13.

APPROVAL, RESOLUTIONS FOR IMPROVEMENT OF CERTAIN ROADS IN JEFFERSON, SCIOTO AND CUYAHOGA COUNTIES.

COLUMBUS, OHIO, January 27, 1917.

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

DEAR SIR:—I acknowledge the receipt of your communications of January 19 and 20, 1917, transmitting to me for examination final resolutions relating to the improvement of the following roads:

Jefferson county, Petition No. 1231, I. C. H. No. 7, Sec. "I."
Scioto county, Petition No. 2906, I. C. H. No. 406, Sec. "M."
Cuyahoga county, Petition No. 2245, I. C. H. No. 3, Sec. "A."

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

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

14.

APPROVAL, LEASES FOR CERTAIN CANAL LANDS, CITY OF LOGAN, OHIO, AND VILLAGE OF NEWCOMERSTOWN, OHIO.

COLUMBUS, OHIO, January 27, 1917.

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

DEAR SIR:—I have your communication of January 22, 1917, transmitting to me for my approval the following leases of canal lands:

Lease to W. E. Shaw and A. R. Kelch, of Logan, Ohio, of certain canal lands

in the city of Logan, Hocking county, O., for residence and agricultural purposes; valuation $400.00; annual rental $24.00.

Lease to F. W. Wise, of Newcomerstown, Ohio, of certain canal lands in the village of Newcomerstown, Tuscarawas county, Ohio, for garage purpose; valuation $400.00; annual rental $24.00.

I find that these leases have been executed in regular form and am, therefore, returning the same with my approval endorsed thereon.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

15.

APPROVAL, LEASE FOR CERTAIN CANAL LANDS, CITY OF TOLEDO, OHIO, TO CITY OF TOLEDO.

COLUMBUS, OHIO, January 31, 1917.

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

DEAR SIR:—I have your communication of January 29, 1917, transmitting to me for my examination the following lease of canal lands:

Lease to the city of Toledo, Ohio, of a portion of what is known as Swan Creek canal in Toledo, Ohio; valuation $200.00; annual rental $12.00.

I find that this lease has been executed in regular form and am therefore returning the same with my approval endorsed thereon.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

16.

COMMON PLEAS JUDGES—NOT ENTITLED TO ADDITIONAL COMPENSATION FOR SERVICES RENDERED UNDER ASSIGNMENT OF CHIEF JUSTICE BY VIRTUE OF SECTION 1469 G. C.—IF ELECTED PRIOR TO AMENDMENT OF SECTION 2253 G. C.

Common pleas judges elected prior to amendment of section 2253 G. C., 104 O. L. 251, are not entitled to additional compensation of $10.00 for each day on which they render services under assignment of the chief justice of the supreme court acting by virtue of section 1469 G. C.

Opinion to that effect by Attorney-General Turner, rendered March 1, 1915, concurred in.

COLUMBUS, OHIO, January 31, 1917.

HON. JAMES W. TARBELL, *Judge of Common Pleas Court, Georgetown, Ohio.*

DEAR SIR:—I have carefully considered the question submitted by you in your letter of January 17, which is whether or not common pleas judges, elected prior to the amendment and taking effect of section 2253 G. C. (104 O. L. 251), are entitled to the additional compensation of ten dollars for each day on which they render services under the assignment of the chief justice of the supreme court, acting by virtue of section 1469 G. C.

In an accompanying letter you call my attention to inconsistent opinions of former attorneys general on this subject, one rendered by Hon. Timothy S. Hogan in August, 1914 (Vol. I, Annual Report for that year, 1057), and the other by Hon. Edward C. Turner (Opinions of the Attorney-General for the year 1915, Vol. I, 206).

My conclusion agrees with that of Mr. Turner, who holds that the common pleas judges in the above described situation are not entitled to the special compensation referred to, for the reason that to allow them such compensation would be violative of article IV, section 14 of the Constitution of this state.

I do not feel that I can add anything to Mr. Turner's statement of the reasons by which he supports this view, and inasmuch as you have made reference to the opinion, I take it that you are familiar with it.

Respectfully,
JOSEPH McGHEE,
Attorney-General.

17.

AUTOMOBILE DEPARTMENT—CASHIER IN UNCLASSIFIED SERVICE —NOT PRACTICABLE TO DETERMINE FITNESS OF SAID OFFICIAL BY COMPETITIVE EXAMINATION.

It is not practicable to determine the merit or fitness of applicants for the position of cashier in the automobile department by competitive examination, and such position is, therefore, in the unclassified service.

COLUMBUS, OHIO, January 31, 1917.

HON. W. D. FULTON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—On January 11, 1917, you addressed an inquiry to this department in reference to your authority to appoint a cashier in the automobile department, and as to whether such position is included in the classified civil service.

Your request is by letter as follows:

> "I desire an opinion from you relative to my power to appoint a person to the vacancy in the position of cashier in the automobile department.
>
> "Am advised that the civil service commission has a list of names from which they can certify a list to me from which to select. Am I bound to appoint from this list so furnished, or can I ignore it and appoint whomsoever I choose? In the event that the appointment must finally be made from the list furnished by the commission have I the power to make a temporary appointment of a person of my own selection, and for what period of time?
>
> "I am especially interested in this position and desire to obtain a man for the place, if possible, who possesses the highest standard of qualifications, honesty and integrity, as all the funds and receipts of that department pass through the hands of the person holding the place.
>
> "Kindly advise me upon these points at your earliest convenience, and oblige."

It transpires upon examination that this is not a question of detail as to a ramification of the power possessed by the civil service commission, but it goes

to the very marrow in the spine of the civil service act itself—its scope and meaning with reference to the organic law upon which it is founded.

The constitutional provision is as follows:

> "Appointments and promotions in the civil service of the state, the several counties and cities, shall be made according to merit and fitness, to be ascertained, as far as practicable, by competitive examinations. Laws shall be passed providing for the enforcement of this provision."
>
> Article XV Section 10.

The legislature then must have passed this law in question *for the enforcement* of this provision. The law is found in Vol. 106 p. 400, G. C. 486 to 486-31. The portion of this law applicable to the question in hand is that part defining the classified and unclassified service beginning at Sec. 486-8. Under subdivision (a) of this section, in subsections numbered from 1 to 12, is what purports to be a complete schedule of all positions in the unclassified service, but which, as shall presently be submitted, has one important limitation—the constitutional one.

If this particular position be unclassified under the letter of the act, it is by virtue of sub-section 9,

> "the deputies of elective or principal executive officers authorized by law to act for and in place of their principals and holding a fiduciary relation to such principals."

There might be doubt as to whether this cashier is a deputy but that doubt should probably be resolved in the affirmative under the description of his duties contained in your inquiry and with reference to this provision containing a qualification of the meaning of deputy and with reference to the change made in that qualification from the law in force immediately before this, and the word "generally," qualifying "to act," having been dropped out of the old law. This functionary though not called a deputy substantially is one in a particular department of the duty of the secretary of state. There is no doubt as to his holding a fiduciary relation, superlatively so, almost exclusively so. There is no doubt of his being authorized to act in the place of his principal. There is a doubt, however, as to whether he is "authorized by law" to so act, there being no statute making any specific provision in that respect, so that it may at least be considered doubtful as to whether he comes under the description of unclassified, as the same is expressly set forth in the law. He does, however, come within that designation by the necessary test of the law by its constitutional foundation.

The addition to the unclassified service alluded to above consists of all those officials whose merit and fitness it is not practicable to ascertain by competitive examination. This class of officials is recognized in the act itself expressly.

Passing to subdivision (b) of the section in question—there is a preliminary statement that all other persons in the public employment not specifically mentioned in subdivision (a) are in the classified service, which is there subdivided into the competitive and the unskilled labor classes.

The recognition of the constitutional qualification above referred to, and creating additional unclassified service appears in subsection 1 of this subdivision in the following language:

> "(1) The competitive class shall include all positions and employments * * * for which it is practicable to determine the merit and fitness of applicants by competitive examinations."

Now this is the exact language of the constitutional qualification, except that in one case we have "for which," and in the other "as far as," a mere verbal difference. The conclusion is irresistible that this language was employed to effectuate this constitutional qualification. It can do so in no other way than by including as unclassified all those positions for which it is impracticable to determine the merit and fitness of applicants by competitive examinations. To so hold is to hold the statute in accordance with the constitution, a construction which is always adopted where possible, even though it be a forced one. To hold otherwise would be to suppose that the law attempts to exceed its constitutional bounds, in which case it would be of no effect and void to the exact extent that it did so. The express list, then, of positions in the unclassified service is only a complete list of those which can be included within the operation of the law at all, viz: those whose merit, etc., it is practicable to determine in this manner. It then only remains to consider whether it is practicable to ascertain the merit and fitness of the cashier by an examination, or to determine between two applicants for such position by a competitive examination.

In no place does the letter of the statute commit the determination of this question to any authority. The spirit of the act, however, would seem to place the responsibility of such decision upon the civil service commission, subject to control by the courts, and there, generally speaking, it is the disposition of this department to leave it. In any case where there could be any doubt upon the subject it should first be left to the decision of the commission. There are, however, some positions that in the common knowledge of everyone are not practicably subject to the test of such examinations, in which case, if there can be no doubt what the commission would find, or what the courts would determine upon the subject, such conclusion may be acted upon as a matter of law, in the first instance, by the appointing authority or its advisers without the unnecessary circumlocution and circumvention of going through the proceedings and records of the commission. This office is such position, and it may safely be said, as a matter of law, that the fitness and merit of a cashier cannot be determined by an examination for the obvious reason that more than ninety-nine per cent of such fitness is a question of integrity, which is inscrutable, past finding out, by any such test, and which no man can determine except as a result of intimate acquaintance or careful observation thereof on his part, or of someone in whom he confides. What would be said of a board of bank directors who would select a cashier for the bank by a competitive examination? Yet the nature of that duty would render it much more appropriate than this cashier, for that cashier has other very prominent duties and requirements aside from the handling of money.

Suppose a warden of the penitentiary wanted a cashier. He would not have to go outside his own walls to find a goodly number from which to make a selection, most of whom could stand the test of a very severe examination, and yet their very reason for being his involuntary guests is that they are unfit to be cashiers.

It is a matter of common knowledge that this cashier will handle over a million dollars a year. His clerical duties are purely negligible compared to this main consideration. He is not like a bank cashier, required to increase the business. He has no competition. All the vast multitude of people who do this particular business can go to nobody but him. It is correct to state, as a matter of law, that it is not practicable to ascertain his merit or fitness by an examination whereby his intellectual acumen or scientific or literary attainments may be compared with those of other persons seeking the same position. He is once for all in the unclassified service.

In so holding there is no underestimate of the exalted object of the civil service law, or disregard of the disinterested purpose of those entrusted by the

state with the duty of enforcing it, nor intention of establishing a precedent of deciding as a matter of law anything which should be left to the civil service commission to draw as inference from facts. This action is taken with reference to this case alone, because, as shown above, it is so peculiarly and exclusively an unfit case for the test of an examination, that there could be no doubt but what the commission would so hold or that the courts would so hold in the event of its reaching them.

This, of course, is taking the duties of the position as set forth in the inquiry. Not being specified by law they will be prescribed by the head of the department.

In this holding we are not without precedent in this office. Each of the last two incumbents have expressed an equivalent opinion. On May 28, 1914, in an opinion to the State civil service commission, in reference to the inclusion or exclusion of certain officers in the classified service, Attorney-General Hogan says:

> "As to some positions it can be determined as a matter of law that it is impracticable to hold examinations therefor."
> Vol. I Attorney-General's Report, p. 715.

On January 16, 1915, Attorney-General Turner, in an opinion rendered to the State civil service commission, gives a practical application of this general statement as follows:

> "I have no hesitancy in saying, as a matter of law, that the secretary to the governor * * * are not within the classified service, for the reason that it is impracticable to determine their merit and fitness by competitive examination."
> Vol. I Opinions Attorney-General, p. 3.

It is true in the latter opinion the attorney-general held that the matter was for the determination of the commission, but inasmuch as he expressly declares what that determination must be as a matter of law, I see no reason why the appointing power may not cut cross-lots and assume the decision without going to the Commission for the main purpose of a determination of that which is already pre-determined.

This opinion, of course, is based entirely upon the state of facts as set forth in the inquiry set out herein.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

18.

APPROVAL—LEASE OF CERTAIN LANDS FOR OIL AND GAS IN ROSS AND MORGAN COUNTIES.

COLUMBUS, OHIO, February 2, 1917.

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

DEAR SIR:—Your communication of January 26, 1917, transmitting to me four leases in triplicate in which certain lands are leased by the state for oil and gas, was received, which leases are as follows:

1. To W. V. Walton, lands in Ross county.
2. To J. D. Varney and D. G. Coyner, lands in Ross county.
3. To George R. Barrett, lands in Morgan county.
4. To George R. Barrett, lands in Ross county, the latter lease embodying two different tracts of land.

I have carefully examined those leases and find them legal in form and that they protect the interests of the state of Ohio in the premises so leased.

I therefore am returning the same properly endorsed.

Your communication states that there are five leases. I am assuming that the lease to George R. Barrett of two tracts in one lease accounts for this, as there were only four separate leases enclosed in your communication to me.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

19.

APPROVAL—TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE MAGNETIC SPRINGS VILLAGE SCHOOL DISTRICT—UNION COUNTY, OHIO.

COLUMBUS, OHIO, February 2, 1917.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of Magnetic Springs village school district, Union county, Ohio, in the sum of $6,000.00, issued to extend the time of payment of certain valid indebtedness of said district, being twelve bonds of five hundred dollars each."

I have examined the transcript of proceedings of the board of education and other officers of the said district relative to the above bond issue; also the bond and coupon form which was submitted to me some time ago, and returned to the clerk of the district; and I find the same regular and in conformity with the provisions of the General Code.

I am of opinion that said bonds drawn in accordance with the form heretofore submitted and executed by the proper officers will constitute valid and binding obligations of said district.

Respectfully,
JOSEPH MCGHEE,
Attorney-General.

20.

MUTUAL FIRE INSURANCE COMPANY—MAY INCORPORATE ONLY FOR PURPOSES DESIGNATED IN FIRST PARAGRAPH OF SECTION 9510 AND IN SECTION 9556 G. C.—DISAPPROVAL ARTICLES OF INCORPORATION OF "THE MUTUAL FIRE AND AUTOMOBILE INSURANCE COMPANY."

A mutual fire insurance company under the provisions of the act of February 6, 1914 (104 O. L. 202 *et seq.—sections* 9607-1 *to* 9607-29 *G. C.) may incorporate only for the purposes designated in the first paragraph of section* 9510 *and in section* 9556 *of the General Code; and such company cannot incorporate for purposes designated in paragraph* 2 *of section* 9510 *General Code.*

COLUMBUS, OHIO, February 3, 1917.

HON. WILLIAM D. FULTON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I am herewith returning to you without approval the articles of incorporation of "THE MUTUAL FIRE AND AUTOMOBILE INSURANCE COMPANY." The purpose clause of the articles of incorporation of this company reads as follows:

> "Said corporation is formed for the purpose of insuring houses, buildings, automobiles and automobile accessories and all other kinds of property in and out of the state against loss or damage by fire, lightning, and tornadoes; and to insure against loss or damage by theft of automobiles and accessories and damage thereto from said cause; and also to insure against loss or damage on account of public liability in the operation of automobiles and automobile accessories by collision, and damage to automobiles and accessories from any other cause whatsoever."

No provision is made in these articles for the capital stock of the proposed company, but the same evidently contemplate the incorporation of the proposed company as an insurance company on the mutual plan.

In the case of State v. Pioneer Live Stock Company, 38 O. S. 347, it was held that the purposes for which a domestic insurance company may be incorporated are limited to those purposes which are specified in the statutory provisions as to insurance companies, and that the general corporation statutory provisions which, with certain exceptions, permit incorporation for any purpose for which individuals may lawfully associate themselves, are not applicable to such companies.

Looking, therefore, to the statutory provisions applicable to insurance companies it will be noted that the only provisions authorizing the incorporation of insurance companies, other than life, on the mutual plan are those contained in the act of February 6, 1914 (104 O. L. 202). which have been carried into the General Code as sections 9607-1 to 9607-29, inclusive.

Sections 2 and 26 of the said act (Secs. 9607-2 and 9607-26 General Code) provide as follows:

> "9607-2. A domestic mutual company may be organized with such powers to transact the business of insurance as are, or may be, granted by law to stock fire insurance companies organized under the laws of this state."

"Sec. 9607-26. The laws of this state governing corporations and the laws relating to insurance, to the extent they are now or hereafter may be applicable to any such mutual companies and not in conflict with the provisions of this act (G. C. sections 9607-1 to 9607-29) are hereby made specifically applicable to such mutual companies."

An examination of section 9510 of the General Code which provides specifically as to the purpose for which insurance companies other than life may be incorporated reveals that this section by separately enumerated paragraphs thereof divides all such insurance companies into four distinct classes with reference to the purposes for which they may be organized and may issue policies, as follows:

1. Insurance companies covering losses against fire, lightning, tornadoes; and insurance companies covering losses upon goods in the process of transportation.
2. Insurance companies covering losses against casulty other than fire.
3. Live stock insurance companies, and
4. Deposit insurance companies insuring the safekeeping of books, stocks, etc.

Paragraph 1 of said section 9510 of the General Code provides that a company may be organized and admitted to

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

Section 9556 of the General Code provides as follows:

"All companies organized or admitted for the purpose of insuring against loss or damage by fire, may insure against loss or damage by water, caused by the breakage or leakage of sprinklers, pumps, tanks, water pipes and fixtures connected therewith, and by lightning, explosions from gas, dynamite, gunpowder, and other like explosions, and tornadoes; and may also insure against loss by the theft of automobiles and accessories, and against damage thereto from this cause."

In view of the provisions of Section 2 of the act of February 6, 1914 (Sec. 9607-2), granting to a mutual fire insurance company such as is here contemplated such powers to transact the business of insurance as are granted by law to stock fire insurance companies organized under the laws of this state it follows from the provisions of the first paragraph of Section 9510 of the General Code, and those of Section 9556 of the General Code, that the company here contemplated would have authority to incorporate for the purpose of insuring houses, buildings, automobiles and automobile accessories and all other kinds of property in and out of the state against loss or damage by fire, lightning and tornadoes, and also to insure against loss or damage by theft of automobiles and accessories and damage thereto from said cause. However, the articles of incorporation submitted indicate a further purpose on the part of the proposed company to

"insure against loss or damage on account of public liability in the operation of automobiles; and also to insure against loss or damage to automobiles and automobile accessories by collision, and damage to automobiles and accessories from any other cause whatsoever."

Paragraph 2 of section 9510 of the General Code provides that a company may be organized to

> "make insurance against loss or damage resulting from accident to property, from cause other than fire or lightning."

and to

> "make insurance to indemnify employers against loss or damage for personal injury or death resulting from accidents to employes or persons other than employes and to indemnify persons and corporations other than employers against loss or damage for personal injury or death resulting from accidents to other persons or corporations."

These statutory provisions in the second paragraph of section 9510 of the General Code are broad enough in their terms to authorize insurance covering the purpose above quoted, stated in the latter part of the purpose clause of the articles of incorporation herein questioned. However, section 9511 of the General Code, which was formerly a part of the same section of the Revised Statutes (Sec. 3641) with section 9510 of the General Code, provides as follows:

> "No company shall be organized to issue policies of insurance for more than one of the above four mentioned purposes, and no company organized for either one of such purposes shall issue policies of insurance of any other."

Inasmuch as under the provisions of section 2 of the act of February 6, 1914 (Secs. 9607-2 G. C.), a mutual fire insurance company such as is contemplated by the articles of incorporation here in question can exercise no greater powers than any other fire insurance company organized for the purpose indicated in the first paragraph of section 9510 of the General Code, it follows by force of the provisions of section 9511 of the General Code, above quoted, that this company cannot be incorporated for the purpose provided for in the second paragraph of section 9510 of the General Code, and inasmuch as the purpose stated in the latter part of the purpose clause of these articles, above quoted, are sanctioned only by the provisions in the second paragraph of section 9510, which are rendered inapplicable by the provisions of said section 9511, I am unable to approve the articles of incorporation here submitted.

I also herewith enclose the check accompanying the said articles of incorporation in the sum of $25.00 payable to your order.

Respectfully,
JOSEPH MCGHEE,
Attorney-General.

21.

PHILIPPINE GOVERNMENT BONDS—NOT BONDS OF THE UNITED STATES WITHIN MEANING OF SEC. 10933 G. C.—GUARDIAN NOT AUTHORIZED TO INVEST MONEY OF WARD IN SUCH BONDS.

Philippine government four per cent registered gold bonds are not "bonds of the United States" within the meaning of section 10933 of the General Code authorizing the guardian of a minor ward to invest the money of the ward in such bonds.

COLUMBUS, OHIO, February 3, 1917.

HON. WILLIAM H. LEUDERS, *Probate Judge, Cincinnati, Ohio.*

DEAR SIR:—I have your letter of January 17, 1917, asking my opinion as to whether or not Philippine government four per cent registered gold bonds are

> "bonds of the United States within the meaning of section 10933 authorizing the guardian for a minor ward to invest the money of his ward in such bonds?"

With respect to the question at hand, section 10933 of the General Code reads as follows:

> "* * * he may invest such money in bonds of the United States, or of a state on which default has never been made in the payment of interest, or bonds of a county or city in this state, issued in conformity to law; * * *"

It is an elementary rule in the construction of statutes that terms therein contained should be taken in their ordinary and natural import unless the context indicates otherwise, and should be given such meaning as comports with common sense or the understanding of the community and which will effectuate the manifest purpose of the statute. (Allen v. Little, 5 Ohio, 65, 71; State v. Peck, 25 O. S., 26, 28.)

The manifest purpose of this statute, in so far as it designates the manner in which the guardian shall invest the money of his ward, is to provide for the security of such fund, and giving effect to the rule above noted—that terms in a statute should be taken in their ordinary and natural import—it is my opinion that the words "bonds of the United States" mean bonds which are the direct and primary obligation of the United States government issued in pursuance of its constitutional power "to borrow money on the credit of the United States" and for the payment of which the full faith of the United States is solemnly pledged by the act of congress under date of April 18, 1869 (Revised Statutes Sec. 3693).

I assume that the bonds of the Philippine government, which are the subject of your inquiry, are bonds issued by the Philippine government pursuant to an act of congress under date of February 6, 1905 (U. S. Stat. at Large, Public Laws, Vol. 33, page 689); which provides, in part, as follows:

> "For the purpose of providing funds to construct port and harbor works, bridges, roads, buildings for provincial and municipal schools, court houses, penal institutions, and other public improvements for the development of the Philippine islands by the general government thereof, the said government is authorized from time to time to incur indebtedness, borrow money, and to issue and sell therefor (at not less than par value in gold

coin of the United States) registered or coupon bonds of such denominations and payable at such time or times, not later than forty years after the date of the approval of this act, as may be determined by said government, with interest thereon not to exceed four and one-half per centum. Provided, that the entire indebtedness of said government created by the authority conferred by this section shall not exceed at any one time the sum of five million dollars: And provided further, That the law of said government creating the indebtedness and authorizing the issue of the bonds under this section shall be approved by the President of the United States.

"All bonds issued by the government of the Philippine islands, or by its authority, shall be exempt from taxation by the government of the United States, or by the government of the Philippine islands or of any political or municipal subdivision thereof, or by any state, or by any county, municipality, or other municipal subdivision of any state or territory of the United States, or by the District of Columbia."

With respect to the question at hand it may possibly be of some significance to note that although with respect to the external and political affairs of the United States its insular possessions are in no way to be considered as foreign countries, yet with respect to the internal affairs of the nation, though our island possessions are territories appurtenant to the United States, they are not a part thereof.

In Vol. 29 of the American and English Encyclopaedia of Law, at page 146, it is said:

"It was held by the supreme court at a very early day that the term 'United States,' even when employed in our internal affairs, designated 'our great republic, which is composed of states and territories.' But the supreme court has recently departed from this early doctrine, and held that, in our internal affairs, the term 'United States' must not be understood as including any territory which is merely appurtenant to the United States, but as embracing only those states whose people united to form the constitution, as also such other states as are or shall be admitted to the Union on an equality with them, and such territory as is incorporated into and forms a part of the United States."

In the case of Downes v. Bidwell, 118 U. S. 244, it was held that the island of Porto Rico by treaty of cession with Spain became territory appurtenant to the United States, but not a part of the United States within the revenue clauses of the constitution, such as article I, section 8, requiring duties, imposts and excises to be uniform

"throughout the United States."

However, it seems manifest that whatever may be concluded with respect to the general question of the status of the Philippine islands in their relation to the United States, it is manifest that bonds issued by the Philippine government under authority of the act of congress above noted are direct and primary obligations of the Philippine government and in no proper sense bonds of the United States.

To my mind, there is no more reason for considering these bonds as bonds of the United States by reason of said act of congress authorizing the Philippine government to issue them than there would be for holding that the bonds of a county to be state bonds in any sense by reason of the fact that the legislature of the state authorized the county to issue bonds for any purpose. To this point, the court in the case of First National Bank of Brunswick v. County of Yankton,

101 U. S. 129, in its opinion says:

> "All territory within the jurisdiction of the United States not included in any state must necessarily be governed by or under the authority of congress. The territories are but political subdivisions of the outlying dominion of the United States. Their relation to the general government is much the same as that which counties bear to the respective states, and congress may legislate for them as a state does for its municipal organizations."

An extended search discloses a dearth of authorities not only on the precise question, but on any question relating to the matter of United States bonds, but in keeping with the rule of construction before noted that unless the context of a statute indicates otherwise the terms therein employed are to receive their natural and ordinary meaning I note the case In Re Hamilton-Bazely v. The President and Governors of the Royal National Hospital, etc., a case decided by an English Court of Appeals in 1900, and reported in Vol. 6, Times Law Reports, at page 173, in which it was held that the words:

> "'Government stocks or securities' as used in a bequest do not include Indian or colonial securities."

Lord Justice Cotton, in his opinion in the case above cited, said that the question was whether the court could say that colonial securities or Indian railway stock guaranteed by the Indian government passed under the words "bonds or other securities." He said that he could not come to that conclusion; that it was conceded that "government stock or securities" according to the ordinary meaning of those words in legal documents, would not include colonial or Indian government securities, and that he could not find anything in the will to induce the court to give to those words a meaning other than their prima facia meaning.

With reference to the precise question at hand it will be noted that the act of congress authorizing the Philippine government to issue the bonds in question itself indicates a legislative recognition that bonds issued by the Philippine government are not bonds of the United States in any complete or proper sense by specifically providing that such bonds shall be exempt from taxation by the government of the United States or by the government of the Philippine islands, or by any state or political subdivision thereof. For, if bonds of the Philippine government are to be considered as bonds of the United States, it would follow that there was no necessity for the provision in the act of 1905 specifically exempting such bonds from taxation for the reason that by the provisions of section 3701 United States Revised Statutes enacted many years prior to 1905 all bonds and other obligations of the United States are exempt from taxation by any authority.

In this connection it will be conceded that a territory of the United States and the political subdivisions thereof are federal agencies in the performance of governmental functions, and on this consideration it has been held that the bonds issued by a municipality within such territory are exempt from state taxation. (Farmers and Mechanics Savings Bank of Minneapolis v. State of Minnesota, 232 U. S. 516.) There is nothing in the opinion of the court in the case just cited, however, indicating that such bonds are in any sense obligations of the United States or to be considered as United States bonds.

On the foregoing considerations I am of the opinion that the bonds of the Philippine government are not bonds of the United States within the meaning of such term as used in section 10933 of the General Code.

Respectfully,

JOSEPH MCGHEE,
Attorney-General.

22.

A JUSTICE OF THE PEACE—MAY SENTENCE WOMEN TO OHIO REFORMATORY FOR WOMEN—IN MISDEMEANOR CASES OF WHICH HE HAS FINAL JURISDICTION.

This opinion holds that a justice of the peace in all misdemeanor cases in which he may rightfully exercise final jurisdiction, has authority to sentence women so convicted to the Ohio reformatory for women.

COLUMBUS, OHIO, February 3, 1917.

HON. D. H. PEOPLES, *Prosecuting Attorney, Pomeroy, Ohio.*

DEAR SIR:—I have your letter of January 16, 1917, as follows:

"Mr. E. R. Titus, one of the justices of the peace in and for this county (Meigs), this day came to my office relative to the following: A notorious character has been arrested upon a warrant of assault and battery upon one of her brothers-in-law. She always enters a plea of guilty to all charges and never has money to pay her fine. She has been sent to the work house four times and confined in the county jail more than a dozen times within the past year, and is a great expense to this county. After a time the commissioners release her.

"Under section 2148, 5-6-7-8, has the justice jurisdiction to sentence this party to the Ohio reformatory for women upon a plea of guilty to a charge of assault and battery?"

Section 2148-5 G. C. provides:

"As soon as the governor shall be satisfied that suitable buildings have been erected, and are ready for use and for the reception of women convicted of felony, he shall issue a proclamation to that effect, attested by the secretary of state, and the secretary of state shall furnish printed copies of such proclamation to the county clerk of courts and from the date of said proclamation all portions of this act except those relating to the commitment of misdemeanants and delinquents shall be in full force and effect. Whenever additional buildings have been completed so as to care for misdemeanants and delinquents, a proclamation shall be issued and published in the same manner and copies furnished to county clerks of courts and to all judges and magistrates having authorities to sentence misdemeanants and delinquents and from and after the date of this proclamation all portions of this act relating to the commitment of persons to said reformatory shall be in full force and effect.

"All female persons convicted of felony, except murder in the first degree without the benefit of recommendation of mercy, shall be sentenced to the Ohio reformatory for women in the same manner as male persons are now sentenced to the Ohio state reformatory. And in so far as applicable, the laws relating to the management of the Ohio state reformatory and the control and management thereof, shall apply to the Ohio reformatory for women."

Section 2148-6 G. C. provides:

"Female persons over sixteen years of age found guilty of a misdemeanor by *any court* of this state shall be sentenced to the Ohio reforma-

tory for women and be subject to the control of the Ohio board of administration, but all such persons shall be eligible to parole under the provisions of this act."

Section 2148-7 G. C. provides:

"After the issuance of the first proclamation hereinbefore referred to, it shall be unlawful to sentence any female convicted of a felony to be confined in either the Ohio penitentiary or a jail, workhouse, house of correction or other correctional or penal institution, and after the issuance of the second proclamation, it shall be unlawful to sentence any female convicted of a misdemeanor or delinquency to be confined in any such place, except in both cases the reformatory herein provided for, the girls' industrial school or other institution for juvenile delinquency, unless such person is over sixteen years of age and has been sentenced for less than thirty days, or is remanded to jail in default of payment of either fine or costs or both, which will cause imprisonment for less than thirty days, provided that this section shall not apply to imprisonment for contempt of court."

Section 13510 G. C. provides:

"When a person charged with a misdemeanor is brought before a magistrate on complaint of the party injured and pleads guilty thereto, such magistrate shall sentence him to such punishment as he may deem proper, according to law, and order the payment of costs. If the complaint is not made by the party injured, and the accused pleads guilty, the magistrate shall require the accused to enter into a recognizance to appear at the proper court as is provided when there is no plea of guilty."

Section 13511 G. C. provides:

"When the accused is brought before the magistrate and there is no plea of guilty, he shall inquire into the complaint in the presence of such accused. If it appear that an offense has been committed and that there is probable cause to believe the accused guilty, he shall order him to enter into a recognizance, with good and sufficient surety, in such amount as he deems reasonable, for his appearance at the proper time and before the proper court; otherwise he shall discharge him from custody. If the offense charged is a misdemeanor and the accused, in a writing subscribed by him and filed before or during the examination, waive a jury and submit to be tried by the magistrate, he may render final judgment."

I shall assume for the purpose of this opinion that the justice of the peace referred to had final jurisdiction under sections 13510 and 13511, above quoted. I take it that what you really want to know is whether or not a justice of the peace, in misdemeanor cases in which he may rightfully exercise final jurisdiction, may sentence to the Ohio reformatory for women instead of to the work house, county jail or other such institution. I am informed by the Ohio board of administration that Governor Willis, on December 27, 1916, issued the second proclamation referred to in section 2148-5, above quoted.

That the legislature meant to include justices of the peace in the term "any court of this state," used in section 2148-6 G. C., is clear from the wording of section 2148-5 G. C. providing that copies of the governor's proclamation opening the institution shall be furnished by the secretary of state to "the county clerks of

courts and to all judges and *magistrates*" having authority to commit to said institution.

In Tissier v. Rhein, 130 III, p. 114, the court was construing section 29 of article VI of the constitution, providing:

> "All judicial officers may be commissioned by the governor. All laws relating to courts shall be general and of uniform operation,"

and the court say:

> "A justice of the peace is a judicial officer, and, by section 8 of chapter 79 of the Revised Statutes, the legislature has required his commission to be issued by the governor. A court has been defined to be that 'body in the government to which the public administration of justice is delegated.' The public administration of justice is delegated to justices of the peace. They are among the bodies, in whom the constitution vests the judicial powers of the state. While engaged in the performance of their public duties as judicial officers, they are 'courts' within the meaning of said section 29."

In view of these sections of the General Code, above quoted, and the authorities herein cited, I am of the opinion that a justice of the peace has jurisdiction to sentence the women referred to to the Ohio reformatory for women.

The question of cost is not passed upon in this opinion.

Respectfully,
JOSEPH MCGHEE,
Attorney-General.

23.

1. NAVAL MILITIA OFFICER—SAID OFFICER IS IN THE ARM OF THE EXECUTIVE DEPARTMENT OF STATE AND COMES WITHIN PURVIEW OF SEC. 2313-3 G. C.
2. EMERGENCY BOARD—MUST ACT UNDER SEC. 2313-3 G. C. WHETHER LEGISLATURE IS IN SESSION OR NOT.

1. *A naval militia officer is an officer in the arm of the executive department of the state and as such comes within the purview of Sec.* 2313-3 *G. C.*

2. *The duties imposed upon the emergency board by section* 2313-3 *G. C. have no reference to whether or not the legislature is in session, and the allowance under said section must be obtained at all times, whether necessary during a recess or session of the legislature.*

COLUMBUS, OHIO, February 5, 1917.

GEN. GEORGE H. WOOD, *Adjutant General of Ohio, Columbus, Ohio.*

DEAR SIR:—I have your communication of January 25, 1917, wherein you state:

> "The annual meeting of the naval militia association will be held in Washington, D. C., February 9, 1917. It would be wise to send representatives of the Ohio naval militia to this meeting. A construction is requested on two propositions:

"(a) Does an officer of the naval militia (and if delegates are sent they will be officers) come within the purview of section 2313-3?

"(b) The legislature being in session, would the emergency board have authority to act under this statute?"

Answering your first question, I would call your attention to the fact that section 5189 of the General Code provides that the commander-in-chief shall organize the Ohio national guard in such tactical units of the several arms and branches of the service, and the departments thereof, as he shall from time to time prescribe, conforming as nearly as practicable to the organization of the armies of the United States, etc.

Section 5214 of the General Code reads:

"There shall be allowed as a part of the organized militia of Ohio, and in addition to the Ohio national guard, not more than two ship-companies of Ohio naval militia as hereinafter provided."

Article 3, section 1 of the Ohio constitution provides:

"The executive department shall consist of a governor * * *"

Article 3, section 10 of the Ohio constitution provides:

"He shall be commander-in-chief of the military and naval forces of the state, except when they shall be called into the service of the United States."

In Wright's Ohio Report, at page 424, the court says:

"The faithful execution of the laws when enacted, expounded and applied by the courts to cases when necessary, is confided to the executive. The governor is our chief executive officer; and, as such, is made commander-in-chief of the militia, except when in the service of the general government. *The militia is an arm of the executive power;* * * *"

In view of the foregoing it is my opinion that an officer of the naval militia is a part of the executive branch of the government.

Section 2313-3 G. C. provides:

"No executive, legislative or judicial officer, board, commission or employe of the state shall attend at state expense any association, conference or convention outside the state unless authorized by the emergency board. Before such allowance may be made, the head of the department shall make application in writing to the emergency board showing necessity for such attendance and the probable cost to the state. If a majority of the members of the emergency board approve the application, such expense shall be paid from the emergency fund."

Since an officer of the naval militia is a part of the executive branch of the government and the above quoted section provides that no executive officer shall attend, at state expense, any association, conference or convention outside the state, unless authorized by the emergency board, it is plainly evident that such naval militia officer comes within the purview of said section 2313-3 G. C.

Answering your second inquiry, an examination of the history of the laws appertaining to the emergency board discloses that on March 11, 1889, 86 O. L., p. 77, after making it unlawful for the trustees of state institutions, and officers of the state, to create a deficiency, incur a liability or expend a greater sum of money than is appropriated by the general assembly for the use of any public institution or department, section 3 of the act provided:

> "In case of an emergency requiring the expenditure of a greater sum than the amount appropriated by the general assembly for such institution or department in any one year, or for the expending of money not specifically provided for by law, the said officers may, on the written advice and consent of the governor, auditor of state, and attorney general, incur such liability as circumstances may require."

In 89 O. L., at page 407, section 3 of the act of March 11, 1889, was amended and read as follows:

> "In case of an emergency requiring the expenditure of a greater sum than the amount appropriated by the general assembly for such institution or department in any one year or for the expending of money not specifically provided by law, there is hereby created an emergency board consisting of the governor, auditor of state, attorney general, chairman of the house finance committee, and chairman of the senate finance committee, to authorize deficiencies to be made. The governor shall be the president and the chairman of the house finance committee shall be the secretary of the board. The secretary will keep a complete record of all the proceedings. Any officer contemplated in this act desiring to ask authority to create a deficiency will notify the secretary in writing setting forth fully the facts in connection with the case. As soon as can be done conveniently the secretary will arrange for a meeting of the board, and will notify the officer of the time and place of meeting and requesting his presence. Before a permit is granted it must have the approval of not less than four members of the board who shall sign the same. The necessary expenses of the chairmen of the senate and house finance committees while engaged in the duties herein specified shall be paid out of the fund for expenses of legislative committees upon itemized vouchers approved by themselves, and the auditor of state is hereby authorized to draw his warrant upon the treasurer of state for the same."

This section was carried into the General Code under sections 2312 and 2313.

These sections were amended and supplemented in 103 O. L., p. 444, and following. Section 2313, as amended in 103 O. L., reads as follows:

> "In case of any deficiency in any of the appropriations for the expenses of an institution, department or commission of the state for any biennial period, which may lawfully and by any unforeseen emergency happen when the general assembly is not in session, the trustees, managers, directors or superintendent of such institution, or the officers of such department or commission, may make application to the board for authority to create obligations within the scope of the purpose for which such appropriations were made. Such applicant shall fully set forth to the secretary in writing the facts in connection with the case. As soon as can be done conveniently, the secretary shall arrange for a meeting of the board, and shall notify the applicant of the time and place of the meeting, and request his presence.

No authority shall be granted with the approval of less than four members of the board, who shall sign it."

The supplemental section 2313-1 provides what the written authority shall specify and where filed and section 2313-2 G. C. provides for a contingent appropriation for the uses and purposes of the emergency board and how same shall be applied.

It will be noted that section 2313, above quoted, provides for deficiencies "by any unforeseen emergency happen when the general assembly is not in session." The last general assembly, as evidenced by 106 O. L., 182, amended sections 2312 and 2313 of the Code and supplemented section 2313 by the enactment of section 2313-3. The amended section 2312 merely made a change of the secretary of the board.

Section 2313 G. C., as found in 106 O. L. 183, reads as follows:

"In case of any deficiency in any of the appropriations for the expenses of an institution, department or commission of the state for any biennial period, or in case of an emergency requiring the expenditure of money not specifically provided by law, the trustees, managers, directors or superintendent of such institution or the officers of such department or commission, may make application to the emergency board for authority to create obligations within the scope of the purpose for which such appropriations were made or to expend money not specifically provided for by law. Such applicant shall fully set forth to the secretary in writing the facts in connection with the case. As soon as can be done conveniently, the secretary shall arrange for a meeting of the board and shall notify the applicant of the time and place of the meeting and request his presence. No authority to make such expenditure shall be granted with the approval of less than four members of the board, who shall sign it."

It will be noted that the amended section omits that portion of the former section which provides for a deficiency "by any unforeseen emergency happen when the general assembly is not in session," and adds the provision "to expend money not specifically provided for by law." So that the present emergency board act provides for a board constituted as in the statute set forth and provides how authority is obtained to make expenditures in case of deficiency, but makes no reference as to whether the board acts during the recess of the legislature or otherwise.

Section 2313-3 G. C. provides:

"No executive, legislative or judicial officer, board, commission or employe of the state shall attend at state expense any association, conference or convention outside the state unless authorized by the emergency board. Before such allowance may be made, the head of the department shall make application in writing to the emergency board showing necessity for such attendance and the probable cost to the state. If a majority of the members of the emergency board approves the application, such expense shall be paid from the emergency fund."

Now since we have determined that a naval militia officer is an officer in the arm of the executive department, and since said section 2313-3 seems to have imposed further duties upon the board known as the emergency board, and since it

further appears there is nothing in the present statute which limits the time of meetings or the transaction of business of the emergency board to the time of the recess of the legislature, it is my view, and in answer to your second inquiry I would say, that if an officer of the naval militia could, under the law, attend, at state expense, any convention outside of the state (a matter concerning which no opinion is asked and concerning which I make no ruling), the head of his department would have to make application in writing to the emergency board, showing necessity, etc., and such application would have to be approved before any expense could be paid from the emergency fund; and that the fact that the legislature was in session would make no difference.

Respectfully,
JOSEPH MCGHEE,
Attorney-General.

24.

DEED OF LAND TO GOVERNOR IN TRUST FOR RELIGIOUS PURPOSES —CONTAINING NO DEFEASANCE CLAUSE—DOES NOT REVERT UPON FAILURE TO USE SAME FOR PURPOSES OF SAID TRUST.

The deed made by the heirs of John Garrett to the governor of Ohio and his successors in office, in trust, for certain religious purposes, but containing no clause of defeasance whereby the title is to revert upon the failure of the use of the property for the purposes of the trust, conveys the whole title without reversion. The remedy in such case, if the trust were violated, would be in favor of the beneficiaries, by preventing the misuse and compelling execution of the trust. No remedy is left to the heirs of the grantor.

The governor, as such trustee, will not consent to, or connive at, a perversion of the terms of the trust.

COLUMBUS, OHIO, February 6, 1917.

Hon. JAMES M. COX, *Governor of Ohio, Columbus, Ohio.*

MY DEAR GOVERNOR:—In reference to deed from John Garrett to Jeremiah Morrow, governor of Ohio, submitted by you to this department with letter attached from J. J. Jackson for an opinion, the letter is as follows:

> "The enclosed letters are self-explanatory.
>
> "You will confer a great favor upon the young people of Garrettsville, Ohio, if after reading the enclosed documents, you will advise me how we may obtain possession of this property by purchase or lease, without its reverting to the original owners through a false step on our part.
>
> "We would like to build a community house and gymnasium on this property which is now idle.
>
> "Kindly let me hear from you by return mail and oblige."

It will be noticed that this is really an inquiry from Mr. Jackson of you, rather than an inquiry on your part to this office, yet it is safe to assume that what you desire is information in reference to this property and your relation to it as trustee, especially as to the inquiry made.

A number of different considerations are involved both of fact appearing from the deed and the communication and of law arising on the facts thus disclosed, which will be stated separately and briefly.

John Garrett, of Garrettsville, in his will devised a piece of land "to the Baptist Society of Christians for the purpose of a burying ground, and also of erecting thereon buildings for public worship for said society," being the land conveyed in the deed in question.

This will failed through some defect in its execution, but the intention of the testator was carried into effect by his heirs in the execution of this deed.

We will assume that the deed was delivered to Jeremiah Morrow and that he thereby accepted the trust.

The terms of this trust are set forth in the deed as follows:

> "Unto the said Jeremiah Morrow, governor of the said state of Ohio, and his successors in office forever in trust for and for the use of the said Baptist society holding and believing the doctrines and tenets contained in a confession of faith adopted by the Baptist Association met in Philadelphia, September 25, 1742, for the purpose of sepulture interment or burial of the dead, and of erecting buildings for public worship for said society and no other."

There is no clause of defeasance or condition in the deed providing for reentry or for reversion of the title in the event of the failure of the designated use.

No information is given as to whether there has ever been any use of the land for the purpose of this trust as set out in the deed.

The trust is what is known as passive. No active duties are devolved upon the governor as such trustee and he is merely the repository of the naked legal title in trust for the objects above set out.

The description of the use for which the property is given, as stated above, is by a uniform current of authority classed as covenant and not condition. That is to say, Jeremiah Morrow, for himself and his successors, by accepting this deed agreed to the use of the property for the purpose of the trust thereby created; and his acceptance amounts to a covenant upon his part, and the provision describing the use is not a condition upon the violation of which the heirs of the original grantor may enter upon the land or recover possession of it, as would be the case were it expressly provided that the title should be defeated upon the failure of the use.

It is perfectly apparent that the use sought to be made of this land by "the young people of Garrettsville" is very far removed from that intended by John Garrett and indicated by his heirs in the deed. Their purpose is to use it for a community house and a gymnasium—his for a church and graveyard. Their purpose is temporary or at least temporal—his eternal. Every comparison unavoidably becomes a contrast. Therefore, the use now desired and suggested would be a perversion of the terms of the trust as set forth in the deed.

It follows from what is set forth above that what is technically known as the doctrine of *cy pres* can have no application and be of no assistance, that doctrine meaning in ordinary terms that where lands are devised to a charitable use and that use becomes impossible, the courts may apply the gift to some other related charity.

On account of the exalted station of this trustee, it cannot be supposed that he would consent to, or connive at, any artifice or measure to defeat the real intent of the trust and no means are apparent whereby the purchase or lease of this property could be obtained from any other source or by any other agency.

It follows from what is stated above that if the good people of Garrettsville were to use this property as they desire, there would be no danger that thereby the title would revert to the Garrett heirs. The only consequence of such use, or

misuse, would be that the adherents of that faith, for whose use John Garrett intended the property, and no other, might prevent the continuance of such use by those who are exercising the same, in which event, if such interference were successful, those who expended money upon the land for modern purposes for which it is desired, might lose it.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

25.

OHIO CANAL COMMISSION—BOARD OF PUBLIC WORKS—DUTIES OF SAME DEVOLVE ON SUPERINTENDENT OF PUBLIC WORKS—CHIEF ENGINEER OF BOARD OF PUBLIC WORKS—OFFICE OF SAID OFFICER ABOLISHED.

The necessary jurisdictional steps leading up to the making of the deed for said sale have all been taken, the duties of the Ohio canal commission and the board of public works now devolving upon the superintendent of public works and the office of chief engineer having been abolished.

COLUMBUS, OHIO, February 7, 1917.

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

DEAR SIR:—I have your communication of January 22, 1917, transmitting to me resolutions providing for the private sale of certain canal lands in Ohio, township of Madison, county of Licking and state of Ohio, to C. M. Johnson.

I note that the valuation of the land to be sold is less than five hundred dollars and that all the jurisdictional facts have been found by you to exist.

I would like to suggest, however, that section 13971 G. C., among other things, provides that:

> "such land or lands shall not be sold or offered for sale unless the said commission, board of public works, and the *chief engineer* of the board of public works shall have, by a majority vote in joint session, determined that such land or lands are not necessary or required for the use, maintenance, and operation of any of the canals of this state."

Under the second "Whereas" of the resolutions you set out the fact that you alone as superintendent of public works have found and determined that the land so sold is not necessary or required for the use, maintenance and operation of any of the canals of the state.

Under section 464 G. C. the duties of the Ohio canal commission and board of public works devolve upon the superintendent of public works, but there is no provision in the statutes that the duties of the chief engineer shall so devolve upon the superintendent.

SECTION 421 G. C. provides for the bond of the chief engineer and section 420 G. C. provides for the appointment of engineers, but there is no provision in the statute for the appointment of a chief engineer, and your department informs me that there is no such employe or officer in your department as chief engineer. If there were such an employe or officer, he would be compelled to join with you, under the provisions of section 13971 G. C., in finding that the lands so sold are

not required for the use, maintenance and operation of any of the canals of this state.

The seeming uncertainty of the statutes in reference to the office of chief engineer in the department of public works arises from the fact that the statute providing for said officer was repealed in the act found in 103 O. L. 119; while the act providing for the deposit of all bonds with the secretary of state, found in 103 O. L. 528 (530) and being section 421 of the General Code, provides that the bond of the chief engineer of public works shall be deposited with the secretary of state, notwithstanding the fact that the office of chief engineer had been abolished by the said act found in 103 O. L. 119.

Inasmuch as there is no such employe or officer in your department, I have attached my signature to the duplicate copies of the two resolutions providing for the sale of the lands in question, and I am herewith returning the same to you.

Respectfully,
JOSEPH MCGHEE,
Attorney-General.

26.

APPROVAL—RESOLUTION FOR IMPROVEMENT OF DENNISON-CADIZ ROAD IN HARRISON COUNTY.

COLUMBUS, OHIO, February 9, 1917.

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

DEAR SIR:—I have your communication of February 1, 1917, in which you ask my approval of the final resolution for the following road improvement:

"Harrison county—Section 'J' Dennison-Cadiz road, Pet. No. 942, I. C. H. No. 370."

I have examined said resolution carefully and find the same regular and legal, and am therefore returning the same with my approval.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

27.

APPROVAL—RESOLUTIONS FOR SALE OF CERTAIN CANAL LANDS IN CITY OF TOLEDO, OHIO, AND PICKAWAY COUNTY, OHIO.

COLUMBUS, OHIO, February 9, 1917.

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

DEAR SIR:—I have your communications of February 6, 1917, in which you ask my approval of certain resolutions leading up to sales of canal lands:

"1. In the city of Toledo, Ohio, to The Investors Realty Company, for the sum of $265.00.

"2. In Pickaway county, Ohio, to J. S. Caldwell, for the sum of $480.00."

Both of said tracts to be sold at private sale.

I have carefully examined the resolutions and find that they contain all jurisdictional matters required by law.

I am therefore returning said resolutions with my approval of the sale of said lands.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

28.

APPROVAL—LEASES OF CERTAIN CANAL LANDS IN MAUMEE, OHIO, AND SIDNEY, OHIO.

COLUMBUS, OHIO, February 9, 1917.

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

DEAR SIR:—I have your communication of February 6, 1917, in which you ask my approval of the following leases of canal lands:

"To Henry N. Perrin, lands in Maumee, Ohio, valuation $700.00.
"To David Oldham, lands in Sidney, Ohio, valuation $150.00."

I have examined carefully the above leases and find them regular in every respect and that they protect the interests of the state of Ohio in said lands.

I am therefore returning said leases to you with my approval.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

29.

BOARDS OF EDUCATION—WHICH FAIL TO ORGANIZE ON FIRST MONDAY OF JANUARY AFTER ELECTION—SHALL ORGANIZE AS SOON THEREAFTER AS SUCH FAILURE IS CALLED TO THEIR ATTENTION—PRESIDENT AND VICE-PRESIDENT HOLD OVER UNTIL SUCCESSORS ARE CHOSEN AND QUALIFIED.

1. *Boards of education which fail to organize on the first Monday of January next after the election of members of such board, should organize under the provisions of section 4747 G. C. as soon as the matter of their failure to organize is called to their attention.*

2. *The president and vice-president of such boards hold over only until the board of which they are members may reorganize.*

COLUMBUS, OHIO, February 10, 1917.

HON. EUGENE WRIGHT *Prosecuting Attorney, Logan, Ohio.*

DEAR SIR:—In your communication of February 6, 1917, you submit the following proposition for my opinion:

"Under section 4747, if the school board of a rural school district should fail to organize and elect a president and vice-president on the first

day of January, in any one year, could they after that date meet and organize by electing a president and vice-president, or would the old president and vice president hold over their term until the next regular date for organization, namely, the following first Monday in January?"

General Code section 4838 provides as follows:

"All elections for members of boards of education shall be held on the first Tuesday after the first Monday in November in the odd numbered years."

General Code Section 4745 provides as follows:

"The terms of office of members of each board of education shall begin on the first Monday in January after their election, and each such officer shall hold his office for four years except as may be specifically provided in chapter 2 of this title (G. C. sections 4698 to 4707), and until his successor is elected and qualified."

General Code Section 4747 provides in part:

"The board of education of each city, village and rural school district shall organize on the first Monday of January after the election of members of such board. One member of the board shall be elected president, one as vice-president and a person who may or may not be a member of the board shall be elected clerk. * * *"

You will note from the above the time of the election of members of the board of education, the length of the term of such members and the direction to the members so elected or to those holding over as to the time of the organization of such board. I do not understand, however, that the language as to the organization of said board is mandatory. It is a well settled principle of law that the provisions regarding the duties of public officers, and specifying the time of their performance, are, in that regard, generally directory, "though a statute directs a thing to be done at a particular time, it does not necessarily follow that it cannot be done afterwards."

Southerland on Statutory Construction, Sec. 612.

As stated by the author just named, the designation of the power in this instance is not a limitation on the power of the board to act, and since the duty is enjoined by law, even though it be delayed beyond the particular time designated in the statute, it can be legally performed at a later date.

It is also provided by General Code section 8 that a person holding an office of public trust shall continue therein until his successor is elected or appointed and qualified and the members of boards of education, being school officers, I am of the opinion would also come under the provisions of said section 8. It has also been frequently held, and particularly in Marvin v. Withrow, 21 O. C. D., 215, that a president of a board of education is an officer within the meaning of said section 8 of the General Code, and would therefore hold over until his successor is regularly chosen and qualified.

This identical question was considered in opinion No. 147, Vol. I, Attorney-General's Reports for 1911-1912, wherein it was held that a board of education that had failed to organize on the first Monday of January next after the election

of members of such board should organize as provided under section 4747 G. C. as soon as the matter of their failure to organize is called to their attention.

I agree with the opinion mentioned and advise you that the president and vice-president hold over only until the board of which they are members may reorganize, which reorganization should occur at once.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

30.

APPROVAL—SYNOPSIS OF PROPOSED CONSTITUTIONAL AMENDMENT—BY PEOPLE'S POWER LEAGUE OF CINCINNATI.

The synopsis of the proposed constitutional amendment filed with the secretary of state by the People's Power League of Cincinnati on January 30, 1917, is sufficient under the statutory provision that a synopsis of such measure may be so filed.

COLUMBUS, OHIO, February 12, 1917.

HON. W. D. FULTON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—Under date of January 30, 1917, the following communication was received from your office:

> "I have just received a communication from The People's Power League of Cincinnati, Ohio, enclosing a draft of a proposed amendment to the Ohio constitution, together with a synopsis of the same. I enclose them to you as they desire your approval of the synopsis.
> "Will you kindly give this your earliest attention and advise me."

The constitutional provision referring to this matter is as follows:

> "A true copy of all laws or proposed laws, or proposed amendments to the constitution, together with an argument or explanation, or both, for, and also an argument or explanation, or both, against the same, shall be prepared * * *. The persons who prepare the argument or explanation, or both, for any proposed law or proposed amendment to the constitution may be named in the petition proposing the same."
> Art. II, section 1-g.

The statutory provision providing for synopsis is as follows:

> "Whoever seeks to propose a law or constitutional amendment by initiative petition or to file a referendum petition against any law, section, or items in any law, may file a duly verified copy of the proposed law, constitutional amendment or the law, section or item to be referred, together with a synopsis of the same with the secretary of state before circulating such petition. If such copy is not filed with the secretary of state, the persons primarily directing the circulation of such initiative or referendum petition shall within ten days after commencing the circulation of such petition, file with the secretary of state a written notice setting forth the date when such circulation was commenced, and embodying the title and

text of such law, section, item or constitutional amendment, and signed by one of the persons promoting the circulation of said petition."

Sec. 5175-29c G. C.

It will be observed that this section is permissive and the legislature has not attempted to impose it as an absolute requirement, but if the synopsis be not filed, has imposed a regulation probably more difficult than to furnish the synopsis.

Comparing the synopsis as submitted, along with the amendment, there is one important correction that should be made. Section 2 of the proposed amendment provides that the income for each eligible person shall be not less than twenty dollars a month, while the synopsis says it shall not be more than that amount. The second paragraph states it fixes the maximum pension of twenty dollars a month. For maximum should be substituted "minimum." This undoubtedly is an oversight.

In other respects the proposed synopsis appears to be what it purports to be, a synopsis of the proposed amendment, though this amendment is drawn with such brevity and succinctness that it is difficult to make a synopsis shorter than the amendment itself.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

31.

HIGHWAY COMMISSIONER—WHEN HE TAKES OVER CONSTRUCTION OF ROAD OR BRIDGE—UNDER FORCE ACCOUNT—MUST BE GOVERNED BY SECTION 1209 G. C.

1. *When the state highway commissioner takes over a contract for the construction of a public highway and finishes same under force account, and to finish same under force account he enters into a contract with another party, he will be controlled in his future course under the provisions of section 1209 G. C. and the provisions of the contract entered into for completing said highway.*

2. *When one contract is let by the state highway commissioner, covering the construction of a steel bridge on the highway as well as the construction of the highway proper, and the same is taken over and completed under force account, the same principles of law will apply to the completion of the bridge as apply to the completion of the other parts of the highway.*

3. *When the state highway commissioner, in completing a contract under force account, makes certain propositions to parties interested, he should govern his future conduct by said propositions so made.*

COLUMBUS, OHIO, February 13, 1917.

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

DEAR SIR:—I have your communication of January 16, 1917, in which you ask my opinion upon certain matters set out in the communication which is as follows:

"The state highway department in 1915 let a contract to Frank J. Bentz for the construction of a section of highway in Morgan county, known as section 'K,' intercounty highway No. 162. The contract for the

construction of the highway included a steel bridge with reinforced concrete abutments.

"This office has been informed that Contractor Bentz sub-let the erection of this steel bridge.

"Because of the unsatisfactory progress made by Mr. Bentz on this contract, the time of completion having expired, this department appointed an agent to proceed with the construction of the highway by employing labor and purchasing necessary materials, and charging the cost thereof to money appropriated for the work, all subject to the approval of the highway commissioner. The original contractor withdrew, and has since taken no hand in the management of the work. The substructure of the bridge above referred to has been completed by the agent of this department, and is now ready to receive the steel superstructure. The bondsman for the original contractor has been informed by this office of this fact.

"We beg to inquire what method of procedure should be adopted for procuring a steel bridge for this place, such that the state's claim against the bonding company may not be weakened should the cost of doing the work exceed the amount of the contract."

To this communication you attached certain correspondence had about the matter upon which you desire my opinion, but the only parts of said correspondence that have any particular bearing are the following:

A letter written by The Bellefontaine Bridge and Steel Company to your department, bearing date November 29, 1916;

A letter of January 2, 1917, from your department to the National Surety Company, which is as follows:

"Referring to the Frank J. Bentz contract for the construction of section 'F' of I. C. H. No. 182, Morgan county, and to my letter of November 1, 1916, with regard to the steel bridge to be included in that contract, and subsequent correspondence.

"I beg to advise that Mr. Shoemaker, of the Engineering Service company, states that the substructure will be ready to receive the steel superstructure by January 10. As mentioned in my letter to you, dated November 1, we are informed that Mr. Bentz has a contract with the Bellefontaine Bridge Company for the erection of the necessary superstructure. In view of this, it would seem desirable for all concerned, for Mr. Bentz to cause this bridge to be placed as called for in the contract. We also believe that the National Surety Company, as bondsman for Mr. Bentz, is directly or indirectly interested in the bridge being placed for the least possible cost.

"Will you please advise us whether or not we can expect Mr. Bentz or yourselves to furnish a bridge for this place, and if not, whether there are any objections to this department, through Mr. Shoemaker, inviting bids from three or more reputable bridge concerns for placing a bridge at the earliest possible date? An early reply will be appreciated. We would be glad to be advised as to your pleasure in this matter not later than January 10, at which time, if we do not hear from you, we will proceed as above indicated.;"

and

A letter of January 5, 1917, to the state highway department from the National Surety Company.

In your communication you state that the state highway department gave a contract to Frank J. Bentz for the construction of a section of highway in Morgan county, which contract included a steel bridge, and that owing to the unsatisfactory progress made by Mr. Bentz on this contract, and the time for completing the same having expired, your department took over the contract and appointed an agent to complete it under force account.

This you did under authority of section 1209 G. C., which is as follows:

> "Section 1209. If, in the opinion of the state highway commissioner, the contractor has not commenced his work within a reasonable time, or does not carry the same forward with reasonable progress, or is improperly performing his work, or has abandoned, or fails or refuses to complete a contract entered into under the provisions of this chapter (G. C. sections 1178 to 1231-3), the state highway commissioner shall have full power and authority to enter upon and construct said improvement either by contract, force account or in such manner as he may deem for the best interest of the public, paying the full costs and expense thereof from the balance of the contract price unpaid to said contractor, and in case there is not sufficient balance to pay for said work, the state highway commissioner shall require the contractor or the surety on his bond to pay the cost of completing said work. It shall be the duty of the attorney-general or the prosecuting attorney of the county in which said improvement or some part thereof is situated, upon request of the state highway commissioner, to collect the same from the contractor and the surety on his bond."

Inasmuch as you have let one contract for not only the construction of the highway proper, but also for the erection of the steel bridge, you will be governed in your further proceedings in the matter by this same section 1209, which provides that the state highway commissioner has full power and authority to enter upon and construct said improvement, either by contract, force account or in such manner as he may deem for the best interest of the public.

As you are completing said work under force account under and by virtue of a contract entered into with the Engineering Service Company, you will be controlled in your further proceedings not only by section 1209 G. C., but also by the provisions of this contract, the third item of which reads as follows:

> "Third. The party of the second part agrees to act as the agent of the party of the first part in the purchase of all necessary materials for the completion of said highway, the character and quality of such materials and the price to be paid therefor to be subject to the approval of the party of the first part. The party of the first part shall pay for all such materials."

It will be noted that in this third item the party of the second part, the Engineering Service Company, is to purchase all necessary materials for the completion of said highway, subject to your approval. This would apply to the material for the bridge as well as to materials for the other parts of the highway; so that the Engineering Service Company, subject to your approval, has the right to purchase the material necessary for the construction of said bridge.

The letter from The Bellefontaine Bridge & Steel Company makes it clear that said company will not furnish the bridge under the terms of their contract with Frank J. Bentz. The letter from said company reads as follows:

"Please be advised that the price we recently quoted you on the 90-foot span which we originally fabricated for Frank J. Bentz, is herewith withdrawn. Should you desire to take the matter up with us later, and if the bridge has not in the meantime been sold to others we shall be glad to quote you a revised price."

While you wrote to the National Surety Company as to whether they had any objections to your inviting bids through Mr. Shoemaker, representing the Engineering Service Company, from three or more reputable bridge concerns, for placing a bridge, yet you were under no obligations to do so. Their letter in reply to yours of January 2, 1917, is as follows:

"Receipt is acknowledged of your letter of January 2, and while this company has denied and continues to deny any liability to the state of Ohio, for the reasons stated in former communications, I have suggested to Mr. Bentz that he do what he can at once to put Mr. Shoemaker in possession of his contract with The Bellefontaine Bridge Company, if this has not already been done. My understanding with Mr. Bentz several months ago was that this contract had been assigned to Mr. Shoemaker and that all of the superstructure had been fabricated by the bridge company and was awaiting orders for shipment.

"You have already been advised of our position with respect to this particular subcontract."

Now, inasmuch as (a) your department let the construction of the bridge and the highway under one contract, (b) your department has taken over the contract and is completing the same under force account, (c) the Engineering Service Company is completing the construction of said highway under a contract to furnish all material, subject to your approval, and (d) your department wrote to the National Surety Company that you were contemplating the inviting of bids, it is my opinion that you should proceed along said lines and ask for bids through the Engineering Service Company from three or more reputable firms, for the placing of the bridge, one of which firms should be The Bellefontaine Bridge and Steel Company, and notify both Frank J. Bentz, the original contractor, and the National Surety Company, who is on his bond, of your action, so they may be in position to have any other reputable bridge company bid, should they desire to do so. This course will protect to the fullest extent possible the interests of Frank J. Bentz, the National Surety Company and the people of the state.

Respectfully,
JOSEPH MCGHEE,
Attorney-General.

32.

APPROVAL—LEASE CERTAIN CANAL LANDS IN CITY OF MASSILLON, O., TO THE MASSILLON ELECTRIC & GAS CO.

COLUMBUS, OHIO, February 14, 1917.

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

DEAR SIR:—I have your communication of February 9, 1917, submitting your communication of February 6, 1917, in which you ask my approval of the lease of certain canal lands located in the city of Massillon, O., to the Massillon Electric &

Gas Company of Massillon, O., for railway switch track, traveling crane and cold storage purposes, the value of said land being $6,666.66 2-3.

I have made careful investigation of the lease and find same regular in every respect and that the interests of the state of Ohio are fully protected in said lease.

I am, therefore, delivering said lease to the governor of Ohio, with my approval.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

33.

CHILDREN'S HOME—INMATES THEREOF ARE ENTITLED TO ATTEND SCHOOL FREE IN DISTRICT IN WHICH HOME IS LOCATED—TUITION FOR SAME PAID BY COUNTY COMMISSIONERS FROM GENERAL FUND—STATE COMMON SCHOOL FUND—APPORTIONMENT IS BASED UPON ENUMERATION.

1. *A children's home maintained for the care, raising and education of children, whether said home is maintained by contributions of parents of the children located therein or contributions from philanthropic bodies, comes within the provisions of section 7681 G. C., and the children who are inmates of the same are entitled to attend the schools of the district in which said home is located, free of charge.*

2. *The tuition of said children, paid for by the county commissioners of the county in which the schools are located, as provided for by statute, must be taken from the general county fund.*

3. *As the apportionment of the state common school fund by the state auditor is based upon the enumeration, and the portion paid by the county commissioners is based upon enrollment, the enumeration of said children must be taken and the enrollment kept. The share of the state common school fund going to the county commissioners from the county treasurer is based upon the enrollment of said children.*

COLUMBUS, OHIO, February 14, 1917.

HON. CHARLES L. FLORY, *Prosecuting Attorney, Newark, Ohio.*

DEAR SIR:—In your letter of January 8, 1917, you ask for an opinion based upon the following statement of facts:

> "Located in the Granville village school district, Licking county, is a children's home, organized by the American Baptist Foreign Missionary Society, which has its headquarters in Boston, Massachusetts. Such society has the general control of the maintenance of the home, but its affairs are indirectly under the control of what is called a local board, consisting of fifteen members of the Baptist church in Ohio. The inmates of the home are the children of foreign missionaries in the service of the Baptist church; the children being placed in the home for raising and education while the parents are engaged in their work in foreign countries. When able, the parents of the children in the home pay a portion of the cost of the maintenance of the home, but such parents do not pay enough to cover the full cost of maintaining their children; the balance of such maintenance is furnished by Baptist societies.
>
> "The children, in the home mentioned, have been attending the schools in the village of Granville. Under favor of section 7681, General Code, as amended Ohio Laws 106, page 489, the board of education of the Granville

village school district has presented to the commissioners of Licking county a bill for the tuition of such pupils. I shall be grateful for your opinion on the following propositions:"

Upon the above statement of facts you ask for my opinion upon the following questions:

"1. Is the children's home mentioned such a home as comes within the terms of said section 7681, General Code?

"2. From what fund under the control of the county commissioners shall such tuition be paid to the Granville village school board?

"3. What procedure shall be followed by the commissioners to obtain a distributive share of school funds from the state for the children of such home for whom such tuition is paid?"

The answers to these questions are to be found in sections 7681, 5630 and 7582 G. C. Said sections are as follows:

"Sec. 7681. The schools of each district shall be free to all youth between six and twenty-one years of age, who are children, wards or apprentices of actual residents of the district, including children of proper age who are inmates of a county or district or of any public or private children's home or orphan's asylum located in such a school district, but the time in the school year at which beginners may enter upon the first year's work of the elementary schools shall be subject to the rules and regulations of the local boards of education. The board of education in any district in which a public or private children's home or orphans' asylum is located, when requested by the governing body thereof, shall admit the children of school age of such home or asylum to the public schools of the school district. The county commissioners shall pay the tuition of such pupils to the school or schools maintained by the board of education at a per capita rate which shall be ascertained by dividing the total expenses of conducting the elementary schools of the district attended, exclusive of permanent improvement and repairs, by the total enrollment in the elementary schools of the district, such amount to be computed by the month. An attendance any part of the month shall create a liability for the whole month. The distributive share of school funds from the state for the children of such home or asylum shall then be paid to the county commissioners. But all youth of school age living apart from their parents or guardians and who work to support themselves by their own labor, shall be entitled to attend school free in the district in which they are employed."

"Sec. 5630. The commissioners of any county, at their June session, annually, may levy not to exceed three mills on each dollar valuation of taxable property within the county, for county purposes other than for roads, bridges, county buildings, sites therefor, and the purchase of lands for infirmary purposes. For the purpose of building county buildings, purchasing sites therefor, and lands for infirmary purposes, they may levy not to exceed two mills on such valuation."

"Sec. 7582. The auditor of state shall apportion the state common school fund to the several counties of the state semi-annually, upon the basis of the enumeration of youth therein, as shown by the latest abstract of enumeration transmitted to him by the superintendent of public instruction. Before making his February settlement with county treasurers, he shall apportion such amount thereof as he estimates to have been col-

lected up to that time, and, in the settlement sheet which he transmits to the auditor of each county, shall certify the amount payable to the treasurer of his county. Before making his final settlement with county treasurers each year he shall apportion the remainder of the whole fund collected, as nearly as it can be ascertained, and in the August settlement sheet which he transmits to the auditor of each county shall certify the amount payable to the treasurer of his county."

Now, as to the first question, it will be noted that section 7681 G. C. provides that:

"The schools of each district shall be free to all youth * * including children of proper age who are inmates of a county or district or of any public or *private* children's home or orphans' asylum located in such a school district. * * *"

The home mentioned in your agreed statement of facts would come under the designation of "private children's home." The only question that could be raised is as to whether the limitation found in the first part of said section, namely, that the children must be children of actual residents of the district, would apply to the children of the home mentioned by you.

I am of the opinion that this limitation does not apply and that the only conditions applying are that the children be inmates of the said home and that they be of school age; further, that the governing body of said home makes the request that they be admitted to the district schools.

It is my opinion, therefore, that said children's home comes within the provisions of section 7681 G. C.

Further, as to the answer to the second question:

Section 5630 G. C. provides that the county commissioners may levy not to exceed three mills on each dollar of valuation, for county purposes other than certain enumerated purposes mentioned in said section.

It is my opinion that the money to pay said tuition must be taken from the fund created for county purposes, as the object and purpose for which it is paid is not in the least related to the other purposes enumerated in said section for which a levy may be made by the county commissioners.

Now, as to the answer to your last question:

Section 7582 G. C. provides that the auditor of state shall apportion the state common school fund to the several counties of the state upon the basis of the enumeration of youth therein.

Section 7681 G. C. provides that the county commissioners shall pay the tuition of such pupils at a per capita rate which shall be ascertained by dividing the total expenses of conducting the elementary schools of the district attended, exclusive of permanent improvement and repairs, by the total enrollment in the elementary schools of the district. Then said section provides that the county commissioners shall be paid the distributive share of school funds from the state for the children of such home. Hence, the enumeration of the children in the home must be taken with the other children of the district, that they may be included in the distribution of the state common school fund by the state auditor. Then the county commissioners will receive from the county treasurer, out of the state common school fund, such a percentage of the said state common school fund credited to said district as the total enrollment of pupils from the home is of the total enrollment of pupils in said elementary schools.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

34.

BLIND PERSONS—MUST RESIDE IN COUNTY ONE YEAR BEFORE ENTITLED TO RELIEF THEREIN.

1. *Under section* 2966 *G. C. a blind person securing relief in one county of the state, then removing to another county, cannot secure relief in the county to which he removes, short of one year's residence therein.*

2. *The facts submitted not being such as to warrant it, no opinion is expressed upon a former decision of this department, found in volume II, page* 1432 *of the Opinions of the Attorney-General for the year* 1915.

COLUMBUS, OHIO, February 14, 1917.

HON. T. ALFRED FLEMING, *Member of the House of Representatives, Columbus, Ohio.*

DEAR SIR:—I have your communication of recent date, which communication was written by Frank Taylor of Lorain, Ohio, to Hon. James M. Cox, governor of Ohio. The communication to the governor is as follows:

> "I am a victim of the present blind pension law. Note, please, a clause in section 2966 of the General Code of Ohio reads as follows:
>
> "'In order to receive relief under the above provisions, a needy blind person must become blind while a resident of the state.'
>
> "We have no objections to the above clause.
>
> "Note the following clause:
>
> "'And shall be a resident of the county one year.'
>
> "Now the point can be raised, does the law apply only to the applicant's first application, or does it apply to all the following applications?
>
> "Now, if the first proposition is correct, well and good. But if the second proposition is true, then we hold the clause entirely void of logic. For example, take my own case. I was born in this state sixty-six years ago; have been a resident of the state all my life. I had been getting a blind pension in my original county for five years.
>
> "Now, must I wait one year in Lorain county in order to become a full fledged citizen of said county, when the basic law of the state requires only thirty days? It don't look good to me. It works a hardship on many blind persons moving from one county to another.
>
> "Suggestion: Could not the attorney-general give a ruling on the matter? That is to say that clause applied only to an applican't first application and not applications thereafter.
>
> "We hope we have made this matter clear to you and sincerely hope you will give it favorable consideration, not for myself alone, but for the sake and relief of the five thousand in the state who are afflicted like myself. Do not consider this a personal appeal, but an appeal to relieve many others who are handicapped like myself."

The particular matter about which inquiry is made in said letter is this:

If a blind person has become blind while in the state of Ohio; has resided in a county of the state for one year before making application for relief; makes application for relief and secures relief in one county of the state; then removes to another county in the state, is he then compelled to reside in the county, to which he has removed, one year before he can be granted relief in the county to which he has removed?

It will assist in an understanding of the matter to give a brief history of recent legislation and decisions in the matter of relief for the blind.

In 103 O. L. 60 we find an act passed by the legislature February 18, 1913, which act was approved by the governor March 7, 1913. This act repeals sections 2962, 2963 and 2964 of the General Code, and amends sections 2967, 2967-1 and 2968 of the General Code. The legislature during the same session enacted a law found in 103 O. L. 833, which created an institution for the relief of needy blind and repeals sections 2962 to 2970, inclusive, of the General Code. This act was passed April 28, 1913, and was approved by the governor May 9, 1913.

The supreme court, however, in the case reported in 89 O. S. 351 found the said act passed April 28, 1913, to be unconstitutional for certain reasons set out in their opinion and found further that the act passed February 18, 1913, was constitutional and in force and effect. Hence, this act (103 O. L. 60) with sections 2965, 2966, 2969 and 2970 of the General Code controls in the matter about which you make inquiry.

Section 2966 reads as follows:

> "In order to receive relief under these provisions a needy blind person must become blind while a resident of this state, and shall be a resident of the county for one year."

Section 2967 of the General Code, as found on page 60 of 103 O. L., reads as follows:

> "At least ten days prior to action on any claim for relief hereunder, the person claiming shall file with the board of county commissioners a duly verified statement of the facts bringing him within these provisions. The list of claims shall be filed in a book kept for that purpose in the order of filing, which record shall be open to the public. No certificate of qualification of drawing money hereunder shall be granted until the board of county commissioners shall be satisfied from the evidence of at least two reputable residents of the county, one of whom shall be a registered physician, that they know the applicant to be blind and that he has the residential qualifications to entitle him to the relief asked. Such evidence shall be in writing, subscribed to by such witnesses, and be subject to the right of cross examination by the board of county commissioners or other person. If the board of county commissioners be satisfied upon such testimony that the applicant is entitled to relief hereunder, said board shall issue an order therefor in such sum as said board finds needed, not to exceed one hundred and fifty dollars per annum, to be paid quarterly from the funds herein provided on the warrant of the county auditor, and such relief shall be in place of all other relief of a public nature."

Now, it will be noted that the county commissioners of each county have jurisdiction over the subject of relief for the needy blind.

Section 2966 of the General Code provides that in order to receive relief under these provisions a needy blind person shall be a resident of the county one year.

Said section 2967 of the General Code, as found on page 60 of 103 Ohio Laws, provides that:

> "1. At least ten days prior to action on any claim for relief hereunder, the person claiming shall file with the board of county commissioners a duly verified statement of the facts bringing him within these provisions.

"2. No certificate of qualification for drawing money hereunder shall be granted until the board of county commissioners shall be satisfied, from the evidence of at least two reputable residents of the county, one of whom shall be a registered physician, that they know the applicant to be blind, and that he has the residential qualifications to entitle him to the relief asked."

In view of the above, one of the residential qualifications is that the applicant shall be a resident of the county one year before he can receive relief. This is a jurisdictional matter and must exist before a certificate of qualification for drawing money can be granted by the board of county commissioners. Hence, answering your question directly, it is my opinion that a blind person, under the conditions set out in your query, cannot secure relief from the county to which he has removed short of a year's residence in the county.

But there is another matter to which I desire to call your attention, although it is not directly involved in your question, and that is a former opinion rendered by Hon. Edward C. Turner, while attorney-general of the state, which opinion is found on page 1432 of Vol. II of the Opinions of the Attorney-General for the year 1915. The syllabus of this opinion you will note is as follows:

"Relief under the blind relief laws, sections 2962 to 2970, inclusive, of the General Code, can only be granted by the county charged with the support of the applicant under the poor laws of the state."

The section of the statutes controlling the granting of relief under the poor laws of the state is section 3477 G. C., the first paragraph of which reads as follows:

"Sec. 3477. Each person shall be considered to have obtained a legal settlement in any county in this state in which he or she has continuously resided and supported himself or herself for twelve consecutive months, without relief under the provisions of law for the relief of the poor.* * *"

No facts are stated in connection with the present inquiry, calling for the application of Mr. Turner's opinion, and I do not wish to be understood as expressing either concurrence therein or disagreement therewith.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

35.

CITY AUDITOR—MAY ACT AS CLERK OF BOARD OF EDUCATION.

This opinion holds that positions of city auditor and clerk of the board of education in a city school district are not incompatible and may be held by one and the same person.

COLUMBUS, OHIO, February 14, 1917.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—I have your letter of January 8, 1917, as follows:

"We respectfully request your written opinion upon the following question:

"May the auditor of a city legally occupy the position of clerk of the board of education in the school district of that city?"

The rule of common law incompatibility is stated by the court in the case of State ex rel. v. Gebert, 12 C. C. (n. s.), page 274, as follows:

"Offices are incompatible when one is subordinate to or in any way a check upon the other; or when it is physically impossible for one person to discharge the duties of both."

After a careful examination of the statutes, I am unable to find anything that prohibits one person from holding both of these offices, and I am, therefore, of the opinion, in direct answer to your question, that the city auditor may act as clerk of the board of education in the school district of the city.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

36.

VILLAGE—BOARD OF TRUSTEES OF PUBLIC AFFAIRS—POWERS AND DUTIES DESCRIBED IN SECTION 4361 G. C. APPLY ONLY TO SAID BOARD—NOT TO DIRECTOR OF PUBLIC SERVICE.

Section 4361 *G. C. refers only to villages and has no application to cities.*

The powers and duties of directors of public service in cities are not broadened or affected in any way by section 4361 *G. C. Reference to the powers and duties of directors of public service in said section is made only in a descriptive way to insure brevity in vesting powers in boards of trustees of public affairs of villages and of placing duties upon them.*

COLUMBUS, OHIO, February 14, 1917.

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

GENTLEMEN:—Under date of January 12, 1917, you submit for my opinion the following request:

"We refer you to section 4361 G. C. as amended 103 O. L. 561, and would call your attention to the following excerpt from said section:

"'And all powers and duties relating to water works in any of these sections shall extend to and include electric light, power and gas plants, and such other similar public utilities.'

"Question: Does this portion of section 4361, G. C., just quoted, apply to both cities and villages, or does it apply to villages only?"

Section 4357 G. C. and section 4361 G. C., as amended 103 O. L. 561, read as follows:

"Sec. 4357. In each village in which water works, an electric light plant, artificial or natural gas plant, or other similar public utility is situated, or when council orders water works, an electric light plant, natural or artificial gas plant or other similar public utility, to be constructed, or to be leased or purchased from any individual, company or corporation, council

shall establish at such time a board of trustees of public affairs for the village, which shall consist of three members, residents of the village, who shall be each elected for a term of two years."

"Sec. 4361. The board of trustees of public affairs shall manage, conduct and control the water works, electric light plants, artificial or natural gas plants, or other similar public utilities, furnish supplies of water, electricity or gas, collect all water, electrical and gas rents, and appoint necessary officers, employes and agents. The board of trustees of public affairs may make such by-laws and regulations as it may deem necessary for the safe, economical and efficient management and protection of such works, plants and public utilities. Such by-laws and regulations when not repugnant to the ordinances, to the constitution or to the laws of the state, shall have the same validity as ordinances. For the purpose of paying the expenses of conducting and managing such water works, plants and public utilities, of making necessary additions thereto and extensions thereof, and of making necessary repairs thereon, such trustees may assess a water, light, power, gas or utility rent, of sufficient amount, in such manner as they deem most equitable, upon all tenements and premises supplied with water, light, power or gas, and, when such rents are not paid, such trustees may certify the same over to the auditor of the county in which such village is located to be placed on the duplicate and collect as other village taxes or may collect the same by actions at law in the name of the village. The board of trustees of public affairs shall have the same powers and perform the same duties as are possessed by, and are incumbent upon, the director of public service as provided in sections 3955, 3959, 3960, 3961, 3964, 3965, 3974, 3981, 4328, 4329, 4330, 4331, 4332, 4333 and 4334 of the General Code, and all powers and duties relating to water works in any of these sections shall extend to and include electric light, power and gas plants and such other similar public utilities, and such boards shall have such other duties as may be prescribed by law or ordinance not inconsistent herewith."

An examination of the above mentioned sections makes it apparent that the board of trustees of public affairs described therein refers only to villages, for the reason that the board is mentioned only in connection with the term "village."

No difficulty arises in determining the meaning of the first part of the last sentence of said section 4361 G. C., wherein it is stated that the board of trustees of public affairs shall have the same powers and perform the same duties as are possessed by and are incumbent upon the director of public service as provided in sections 3955, etc., of the General Code. The latter part of said sentence is to the effect that all powers and duties relating to water works in any of these sections shall extend to and include electric light, power and gas plants and such other similar public utilities, and such board shall have such other duties as may be prescribed by law or ordinance not inconsistent herewith.

The question then presents itself, does the statement in said section 4361, that

"all powers and duties relating to water works in any of these sections shall extend to and include electric light, power and gas plants," etc.,

refer to the powers and duties of said board of trustees of public affairs, to said director of public service, or both? The proper answer to said question in my opinion is, that said "powers and duties" refer only to the board of trustees of public affairs.

I am led to this conclusion by the fact that the title of the act amending said section 4361, in 103 O. L. 561, is as follows:

> "An act to amend section 4361 of the General Code, relating to the powers and duties of the board of trustees of public affairs."

The title of said act refers only to the powers and duties of boards of trustees of public affairs and does not make any reference to the powers and duties of directors of public service who have powers and duties in city governments similar to those had by said boards in villages.

Article II, section 16 of the constitution of Ohio provides that:

> "* * No bill shall contain more than one subject, which shall be clearly expressed in its title. * *"

The courts have held that they will look to the title of a bill to determine the intention and object of the legislature in enacting the law.

> Bronson v. Oberlin, 41 O. S. 476.
> State ex rel. v. Kinney, 20 O. C. C. 325; 11 O. C. D. 261.

In my opinion, the title of the act amending this section shows clearly that it was the intention of the legislature to enact a law that would vest powers in and place duties upon the village board and no other board or official.

Further, the language of said section 4361, wherein reference is made to the powers and duties of a director of public service and to the sections granting and fixing same, does not disclose in my opinion any intention to broaden this official's powers and duties, but rather a use of these references only in a descriptive way, to insure brevity in vesting powers in said board and placing duties upon it.

Hence, being convinced that the boards of trustees of public affairs, above mentioned, refer only to villages, and that the powers granted and duties fixed in said section 4361 refer only to boards of trustees of public affairs, I am of the opinion that the portion of said section 4361 quoted by you in your request for an opinion applies only to villages and has no application to cities.

Respectfully,
JOSEPH MCGHEE,
Attorney-General.

37.

APPROVAL—CONTRACT BETWEEN OHIO BOARD OF ADMINISTRATION AND THE STANDARD PAVING CO. AND BOND SECURING SAME.

COLUMBUS, OHIO, February 15, 1917.

The Ohio Board of Administration, Columbus, Ohio.

GENTLEMEN:—Under date of February 2, 1917, you submitted to this department the contract entered into between your board and the Standard Paving Company of Columbus, Ohio, for the erection and completion of a cottage at the Massillon state hospital near Massillon, Ohio, together with the bond securing said contract.

I have gone over the contract and bond and find the same in compliance with law.

I have also received from the auditor of state a certificate to the effect that there is money available for the purposes of said contract.

I have approved the said contract and two duplicate copies thereof in writing and have filed the original, together with the bond, in the office of the auditor of state, and have turned over to Mr. Harry C. Holbrook, your architect, the balance of the papers submitted.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

38.

MUNICIPAL PARK COMMISSION—WHEN AUTHORIZED BY COUNCIL MAY INSTALL CHRISTMAS TREE IN PLAY GROUNDS—HAS NO AUTHORITY TO PURCHASE GIFTS OR PAY COMPENSATION FOR EXERCISES IN CONNECTION THEREWITH.

Under sections 4057 and 4058 G. C. a municipal park board or commission, being properly authorized by council, may install and decorate and conduct a municipal Christmas tree in a park or children's play ground. Such authority refers only to the enjoyment and equipment of parks and children's play ground property, and does not sanction the installation of Christmas trees generally and in places not dedicated to public use for parks or children's play ground purposes; nor does it permit the purchase and distribution of gifts or the payment of compensation to persons for services rendered in conducting appropriate exercises in connection with said tree.

In effect, the authority granted would amount to the right and power to add to the ornamental features of a park or children's play ground, so that same would be equipped and could be enjoyed in accordance with the spirit and sentiment of the Christmas season.

COLUMBUS, OHIO, February 15, 1917.

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

GENTLEMEN:—Under date of January 8, 1917, you submitted for my opinion the following proposition:

> "Is the expense covering the purchase, decoration, lighting and expense of conducting a municipal Christmas tree a legal charge against the municipal funds?
>
> "Is such expense authorized under section 4058 General Code?"

Sections 4057 and 4058 G. C. are as follows:

> "Sec. 4057. The board of park commissioners shall have the control and management of parks, park entrances, parkways, boulevards and connecting viaducts and subways, children's play grounds, public baths and stations of public comfort located in such parks, of all improvements thereon and the acquisition, construction, repair and maintenance thereof. The board shall exercise exclusively all the powers and perform all the duties, in regard to such property, vested in and imposed upon the director of public service."
>
> "Sec. 4058. The board shall have the expenditure of all moneys appropriated by the city council or received from any other source whatever, for the purchase, acquisition, improvement, maintenance, equipment or en-

joyment of all such property, but no liability shall be incurred or expenditure made unless the money required therefor is in the treasury to the credit of the park fund and not appropriated for any other purpose."

Section 4057 G. C. vests in the board of park commissioners the control and management of parks and children's play grounds.

Section 4058 G. C. among other powers authorizes the board to expend money appropriated by council or received from other sources for the improvement, equipment or enjoyment of said property mentioned in said section 4057 G. C.; the authorization being contingent upon the money required therefor being in the treasury to the credit of the park fund and not appropriated for any other purpose.

The parks and children's play grounds are established and maintained by public agencies for the use of the general public in the way of affording recreation and serving as ornamental public domain. It would be difficult to establish any set of rules to govern the exact bounds within which the recreation or ornamental features of a park or children's play ground could be limited, as these features are largely matters of taste and of varying ideas by those in charge.

It is my opinion that the incurring of expense for the installation of a municipal Christmas tree in a park or children's play ground by the park board or commission, being properly authorized by council and supplied with funds therefor, would be a rightful exercise of the power to equip or enjoy park or children's play ground property.

The authorization as above set forth, however, would extend only to the installing, decorating and conducting of the Christmas tree proper, and would not be sufficient to sanction the incurring of expense in the purchase of gifts to be placed on said tree and distributed therefrom, nor the payment of compensation to persons for special services rendered in conducting appropriate exercises in connection with said tree.

In other words, the authority granted would refer to decorative features only and in application would amount to an exercise of the power to add to the ornamental features of a park or children's play ground, so that same would be equipped and could be enjoyed in accordance with the spirit and sentiment of the Christmas season.

Further, I am convinced that this authority refers only to the enjoyment and equipment of parks and children's play ground property and that these sections would not authorize the installation of municipal Christmas trees generally and in places not dedicated to public use for parks or children's play ground purposes.

It is a well settled principle of law that municipal corporations have only those powers that are specifically granted by the legislature and the above mentioned provisions are the only ones, to my knowledge, that could be construed in any way to permit the erection of municipal Christmas trees at municipal expense.

Hence, it is my opinion that the expense of the purchase, decoration and lighting and expense of conducting a municipal Christmas tree, under the law as it now exists, could be made a legal charge against municipal funds only in the way above mentioned.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

39.

TRUSTEES—OHIO STATE AND MIAMI UNIVERSITIES—ABSENCE FROM MEETINGS NOT ABANDONMENT OF OFFICE—DOES NOT CREATE VACANCY.

Mere absence from meetings of the trustees of the Ohio, Ohio State and Miami universities will not constitute an abandonment of the office so as to produce a vacancy; neither is mere absence a cause for removal under section 13 G. C., or section 6 of the act of 1809, 7 O. L. 184. The causes of removal are specifically enumerated and for them alone can a removal be made, and in the manner provided by law. Suggestion made that absence be added to the statutory causes for removal.

COLUMBUS, OHIO, February 17, 1917.

HON. JAMES M. COX, *Governor of Ohio, Columbus, Ohio.*

MY DEAR GOVERNOR:—You have made inquiry of this department concerning the three educational institutions hereafter mentioned, stating that it has been reported to you that certain trustees have failed to attend meetings of their respective boards and that you desire to know:

"First. Would such absence produce a vacancy in the office that could be filled by appointment under the law?

"Second. If such absence would not constitute a vacancy, would it constitute a cause for removal?

"Third. What suggestions could be made as to a change of the statutes that might correct the language used?"

To properly answer the inquiries it would not be amiss to look into the legislative history of the institutions.

OHIO STATE UNIVERSITY.

Section 7942 G. C. provides:

"The government of the Ohio state university shall be vested in a board of seven trustees, who shall be appointed by the governor, with the advice and consent of the senate. One trustee shall be appointed each year for a term of seven years from the fourteenth day of May of such year, and serve until his successor is appointed and qualified. A vacancy in the office of trustee shall be filled by an appointment to be made in the same manner as an original appointment, but only for the unexpired term. The trustees shall not receive compensation for their services, but shall be paid their reasonable necessary expenses while engaged in the discharge of their official duties."

Section 7946 G. C. provides for the meetings of the board.

I herewith attach references to the acts found in 67 O. L. 20, 74 O. L. 100, 75 O. L. 126. An examination of these acts shows that on March 22, 1870, an act was passed establishing "The Ohio Agricultural and Mechanical College." In 75 O. L. 126, an act was passed reorganizing and changing the name of The Ohio Agricultural and Mechanical College to "The Ohio State University." Sections 2 and 3 of that act have been carried into the General Code as section 7942.

There is no specific statute providing for the removal of trustees and the question of removal of these officers must be found in section 13 of the General Code. The appointment of the trustees shall be made by the governor, with the advice and consent of the senate.

THE MIAMI UNIVERSITY.

Section 7939 G. C. provides:

> "The government of Miami university shall be vested in twenty-seven trustees, to be appointed by the governor by and with the advice and consent of the senate. Nine trustees shall be appointed every third year, for a term of nine years, beginning on the first day of March in the year of their appointment. Vacancies in the board of trustees shall be filled for the unexpired term in the same manner."

I am attaching hereto a legislative history of Miami university, as far as necessary for this opinion, and an examination of it will disclose that the Miami university was originally established February 17, 1809, as found in 7 O. L. 184. The original act, section 6, gave the right to the corporation to suspend and dismiss a member of the corporation, who by his conduct renders "himself unworthy of the office, station or place he sustains, or who from age or other infirmity, is rendered incapable to perform the duties of his office."

Section 7 of the original act provided that the trustees should have the power to fill all vacancies which may happen in their board during the recess of the legislature "who shall continue in office until the end of the next session of the legislature," and that the president should make report thereof to the governor and enable him to lay the same before the next legislature, which under section 8 should fill vacancies.

The act itself names the trustees and succeeding acts at different times name the trustees of this institution. The act of February 10, 1824, found in 22 O. L. 68 amends several acts establishing the Miami university and at section 4 provides for eighteen trustees to be chosen by the legislature.

On March 7, 1842, as found in 40 O. L. 123, the first section of the act provided:

> "Be it enacted, etc., that so much of the act entitled 'An act to establish the Miami university,' passed February 17, A. D. 1809, or of any act amendatory thereto, which gives authority to the board of trustees to make removals from, or fill vacancies in, their own body, be and the same is hereby repealed. When any vacancy shall hereafter occur in the said board by removal from the state, death, or otherwise, it shall be the duty of the secretary of the board to report such vacancy to the governor of the state, who shall, thereupon, appoint some suitable person to fill the same, who shall hold the office until the end of the next succeeding session of the legislature; and it shall be the duty of the governor to report such vacancy to the legislature, as in case of other offices, and the legislature shall fill the same for the remainder of the unexpired term, in accordance with the fourth section of the 'act further to amend the several acts establishing the Miami university,' passed February 10, A. D. 1824; provided that the seat of any member of the board who may absent himself for two years together, from the regular meetings of the trustees, may, at the discretion of the board, be declared vacant, and such vacancy shall be reported to the governor as other vacancies are."

While the matter is not carried into the General Code, section 1, as above quoted, seems to be the only existing statute referring specifically to the removal of officers of this corporation. This act takes away from the board of trustees the authority to make removals and fill vacancies in their own body, yet in the same section it is provided that "the seat of any member of the board who may absent himself for two years together, from the regular meetings of the trustees, may, *at the discretion of the board,* be declared vacant, and such vacancy shall be reported to the governor as other vacancies are."

I have not been able to obtain any information as to what the practice has been since the amendment of 1842, but I am inclined to believe that it has been treated as if there were no specific statute for the removal of the trustees of Miami university and in consequence relief as far as this institution would be concerned would have to be sought under the provisions of section 13 G. C.

Section 13 G. C. provides:

> "When not otherwise provided by law, an officer who holds his office by appointment of the governor with the advice and consent of the senate, may be removed from office by the governor with the advice and consent of the senate, if it be found that such officer is inefficient or derelict in the discharge of his duties or that he has used his office corruptly. If, in the recess of the senate, the governor be satisfied that such officer is inefficient or derelict or corrupt, he may suspend such officer from his office and report the facts to the senate at its next session. If in such report the senate so advise and consent, such officer shall be removed, but otherwise he shall be restored to his office."

This section authorizes the governor, with the advice and consent of the senate, to remove a trustee of either one of these educational institutions. There is no question as far as Ohio state university is concerned and there is no other provision of law which would effectuate a removal, and the present condition of the statute in relation to Miami university, with the single exception as to absence from meetings of the board for two years, would provide no other statutory method of removal, and hence, the manner of removal would have to be found in the general section 13 G. C., supra.

Since this section makes a finding of inefficiency or dereliction in the discharge of the duty, or that the office has been used corruptly, the grounds for removal, under the law, before a trustee of such institution could be removed, it would be necessary that specific charges under the statute be filed with the governor, that notice be given to the officer, that a hearing be had and a finding be made of guilty of the charge preferred. Then, if the senate were in session, a report of such hearing would have to be made to the senate and no removal could ensue, unless with the advice and consent of the senate. On the other hand, if the senate were not in session, and the governor was satisfied that the officer was guilty after a hearing upon proper charges, after due notice, such officer might be suspended from office and it would be the further duty of the governor to report all the facts to the senate at the next session, and if the senate would consent to the governor's report, the officer might then be removed.

Our supreme court in State ex rel. v. Sullivan, 58 O. S. 504, and later in State ex rel. v. Hoglan et al., 64 O. S. 532, as well as in other cases, has adhered to the proposition of law settled as far as this state is concerned, that in cases where the statute fixes the causes for which an officer may be removed, the power of removal cannot be exercised arbitrarily, but only upon complaint and after a hearing had in which the officer is afforded an opportunity to refute the case made against him.

Now, as to these two institutions, I am satisfied that since it would be necessary, under section 13 of the General Code, to find that the officer is "inefficient or derelict in the discharge of his duties or that he has used his office corruptly" before an officer could be removed, *mere absence* from meetings is not a specific cause for removal, neither would proof of absence alone be sufficient to substantiate either one of the above named charges, which are grounds for removal. There would have to be something more than mere absence—a failure partial or total in the performance of some duty—in fine, evidence that would conclusively show that the officer was either inefficient, or derelict, in the discharge of his duties, or that he had used his office corruptly. Of course, if continued absence, or wilful absence were made a ground of removal by the statute, then proof of that fact would be sufficient.

OHIO UNIVERSITY.

The position of Ohio university is somewhat different from the two institutions heretofore spoken of. I have attached hereto some legislative history pertaining to this university, from which it will be seen that the act establishing the university in the town of Athens in 1804 by the name and style of the "Ohio university" is found in 2 O. L. 193, etc. This is the recognized charter of that institution. There was a prior act found in 2 Laws of Northwest Territory at page 161 which establish at the same place "The American Western University."

What became of the last named corporation, whether it was ever organized or not, does not appear as far as the state legislature is concerned. It seems to have been dissolved by the act creating the Ohio university, which act invested the Ohio university with all the powers and privileges of the American western university, for the act of 1804 as a matter of law empowered the obligations of the contract giving the American western university corporate powers. This last named act might be unconstitutional, unless the trustees of the American western university assented to the act of 1804. Since the trustees of the two institutions were practically the same persons, it may be well argued that there was such assent.

Section 2 of the act of 1804 provides:

> "That there shall be and forever remain in the said university, a body politic and corporate, by the name and style of 'The president and trustees of the Ohio university;' which body politic and corporate shall consist of the governor of the state (for the time being), the president, and not more than fifteen nor less than ten trustees, to be appointed as hereinafter is provided."

Section 6 of the act provides:

> "That the said corporation shall have power and authority to suspend or remove the president or any member of the said corporation, who shall, by his misconduct, render himself unworthy of the office, station or place he sustains, or who, from age or other infirmity, is rendered incapable to perform the duties of his office; and the said corporation shall have power and authority to suspend or remove from the university, any professor, instructor or resident student, or servant, whenever the corporation shall deem it expedient for the interest and honor of the university."

Prior to the adoption of the constitution of 1851, the trustees of the Ohio university were appointed by resolution of the general assembly, but since then

they have been appointed by the governor by and with the consent of the senate, by virtue of sections 2 and 3 of article VII of the constitution.

Section 2 provides:

> "The directors of the penitentiary shall be appointed or elected in such manner as the general assembly may direct; and the trustees of the benevolent, and other state institutions, now elected by the general assembly, and of such other state institutions, as may be hereafter created, shall be appointed by the governor, by and with the advice and consent of the senate; and upon all nominations made by the governor, the question shall be taken by yeas and nays, and entered upon the journals of the senate."

Section 3 provides:

> "The governor shall have power to fill all vacancies that may occur in the offices aforesaid, until the next session of the general assembly, and, until a successor to his appointee shall be confirmed and qualified."

The term of these trustees is for life or until they resign, or *are removed by the board of trustees for misconduct,* for such causes as are set forth in section 6, supra. The legislature at different times has passed acts authorizing an increase in the number of trustees of colleges and universities, and changing the number of trustees as provided for originally in the act of 1804.

In 7 Ohio Reports 82, will be found the case of State ex rel. Jacob Linley v. Thomas Bryce, the syllabus of the case reading as follows:

> "A trustee of the Ohio university cannot be regarded as having vacated his place, if he has not resigned, unless there is a judicial decision that such vacation has taken place. A legislative appointment of a successor, without such resignation or adjudication, confers no legal right upon the person appointed."

From the facts stated in the above case, Linley was appointed trustee of the Ohio university in 1805, at which time he resided in Athens, Ohio, and regularly performed his duties on the board until 1828. He then removed to the neighborhood of Cincinnati, having care of a church on Walnut Hills. In 1829, he removed to the flats of Grave Creek in Virginia, one hundred and twenty miles east of Athens. Later he removed to Washington county in Pennsylvania, where he was residing on January 11, 1832. Between the time of his removal from Athens in 1828, and January 11, 1832, he appears to have been present at but one meeting of the board in 1830, when he transacted business with them without objection. This being prior to 1851, the original act providing for appointments of trustees by the general assembly was in force and in 30 O. L. 326 is found a resolution that Thomas Bryce was "appointed a trustee of the Ohio university to fill the vacancy occasioned by Jacob Linley having removed out of the state."

Judge Lane, at page 83, says:

> "It is conceded that the legislature have no power of appointment, except in the event of 'a vacancy.' Unless, therefore, the non-residence or non-attendance of Linley renders his office *vacant,* the appointment of Bryce is not good.

"It is well settled that neither a neglect to exercise corporate powers, nor even an abuse of them, ipso facto, works a forfeiture of the franchise; that the corporation subsists until the forfeiture be ascertained and declared by a competent tribunal, in a judicial proceeding instituted for that purpose against it by government. 2 Burr. 869; 5 Mass. 230; 16 Mass. 94; 7 Pick. 344; 2 Term 515; 9 Cranch 51; 6 Cowen 23; 5 Johns. 380; 16 Serg. & R. 140; 1 Blackf. 267. It is equally well settled that no member of a corporation shall be disfranchised, no officer removed, without the agency of a tribunal competent to investigate the cause and pronounce the sentence of the loss of right. The office is not vacant by neglect or abuse, it requires *an act done,* or the *exercise of power,* to work the forfeiture and determine the title to the office. 2 Black. 156; 4 Kent's Com. 127; for it is the forfeiture of a vested right for the breach of a condition in law. Where the charter prescribes the terms under which the power of a motion is to be exercised, they must be pursued; where the organic law is silent, the corporation itself possesses the inherent power to ascertain and declare the forfeiture either of franchise or office. 2 Kent's Com. 297; 1 Burr, 517; 2 Binn. 441; 4 Binn. 448; 5 Binn. 486; Angell and Ames on Corp. 237.

"This proceeding is essentially adversary in its character. The justice of the common law permits no investigation of facts which may be followed by the loss of a right, or by the infliction of a penalty, to be conducted *ex parte.* It is essential to its validity that the party should be duly summoned. 4 Black. Com. 282; 1 East 638; 6 Conn. 542; 2 Serg. & R. 141; 1 Burr. 540; Doug. 174.

"In the present case, if the relator had forfeited his office by neglecting his duties, it was necessary that the corporation, after reasonable notice to him and an opportunity for hearing; should investigate the facts, and determine his title to the office by sentence, and thus create the vacancy. Until this was done, the relator was entitled to his seat, and the contingency had not happened in which the legislature could lawfully appoint a trustee.

"As no statutory provision has prescribed a rule of proceeding in cases of quo warranto, the forms of proceeding are as at common law. As this application is made by the prosecuting attorney of the county, and the defense sets up a title to the office without objection to the authority for prosecuting, the court have adjudicated no other questions."

In the case of State v. Trustees of the Vincennes University, 5 Ind. 89, the court held that removal from the state by a trustee of the university or *failure to attend three successive meetings, will not of itself vacate the office.* In this case the charter of the university provided that *willful* absence constituted a ground of removal and the court at page 81 said that failure to hold meetings, or that failure of particular members to attend for three successive meetings would not, per se, vacate their seats, in fact, that their removal from the state would not vacate their seats; while these acts would be grounds on which the remaining trustees might vacate the seats of such absent members, by electing others in their places. The court further said:

"Indeed, simple absence for three meetings was not, by the charter, a ground for vacating the seat of a member. It was willful absence that constituted such ground, and this would present a question to be tried on an attempt by the remaining trustees to insist on a vacancy for such cause."

It is my opinion, therefore, that mere absence from meetings, either for the Ohio State and Miami universities for which the causes are practically iden-

tical, or for the Ohio university, the causes for removal being as stated supra in section 6 of the act of 1804, would not be sufficient of itself to constitute a cause for removal. So, where an attempted removal was by the governor in the one case, or the board of trustees of the Ohio university in the other, the settled law of Ohio is that prior to any finding, charges would have to be filed with the officer or the board authorized to hear the same, due notice would have to be given the officer charged, a hearing had, and a determination or finding made before the appointing power could exercise the right of removal.

Conditions as above stated, apply to mere absence, and it might be well to further consider where and how an officer can abandon his office and thus create a vacancy. In determining whether there has been an abandonment, the primary object is the intention of the officer, for ordinarily there can be no abandonment by him without an intention, actual or imputed, so to abandon. This intention is a question of fact, to be determined as any other fact, and may be inferred from his acts, his conduct or his statements. Such a relinquishment, however, which *ipso facto* vacates the office, is not to be confounded with non-user or neglect of duty. The former vacates the office, the latter constitutes a ground for proceeding in the proper forum against the officer, but it does not of itself produce a vacancy in the office without a judicial determination or finding to that effect by the officer or board authorized to try the cause.

It is said by Justice Marshall, in Page v. Hardin, 47 Ky. (8 P. Mon.) 648:

> "A right may be forfeited or lost by neglect or misconduct, though the party has continually asserted or claimed it. Its vacation by abandonment, implies a voluntary and intentional rejection, disclaimer or surrender of it by the party to whom it pertains. An office may be forfeited by non-user or by official misconduct or misbehavior. A partial neglect to perform certain duties of an office, may amount to misbehavior, and as such, be cause for forfeiture. But no partial neglect or non-user can, in itself, be sufficient evidence of abandonment—which implies a mental renunciation of the office. And if abandonment may be inferred conclusively from non-user or neglect of duties, so as to amount, in itself, to an absolute vacation without express renunciation of the office once lawfully held by the party, it can only be when the non-user or neglect is not only total or complete, but of such continuance, or under circumstances so clearly indicating absolute relinquishment, as to preclude all future question of the facts."

My conclusion on this question is that mere absence from meetings by the officers of the institutions above named would not constitute an abandonment of the office so as to produce a vacancy. So far as Miami university is concerned, this is evidenced by the provisions in the act of 1842 which specified that even an absence for two years would not necessarily create a vacancy and it would be up to the board at their discretion, which would imply a finding, to make such declaration.

It strikes me that the only safe method to be followed would be in the case of Ohio state university and Miami university to either, by amendment to sections 7939 and 7942 G. C. make provision that absence without cause from the regular or special meetings of the board of trustees of the respective institutions for two or more such consecutive meetings shall constitute dereliction in the discharge of the duties of such trustee within the meaning of section 13 of the General Code, and to repeal section 6 of the act of 1804 of the Ohio university, which empowers the corporation to suspend or remove its members, thus giving the right of removal to the governor under section 13 G. C. since then there would be no other provision of law for such removal, or, to amend section 13 G. C. in such a manner as to provide that whenever a member of the board of trustees of the said educa-

tional or benevolent institutions or universities which receive state aid, who holds his office by appointment of the governor on the advice and consent of the senate, absents himself without cause from the regular or special meetings of such board of commissioners or trustees for two such consecutive meetings, such absence shall constitute dereliction in the discharge of the duties of such member.

There is a further observance to be made concerning the Ohio university and the possible right to amend or repeal section 6 of the act of 1804. Under the rule in the Dartmouth college case, the right of the legislature to change the corporate franchise granted in 1804, might be seriously questioned. I would further recommend that since the change in any event could be made with the consent or assent of the trustees of Ohio university, that as an inducement to such assent, some sort of an act be passed requiring as a condition precedent for the receipt of state aid of any incorporated educational institution, that such corporation should first file with the officer authorized to pay the trustees any levy. for state aid, a certified copy of a resolution properly passed by the board of trustees of such corporation, assenting to the change or changes above mentioned.

The Ohio university occupies an anomalous position and there is always the question that it is not a state institution under section 2 of article VII of the constitution, although ever since the adoption of the 1851 constitution the trustees have been appointed and all the trustees now serving were appointed under the provisions of said section 2.

The state of Ohio, as trustee, accepted a land grant made by the act or resolution of congress of 1787 for the sale of a large tract of land in Ohio "to the Ohio company" wherein it was provided that:

> "Not more than two complete townships to be given perpetually for the purposes of an university, to be laid off by the purchaser or purchasers as near the center as may be, so that the same shall be of good land to be applied to the intended object by the legislature of Ohio."

The state placed the immediate care and supervision over the lands granted as aforesaid as well as the affairs of the university in the hands of certain agents of the state in its behalf appointed by the legislature and denominated the "president and trustees of the Ohio university."

There is no duty devolving upon the state to grant further and additional sums to this university, but an entering wedge was secured in 1875, 72 O. L. 84, when an act refunding certain funds was passed by the general assembly. It was not until 1896, 92 O. L. 40, that the levy of an annual tax for this institution was passed in what was known as "the Sleeper bill." This is followed by an act in 95 O. L. 45, establishing a normal school there, and later acts of April 2, 1906, 98 O. L. 309, which determined the policy of the state towards the Ohio and other named universities, and fixed the state taxes to be thereafter levied for their support.

Inasmuch as this policy is firmly established and each succeeding legislature has contributed to these institutions, I hardly think the trustees would fail to withstand inducement offered for their assent to such a change in the corporate franchise as will place beyond question the appointment of the trustees in the hands of the governor under sections 2 and 3 of article VII of the constitution and give him the right to make removals under section 13 of the General Code.

Miami university, likewise, is not owned and operated by the state, but the legislature in 1869 passed an act authorizing the governor to make the appointments of the trustees and this has been acceded to ever since and no question has ever been raised as to the legislature's right to make this change. It might be observed

that the original act establishing Miami university in section 15 reserved the right to the legislature to alter the provisions of that charter, which right does not appear to have been reserved in the incorporation of Ohio university.

Trusting that this fully answers your inquiry, I am,

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

40.

INDUSTRIAL COMMISSION—UTILITIES COMMISSION—ACTS CREATING SAME ARE CONSTITUTIONAL UNDER SECTION 16, ARTICLE 11.

1. *The act creating the public utilities commission of Ohio is not unconstitutional under and by virtue of section 16 of Article II of the Constitution. The conditions of said section of the Constitution are fully met in said act. The sections amended or changed are repealed. The act nowhere refers to sections that are repealed. The act is not in the least dependent upon repealed sections for its force and vitality, but it is one full, complete, rounded out act, embodying within itself everything that is necessary to give it force and vitality.*

2. *The act creating the industrial commission of Ohio is not unconstitutional under and by virtue of said section of the Constitution. This for the same reasons as set out in reference to the act creating the public utilities commission; and for the further reason that said act specifically provides that the powers and duties conferred on said industrial commission are such as are conferred by law. Not conferred by repealed statutes, but by living, vital statutes.*

3. *There is no aim or intention to find or decide in this opinion as to what extent or in what respects the Parrett-Whittemore law is unconstitutional under and by virtue of the recent decision of the supreme court.*

COLUMBUS, OHIO, February 17, 1917.

HON. JAMES M. COX, *Governor of Ohio, Columbus, Ohio.*

DEAR SIR:—Your communication of January 20, 1917, in which you make inquiry as to the constitutionality of the acts creating the public utilities commission and the industrial commission, was received. The communication reads as follows:

> "One of the grounds upon which the Parrett-Whittemore law was held to be unconstitutional, was that in its construction certain vitals were carried into it from the Warnes law, by reference to sections from the Warnes law, and then, in the concluding part of the Parrett-Whittemore law, the Warnes law was repealed, embodying the sections that were to be a part of the Parrett-Whittemore law."

Your inquiry refers to the industrial commission law and the public utilities commission law, and is as to whether these two laws might possibly be unconstitutional for the same reasons as set out in the recent opinion of our supreme court, for which the Parrett-Whittemore law was declared unconstitutional.

I will first notice your inquiry as to the act creating the public utilities commission. Let us first consider just what the supreme court decided in the case of The State of Ohio ex rel. Willis R. Godfrey, a Taxpayer, v. P. C. O'Brien, Treas-

urer, et al., wherein the court held the Parrett-Whittemore law to be unconstitutional, and why said court so decided.

In so far as your inquiry is concerned, the criticism of the court was aimed at section 3 and section 17 of said act (106 O. L. 246).

Section 3 of said act is as follows:

"Section 3. Whenever any person, company, firm, partnership, association or corporation was by any existing provision of any law repealed by this act required to return property to the district assessor for taxation, the same shall be returned to the county auditor; and whenever the district assessor was by any provision of any such law charged with any duty or vested with any powers in making up the original tax list, or in listing and valuing any property which has been omitted from the tax list, or in correcting any returns or statements of property for taxation, either with respect to its valuation or amount, such duty shall devolve upon and be performed by the county auditor and such power shall vest in him and be exercised by him."

Section 17 of said act is as follows:

"Section 17. At the regular election to be held in November, 1915, and biennially thereafter, assessors shall be elected in the manner provided by law for the election of ward, district, city, village and township officers as follows: In municipal corporations divided into wards, one assessor shall be elected in each ward; in villages one assessor shall be elected; in cities not divided into wards, the board of deputy state supervisors of elections or the board of deputy state supervisors and inspectors of elections, as the case may be, shall, acting in conjunction with the county auditor, within ten days after this act shall become effective, divide such cities or such part or parts thereof as may be located in their county, into such number of assessment districts as in the judgment of the county auditor may be necessary in order to provide for the assessment of all the property therein; a division so fixed shall remain in effect for a period of four years, at the expiration of which and quadrennially thereafter a like division shall be made in the same manner and by the same authority. One assessor shall, at the time specified in this section, be elected in each assessment district so created; provided, however, that nothing therein shall be so construed as to require a division of any municipal corporation or part thereof into assessment districts when, in the judgment of the county auditor, such division is not necessary, in which event one assessor shall be elected in the entire municipal corporation or in that part thereof which may be located in one county as the case may be; in townships not having a municipal corporation therein, one assessor shall be elected in such township; in townships composed in part of a municipal corporation, one assessor shall be elected in the territory outside such municipal corporation. An assessor shall be a citizen possessing the qualifications of an elector of such ward, district, city, village or township. Such assessor shall take and hold his office for the term of two years from and after the first day of January following his election. Upon the election and qualification of such assessor, the right of the deputy assessor, theretofore appointed under any provision of law to exercise any powers or perform any duties as such deputy assessor shall cease and determine, and he shall turn over to the person so elected and qualified, all the books, records, papers and

furniture of said office. Such elected assessor shall be the successor of said appointed officer, with full power to take up, carry on and complete any and all of the unfinished business thereof, and he shall perform all the duties, exercise all the powers and be subject to all the liabilities and penalties devolved, conferred or imposed by law upon the deputy assessor so appointed."

The court held that these two sections were not in harmony with section 16 of article II of the Constitution, which reads as follows:

"No bill shall contain more than one subject, which shall be clearly expressed in the title. And no law shall be revived or amended, unless the new act contains the entire act revived or the section or sections amended, and the section or sections so amended shall be repealed."

The court held in the syllabus as follows:

"* * * * * * * * * *

"6. The provisions of section 16 of article II of the Constitution of Ohio, providing that no law shall be revived or amended unless the new act contains the entire act revived, or the section or sections amended, is mandatory. The inclusion by reference, of the provisions of a repealed statute is in violation of this provision of the constitution of Ohio, and void.

"7. The statute defining the duties, powers, liabilities and penalties imposed upon deputy assessors being repealed, the provisions of section 17 of the act of the general assembly of Ohio, passed May 7, 1915 (106 O. L. 246), that the elected assessor 'shall perform all the duties, exercise all the powers and be subject to all the liabilities and penalties devolved, conferred or imposed by law upon the deputy assessor so appointed,' is unconstitutional and void.

"* * * * * * * * * *"

And in the opinion the court says:

"Section 3 of this act provides that the duties imposed upon the district assessor, 'by any existing provision of any law repealed by this act * * * shall devolve upon and be performed by the county auditor.'

"* * * * * * * * * *

"While it was held by this court in the case of Lehman v. McBride, 15 Ohio St. 571, that the clause in section 16 of article II which provides that, 'the section or sections so amended shall be repealed,' is directory only to the general assembly, and was not intended to abrogate the long established rule as to repeals by implication; yet it is clear that this court entertained a different view as to the other provisions in the same section of the constitution.

"In the opinion in that case (page 603), it is said that the purpose of this constitutional provision is to make 'all acts when amended intelligible without the examination of the statute as it stood prior to the amendment. It requires every section intended to supersede a former one to be fully set out. No amendments are to be made by directing specified words or clauses to be stricken from or inserted in the section of a prior statute which may be referred to, but the new act must contain *the section as amended.*'

"Aside from this positive declaration of this court in the case of Lehman v. McBride, supra, it is clear that this provision of the constitution

requiring each new act to contain the entire act as revived, or the section or sections amended, is mandatory; otherwise repealed sections must be given the same force and effect as if they were not in fact repealed.

"The repeal of a statute is the end of that statute. To all intents and purposes it is the same as if it had never existed. A reference in a legislative act to a repealed law, as supplementary or explanatory of the new act, is an absurdity, prohibited by this provision of the constitution.

"Any other course would lead to endless confusion and uncertainty, and prevent an intelligent administration of the statutory law of this state. The fact that a statute is recently repealed, or repealed by the same act which refers to it, is no argument in favor of such loose legislation. If that can be done, then reference can be made to a statute repealed half a century ago, or, the new section might remain unrepealed for the next half century. In either case it would require that all repealed statutes be carried into each edition of the General Code published, otherwise there would be no means available to determine the scope, intent and purpose of the act which incorporates by reference a part of the provisions of the repealed law. This, of course, would be wholly impracticable, if not impossible."

From the law as laid down in the syllabus and from the opinion of the court, it is plainly evident that the part of the Parrett-Whittemore act which the court criticised, was that part in which the said act referred to sections of the former act and then repealed said sections.

In considering the decision of the court as to the unconstitutionality of the Parrett-Whittemore law, it must be noted that the Parrett-Whittemore law is one whole and complete scheme of taxation, and was enacted to take the place of the Warnes law (103 O. L. 786), and it repealed the entire Warnes law in repealing sections 5579 to 5624-20 both inclusive, but at the same time that the Parrett-Whittemore law repealed every provision and every section of the Warnes law, it provided in section 3 that the county auditor shall perform the duties of the district assessor, which duties were set forth nowhere but in the law repealed.

Further, section 17 of the Parrett-Whittemore act provided that—

"Such elected assessor shall be the successor of said appointed officer, with full power to take up, carry on and complete any and all of the unfinished business thereof, and he shall perform all the duties, exercise all the powers and be subject to all the liabilities and penalties devolved, conferred or imposed by law upon the deputy assessor so appointed."

It was the Warnes law which provided for the appointment of deputy assessors and conferred upon them their duties. Thus, the Parrett-Whittemore law, at the same time that it conferred upon the elected assessor the duties then and theretofore devolving upon the appointed deputy assessor, repealed the whole law in which the duties of the appointed deputy assessor were set forth.

In considering the recent decision of our supreme court, it is very clear that this is the foundation and whole ground work of its decision.

Now, the question is as to whether the act creating the public utilities commission is unconstitutional by virtue of this same provision of the constitution. First, let us notice a few things in general as to this act.

The act creating the public utilities commission amended the act creating the public service commission and conferred further duties and powers upon the public utilities commission. The title to the public utilities commission act, as found on page 804 of 103 O. L., is as follows:

"AN ACT

to create the public utilities commission of Ohio, to prescribe its organization, its powers and its duties, and to repeal sections 487 to 499, inclusive, sections 543 to 551 inclusive, sections 614, 614-24, 614-25, 614-26, 614-69, 614-70, 614-80, 614-81 and 614-83 of the General Code."

In other words, it created the public utilities commission to take the place of the public service commission, provided for its organization, prescribed its duties and repealed certain sections of the public service commission act.

The act creating the public service commission is found in 102 O. L. 549, the title of which reads as follows:

"AN ACT

"Changing the name of the railroad commission of Ohio, to that of the Public Service Commission of Ohio, defining the powers and duties of the latter commission with respect to public utilities, and to amend sections 501, 502 and 606 of the General Code."

This act created the public service commission to take the place of the railroad commission and prescribed the duties of the public service commission and repealed certain sections.

Section 614-1 of the General Code, which is a part of the act creating the public service commission, is as follows:

"The railroad commission of Ohio shall hereafter be known as the Public Service Commission of Ohio. In addition to the powers, duties and jurisdiction conferred and imposed upon said commission by chapter one, division two, title three, part first, of the General Code, and the acts mandatory or supplementary thereto, the public service commission of Ohio shall have and exercise the powers, duties and jurisdiction provided for in this act."

The act creating the railroad commission and prescribing its duties is found in 98 O. L. 342, the title of which is as follows:

"AN ACT

"To regulate railroads and other common carriers in this state, create a board of railroad commissioners, prevent the imposition of unreasonable rates, prevent unjust discriminations and insure an adequate railway service."

It will be noticed that each one of these acts is full and complete within itself. The act creating the railroad commission was one entire, complete act. The act amending the railroad commission act and creating the public service commission to take the place of the railroad commission provided that the public service commission should perform all the duties and have all the powers of the railroad commission, and in addition thereto such powers and duties enumerated in the act itself.

The act amending the public service commission act and creating the public utilities commission to take the place of the public service commission, provides that the public utilities commission shall succeed to all the rights, powers and

authority heretofore exercised by the public service commission, and in addition gives the public utilities commission further rights, powers and authority enumerated in the act itself.

Section 20 of the act, which is section 499-7 of the General Code, reads as follows:

> "Section 499-7. The public utilities commission shall succeed to and be possessed of the rights, authority and powers now exercised by the public service commission of Ohio and perform all the duties now imposed upon the public service commission of Ohio, and said powers and authority shall be exercised and enforced, and said duties performed in the manner now provided by law for the said public service commission. Said public service commission of Ohio shall on and after the time when this act shall take effect have no further legal existence, and the public utilities commission is hereby authorized and directed to assume and continue as successor of said public service commission of Ohio. Wherever in the General Code the terms railroad commission or public service commission occur, the term public utilities commission shall be substituted therefor."

And this section is the only section of the act which has any similarity to sections 3 and 17 of the Parrett-Whittemore act, and is the only section of the act which could be open to the same criticism as sections 3 and 17 of the Parrett-Whittemore law.

But section 20 does not contain the provisions which drew the fire of the supreme court in its recent decision and because of which the supreme court declared the act unconstitutional. Section 20 does not refer to repealed statutes. It refers to no statutes that are not in full force and effect. It does not even refer to anything outside the very act which was amended by the act creating the public utilities commission, and of which section 20 is a part. It does not pretend to do anything other than to place the powers, duties and authority heretofore devolving upon the public service commission, upon the public utilities commission. So there is no similarity whatever between the provisions of section 20 of the public utilities commission act and sections 3 and 17 of the act declared unconstitutional by the supreme court.

But let us go further and consider the public utilities commission act in the light of section 16 of article II of the Constitution, and independent of the late decision of the supreme court. Said section 16 reads in part as follows:

> "And no law shall be revived or amended unless the new act contains the entire act revived, or the section or sections amended, and the section or sections so amended shall be repealed."

The act creating the public utilities commission comes clearly within the above constitutional provision. The act does not revive a repealed act. It amends a living act.

Now, what does the constitution require when this is done? Simply, that the new act contain the section or sections amended, and secondarily that the section or sections so amended shall be repealed. These conditions are fully and completely complied with. The sections of the new act which modify sections of the old act are all set out. The sections amended or changed are repealed. The sections repealed, namely, sections 487 to 499 inclusive, 543 to 551 inclusive, 614, 614-24, 614-25, 614-26, 614-69, 614-70, 614-80, 614-81 and 614-83 of the General Code do not contain any matter which is not provided for in the new act. The new act nowhere refers to the sections repealed. Neither is it in the least de-

pendent upon the repealed sections for its force and vitality. The new act simply transfers the duties of the old public service commission to the public utilities commission, and gives the latter commission further duties. The act as amended is one full, complete, rounded-out act, embodying in itself everything that is necessary to give it force and vitality.

Hence, it is my opinion that the act amending the public service commission act and creating the public utilities commission to take the place of the public service commission, and prescribing its duties, is clearly constitutional in the light of section 16 of article II of the Constitution.

Your second query goes to the question of the constitutionality of the act creating the industrial commission of Ohio, which act is found in 103 O. L. 95. The title of said act is as follows:

"AN ACT

"Creating the industrial commission of Ohio, superseding the state liability board of awards, abolishing the departments of commissioner of labor statistics, chief inspector of mines, chief inspector of workshops and factories, chief examiner of steam engineers, board of boilers rules and state board of arbitration and conciliation, merging certain powers and duties of said departments in and transferring certain powers and duties of said departments to said industrial commission of Ohio, and granting such commission certain other powers, and repealing sections 872, 873, 874, 876, 877, 878, 879, 880, 881, 883, 884, 897, 898, 900, 902, 903, 908, 979, 981, 983, 984, 986, 987, 988, 993, 1001, 1028-4, 1038, 1039, 1042, 1043, 1044, 1046, 1058, 1058-6, 1058-9, 1058-13, 1058-14, 1058-15, 1058-27, 1059, 1060, 1061, 1062, 1078 of the General Code."

It will be noted in the title that this act creates the industrial commission to supersede the state liability board of awards and abolishes a number of departments theretofore existing in the state, and grants to the industrial commission additional powers and repeals certain sections of the General Code.

A careful consideration of the sections repealed by this act will convince one that this is all that was contemplated by the act. The sections providing for the duties of the boards and departments abolished are not repealed excepting in a few minor points. The sections repealed simply refer to the appointment of the members of the different departments, their organization, their bonds and their reports, leaving in the statutes the sections which refer to the duties of these different departments and boards which the act abolishes, and then confers upon the industrial commission these same duties and powers.

Very much the same line of reasoning applies to the consideration of the constitutionality of this act as was used in considering the constitutionality of the act creating the public utilities commission. There are three sections, and only three, in the act creating the industrial commission, which must be considered. The first is section 11 of said act, which is section 871-11 of the General Code. This section reads as follows:

"Section 871-11. On and after the first day of September, 1913, the following departments of the state of Ohio, to wit: Commissioner of labor statistics, chief inspector of mines, chief inspector of workshops and factories, chief examiner of steam engineers, board of boiler rules, and the state board of arbitration and conciliation, shall have no further legal existence, except that the heads of the said departments, and said boards, shall within ten days after the said date submit to the governor their reports of their

respective departments for the portion of the year 1913 during which they were in existence, and on and after the first day of September, 1913, the industrial commission of Ohio shall have all the powers and enter upon the performance of all the duties conferred by law upon the said departments."

Section 24 of this act is very similar to section 11, this being section 871-24 G. C., and reads as follows:

"Section 871-24. All duties, liabilities, authority, powers and privileges conferred and imposed by law upon the commissioner of labor statistics, special agents for the commissioner of labor statistics, chief inspector of mines, district inspectors of mines, chief inspector of workshops and factories, first assistant chief inspector of workshops and factories, second assistant chief inspector of workshops and factories, district inspectors of workshops and factories, chief examiner of steam engineers, assistant chief examiner of steam engineers, district examiners of steam engineers, the board of boiler rules, head of the department of the board of boiler rules and chief inspector of steam boilers, assistant chief inspector of steam boilers, general inspectors of steam boilers, special inspector of steam boilers, state board of arbitration and conciliation, are hereby imposed upon the industrial commission of Ohio and its deputies on and after the first day of September, 1913.

"All laws relating to the commissioner of labor statistics, special agents of the commissioner of labor statistics, chief inspector of mines, district inspectors of mines, chief inspector of workshops and factories, first assistant chief inspector of workshops and factories, second assistant chief inspector of workshops and factories, district inspectors of workshops and factories, chief examiner of steam engineers, assistant chief examiner of steam engineers, district examiners of steam engineers, the board of boiler rules, head of the department of the board of boiler rules and chief inspector of steam boilers, assistant chief inspector of steam boilers, general inspectors of steam boilers, special inspectors of steam boilers, state board of arbitration and conciliation, on and after the first day of September, 1913, shall apply to, relate and refer to the industrial commission of Ohio, and its deputies. Qualifications prescribed by law for said officers and their assistants and employes shall be held to apply, wherever applicable, to the qualifications of the deputies of the commission assigned to the performance of the duties now cast upon such officers, assistants and employes."

These sections do not provide that the industrial commission shall perform duties and exercise powers set out in certain sections repealed by the act, as did sections 3 and 17 of the Parrett-Whittemore law. These sections simply provide that the industrial commission is to perform the duties and exercise the powers which theretofore had been performed and exercised by the boards and departments abolished, and the legislature was careful to make this clear in the wording of these sections.

Section 11 of the act under consideration provides that:

"On and after the first day of September, 1913, the industrial commission of Ohio shall have all the powers and enter upon the performance of all the duties conferred *by law* upon the said departments."

Section 24 provides that "all duties, liabilities, authority, powers and privileges conferred and imposed by law upon" the various boards and departments abolished, "are hereby imposed upon the industrial commission of Ohio and its deputies, on and after the first day of September, 1913."

Now, the language used in these sections is just the reverse of the language used in sections 3 and 17 of the Parrett-Whittemore law. Under no view that could be taken of sections 11 and 24 could it be held that repealed statutes confer powers and duties *by law*. The only duties and powers to be performed by the industrial commission are those duties and powers conferred upon the departments mentioned in sections 11 and 24, as found in living, vital statutes.

We must also note section 12 of the act under consideration. This section was amended at the same session of the legislature in which the original law creating the industrial commission was enacted. As amended, it is found in 103 O. L. 656 and reads as follows:

> "Section 12. The industrial commission shall supersede and perform all of the duties of the state liability board of awards, provided in and by the act of the general assembly of the state of Ohio passed the thirty-first day of May, 1911 (102 O. L. 524), entitled, 'An act to create a state insurance fund for the benefit of injured and the dependents of killed employes and to provide for the administration of such fund by a state liability board of awards,' and all amendments to said act, and by the act of the general assembly passed February 26, 1913, approved March 14, 1913, and filed in the office of the secretary of state March 17, 1913, entitled 'An act to further define the powers, duties and jurisdiction of the state liability board of awards with reference to the collection, maintenance and disbursement of the state insurance fund for the benefit of injured, and the dependents of killed employes and requiring contribution thereto by employers, and to repeal sections 1465-42, 1465-43, 1465-45, 1465-46, 1465-53, 1465-54, 1465-55, 1465-56, 1465-57, 1465-58, 1465-59, 1465-60, 1465-61, 1465-62, 1465-63, 1465-64, 1465-65, 1465-66, 1465-67, 1465-68, 1465-69, 1465-70, 1465-71, 1465-72, 1465-73, 1465-74, 1465-75, 1465-76, 1465-77, 1465-78, 1465-79 of the General Code,' on and after the first day of September, 1913; and said commission on and after the first day of September, 1913, as successor of the said liability board of awards, shall be vested with and assume and exercise all powers and duties cast *by law* upon said liability board of awards, and on the first day of September, 1913, the term of office of the members constituting the said state liability board of awards of Ohio shall cease and terminate, together with all rights, privileges and emoluments connected therewith."

To understand this section as amended, several facts must be noted:

(a) The original act creating the state liability board of awards is found in 102 O. L. 524, the title of which act is as follows:

> "AN ACT
>
> "To create a state insurance fund for the benefit of injured, and the dependents of killed employes, and to provide for the administration of such fund by a state liability board of awards."

(b) This act was radically amended by an act which is found in 103 O. L. 72, which act is commonly known as the workmen's compensation law, the title of which act is as follows:

"AN ACT

"To further define the powers, duties and jurisdiction of the state liability board of awards with reference to the collection, maintenance and disbursement of the state insurance fund for the benefit of injured, and the dependents of killed employes and requiring contribution thereto by employers, and to repeal sections 1465-42, 1465-43, 1465-45, 1465-46, 1465-53, 1465-54, 1465-55, 1465-56, 1465-57, 1465-58, 1465-59, 1465-60, 1465-61, 1465-62, 1465-63, 1465-64, 1465-65, 1465-66, 1465-67, 1465-68, 1465-69, 1465-70, 1465-71, 1465-72, 1465-73, 1465-74, 1465-75, 1465-76, 1465-77, 1465-78, 1465-79 of the General Code."

Hence, section 12 of the act under consideration confers upon the industrial commission all the powers and duties originally conferred upon the state liability board of awards and all amendments to said act, together with all the duties and powers conferred upon the state liability board of awards by the act passed February 26, 1913, and found, as above set forth, in 103 O. L. 72. But it confers upon the industrial commission no duties and powers set out in certain sections of the statutes which are repealed by the same act. The legislature was again careful to provide in this section also that—

"said commission on and after the first day of September, 1913, as successor of the said liability board of awards, shall be vested with and assume and exercise all powers and duties cast *by law* upon said liability board of awards,"

not duties and powers conferred by *repealed statutes,* but duties and powers conferred *by law.*

I know it might be thought at first sight that, inasmuch as the act found in 103 O. L. 72 repeals many of the sections of the act found in 102 O. L. 524, conferring duties upon the state liability board of awards, section 12 of the act under consideration confers duties and powers set forth in repealed sections of the act; but the legislature was careful to provide that there should be conferred on the industrial commission the duties of the state liability board of awards provided for in the act found in 102 O. L. 524 *and all amendments to said act, and by the act of the general assembly passed February* 26, 1913, to prevent such a construction being placed upon said section.

Not the original act alone, but the original act as amended, was in the mind of the legislature. Not the repealed sections of the original act creating the state liability board of awards, but the act as amended, is referred to in section 12 of the act under consideration. Not dead provisions in repealed statutes, but living principles in an amended law, were in the mind of the legislature.

I am therefore of the opinion that the act creating the industrial commission of Ohio is not unconstitutional in the light of section 16 of article II of the Constitution. The only theory upon which the acts creating the public utilities commission and the industrial commission could be held unconstitutional in view of section 16 of article II of the Constitution, would be the following, that no statute or section of a statute can be made to refer to the provisions of any other statute or section thereof. But it is my opinion that said section of the constitution would not bear this construction. Neither do I consider that the supreme court in its recent decision placed such a construction upon the same.

I might say, in passing, that sections 1465-37, 1465-40 and 1465-41 G. C. ought to be repealed. The industrial commission supersedes the state liability board of

awards and the provisions of said sections are at the present repealed by implication. Hence they should be repealed in fact.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

41.

CORPORATION—CANNOT INCREASE CAPITAL STOCK BY INCREASING NOMINAL VALUE OF SHARES.

A corporation has no power under the statutes of Ohio to increase its capital stock by increasing the nominal value of its shares.

COLUMBUS, OHIO, February 17, 1917.

HON. WILLIAM D. FULTON, *Secretary of State, Columbus, Ohio.* 1

DEAR SIR:—This office is in receipt of a communication from you under date of February 1, 1917, in which you ask my opinion as follows:

> "The Ohio Oil Company, a corporation of Findlay, Ohio, has made application to this office to increase its capital stock from $15,000,000.00 to $60,000,000.00. It is attempting to do this, as shown by the enclosed certificate, by increasing the par value of its shares without increasing the number of shares.
>
> "I desire an opinion from you whether this can be done; also whether the enclosed certificate should be accepted and filed by this office."

By reference to the certificate of increase tendered you by the corporation and referred to in your communication to me I note that at a special meeting of the stockholders of the Ohio Oil Company held at the general offices of the company at Findlay, Ohio, on January 31, 1917, called in apparent conformity to the provisions of the statutes, the stockholders of the company voted an increase of the capital stock of the company by resolution, which, in words and figures, is as follows:

> "Resolved, That the capital stock of the Ohio Oil Company be increased from the present amount thereof, to wit: Fifteen million ($15,000,000.00) dollars, consisting of six hundred thousand (600,000) shares of the par value of twenty-five ($25.00) dollars each, to sixty million ($60,000,000.00) dollars, to consist of six hundred thousand (600,000) shares of the par value of one hundred ($100.00) dollars each; and
>
> "Be it further Resolved, That the president and secretary of the company be, and hereby are, directed to file with the secretary of state of state of Ohio, a certificate of such increase, and to do all acts and things that may be necessary to comply with the provisions of any law or laws applicable to and regarding the increase of stock."

The certificate of increase of capital stock above referred to further provides:

> "And this is to further certify: That all of the capital stock of the said the Ohio Oil Company heretofore authorized, amounting to fifteen million ($15,000,000.00) dollars, has been subscribed and fully paid up."

With respect to the increase of the capital stock voted by the stockholders of the Ohio Oil Company, as indicated by your communication and the certificate thereto attached, I may add that I am in receipt of a communication from the attorneys representing the Ohio Oil Company in which they say:

"Referring to the certificate of increase of the capital stock of the Ohio Oil Company, recently presented for filing in your office, we beg to advise that on January 1, 1916, the assets of the Ohio Oil Company exceeded its capital stock and all other liabilities by $65,811,743.12, and the capital stock has been increased in order that it may more nearly equal the assets.

"In notices of the special meeting mailed to all stockholders it was stated that if a proposed increase of capital stock was authorized the same would be distributed pro rata to all stockholders and in conformity to this plan on January 31, 1917, immediately following the adjournment of the stockholders' meeting, all of the directors of the Ohio Oil Company met and unanimously adopted a resolution to distribute this stock, represented by the increase, pro rata to the stockholders of the Ohio Oil Company.

"By increasing its capital stock the stockholders of the Ohio Oil Company had only in mind the purpose of eliminating a great disparity between assets and capital stock and distributing the additional stock pro rata to all stockholders. This was the plan and it has been consummated.

"This increase is effected by increasing the nominal value of existing shares to avoid the great additional expense of bookkeeping that would be required if the increase had been made by increasing the number of shares, the statute, as we think, plainly contemplating these alternative modes to suit the accommodations of the stockholders. This places the nominal value of the shares of stock precisely where it was at the original organization of the company and where it might now be placed by original articles of incorporation."

From the certified copy of the articles of incorporation of this company and the certificate of increase and reduction of its capital stock heretofore made, it appears that the company was incorporated in 1887 with a capital stock of $1,000,000.00 divided into 10,000 shares of $100.00 each. Thereafter, in 1889, proceedings were had increasing the capital stock from $1,000,000.00 to $3,500,000.00. In 1890 the capital stock was further increased from $3,500,000.00 to $8,000,000.00. In 1892 a certificate was filed by this company in the office of the secretary of state reciting proceedings had by the stockholders of the company reducing the capital stock from $8,000,000.00 to $2,000,000.00; the action of said stockholders and directors of the company being indicated by the following taken from the said certificate:

"KNOW ALL MEN BY THESE PRESENTS, That we, the undersigned, being all of the stockholders of the Ohio Oil Company, a corporation organized under the laws of the state of Ohio, do hereby consent and agree to and with each other, and with all others concerned, that the board of directors of the said the Ohio Oil Company may reduce the amount of its capital stock from eight millions of dollars ($8,000,000.00) to two millions of dollars ($2,000,000.00), and that the board of directors for that purpose may reduce the nominal value of all the shares of the capital stock of the said the Ohio Oil Company from one hundred dollars ($100) per share to twenty-five dollars ($25) per share, and issue certificates therefor.

* * * * * * * * * *

"Resolved, That the capital stock of the Ohio Oil Company be, and the same is hereby reduced from eight millions of dollars ($8,000,000.00) to two millions of dollars ($2,000,000.00) and that for the purpose of effecting said reduction in the amount of the capital stock of this company, the par value of each and every share of its capital stock is hereby reduced from one hundred dollars ($100) to twenty-five dollars ($25) per share; and

Resolved, That each and every stockholder of this company shall be, and he is hereby required to surrender the stock certificate which he now holds, and on such surrender the president and secretary are hereby instructed and directed to issue to him a new certificate for the same number of shares as represented by the certificate surrendered for cancellation, at the nominal value of twenty-five dollars ($25) per share, and

"Resolved, That the president and secretary be, and they are hereby instructed and directed to prepare and file with the secretary of state of the state of Ohio a certificate under the seal of this company certifying the action of the stockholders and board of directors decreasing the capital stock of this company from eight million of dollars ($8,000,000.00) to two millions of dollars ($2,000,000.00), as required by section 3264 of the Revised Statutes of the state of Ohio."

Later, it appears, proceedings were had increasing the capital stock of the company to $15,000,000.00.

Section 8625 of the General Code provides that any number of persons, not less than five, a majority of whom are citizens of this state, desiring to become incorporated, shall subscribe and acknowledge articles of incorporation, which must contain;

* * * * * * * * * *

"4. The amount of its capital stock, if it is to have capital stock, and the number of shares into which it is divided. * * *"

Preceding section 8698 we find the head line "Changes in Capital Stock." This is adopted first in the General Code, not appearing in the Revised Statutes. It is, nevertheless, in three sections, a codification of all the statutory provisions upon the subject. Section 8719, however, takes up the subject and imposes a restriction, stating

Section 8699 provides that upon increasing the capital stock the company may issue and dispose of preferred stock. It will be seen that there is no express authority for increasing the nominal value of shares of stock. The implication is against the authority to do so.

Abbreviating section 8698, we have:

"* * * may increase its capital stock *or the number of shares* into which it is divided. * * * After organization *the* increase may be made by a vote of the holders of a majority of the stock. * * * Or the stock may be increased at a meeting of the stockholders at which all are present in person, or by proxy. * * *"

The increase after organization refers to the same increase mentioned above. The expression "may increase its capital stock or the number of shares" is capable of two constructions, either it provides for two separate and distinct things—the increase of capital stock and the increase of the number of shares, either of which

might take place without the other, in which case the "or" is used in the disjunctive sense, but the meaning that seems to be apparent is the other use of the word, making of the expression following it an equivalent of the one preceding.

Amet v. T. and P. Ry. Co. 117 La. 454-458;
Board of Trustees v. Attorney-General, 228 Mo. 514; syl. 4.
State, etc., v. Chesapeake, etc., Ry. Co., 98 Md. 35;
Bryan v. Menafee, 21 Okla. 1-11.

To suppose it in the disjunctive and assume that it provides for an entirely different and new act by a corporation, it would seem to be introduced with very little ceremony. If the legislature had meant to permit a different thing to be done, that different thing would have been conspicuous in the legislative intent, and more conspicuous in the expression of the same. This view is reinforced by the comparison with section 8700 where the opposite thing is done from what is desired here and intended to be meant. It is expressly provided that the corporation may reduce the nominal value of all its shares. Had there been a legislative intent to permit the corresponding increase, it would have been expressed with the same clearness, and this presumption of construction is a violent one. Again taking these two sections, being the two which provide for increase and reduction of capital stock, set off the expression in the one against the other.

"Increase its capital stock or the number of shares into which it is divided."

"Reduce the amount of its capital stock and the nominal value of all the shares."

The first seems to give the method of increase; the second the method of reduction. You increase by adding an additional number; you decrease by boiling down the size. In other words, the expressions in each case are equivalent, and while in each case a designation of a particular power is given, the additional expression describes the mode of the exercise of that power and is an implied exclusion of other methods.

It is here important to observe that there is absolutely no power to increase the stock of a corporation except by the permission of statutes, and in this case, these statutes are what we are here considering.

"In the absence of express authority from the state, a corporation has no power whatever to increase or reduce the amount of its stock, and any attempt upon the part of the corporation, either by the corporation's officers or by the stockholders, to do so, is wholly illegal and void."

(1 Cook on Corporations—7th Ed., Sec. 281.)

The same author, in section 290 of his work on Corporations above noted, says:

"It is a well settled principle of law that the number of shares into which the capital stock has been divided and the par value of those shares can neither be increased or diminished without express warrant of authority either from the legislature or the charter of the company. When, however, the charter does not fix the number or amount of the shares it devolves upon the stockholders or directors to fix them; and in such a case it seems that the limit established might lawfully be changed without special authority."

To this point, Beach, in his work on Private Corporations, at section 468, says:

> "The shares of a corporation can neither be increased or diminished in number or in their nominal value, unless this be expressly authorized by the company's charter or by act of the legislature."

Supporting the rule noted by Beach, as well as by Cook, the following decisions may be cited:

> Re Financial Corporations, L. R. 2 Ch. App. 714;
> Droytwich Salt Co. v. Curzon, L. R. 3 Exch. 35, 42;
> Smith v. Goldsworthy, 4 Q. B. 430;
> Tschumi v. Hills, 6 Kan. App. 549;
> Seigmouret v. Home Insurance Co., 24 Fed. Rep. 332.

The pedigree of these acts justifies and strengthens the same view, and in the main is as follows:

The first act permitting an increase of capital stock was April 12, 1865 (62 O. L. 134). It provided that manufacturing bridge and gas corporations might increase capital stock. Section 3 of the act is as follows:

> "Upon the vote of the stockholders owning two-thirds at least of the stock of any such company in favor of such increase of its capital, the directors of such company shall apportion such increase, pro rata, to the stockholders of said company, in proportion to their stock therein."

It then went on to say that if anybody didn't take his in thirty days the directors might dispose of it otherwise. Now this must have assumed that the increase would have been made by the issue of additional shares, as otherwise the provisions would have been difficult or incapable of carrying out.

In 1872, 69 O. L. 24, the above provision was amended to include certain other corporations, and contained a significant provision which parallels the situation in the present case, that is, that before voting on the proposition to increase the capital stock, or after such vote and before issuing any certificate of such increase in stock, it shall be lawful for the directors by and with the consent of the majority in the interest of the stockholders to cause a correct inventory to be made of all the earnings and increase of property belonging to the company, that had not already been divided among the stockholders, and add the aggregate amount thereof to the then capital stock.

Now this you might naturally have supposed would have been done by increasing the nominal value of shares, but not so, as that provision is followed by a direction to issue certificates of such additional stock to the stockholders of such company in proportion to the amount of stock then held by each, and to no other person. Here you have the exact thing which the Ohio Oil Company seeks to do—increase of stock by absorbing surplus assets, but the terms of the statute compel them to do it by increasing the number of shares. This was again amended in 70 O. L. 37, to include other corporations, and in this form was carried into the Revised Statutes as section 3262.

In 1883 (80 O. L. 23) this section was amended so as to include any corporation for profit after its original capital stock is fully paid up, and finally in 1886 (83 O. L. 134), it took its present form by including the words in question, "or the number of shares into which its capital stock is divided." It surely seems from this that the introduction of those words was only a short form of expressing that understanding which had been in the statute all through.

It is equally well settled that at common law, upon an increase of stock, the holders of the stock already issued, have the first option to take the increase.

Sutton v. Stacy Mfg. Co. 17 N. P. (n. s.) 497;
Thompson on Corporations, Sec. 3642.

This last purpose of the law would be defeated, if an increase were permitted by simply increasing the size of shares. That is, take the proposed increase in this case. The proposition is to do that thing which was provided for in the act of 1872—give the increase entirely to the existing stockholders, and this could be done and well done in this form. This, however, is not permitted by the rule. The stockholder has only the option to take the additional shares allotted to him and is not compelled to do so. He has a right to say to the company that they shall sell the additional stock, and directly or indirectly give him the proceeds. That right is taken away if you simply swell each share of stock to four times its original size; otherwise, they would be compelled to take up the certificate he already has, issue a new certificate for the amount he desires, and other certificates for the residue, represented by his shares, to purchase if any were found. This is not contemplated in this proceeding. It might be possible to do it because if a man now has one share worth $25.00 you would issue him one-fourth of a share and sell the other three-fourths to some one else, and in ordinary cases, say where capital would enlarge from $25,000.00 to $35,000.00, or something like that, the aliquot parts into which the shares would be divided, would work out very curiously.

The desired interpretation of this statute finds no encouragement in contemporary construction, as, so far as known, it has never yet been done in Ohio, and presumably for the reasons given above that the law does not contemplate it.

Your inquiry is whether the increase of stock can be made in this manner. The answer is: Not according to law. You then inquire whether the enclosed certificate should be accepted and filed by this office. This is not a legal question, but an administrative one for your own determination. The law does not commit to your department the power to grant authority to make such increase any further than may be necessarily involved in your filing or refusing to file the certificate and certify a copy of it, as you are not required by any statutory provision to make any certificate as to the legality of it. Undoubtedly, however, if a certificate be presented to you, showing an increase in a manner now provided by law, you have authority to refuse to receive and file it.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

42.

APPROVAL—TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE BY BROOK PARK VILLAGE SCHOOL DISTRICT.

COLUMBUS, OHIO, February 17, 1917.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of Brook Park village school district in the amount of $10,000.00 issued for the purpose of completing school house in the said district, being fifty bonds of $200.00 each."

I have examined the transcript of proceedings of the board of education and other officers of Brook Park village school district; also copy of the bond and coupon form attached thereto; and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds when drawn in accordance with the form submitted and executed by the proper officers will, upon delivery, constitute valid and binding obligations of the said school district.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

43.

SCHOOL DISTRICTS—FUNDS FOR CURRENT EXPENSES MAY NOT BE RAISED BY BOND ISSUE UNDER SEC. 7625 G. C.

Bonds for school districts may not be voted and issued under section 7625 of the General Code for the purpose of raising additional money for current expenses in conducting the school, but the board of education of such school district may find under sections 5656 and 5658 of the General Code a valid indebtedness so incurred, and may make an additional levy for such purpose for a period not exceeding five years on a favorable vote of the electors of the school district under sections 5649-5 and 5649-5a, General Code.

COLUMBUS, OHIO, February 17, 1917.

HON. GEORGE F. CRAWFORD, *Prosecuting Attorney, Greenville, Ohio.*

DEAR SIR:—I have the honor to acknowledge receipt of your favor of February 1, 1917, in which you ask my opinion on facts stated as follows:

> "There are a number of city, village and rural school districts in my county that are unable to keep even under the Smith taxation law. There is one district, notably the Ithaca village district, that will be unable to keep its schools in session for the period required by law unless some relief is given soon.
>
> "Borrowing money to extend a debt, as I understand the board may do, only causes the board more trouble in the future. I do not understand that section 7625 of the General Code would authorize a bond issue for the general running expenses of the school. The board has asked for sufficient money to run its schools, but this has been reduced by the board of equalization. It seems to me that if section 7625 as it now stands would not authorize a bond issue, it should be so amended as to include the general running expenses of the school. In other words, it does not seem right that the efficiency of the schools of a district should be curtailed, when if the people had a right to vote on the question, they might vote for their efficiency.
>
> "I wish you would take this matter up at your very earliest convenience and give me your opinion as to the relief these people can have under existing laws."

The question submitted by you is not specific and therefore does not admit of an answer as specific as might otherwise be the case.

You are correct in your assumption that section 7625 of the General Code has no application for the purpose of raising money for the general running ex-

penses of the taxing district. This section has application only for the purpose of raising money by bond issues on a vote of the electors of the school district for purposes incident to the erection or improvement of school buildings.

In saying that the money levied by the board of education of this village school district to run its school has been reduced by the "Board of Equalization" I presume that you have reference to the county budget commission, and with respect to the action of this board it is obvious that it had no discretion to do otherwise than to see that the tax levy for school purposes in the school district was within the five mill limitation for school purposes, as provided in section 5649-3a of the General Code, and that the aggregate tax for all purposes was within the ten mill limitation of section 5649-2 of the General Code.

By compliance with the provisions of sections 5656 and 5658 of the General Code, provisions which I infer you have in mind, the board of education of this school district can fund any existing valid indebtedness created by the board in the conduct of the schools of the district, which the board may not be able to pay at maturity by reason of the limits of taxation to which the district is subject. Such indebtedness may be funded by the issue of bonds or notes, but as you have observed taxes levied for the purpose of retiring such bonds or notes and the interest thereon would likewise be subject to both the internal limitation of five mills for school purposes and the external limitation of ten mills for all purposes provided by the Smith one per cent. law.

You suggest that section 7625, General Code, should be amended so as to be available for the purpose of procuring additional money for current expenses of the school. As to this it may be observed that except that no special election is authorized therefor practically the same relief can be afforded by a vote of the electors of the school district under sections 5649-5 and 5649-5a of the General Code for a period of years not exceeding five. The vote therein provided for can be taken only at a regular November election, and if the proposition for an increased tax rate carries, taxes levied in the school district will be subject only to the limitation provided in section 5649-5b, that the combined maximum rate for all taxes shall not exceed fifteen mills. This limitation is, of course, the same as that applicable in the case of a bond issue on a vote of the electors of the school district under section 7625 of the General Code.

You do not in your communication state facts which suggest a discussion by me of the question whether or not the school district referred to by you is entitled to state aid under the statutory provisions providing for state aid for weak school districts. Such provision is made by sections 7595 and 7596 General Code to which you are referred.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

44.

BONDS OF SAN JUAN, PORTO RICO—NOT TAXABLE UNDER STATE LAW.

Bonds of the city of San Juan, Porto Rico, owned by residents of the state of Ohio, are not taxable under the laws of such state.

COLUMBUS, OHIO, February 17, 1917.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I have the honor to acknowledge receipt of your favor under date of February 8, 1917, asking my opinion on the following question:

"Are bonds of the city of San Juan, Porto Rico, taxable when owned by residents of Ohio?"

In March, 1898, congress passed an act applicable generally to the territories of the United States authorizing municipal corporations in such territories having a bona fide population of not less than 1,000 persons to issue bonds for sanitary and health purposes, construction of sewers, water works and the improvement of streets. (30 Statutes at Large 252.)

Later, in June, 1900, congress passed an act likewise applicable to territories generally authorizing municipal corporations in such territories having a bona fide population of not less than 10,000 persons to issue bonds for erecting a city building and purchasing ground for the same. (31 Statutes at Large 683.)

In the organic act of congress under date of April 12, 1900, providing for the government of the Island of Porto Rico (31 Statutes at Large 77), it is provided by section 7 of the said act that the citizens of Porto Rico and the citizens of the United States residing therein:

"Shall constitute a body politic under the name of 'the people of Porto Rico' with governmental powers as hereinafter conferred and with the power to sue and be sued as such."

Sections 32 and 38 of said organic act of congress read as follows (4 U. S. Compiled Stat. An. Sec. 3781):

"The legislative authority herein provided shall extend to all matters of a legislative character not locally inapplicable, including power to create, consolidate and reorganize the municipalities, so far as may be necessary, and to provide and repeal laws and ordinances therefor; and also the power to alter, amend, modify, and repeal any and all laws and ordinances of every character now in force in Porto Rico, or any municipality or district thereof, not inconsistent with the provisions hereof; provided, however, that all grants of franchises, rights and privileges or concessions of a public or quasi-public nature shall be made by the executive council, with the approval of the governor, and all franchises granted in Porto Rico shall be reported to congress, which hereby reserves the power to annul or modify the same.

"Sec. 38. No export duties shall be levied or collected on exports from Porto Rico; but taxes and assessments on property, and license fees for franchises, privileges and concessions may be imposed for the purposes of the insular and municipal governments, respectively, as may be provided and defined by act of the legislative assembly; and where necessary to anticipate taxes and revenues, bonds and other obligations may be issued by Porto Rico or any municipal government therein as may be provided by law to provide for expenditures authorized by law, and to protect the public credit, and to reimburse the United States for any moneys which have been or may be expended out of the emergency fund of the war department for the relief of the industrial conditions of Porto Rico caused by the hurricane of August eighth, eighteen hundred and ninety-four; Provided, however, that no public indebtedness of Porto Rico or of any municipality thereof shall be authorized or allowed in excess of seven per centum of the aggregate tax valuation of its property."

Pursuant to the legislative power granted by section 32, above quoted, the legislative assembly of Porto Rico has from time to time authorized municipalities therein to issue bonds for various purposes.

A diligent search fails to reveal any legislation by congress expressly exempting from taxation bonds issued by the Island of Porto Rico or by any of its municipalities. As against the right of taxation of such bonds by the state or under state laws, however, it seems clear that no act of congress declaring such exemption is necessary. The question has been conclusively settled by a decision of the supreme court of the United States in the case of Farmers' and Mechanics' Saving Bank of Minneapolis v. State of Minnesota, 232 U. S. 516, where it was held broadly that a state may not tax bonds issued by a municipality of a territory of the United States, and so held as to an attempt by the state of Minnesota to tax bonds issued by the municipalities of the Indian Territory and the Territory of Oklahoma held by banks in Minnesota. The court in this case, grounding its decision on the broad principle that states may not tax agencies of the federal government, held that territories of the United States are instrumentalities established by congress for the government of the people within their respective borders, with authority to subdelegate that governmental power to the municipal corporations therein, and that the latter, therefore, are likewise instrumentalities of the federal government. The court further held that a tax upon the exercise by such municipalities of the function of issuing bonds is a tax upon the operation of such municipal government, and that to tax the bonds as property in the hands of the holder is in effect a tax upon the right of the municipality to issue them.

The Island of Porto Rico is a territory of the United States, and as stated in the case above cited, it and the municipalities therein acting under delegated power are instrumentalities or agencies of the federal government, and for this reason, on authority of the case cited, I am of the opinion that the bonds of the city of San Juan, Porto Rico, are not taxable when owned by residents of Ohio.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

45.

HIGHWAY CONSTRUCTION—BIDS FOR SAME MUST BE ACCEPTED WITHIN REASONABLE TIME—OTHERWISE NOT BINDING ON CONTRACTOR—HIGHWAY COMMISSIONER MAY ASSUME SUCH PART OF COST OF CONSTRUCTION AS HE DEEMS BEST.

1. *When a person bids for the construction of a highway under instructions from the state highway department, and the contract for said construction is not let under said bidding for an unreasonable length of time, during which time materials and labor have greatly increased in price, said person so bidding ought not in good conscience and morals be held to his bid, and cannot be so held in law.*

2. *Where the state highway commissioner proceeds to construct an intercounty highway through a village under the provisions of section* 1231-3 *G. C., he can by agreement with said village, either original or supplemental, assume such part of the costs of said construction as he deems to be for the best interests of the village and the state at large.*

COLUMBUS, OHIO, February 17, 1917.

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

DEAR SIR:—Your communication of February 7, 1917, asking my opinion upon the matters set out therein, was received. The communication reads as follows:

"Under date of August 30th, this department received bids for the improvement of sections 'H' and 'h' of intercounty highway No. 400 in Jack-

son county. This improvement lies partly in the village of Oak Hill, and partly in Jefferson township outside of the village of Oak Hill. The firm of Charles and George P. Mahl was lowest and best bidder.

"Bids were received on this work before all the proceedings had been taken by the village of Oak Hill for the financing of its proportion of the cost of the improvement. I am attaching hereto a transcript of the proceedings of the village in the matter. No certification has yet been filed with this department to the effect that the funds of the village are properly deposited and available for the contract.

"Since the date set for the completion of the improvement was December 15, 1916, and since the above firm wrote this department on December 14th, requesting that they be relieved of the above proposal, for the reason stated that all quotations had been withdrawn and the prices of labor and materials had advanced, this department wrote the council of the village of Oak Hill on January 12th, expressing its opinion that the justice of the matter favored releasing the bidder from its proposal, and requested the opinion of the council of the village in the matter.

"The members of the council of the village of Oak Hill have since called at this office, and expressed the fear that were the bidder released from its proposal, it would be impossible to secure another satisfactory bid at as low a price, and further, that the amount of bonds issued by the council would not provide for a substantial increase in the cost of the improvement.

"The state had proposed paying one-half of the cost of the improvement lying within the village of Oak Hill, and the entire cost, with the exception of the amount to be assessed abutting property, on the section to be improved in Jefferson township outside of the village of Oak Hill.

"This department can eliminate part of the proposed improvement outside of the village of Oak Hill, and use the funds which were to have been used on the portion omitted, for the payment of the extra cost of a new contract for the improvement of the section through the village of Oak Hill. In this case, the village of Oak Hill would pay as much of the cost of the improvement as their funds would permit, and the state will pay the balance of the cost.

"In view of the above facts, I respectfully request your opinion as to whether the bidder may legally be released from his proposal, and the work be readvertised for improvement on the above basis."

You also attach copies of resolutions and ordinances as enacted by the village council of Oak Hill.

This legislation is too voluminous to set out in full, but the facts in reference to your communication, as I understand it, are as follows:

1. Your department received bids on August 30, 1916, for the construction of a road running through the village of Oak Hill, Jackson county, O., and lying also partly in Jefferson township of said county.

2. The lowest and best bidder for the construction of said highway was the firm of Charles and George P. Mahl.

3. The work under said bid was to be completed by December 15, 1916, but owing to the fact that the village had not enacted the necessary legislation, the contract was not let nor the work begun upon said improvement up until December 14, 1916, on which date said firm of Charles and George P. Mahl requested that they be released from their bid or proposal, for the reason that material and labor had increased in price and that quotations made to said firm for material had been withdrawn, and that they would suffer a loss owing to the fact they were not

enabled to begin said improvement in time to complete it by the date set out in said proposal,

Now, your first question is as to whether the firm ought to be held to their bid, or whether they should be released from the same. In a letter written to the village council of Oak Hill you express the opinion that said contractors ought to be released from their proposal. In this I concur. I do not feel that these contractors ought in good conscience or morals to be held to their bid or proposal. Neither do I believe they could be held in law. They were not responsible in any way for the delay in entering upon the construction of the work, but they were damaged on account of the delay over which they had no control, due to the rise in price of material and labor.

We come now to the second proposition that you submit. This proposition is based upon the following state of facts:

1. The highway to be improved lies partly in the village and partly outside the village.

2. The part lying outside the village was to be improved entirely at the expense of the state.

3. The state and the village were to bear equally the expense of constructing the part of the highway lying within the village.

4. In pursuance of the above, the village enacted the following legislation:

(a) On August 23, 1916, a resolution was adopted by the said village, providing for the necessary steps in reference to said improvement.

(b) On August 23, 1916, said village passed an ordinance consenting to have constructed the highway through the village by the state highway commissioner.

(c) On August 23, 1916, said village passed an ordinance approving the plans, specifications, profiles, cross sections and estimates as prepared and approved by the state highway commissioner, and provided that the village should pay one-half the estimated cost of said improvement.

(d) On November 14, 1916, said village passed an ordinance agreeing to proceed with said improvement; that one-half the total cost be assessed against abutting property owners; that assessments be paid in ten annual installments; that bonds be issued in anticipation of collecting said assessments, and that the village assume the cost of intersections, of appropriation proceedings and of damages awarded any owner of abutting lands.

(e) On November 14, 1916, said village passed an ordinance providing for issuing bonds to the amount of $13,500.00, for paying one-half of said improvement; that the proceeds from the sale of said bonds shall be applied to the payment of one-half the total cost and expenses of said improvement, as hereinbefore provided, and for no other purposes; and that the bonds issued should set out the purposes for which the money derived from the sale of the same should be used. Said ordinance further provided for a levy to take care of the sinking fund and interest of said bonds.

On December 5, 1916, said village proceeded to advertise that the bonds would be sold on January 10, 1917.

Now, in view of all the above, it is clear that the village has provided $13,500.00 from the sale of bonds, to take care of the one-half of the cost of the construction, provided said construction had been made under the estimate heretofore made by your department, but the village will not have sufficient funds to pay half under an increased estimate, which will be necessary, due to increased cost of labor and material, and the village further suggests that they are not in a position to raise any further money to take care of their share of an advanced estimate.

What is best to do now under all these circumstances? You have proceeded under section 1231-3 G. C., which reads as follows:

"Sec. 1231-3. The state highway commissioner may extend a proposed road improvement into or through a village when the consent of the council of said village has been first obtained, and such consent shall be evidenced by the proper legislation of the council of said village duly entered upon its records, and said council may assume and pay such proportion of the cost and expense of that part of the proposed improvement within said village as may be agreed upon between said state highway commissioner and said council. The state highway commissioner may also enter into an agreement with the council of said village to improve any part of the road within said village to a greater width than is contemplated by the proceedings for said improvement, and the state highway commissioner and the council of said village shall be governed as to all matters in connection with said improvement within said village by the statutes relating to road improvements through municipalities, by boards of county commissioners."

This section states the same course of procedure shall be followed by you as is followed by county commissioners in similar cases. The procedure of county commissioners is set forth in section 6949 to 6954, inclusive, G. C.

Section 6949 G. C. reads as follows:

"The board of county commissioners may extend a proposed road improvement into or through a municipality when the consent of the council of said municipality has been first obtained, and such consent shall be evidenced by the proper legislation of the council of said municipality entered upon its records, and said council may assume and pay such proportion of the cost and expense of that part of the proposed improvement within said municipality as may be agreed upon between said board of county commissioners and said council."

Section 6951 G. C. reads as follows:

"If the board of county commissioners approve the same, said board shall have prepared the necessary plans, profiles, cross-sections, specifications and estimates for the improvement of such portion of said road, to the width indicated in said resolution of such municipality. The estimates therefor shall set forth in detail the probable cost and expense of so much of said improvement as is made necessary by reason of the same being improved to said increased width. After the plans, specifications, profiles, cross-sections and estimates have been returned to the county commissioners by the county surveyor, and by them approved, the county commissioners shall cause a copy thereof to be filed with the clerk of said municipality. Said plans, profiles, specifications and estimates shall also state what proportion of said increased cost is made necessary by improving street intersections."

Section 6952 G. C. reads in part as follows:

"Upon receipt of such copy the council of such municipality may approve such plans, specifications, profiles, cross-sections and estimates, and such council may enter into an agreement with the board of county commissioners of such county as to the part of the estimated cost and expense of said improvement that is to be paid by said municipality on account of the increased width of the said improvement.

* * * * * * * * * *

"The council of said municipality may assess against abutting property owners all or any part of the cost and expense of said improvement to be paid by it under agreement with the county commissioners. Said assessments shall be made in one of the methods provided for in the case of street improvements wholly within the municipality, and under the exclusive control of the council."

Section 6953 G. C. provides as follows:

"The municipality shall pay to the county treasurer its estimated proportion of the cost of said improvement as fixed in said agreement between the council and the county commissioners, out of any funds available therefor, and in anticipation of the collection of assessments to be made against abutting property hereinbefore provided, and in anticipation of the collection of taxes levied for the purpose of providing for the payment of the municipality's share of the cost of such improvement, said municipality is authorized to sell its bonds under the same conditions and restrictions imposed by law in the sale of bonds for street improvement under the exclusive jurisdiction and control of the council of a municipality."

It will be noticed in the legislation had by the said village that all the provisions of these statutes have been complied with.

Section 6954 G. C. provides that after this is done the county commissioners shall thereupon receive bids and let the contract for improving such portion of said road as lies within the municipality, either in connection with the remainder of said improvement or separate, as such board of commissioners may determine. This provision governs you also.

So that, in view of the facts and the law, it is my opinion that you should simply make a new estimate of the cost of the construction of that part of the highway lying within the village. It is my opinion that this new estimate will not need to be submitted to the village for its approval, inasmuch as the village has already approved the estimate so far as the part of the cost of the improvement which it has to bear. So that after the new estimate is made you would simply enter into a supplemental agreement with the village, in which agreement the village would assume that part of the cost of the improvement which it had already agreed to assume, and the state, through your department, would agree to assume all the cost over and above that assumed by the village. You would then be in position to accept new bids for the construction of the part of the work located in the village. The auditor of the village should certify that the funds are in the village treasury.

This opinion is given on the theory that your department has entered into no contract or agreement with the county commissioners or township trustees in reference to the part of the highway lying outside of the village. This is evidently the case, for the reason that you set out in your communication that the state was to bear all the cost of the improvement lying outside the village.

In passing I would like to call attention to the latter part of section 6952 G. C., which provides the manner in which the village shall proceed to make assessments against the abutting property owners. While this is not involved in your query, yet it might be well for your department to call the attention of the village to this matter, so that it would also proceed in the matter according to law.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

46.

APPROVAL—FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN WARREN, COLUMBIANA AND HAMILTON COUNTIES.

COLUMBUS, OHIO, February 19, 1917.

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

DEAR SIR:—I have your communication in which you enclose three final resolutions, asking for my approval of the same. Said resolutions are as follows:

"1. Warren County—Section 'b,' Pet. No. 3054-T, I. C. H. 252.
"2. Columbiana County—Section 3, Pet. No. 1445, I. C. H. 86.
"3. Hamilton County—Section 'A,' Pet. No. 2415, I. C. H. 43."

I have examined these final resolutions carefully and find them in all respects regular and according to law, and am, therefore, returning the same to you with my approval.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

47.

BOARD OF EDUCATION—TO ISSUE BONDS FOR SCHOOL IMPROVEMENT MUST DO SO UNDER SEC. 7630 G. C.—MUST FIND THAT FUNDS AT ITS DISPOSAL, OR THAT CAN BE RAISED UNDER SECS. 7629 AND 7630, ARE INSUFFICIENT—DISAPPROVAL—TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE OF VERMILLION VILLAGE SCHOOL DISTRICT, ERIE CO., OHIO.

Proceedings by a board of education of a school district to issue bonds under the provisions of section 7630-1 General Code, for the purpose of installing an improvement in a school building ordered by the department of workshops and factories of the industrial commission of Ohio, must conform with the provisions of section 7625 General Code, and before the question of a bond issue for said purpose is submitted to the electors of the school district the board of education must affirmatively find that the funds at its disposal or that can be raised under the provisions of sections 7629 and 7630 are insufficient for the purpose.

COLUMBUS, OHIO, February 20, 1917.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of Vermillion village school district, Erie county, Ohio, in the sum of $8,000.00 for the purpose of providing funds to pay the cost of purchasing and installing a new heating system in the school building of said school district."

The transcript furnished to me by the clerk of Vermilion school district shows that the resolution of the board of education submitting to the electors of the school district the question of issuing said bonds in the amount stated is in words and figures as follows:

"Be it resolved, by the board of education of Vermilion village school district, Erie county, Ohio, that in the opinion of said board, it is expedient and necessary, for the protection of the health and welfare of the pupils attending the only school in said village school district, to construct a new heating system in the said school building in said village school district and also by virtue of the industrial commission of Ohio, directing that a new heating system be erected in said school building and that in the furtherance of the same, the necessary legal procedure be taken to bring about a special election in said village school district on November 7, 1916,

"That the question of the issuing of bonds in the amount of eight thousand dollars ($8,000.00), for the purchase and erection of said heating plant in said school building, be submitted to the qualified electors of said Vermilion village school district.

"The clerk of this board is hereby directed to file a certified copy of this resolution with the deputy state supervisors of elections of Erie county, Ohio, not less than ten days before the time of said election and the deputy state supervisors of elections, shall cause to be prepared and furnished ballots for said election."

From the resolution it appears that the contemplated improvement for which the bonds were issued was directed by the industrial commission of Ohio, and this fact suggests the consideration of section 7630-1 of the General Code, which reads as follows:

"If a school house is wholly or partly destroyed by fire, or other casualty, or if the use of any school house for its intended purpose is prohibited by any order of the chief inspector of workshops and factories, and the board of education of the school district is without sufficient funds applicable to the purpose, with which to rebuild or repair such school house or to construct a new school house for the proper accommodation of the schools of the district, and it is not practicable to secure such funds under any of the six preceding sections because of the limits of taxation applicable to such school district, such board of education may, subject to the provisions of sections seventy-six hundred and twenty-six and seventy-six hundred and twenty-seven, and upon the approval of the electors in the manner provided by sections seventy-six hundred and twenty-five and seventy-six hundred and twenty-six issue bonds for the amount required for such purpose. For the payment of the principal and interest on such bonds and on bonds heretofore issued for the purposes herein mentioned and to provide a sinking fund for their final redemption at maturity, such board of education shall annually levy a tax as provided by law."

It will be noted from the provisions of section 7630-1 of the General Code that proceedings for the issue of bonds under this section are subject to the provisions of sections 7625, 7626 and 7627, General Code, it appearing further that the only purpose of the provisions of section 7630-1 is to provide for a bond issue in the cases therein provided, which shall not be subject to the tax limitation applicable to bonds issued pursuant to the provisions of sections 7625 and 7629 of the General Code.

Section 7625 of the General Code, referred to in section 7630-1 G. C., as applicable to bond issues under said section, provides as follows:

"When the board of education of any school district determines that for the proper accommodation of the schools of such district it is necessary

to purchase a site or sites to erect a school house or houses, to complete a partially built school house, to enlarge, repair, or furnish a school house or to purchase real estate for play ground for children, or to do any or all of such things, that the funds at its disposal or that can be raised under the provisions of sections seventy-six hundred and twenty-nine and seventy-six hundred and thirty, are not sufficient to accomplish the purpose and that a bond issue is necessary, the board shall make an estimate of the probable amount of money required for such purpose or purposes and at a general election or special election called for that purpose, submit to the electors of the district the question of the issuing of bonds for the amount so estimated. Notices of the election required herein shall be given in the manner provided by law for school elections."

It appears from the provisions of this section that before the question of a bond issue for any purpose therein mentioned can be submitted by the board of education to the electors of a school district it must appear that the funds at the disposal of the board or that can be raised under the provisions of sections 7629 and 7630 are not sufficient to accomplish the purpose for which the proposed bond issue is contemplated.

Section 7629 of the General Code provides that the board of education may of itself issue bonds to improve the public school property subject to the provision that no greater amount of the bonds can be issued in any year than would equal the aggregate of a tax at the rate of two mills for the year next preceding such issue.

In submitting to the electors of the school district under section 7625 the question of a bond issue for any purpose therein provided for, I know of no way in which the fact that the funds at the disposal of the board or which can be raised under the provisions of section 7629 are not sufficient for the purpose for which the bonds are to be issued can be evidenced otherwise than by a finding by the board of education itself, which finding should be made by the board before the submission of the question of a bond issue to the electors and regularly should be incorporated in the resolution providing for the submission of the question of such bond issue to the electors of the school district.

It will be noted that the resolution here in question does not contain any such finding by the board of education, nor does it appear that it was made by the board at any time prior to the submission of the question of bond issue to the electors of the school district, and for this reason I am of the opinion that the issue of the bonds in question has not been made in accordance with the laws of the state of Ohio, and that you should not purchase the same.

I also note in an examination of the transcript that the canvass of votes on the question of this bond issue was made by the board on November 13, 1916, which date was the first Monday after the election; whereas section 5120 of the General Code specifically provides that in school elections the board of education shall canvass the returns of such election at a meeting to be held on the second Monday after election. It is probable that the provisions of this section with reference to the time when the canvass of votes should be made by the board are directory rather than mandatory, and I am not disposed to advise you to reject the bonds on this ground.

I may say, in conclusion, that the transcript fails to disclose the tax duplicate of the valuation of real and personal property in the school district, the existing rate, the fact whether or not there is any outstanding bonded indebtedness, whether or not the school district has a board of sinking fund commissioners, and a number of other facts which should be in the transcript. These facts could undoubt-

edly be afforded by a supplemental transcript to be furnished by the clerk of the board of education of the school district, but inasmuch as the defect in the proceedings first above mentioned is sufficient to invalidate the bonds here in question, I herewith enclose the transcript submitted to me.

Respectfully,
JOSEPH MCGHEE,
Attorney-General.

48.

COUNTY SURVEYOR—UNLAWFUL FOR SAID OFFICIAL TO SELL MAPS TO COMMISSIONERS—COMMISSIONERS CANNOT PAY HIM ADDITIONAL SALARY THAN PROVIDED BY LAW AND PAYMENTS MAY BE RECOVERED—MAPS MADE BY COUNTY SURVEYOR FOR USE OF COUNTY—CANNOT BE RECOVERED BY HIM UPON RETURN OF MONEY PAID THEREFOR.

It is unlawful for a county surveyor to sell maps or other supplies to the county, and unlawful for the county commissioners to contract with him to pay him additional fees and compensation over and above those provided by law for the performance of any of his official duties, and any such payments may be recovered back.

Maps made by the county surveyor for the use of the county, upon which he expends time for which he received his regular compensation, are the property of the county, and if he sells maps to the county which are his own private property, he cannot, upon returning the purchase price, recover back such maps.

COLUMBUS, OHIO, February 21, 1917.

HON. DONALD F. MELHORN, *Prosecuting Attorney, Kenton, Ohio.*

DEAR SIR:—Under date of January 8, 1917, you request an opinion on the following statement of facts:

> "On November 29, 1916, I addressed a letter to Hon. E. C. Turner, attorney-general of Ohio, asking for an opinion relative to the finding of Mr. Edwin E. Hall, state examiner, against Mr. L. R. Anspach, former surveyor of Hardin county. On December 18, 1916, Mr. Turner rendered his opinion to me (No. 2117), sustaining the finding in question.
>
> "This opinion, while fully responsive to the precise questions submitted, does not touch upon this further circumstance which I now desire to call your attention to. If, agreeably to the examiner's ruling, Mr. Anspach pays back into the county treasury the $375.00 drawn by him for ditch maps, he will doubtless demand, and will be entitled to receive back, said ditch maps. In such case, the county surveyor's office will be deprived of the use of these maps, which, I am informed, are of great utility in that office.
>
> "Granting that the county commissioners have no authority to contract with the county surveyor for the purchase of such maps, have the commissioners the right to buy them from a person holding no official relation to the county?"

It also appears from the examiner's report shown in the opinion of Mr. Turner referred to in your inquiry, that during the whole period of time in which

the surveyor was engaged in making these maps, he was also employed as such officer for the county and receiving his regular per diem of $5.00 for each working day, and in addition thereto was compensated at the rate of $25.00 per month as tax map draughtsman, under authority of the statutes governing the same; so that while the contract in form purports to be one for supplies, yet in reality and essentially it was a mere additional contract in reference to the performance of service by the incumbent of the office, for which he was fully paid by the compensation allowed by law for his services as such officer, which he received.

We will consider the matter, however, in both aspects as a contract for supplies to be furnished the county, which it purports upon its face to be, and as a contract for the performance of services by the county surveyor for the county. It may be remarked that if these maps were such as the county had a right to purchase (which seems to be disputed in the former opinion referred to), then the service in making them was a duty of the county surveyor especially required by the statute to be done by him and his deputies. (G. C. 2792.)

Your inquiry states and assumes as a fact a proposition with which I cannot agree, that is, when Mr. Anspach pays back into the county treasury the $375.00 drawn by him for ditch maps he will be entitled to receive back said ditch maps. The county commissioners of Hardin county, on the 28th day of December, 1914, had authority to purchase for a county surveyor's office any suitable articles which the board of commissioners might determine necessary for said office. Said authority is granted by and under the provisions of General Code section 2786, which reads in part as follows:

> "The county surveyor shall keep his office at the county seat in such room or rooms as are provided by the county commissioners, which shall be furnished with all necessary cases and *other suitable articles,* at the expense of the county. Such office shall also be furnished with all tools, instruments, books, blanks and stationery necessary for the proper discharge of the official duties of the county surveyor. The cost and expense of such equipment shall be allowed and paid from the general fund of the county upon the approval of the county commissioners. * * *"

But, said board of commissioners were not authorized to enter into a contract for the purchase of said suitable supplies with a county official, for General Code section 12910 provides in part:

> "Whoever, holding an office of trust or profit by election * * * is interested in a contract for the purchase of * * * supplies * * * for the use of the county, * * * with which he is connected, shall be imprisoned in the penitentiary not less than one year nor more than ten years."

The contract between the board of county commissioners and the county surveyor was an illegal one and the money which was paid from the county treasury, under the terms of such illegal contract, should be recovered upon the finding of the state inspector by and under authority of section 286 of the General Code of Ohio. The property being in the possession of the county, the surveyor could not recover same, for General Code section 2789 provides in part that:

> "On going out of office, the county surveyor shall deliver to his successor all books, papers and other property and effects belonging to his office. * * *"

and the illegal contract having been completely executed by delivery on the one part and payment on the other, neither party may maintain an action against the other, either for a return of the money (in the absence of statute, which in this case is covered by section 286 G. C.) or for the specific property.

In Insurance Company v. Hull, 51 O. S., 270, the following language is used:

> "The rule that a party who would rescind a contract must restore what he has received under it, does not apply to contracts founded on an illegal consideration, and are void for that reason."

In Hooker et al v. DePalos et al, 28 O. S., p. 251, the following language is used on page 258:

> "Plaintiffs below in their petition base their right of recovery on the ground that the defendants below had disabled themselves to perform the contract, by conveying the lands sold to them to other parties, in consequence of which they were justified in regarding the contract as rescinded, if they chose to do so, and in demanding that they should be placed in *statu quo,* by a return of the money paid. This alleged state of facts would, without doubt, if proved, have entitled the plaintiffs below to recover, *provided the contract had been a legal one,* and as such binding upon the parties. But it was wholly illegal, and bound neither of them. The non-performance of it by either of the parties gave no right of action to the other. * * *"
>
> "The maxim *'Ex turpi causa, non oritur actio,'* is an old and familiar one, resting on the clearest principles of public policy, and never to be ignored. In accordance with this maxim, nothing is better settled than that, in regard to contracts which are entered into for fraudulent or illegal purposes, the law will aid neither party to enforce them whilst they remain *executory,* either in whole or in part, nor, when *executed,* will it aid either party to place himself in *statu quo* by a rescission, but will, in both cases, leave the parties where it finds them."

Recovery, then, is made upon the finding of the inspector under and by virtue of the provision of the section of the General Code above named, to wit: General Code section 286, and the surveyor having received money out of the county treasury, other than that specifically provided by law, is liable under the statute to an action upon his bond and recovery can be had for the amount wrongfully received.

State v. Kelly, 25 O. S. 421.

If, however, the original contract be considered for services only, recovery of the illegal payments can still be made under the authorities above cited, and such recovery would give no right of action to the ex-surveyor to recover the property from the county. The ex-surveyor was employed by the county for each working day of the time between the letting of the contract and the payment of the money, at the rate of $5.00 per day for his services on other matters. Whatever services he performed during that time should be for the benefit of the county. Good morals and public policy both require faithful services on behalf of all public officials. The only thing the county received from him outside of the articles furnished was his services and he was in duty bound to render these.

Answering your question, then, fully together with all that your inquiry might suggest, you are advised that this was an illegal payment and should be recovered

back, illegal if it be considered for supplies, by reason of the law preventing the officers furnishing them to the county. If it be considered service, illegal because it is additional pay and perquisite over and above his salary, which he has no right to receive. That, really being service performed by him for pay for the county, the maps belong to the county; or if it were supplies illegally sold by him to the county, he would have no recourse to get them back again and the maps should be kept in the surveyor's office as public property.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

49.

OHIO REFORMATORY FOR WOMEN—WOMEN MUST BE SENTENCED THERETO WHEN SENTENCE WILL RESULT IN IMPRISONMENT FOR MORE THAN THIRTY DAYS—VIOLATORS OF CITY ORDINANCE NOT TO BE SENTENCED THERETO.

A woman convicted of a misdemeanor must be sentenced to the Ohio reformatory for women when such sentence will result in imprisonment for more than thirty days and in such cases where a prisoner is remanded for non-payment of fines and costs, she must be remanded to the Ohio reformatory for women instead of to a jail, workhouse or other such institution, when the imprisonment so caused will be in excess of thirty days.

COLUMBUS, OHIO, February 23, 1917.

HON. PERRY SMITH, *Prosecuting Attorney, Zanesville, Ohio.*

DEAR SIR:—I have your letter of January 27, 1917, as follows:

"M. G. was sentenced by the court of common pleas to 30 days in the workhouse and a fine of $25.00 and costs of $9.76, making a total of $34.76. It will take 88 days in all to work this fine and costs out. I. L. was sentenced to the workhouse from the police court to pay a fine of $5.00 and costs $3.90, total $8.90, and a fine of $20.00, costs $3.90, total $23.90, in all $32.80, which amounts to 65 days at 60 cents a day. I desire to know from you if it is proper for the superintendent of the workhouse of the city of Zanesville, county of Muskingum, to accept these women.

"Under section 2148-7 of the General Code, as amended in 105-106 Ohio Laws, why should they not have been sentenced to Marysville as contemplated by this law. Please give me an answer by return mail as these parties are now confined in the workhouse. We do not desire to violate this law, but my contention and construction of the law is as follows:

"So long as the sentence of the court is no more than 30 days, they are not violating this law. Am I right or wrong in my interpretation of the statute?"

Section 2148-1 G. C. reads:

"The Ohio reformatory for women shall be used for the detention of all females over sixteen years of age, convicted of a felony, misdemeanor, or delinquency as hereinafter provided, and for the detention

of such female prisoners as shall be transferred thereto from the Ohio penitentiary and the girls' industrial school as hereinafter provided.

Section 2148-7 reads:

"After the issuance of the first proclamation hereinbefore referred to, it shall be unlawful to sentence any female convicted of a felony to be confined in either the Ohio penitentiary or a jail, workhouse, house of correction or other correctional or penal institution, and after the issuance of the second proclamation it shall be unlawful to sentence any female convicted of a misdemeanor or delinquency to be confined in any such place, except in both cases the reformatory herein provided for, the girls' industrial school or other institution for juvenile delinquency, unless such person is over sixteen years of age and has been sentenced for less than thirty days, or is remanded to jail in default of payment of either fine or costs or both, which will cause imprisonment for less than thirty days, provided that this section shall not apply to imprisonment for contempt of court."

The governor issued the second proclamation above referred to on December 27, 1916.

This department has just rendered an opinion to Hon. D. H. Peoples, prosecuting attorney, Pomeroy, Ohio, to the effect that a justice of the peace in misdemeanor cases in which he has final jurisdiction may sentence a woman prisoner to the Ohio reformatory for women.

In reply to your inquiry I beg to state that I am of the opinion that the provisions of section 2148-7 make it mandatory upon the sentencing court or magistrate to sentence a woman convicted of a misdemeanor to the Ohio reformatory for women instead of to the workhouse, jail or other such institution when such a sentence so impqsed is in excess of thirty days, and that when in such misdemeanor cases a woman is remanded for non-payment of costs, she must be remanded to the Ohio reformatory for women intead of to a jail, workhouse or other such institution, when the imprisonment so caused will be in excess of thirty days.

I note, however, that one of the women referred to in your letter was sentenced to the workhouse from the police court of Zanesville, and the possibility that she may have been sentenced for a violation of a city ordinance induces me to take up a question here concerning which official inquiry has been made of this department frequently within the last week. This question is whether or not a female person convicted of a violation of a city ordinance can be committed to the Ohio reformatory for women.

Section 12372 G. C. defines "misdemeanor" as follows:

"Offenses which may be punished by death, or by imprisonment in the penitentiary, are felonies; all other offenses are misdemeanors."

Section 2148-1 G. C. provides in part:

"The Ohio reformatory for women shall be used for the detention of all females over sixteen years of age, convicted of a felony, misdemeanor, or delinquency"

and section 2148-7 G. C. makes it unlawful to sentence prisoners convicted of these classes of crimes to the workhouse or jail where the sentence is in excess

of thirty days. The question then is, does the word "misdemeanor" as used in these sections include violations of municipal ordinances.

Bouvier defines misdemeanors as follows:

> "The word is generally used in contradistinction to felony; misdemeanors comprehending all *indictable offenses* which do not amount to a felony, as perjury, battery, libels, conspiracy and public nuisances, but not including a multitude of offenses over which magistrates have an exclusive summary jurisdiction, for a brief designation of which our legal nomenclature is at fault."

State v. McConnell, 70 N. H., 158, gives the following definition:

> "A crime or misdemeanor is an act committed *in violation of a public law,* either forbidding or commanding it, which the state *punishes in criminal proceedings in its own name.*"

Also Adams Express Company v. State, 161 Ind. 328.

In the case of Pearson v. Wimbish, 124 Ga. 709, the very question at issue here was passed upon. In that case the penal code of the state read in part:

> "Crimes or misdemeanors shall consist of a violation of a public law, in the commission of which there shall be a union or joint operation of act and intention or criminal negligence."

And also provided:

> "Every crime, other than a felony, as therein defined, is a misdemeanor."

The court in construing these provisions said:

> "This definition appertains to the subject matter of the penal code wherein only offenses against the public laws of the state are considered. Municipal offenses are not treated as a violation of public laws, but as any fractions of the legal laws of the municipality which have no place in the penal code of the state."

The holding pointed to by these authorities is strengthened by the fact that the state institutions are maintained by the state at state expense and were not intended to care for local municipal charges.

In view of the authorities herein cited, I am of the opinion that women convicted of violations of city or local ordinances cannot be sentenced to the Ohio reformatory for women at Marysville.

Since you have not stated what crimes the women referred to have been convicted of, I will not pass upon their individual cases in this opinion, but leave the application of the rules herein laid down to their cases for yourself.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

50.

OHIO PENITENTIARY—PAROLE OF LIFE PRISONER WHOSE TERM HAS BEEN COMMUTED TO 20 YEARS BY BOARD OF MANAGERS VOID—VIOLATION OF SUCH PAROLE DOES NOT FORFEIT "GOOD TIME" NOR PAROLE DEPOSIT.

A prisoner was sentenced to the Ohio penitentiary in July, 1904, *to serve a life term for murder in the second degree. The sentence was commuted by the governor in April,* 1908, *to a term of* 20 *years, and in August,* 1908, *he was paroled by the board of managers of the Ohio penitentiary, and under this rule was required to deposit* $25.00 *at the time of the parole. In December,* 1908, *the board of managers revoked the prisoner's parole and declared the parole deposit forfeited. At the time of his parole the prisoner had served less than five years in the penitentiary, whereas the statute provided that a prisoner serving the sentence for murder in the first or second degree should not be eligible for parole until he had served twenty-five years.*

HELD: That the board of managers of the Ohio penitentiary had no authority to parole this prisoner, nor to require the parole deposit, and they therefore had no authority to deduct "good time" from the prisoner for violation of parole under section 2174 *G. C., nor to declare the parole deposit forfeited for such violation. The prisoner should be released at the expiration of his twenty-year term as though never paroled, and the* $25.00 *parole deposit should be refunded to him.*

COLUMBUS, OHIO, February 23, 1917.

HON. F. E. THOMAS, *Warden, Ohio Penitentiary, Columbus, Ohio.*

DEAR SIR:—I have your letter of February 8, 1917, as follows:

"I respectfully request your opinion based on the following facts, as to the status of the case of Harry Mapleson, serial No. 35623, and advice as to whether Mapleson should have the benefit of diminution of sentence so as to release him on February 28, 1917.

"Mapleson was tried at the April, 1904, term of court in Cuyahoga county on an indictment charging murder in the first degree. His trial resulted in a disagreement and before his second hearing began Mapleson volunteered a plea of guilty to murder in the second degree, and was sentenced to life imprisonment in this institution, which sentence he began on July 1, 1904.

"On April 29, 1908, Mapleson's life term was commuted to a term of 20 years, which, with the diminution of sentence allowed by law, expires on February 28, 1917.

"On August 13, 1908, the then board of managers of the Ohio penitentiary released Mapleson on parole.

"Mapleson was declared a parole violator and returned to the Ohio penitentiary on November 13, 1908, and on December 10, 1908, the board of managers revoked Mapleson's parole, but held that he should forfeit no "good time." This is recorded in the minutes of the proceedings of the board of managers in session on December 10, 1908, in the following entry:

"'Harry Mapleson, serial No. 35623, parole No. 1860, paroled August 13, 1908, was returned to prison November 13, 1908, by Field Officer B. S. Ogle for violation of his parole. On account of the long time he has

yet to serve, on motion, his parole was revoked, his parole deposit forfeited, but no time taken, Warden's recommendation, which was unanimously concurred in.'

"At the time Mapleson was paroled the statutes prescribed that a prisoner serving life for murder in the second degree was not eligible to parole until he had served twenty-five full years of imprisonment. Mapleson had served a little more than four years when released on parole.

"Section 2174 of the General Code, also Opinions of the Attorney-General (No. 567, July 24, 1912, to the warden of the Ohio penitentiary, and No. 574, August 8, 1912, to the Ohio board of administration) hold that a person who violates the conditions of his parole, and whose parole is revoked, must serve the unexpired period of the maximum term of his imprisonment, with no "good time" allowance.

"Mapleson has in his possession a "Notice of Action by Board," issued to him by the former board of managers, advising him that no 'good time' was declared forfeited because of his violation and revocation of parole. Similar entries also appear on the records of the Ohio penitentiary, which, if held to be proper, will release Mapleson on February 28, 1917.

"I wish, therefore, that you would advise me whether Mapleson should have the benefit of the diminution of sentence and the action of the former board of managers be discharged at the expiration of the original 'short time' sentence, February 28, 1917."

Sections 2164, 2169 and 2174 of the General Code read as follows:

"Section 2164. The board of managers may deduct from a prisoner a part or all of the good time gained, for a violation of the rules of discipline, or a want of fidelity and care in the performance of work, according to the aggravated nature or the frequency of the offense. The board may review the conduct record of a prisoner. If a violation of the rules and discipline was committed through ignorance or circumstances beyond his control or abuse by an officer, the managers may restore to the prisoner the time lost by such violations."

"Section 2169. The board of managers shall establish rules and regulations by which a prisoner under sentence other than for murder in the first or second degree, having served the minimum term provided by law for the crime of which he was convicted, and not previously convicted of felony or not having served a term in a penal institution, or a prisoner under sentence for murder in the first or second degree, having served under such sentence twenty-five full years, may be allowed to go upon parole outside the buildings and enclosures of the penitentiary. Full power to enforce such rules and regulations is hereby conferred upon the board, but the concurrence of every member shall be necessary for the parole of a prisoner."

"Section 2174. A prisoner violating the conditions of his parole or conditional release, having been entered in the proceedings of the board of managers and declared to be delinquent shall thereafter be treated as an escaped prisoner owing service to the state, and, when arrested, shall serve the unexpired period of the maximum term of his imprisonment. The time from the date of his declared delinquency to the date of his arrest shall not be counted as a part of time served."

It will not be necessary in this opinion to discuss the question as to whether or not the time forfeited under section 2174 by a prisoner for violation of parole, can be restored to him by the board of managers (now the board of administration) under section 2164, for the reason that the answer to your question will be based on other facts stated in your letter.

Section 2169 G. C., above quoted, provided that "the board of managers shall establish rules and regulations by which a prisoner under sentence other than for murder in the first or second degree * * * or a person under sentence for murder in the first or second degree having served under such sentence twenty-five full years" may be paroled.

Your letter shows that the prisoner M. was tried in April, 1904, and sentenced at the April, 1904, term of court, and paroled in August, 1908.

This section as above quoted, though amended since, was in force as quoted at that time. M. was sentenced to the Ohio penitentiary to serve a life term for murder in the second degree, and the fact that on April 28, 1908, his life term was commuted by the governor to twenty years in no way affected the question of his eligibility for parole.

See Opinions of the Attorney-General, 1912, volume 2, page 1923.

It seems very clear, therefore, that the board of managers at the time they paroled prisoner M., or rather when they attempted to parole him, had no authority to do so, and their action was, therefore, null and void. The same thing is true concerning their action in declaring his parole revoked on December 10, 1908. In other words, they really never paroled him or revoked his parole, and he, therefore, neither lost nor gained any good time by either attempt of the board to do these things. This being the case he is entitled to his release when his twenty-year sentence, minus the good time gained under section 2163, is served.

The parole statute provides that "the time from the date of his declared delinquency to the date of his arrest, shall not be counted as a part of the time served, but inasmuch as he was never really paroled, and never really became delinquent as a parole violator, he could not be charged with this loss of good time. However, I am informed that in his case the board declared him delinquent and revoked his parole at the same time that he was arrested and returned to the prison, so that this question will not, in his case, affect the date of release.

At the time of his parole the rules of the board of managers of the Ohio penitentiary provided that a prisoner must deposit with the warden of the penitentiary the sum of $25.00 at the time of his parole, and that in the event the board should later find it necessary to revoke his parole they should declare the deposit of $25.00 forfeited. This you inform me they did in the case of the prisoner referred to in your request. Inasmuch as the board had no authority to parole him, they had no authority to require him to make this deposit, and their action in doing so, and in later declaring the deposit forfeited was null and void.

It might be argued that even though the board of managers of the Ohio penitentiary had no authority to parole this prisoner, nor to take away lost time from him because of violation of parole, nevertheless it was in their power to find him guilty of misconduct for violation of prison rules under section 2164 G. C., and that the prisoner M. could lose his good time under this section. If this be true, and it be held that the old board of managers of the Ohio penitentiary had authority to take this time from M., not for violation of parole, but for violation of prison rules, even then their later action of December 10, 1908, in restoring his time would bind them and leave the prisoner's date of release unaffected.

For these reasons I am of the opinion that the prisoner you refer to should be released on February 28, 1917, when you state the twenty-year sentence will be completed, and I am also of the opinion that the $25.00 which the state took from him as a parole deposit should be returned to him.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

51.

RESOLUTION—BY COUNTY COMMISSIONERS PROVIDING FOR ISSUANCE OF BONDS DOES NOT THEREBY ISSUE BONDS—PROVISION IN SAID RESOLUTION REQUIRING LEVY ON TAXABLE PROPERTY FOR INTEREST AND SINKING FUND SUFFICIENT PRIOR TO ISSUANCE OF SAID BONDS—MONEY COMING INTO SINKING FUND FROM OTHER SOURCES THAN TAX LEVY—MAY BE USED TO PAY INTEREST ON SAID BONDS.

A resolution by the board of county commissioners providing for the issuance of bonds under section 1223 of the General Code does not thereby issue said bonds, and therefore a provision in said resolution requiring an annual levy on the taxable property of the county in a sum sufficient to pay the interest on such bonds and to create a sinking fund for their retirement at maturity is a provision for such purpose "prior to the issuance of such bonds" within the meaning of said section.

Moneys legally coming into a county debt or sinking fund with respect to such bond issues from sources other than the proceeds of the annual tax levy required by said resolution may be used in paying interest accruing on said bonds after issue.

COLUMBUS, OHIO, February 23, 1917.

HON. BEN A. BICKLEY, *Prosecuting Attorney, Hamilton, Ohio.*

DEAR SIR:—I am in receipt of your favor under date of February 17th, enclosing copy of the resolutions adopted on January 3, 1917, by the board of county commissioners of your county providing for bond issues in the sum of $18,000.00, $45,000.00 and $55,000.00 respectively, to apply on the cost of a number of intercounty highway improvements which have been projected in your county. In your communication you ask my opinion as to the validity of this bond issue, but inasmuch as I have not the complete transcript of the proceedings relating to these proposed improvements I shall, as requested by you, address myself to one question only, to wit: that raised by the auditor of your county, as to which you say:

> "Objection has been made by Quincy A. Davis, county auditor, for the reason that he claims that the county commissioners have not provided, prior to the issuing of bonds for levying and collecting annually a tax upon all taxable property of the county to provide a sum sufficient to pay the interest on such bonds and to create a sinking fund for their retirement at maturity. He claims that no such provision has been made and that there will be no money to pay the interest on the bonds if issued, and for said reason he has intimated he will not sign the said bonds."

As before noted, these three bond issues are provided for in the same resolution. I do not understand that a question has been raised as to this procedure,

and on the authority of the case of Heffner v. Toledo, 75 O. S. 413, it would seem that such procedure is entirely regular so far as this question is concerned.

As I understand from the information imparted by you on the occasion of your visit to this office a few days ago, the proposed intercounty highway improvements were projected by application made to the state highway commissioner by the commissioners of your county, and that the respective bond issues provided for in the resolution above mentioned covered the shares of the cost and expense of such improvement to be ultimately borne by the county and the owners of property abutting upon said respective improvements, and that the several townships in which these proposed improvements are located are not to pay any part of the cost and expense of said improvements, but the county commissioners acting, as I presume, under the provisions of section 1217 of the General Code have as to each of said improvements assumed the part of such cost and expense as would otherwise be apportioned to said respective townships under the provisions of section 1214 of the General Code.

I do not deem it necessary to discuss or even note all of the various statutory provisions relating to the improvement of intercounty highways under chapter 8 of the Cass Road Law.

Section 1218 of the General Code provides that where the improvement of an intercounty highway is projected on the application of the county commissioners for state aid in such an improvement, no contract shall be let by the state highway commissioner unless the county commissioners of the county in which the improvement is located shall have made a written agreement to assume in the first instance that part of the cost and expense of the said improvement over and above the amount to be paid by the state; while section 1212 of the General Code provides in such case that the proportion of the cost and expense of constructing such improvement to be paid by the township, county and property owners shall be paid by the treasurer of the county in which the highway is located upon the warrant of the county auditor issued upon the requisition of the state highway commissioner.

These provisions, as well as those of section 1223 of the General Code, hereinafter noted, are full warrant for the conclusion that the state in such case has a right to look to the county for such part of the cost and expense of the improvement as is not to be borne by the state itself.

Section 1223 of the General Code reads as follows:

> "The county commissioners, in anticipation of the collection of such taxes or assessments, and whenever in their judgment it is advisable, are hereby authorized to sell the bonds of any such county in which such construction, improvement or repair is to be made to an amount necessary to pay the respective shares of the county, township or townships, and the lands assessed for such improvement, but the aggregate amount of such bonds issued shall not be in excess of one per cent of the tax duplicate of such county. Such bonds shall state for what purpose issued and bear interest at a rate not to exceed five per cent per annum, payable semi-annually, and in such amounts as to mature in not more than five years after their issue, as the county commissioners shall determine. Prior to the issuance of such bonds the county commissioners shall provide for levying and collecting annually a tax upon all taxable property of the county to provide a sum sufficient to pay the interest on such bonds and to create a sinking fund for their retirement at maturity. The proceeds of such bonds shall be used exclusively for the payment of the cost and expense of the construction, improvement or repair of the highway for which the bonds are issued. If bids are made for a portion of the pro-

posed issue, the commissioners may accept a combination of bids, if by so doing the bonds will produce the best price to the county, and at the request of the purchaser the bonds may be issued in denominations of one hundred dollars or multiple thereof, notwithstanding a provision of the resolution providing for their issue."

Though, as before noted, the respective bond issues provided for by the resolution adopted by the commissioners of your county covered not only the share of the cost and expense of the improvement of these respective improvements to be ultimately borne by the county, but the share of the cost and expense to be borne by the owners of the property abutting on said improvements as well, yet by virtue of the provisions of section 5630-1 of the General Code said bonds, when issued, are to be deemed county obligations in the full and complete sense of the word. I presume that the question made by the auditor of your county arises by reason of the following provision in section 1223:

"Prior to the issuance of such bonds the county commissioners shall provide for the levying and collecting annually a tax on all taxable property of the county to provide a sum sufficient to pay interest on such bonds and to create a sinking fund for their retirement at maturity."

This provision, quite identical to that found in section 6929 of the General Code relating to the issue of bonds by the county commissioners for the construction of county road improvements under section 6 of the Cass Road Law, is not, as I view it, to be interpreted as making a requirement with respect to the provision for the issue of bonds under section 1223 in addition to that required by section 11 of article XII of the State Constitution, which reads as follows:

"No bonded indebtedness of the state, or any political subdivisions thereof, shall be incurred or renewed unless, in the legislation under which such indebtedness is incurred or renewed, provision is made for levying and collecting annually by taxation an amount sufficient to pay the interest on said bonds, and to provide a sinking fund for their final redemption at maturity."

Construing this provision of the state constitution, the court, in the case of Linke v. Karb, 89 O. S. 326, in its opinion at page 339 of the report, says:

"This, of course, does not require the immediate levying of a tax certain, either in the amount or rate, for the provision of this amendment is that this tax shall be levied annually and collected annually, but it does not mean that, at the time the issue of bonds is authorized, the taxing authorities proposing to issue such bonds shall provide that a levy shall be made each year thereafter during the term of the bonds in an amount sufficient to pay the interest thereon and retire the bonds, and such provision, so made at the time the bonds are authorized, shall be binding and obligatory upon these taxing officers of that political subdivision and their successors in office until the purpose of such levy shall have been fully accomplished by the retirement of the bonds so issued. Such a provision fills the full purpose of this amendment to the constitution and is not subject to the objection that it is impossible at the time of issue to determine either the amount that must be raised for that purpose or the rate that must be levied to raise such an amount. That amount may be determined from year to year, and levied annually, for that is the com-

mand of the amendment itself; but having declared at the time of the issue of such bonds that a levy shall be made in an amount sufficient, there then remains for the taxing officials the mere matter of calculation as to the amount. The levy must be made at all events in pursuance to the original provisions therefor, and subsequent taxing authorities must make such annual levy, regardless of what exigencies may arise in the future."

With respect to the question here made, the resolution of the board of county commissioners of your county providing for the bond issue above noted further provides as follows:—

"Be it further resolved that for the purpose of providing funds to pay the interest upon the aforesaid bonds as the same fall due, and also to create and maintain a sinking fund sufficient to discharge the principal of said bonds at maturity there shall be levied and collected upon all taxable property in Butler county, for the year 1917, and for each year thereafter up to and including the year 1922, in addition to all other taxes, taxes to produce an amount sufficient to pay the interest on such bonds, and provide a sinking fund for their final redemption at maturity, and all funds derived from said taxes shall be placed in a separate and distinct fund, which together with all interest collected on the same shall be irrevocably pledged to the payment of interest and principal of said bonds as the same fall due."

This provision in the resolution seems to be a substantial compliance with the requirements of section 11 of article XII of the State Constitution, and inasmuch as the particular provision above quoted from section 1223 of the General Code is not to be interpreted as adding anything to the constitutional provision I am of the opinion that the county commissioners have all the provision for levying and collecting an annual tax for interest and sinking fund purposes as is required.

The resolution of the county commissioners *provides for* the issuance of these bonds, but the bonds are not thereby *issued;* and the provisions above quoted from said resolution does, therefore, prior to the issuance of said bonds, make provision for an annual tax levy to secure the payment of interest on these bonds and the creation of a sinking fund to retire them at maturity.

(Linke v. Karb, supra, pages 326, 336 and 339.)

Inasmuch as the proceeds of the first annual levy to be made by the county commissioners under the direction of the resolution providing for this bond issue may not be available until the tax distribution of February, 1918, it is obvious that the first semi-annual installment of the interest on said bonds falling due August 1, 1917, cannot be paid out of such proceeds.

As to this, however, I note from a memorandum enclosed by you that the bonds in question, aggregating $118,000.00, have been purchased by the First National bank of Columbus, Ohio, at a premium of $2,843.80. Section 2295 of the General Code provides that money paid by way of premium and accrued interest on the purchase of bonds shall be credited to the sinking fund from which such bonds are to be redeemed. This being so, I see no objection to the payment of the first annual installment of interest on these bonds from the amount received for premium and accrued interest on the sale of the bonds.

In this connection it is plain that neither the constitutional provision nor that of section 1223 of the General Code, above quoted, contemplates that the proceeds of the annual tax levy directed by these provisions, or by resolution

issuing the bonds, shall be the sole fund from which these bonds and interest thereon are paid. On the contrary, the only purpose of this tax levy is to protect the bonds and the interest thereon as against a deficiency in the collection of special taxes and assessments laid to cover the respective shares of the cost of the improvement to be paid by the county (township), and property owners. This is recognized by the provisions of section 5630-1 of the General Code, and it is only when there are not other moneys coming into the sinking or county debt funds applicable to the payment of the bonds or interest thereon that resort to the levies directed by the constitutional provision and section 1223 of the General Code must be made. Consistent with other constitutional provisions, this is as far as the annual tax levies thus directed can go.

Wasson v. Commissioners, 49 O. S. 622;
Hubbard v. Fitzsimmons, 57 O. S. 436;
State ex rel. Brennan v. Benham, 89 O. S. 351.

Therefore, I am of the opinion that if there are in the sinking or debt funds of the county moneys from any source from which the first semi-annual installment of these bonds can be paid such interest payment can be made from said moneys, and that unless there are other objections to the validity of these bond issues, such as would justify the purchaser in refusing to take the same, the fact that the first semi-annual installment of interest cannot be paid from the proceeds of the taxes should not avail to defeat said bond issue.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

52.

TAX MAPS—COUNTY COMMISSIONERS MAY LET CONTRACT FOR SAME TO DEPUTY SEALER OF WEIGHTS AND MEASURES.

The law does not prohibit county commissioners from letting contract for tax maps to the deputy sealer of weights and measures provided the county commissioners have advertised for bids and the contract is otherwise properly let.

COLUMBUS, OHIO, February 23, 1917.

HON. C. C. CHAPMAN, *Prosecuting Attorney, Ashland, Ohio.*

DEAR SIR:—I have your letter of January 2, 1917, as follows:

"The county commissioners of Ashland county have advertised for bids on making tax maps for the auditor and assessors for the year 1917. In your opinion can the deputy sealer of weights and measures do this work if the contract should be awarded to him. The making of the tax maps would not in any way interfere with his duties as sealer of weights and measures as the making of the maps would be done outside of his office hours. Would the opinion No. 205, rendered by Hon. Timothy S. Hogan on March 30, 1911, apply to this same case?"

Sections 5549, 5550, 5551 and 5552 of the General Code read:

"Section 5549. If, in the opinion of the county commissioners, it is necessary to the proper appraisal of the real estate of such county, on or before their June session, one thousand nine hundred and thirteen, and every fourth year thereafter, they may advertise for four consecutive weeks in one or more newspapers of general circulation in the county, for sealed proposals to construct the necessary maps and plats to enable the assessors in the county, or any district thereof, to correctly reappraise all real estate. The maps and plats shall be made under the supervision of the county auditor, and such advertisement shall particularly specify the extent and character of the work to be done. Each bid shall be accompanied by a good and sufficient bond of not less than one thousand dollars conditioned that said bidder will not fail or refuse to enter into contract in accordance with the advertised proposals, in case his bid is accepted. The commissioners shall open the bids on the day named in the advertisement, and, within three days thereafter, award the contract to the lowest and best bidder, if, in their opinion, it is to the interest of the county so to do, or they may reject any and all bids.

"Section 5550. If the contract is awarded, the bidder to whom it is awarded shall forthwith give a good and sufficient bond, with two or more sureties, in an amount of not less than two thousand dollars, nor more than ten thousand dollars, as required by the county commissioners, conditioned for the prompt, faithful and accurate performance of the work to be done. On completion of any city, village, township, or district, the work shall be paid for out of the county treasury, on the warrant of the county auditor, after it has been duly accepted and approved by the county commissioners. No bill shall be allowed until the auditor and commissioners are satisfied that the labor has been performed in accordance with the contract on file with the county auditor. In counties or districts having no map, the commissioners shall furnish it under the provisions of this chapter.

"Section 5551. The board of county commissioners may appoint the county surveyor, who shall employ such number of assistants as are necessary, not exceeding four, to provide for making, correcting, and keeping up to date a complete set of tax maps of the county. Such maps shall show all original lots and parcels of land, and all divisions, subdivisions and allotments thereof, with the name of the owner of each original lot or parcel and of each division, subdivision or lot, all new divisions, subdivisions or allotments made in the county, all transfers of property showing the lot or parcel of land transferred, the name of the grantee, and the date of the transfer, so that such maps shall furnish the auditor, for entering on the tax duplicate, a correct and proper description of each lot or parcel of land offered for transfer. Such maps shall be for the use of the board of equalization and the auditor, and be kept in the office of the county auditor.

"Section 5552. The board of county commissioners shall fix the salary of the draughtsman at not to exceed two thousand dollars per year. They shall likewise fix the number of assistants not to exceed four, and fix the salary of such assistants at not to exceed fifteen hundred dollars per year. The salaries of the draughtsman and assistants shall be paid out of the county treasury in the manner as the salary of other county officers are paid."

Assuming that the county commissioners still have the power to contract for tax maps under these sections, which is a very doubtful question in view of the

present chaotic condition of our tax legislation, I will proceed to answer your question as to whether or not they may contract with the deputy sealer of weights and measures.

The opinion you refer to in your letter was rendered by former Attorney-General Hogan on March 30, 1911, and is found in volume I of the Opinions of the Attorney-General, 1911-12, page 225. In this opinion it was held that:

> "Where the county commissioners advertise for bids for making plats for the use of the quadrennial real estate appraisers and the recorder of the same county submitted a bid, was awarded the contract, rendered the service and was paid the amount of his bid, *there should be no recovery as there is no prohibition in the law against the letting of such a contract to the county recorder.*"

The effect of section 12910 G. C. was not discussed in this opinion for the reason that the opinion treated the making of the tax plats as a contract for services and not one for "supplies" within the meaning of the section.

This view, I am inclined to think, is correct, and I am, therefore, of the opinion that the law does not prohibit the county commissioners from letting the contract for the tax maps referred to, to the deputy sealer of weights and measures, providing the county commissioners have advertised for bids and the contract is otherwise properly let.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

53.

CORPORATIONS—WHICH ARE ORGANIZED PROVIDING FOR COMMON STOCK ONLY—MAY INCREASE CAPITAL STOCK BY ISSUING ONLY PREFERRED STOCK—CERTIFICATE OF INCREASE MAY SET OUT PREFERENCES AND RESTRICTIONS—NOT NECESSARY TO AMEND ARTICLES OF INCORPORATION.

1. *In cases in which corporations for profit are organized providing for common stock only, and the capital stock is increased by providing for the issuing of preferred stock, the certificate of increase filed with the secretary of state may set out and provide for such preferences and restrictions upon the preferred stock as are provided for by law.*

2. *Under such conditions it is not necessary to provide for such preferences and restrictions by way of amending the articles of incorporation, but they may be provided for in the certificate of increase.*

COLUMBUS, OHIO, February 23, 1917.

HON. W. D. FULTON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I have your communication of February 10, 1917, in which you ask my opinion upon certain matters therein contained. Said communication is as follows:

> "I am herewith enclosing a certificate of increase of capital stock of The Culver Art and Frame Company, to increase its present capital stock of $35,000.00, all common, to $50,000.00, the increase to be preferred.

"The articles of incorporation provide only for common stock, which has all been subscribed for and issued.

"I desire to know whether preferred stock can be issued as attempted in this case without any provision for preferred stock in the articles of incorporation.

"I direct your attention to sections 8667, 8668 and 8669 of the General Code, and section 8699 of the Code under which the present increase is attempted to be made.

"I desire an opinion from you whether it is necessary to first amend the articles to provide for preferred stock before such an increase as is provided by the enclosed certificate can be made. Also advise me if I shall accept and file the enclosed certificate without any further procedure on the part of the corporation."

The material facts upon which you ask an opinion are as follows:

"(1) The Culver Art and Frame Company incorporated with a capital stock of $35,000.00, all common stock.

"(2) This stock is all subscribed for and issued and an installment of 10% paid on each share.

"(3) Said company desires to increase its capital stock to $50,000.00, an increase of $15,000.00, all to be sold as preferred stock."

The certificate sent to you as secretary of state, to be filed as provided by law, contains certain preferences, designations, restrictions and qualifications. The said certificate reads as follows:

"The Culver Art and Frame Company hereby certifies that on the 3rd day of February, A. D. 1917, the capital stock of said company was fully subscribed for, and an installment of ten per cent on each share of stock has been paid; that at a meeting of its directors, held at the office of said company on the 3rd day of February, A. D. 1917, the assent in writing of three-fourths in number of the stockholders, representing more than three-fourths of the capital stock of said company, having been first previously obtained, the following resolution was adopted, viz:

" 'Resolved, That the capital stock of said, The Culver Art and Frame Company be and the same is hereby increased from $35,000.00 to $50.000.00, and that $15,000.00 of said increase be issued and disposed of as preferred stock, in one hundred and fifty (150) shares of $100.00 each, and that the holders thereof be entitled to receive a dividend on said preferred stock of 6% per annum, payable semi-annually out of the surplus profits of the company for each year, in preference to all other stockholders, and such dividends shall be --------cumulative.

" 'Such preferred stock may be redeemed at not less than par at the time and price hereby fixed, and to be also expressed in the stock certificates thereof; to wit: * * *

" 'The purchasers and owners of the preferred stock shall be entitled to a dividend of 6% per annum payable semi-annually out of the surplus profits for each year, in preference to all other stockholders, and such dividends shall be cumulative.

" 'The holders of the preferred stock shall have no voting power upon any question in the management of the corporate business.

"'The preferred stock shall be subject to redemption at par and accrued dividends and 5 per centum additional at any time on or before five years from its date of issue.'"

Now your question is as to whether the certificate of increase of stock to be issued and disposed of as preferred stock can legally contain these preferences, designations, restrictions and qualifications, or must these be provided by way of an amendment to the original articles of incorporation?

Before answering your question, I want to call your attention to an opinion rendered by Hon. Edward C. Turner, found in volume II, page 1835, of the Opinions of the Attorney-General for 1915. In this opinion Mr. Turner held that the articles of incorporation may be amended after the filing of the certificate in such a way as to show the preferences, restrictions, etc., of the preferred stock, but he says that he does not at all pass upon the question as to whether these same preferences and restrictions might be placed in the certificate of increase of capital stock. In volume II, page 1856, of the Opinions of the Attorney-General for 1915, Hon. Edward C. Turner rendered another opinion in which he held that it is not necessary to set out preferences, restrictions, etc., in the certificate of increase, but he did not pass upon the question you ask.

The answer to your question is to be found in the following sections of the General Code, which I quote in full:

"Section 8667. If a corporation be organized for profit, it must have a capital stock, which may consist of common and preferred, or common only; but at no time shall the amount of preferred stock at par value exceed two-thirds of the actual paid in in cash or property.

"Section 8668. When the capital stock is to be both common and preferred, it may be provided in the articles of incorporation that the holders of the preferred stock shall be entitled to yearly dividends of not more than eight per cent, payable quarterly, half yearly, or yearly out of the surplus profits of the company each year in preference to all other stockholders. Such dividends also may be made cumulative.

"Section 8669. A corporation issuing both common and preferred stock may create designations, preferences, and voting powers, or restrictions or qualifications thereof, in the certificate of incorporation, and if desired, preferred stock may be made subject to redemption at not less than par, at a fixed time and price, to be expressed in the stock certificates thereof.

"Section 8699. Upon the assent in writing of three-fourths in number of the stockholders of a corporation, representing at least three-fourths of its capital stock, to increase the capital stock, it may issue and dispose of preferred stock in the manner by law provided therefor. Upon such increase of stock, a certificate shall be filed with the secretary of state as provided in the next preceding section."

Section 8667 G. C. provides that a corporation for profit must have a capital stock, which may consist of common and preferred, or it may consist of common stock only.

Section 8668 G. C. provides that when the capital stock is to be both common and preferred, the articles of incorporation may provide for preferences on behalf of holders of preferred stock.

Section 8669 G. C. provides that when both common and preferred stock is issued, the certificate of incorporation may create preferences and restrictions as to voting power of preferred stock and as to time of redemption of preferred stock.

Section 8699 G. C. provides that when three-fourths of the stockholders, representing three-fourths of the capital stock, assent in writing to increase of capital stock, it may issue and dispose of preferred stock in the *manner provided therefor by law.*

Now, what is the answer to your question under the above provisions of law?

It is my opinion that the corporation can provide for designations, preferences, voting powers and restrictions, such as set out in the certificate deposited with you for filing. It is true sections 8668 and 8669 G. C. state that these preferences, restrictions, etc., must be set out in the articles of incorporation, but this obtains only when both common and preferred stock are provided for at the time of the incorporation.

Section 8699 G. C. does not limit the issuing and disposing of preferred stock to corporations which were incorporated with common and preferred stock, but it does provide that preferred stock may be issued and disposed of in the *manner by law provided therefor.* It is my opinion that the words: "in the manner by law provided therefor" refer back to sections 8667, 8668 and 8669 G. C. in so far as the effect; and that preferred stock can be issued and disposed of by way of increasing the capital stock of the incorporation under the same terms and conditions as it could have been at the time of the incorporation of the company, even though at the beginning, no preferred stock was provided for; that the certificate for such increase may contain such preferences, restrictions, etc., as might have been provided in the original articles of incorporation had both common and preferred stock been provided for.

You also ask in your communication whether you should file this certificate without any further procedure on the part of the corporation. It is my opinion that you should do so. It is true the provision found in section 8667 G. C. applies to the issuance of preferred stock, which provision is as follows:

> "* * * but at no time shall the amount of preferred stock at par value exceed two-thirds of the actual capital paid in in cash or property."

but I take it that this provision has nothing to do with the certificate, but merely regulates the action of the corporation in the issuance of stock.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

54.

COUNTY COMMISSIONERS—MAY PROVIDE FOR BOND ISSUE UNDER SEC. 1223 G. C. TO PROVIDE MONEY FOR HIGHWAY CONSTRUCTION—BEFORE ACTUAL TAX LEVY IS MADE BY COUNTY OR TOWNSHIP UNDER SEC. 1222—RESOLUTIONS SHOULD, HOWEVER, DIRECT ANNUAL LEVY.

A board of county commissioners may under section 1223 General Code provide for the issue of bonds covering the share of the cost of the construction of an intercounty highway to be borne by the county, township and abutting property owners before an actual levy of taxes is made either by the county or township under section 1222 General Code.

COLUMBUS, OHIO, February 23, 1917.

HON. CHARLES G. WHITE, *Prosecuting Attorney, Batavia, Ohio.*

DEAR SIR:—This office is in receipt of your communication of January 23, 1917, asking our opinion on the following matter:

> "The state highway department and the county commissioners have agreed to build a piece of road in Ohio township, this county, but as I understand it neither the county nor the township have made any provision for the levy of a tax, nor has any arrangement been made for the assessing of abutting land owners. The commissioners now desire to proceed and issue bonds under section 1223 of the General Code, provided they have the right.
>
> "Will you please inform me whether or not the county commissioners have the right to issue bonds under section 1223 of the General Code of Ohio, as amended in 106 Ohio Laws, before any arrangements have been made for the levy of the county or township tax, and also, before anything is done toward the assessment against the abutting owners of the property along the suggested state highway."

I assume that the road the construction or improvement of which is contemplated, is either an intercounty highway or a main market road, and with reference to the matter of the construction or improvement of such road, section 1191 of the General Code provides that the commissioners of any county may make application to the state highway commissioner for aid from any appropriation by the state from any fund available for the construction, improvement, maintenance or repair of such road.

Section 1192 of the General Code provides that if the county commissioners do not make application for state aid for the construction or improvement of any such road on or before the time herein designated, the township trustees of any township within the county may file such application, in which case the state highway commissioner may co-operate with such trustees in the construction or improvement of such road in the same manner as is provided in cases where the county commissioners make application.

Section 1193 of the General Code, among other things, provides that each application for state aid, whether made by the county commissioners or the township trustees, shall contain an agreement to pay one-half of the cost and expense of the surveys and other expenses preliminary to the construction or improvement of the road.

By section 1195 of the General Code it is provided that if upon receipt of an application for state aid for any construction or improvement of an intercounty

highway or main market road, the highway commissioner approves the construction or improvement of the same, he shall certify his approval of the application or any part thereof to the county commissioners or township trustees, as the case may be.

With respect to the payment of the cost and expense of the construction or improvement of such road, section 1212 of the General Code provides that the state's portion of the cost and expense shall be paid by the treasurer of state upon a warrant of the auditor of state, and the proportion of the cost and expense thereof to be borne by the county, township and property owners shall be paid by the treasurer of the county in which the road is located upon the warrant of the county auditor, the same to be issued on the requisition of the state highway commissioner.

Section 1214 of the General Code provides the manner in which the cost and expense of the improvement other than the part thereof to be paid by the state shall be apportioned between the counties, the township or townships and the abutting property owners, and further provides that the township trustees shall apportion the amount to be paid by the owners of abutting property according to the benefits accruing to such owners of the land so located. This section further provides as follows:

> "When bonds are issued in anticipation of taxes and assessments the interest thereon shall be treated as a part of the cost and expense of the improvement and apportioned among the county, the township or townships, and the specially benefited property in the proportions to which they severally contribute to the payment of the total cost and expense thereof not paid by the state under the provisions of this or any other section."

Section 1218 of the General Code provides as follows:

> "Each contract under the provisions of this chapter (G. C. Secs. 1178 to 1231-3) except as otherwise provided in section 156 of this act (Sec. 7199) shall be made in the name of the state and executed on its behalf by the state highway commissioner and attested by the secretary of the department. No contract shall be let by the state highway commissioner in a case where the county commissioners or township trustees are to contribute a part of the cost of said improvement, unless the county commissioners of the county in which the improvement is located shall have made a written agreement to assume in the first instance that part of the cost and expense of said improvement over and above the amount to be paid by the state. Where the application for said improvement has been made by the township trustees, then such agreement shall be entered into between the state highway commissioner and the township trustees. Such agreement shall be filed in the office of the state highway commissioner with the approval of the attorney-general endorsed thereon as to its form and legality."

Sections 1222 and 1223 of the General Code provide for tax levy and the issuance of bonds with respect to the construction or improvement of such road, and the same read as follows:

> "Sec. 1222. For the purpose of providing a fund for the payment of the county's proportion of the cost and expense of the construction, improvement, maintenance and repair of highways under the provisions of this chapter, the county commissioners are hereby authorized to levy a tax not exceeding one mill, upon all taxable property of the county. Said

levy shall be in addition to all other levies authorized by law for county purposes, but subject, however, to the limitation upon the combined maximum rate for all taxes now in force.

"For the purpose of providing a fund for the payment of the proportion of the cost and expense to be paid by the township or townships for the construction, improvement, maintenance or repair of highways under the provisions of this chapter (G. C. 1178 to 1231-3), the township trustees are authorized to levy a tax, not exceeding two mills, upon all taxable property of the township in which such road improvement or some part thereof is situated; such levy shall be in addition to all other levies authorized by law for township purposes and shall be outside of the limitation of two mills for general township purposes, but subject, however, to limitation upon the combined maximum rate for all taxes now in force.

"A county or township may use any moneys lawfully transferred from any fund in place of the taxes provided for under the provisions of this section.

"Sec. 1223. The county commissioners, in anticipation of the collection of such taxes or assessments, and whenever in their judgment it is advisable, are hereby authorized to sell the bonds of any such county in which such construction, improvement or repair is to be made to an amount necessary to pay the respective shares of the county, township or townships, and the lands assessed for such improvement, but the aggregate amount of such bonds issued shall not be in excess of one per cent. of the tax duplicate of such county. Such bonds shall state for what purpose issued and bear interest at a rate not to exceed five per cent. per annum, payable semi-annually, and in such amounts as to mature in not more than five years after their issue, as the county commissioners shall determine. Prior to the issuance of such bonds the county commissioners shall provide for levying and collecting annually a tax upon all taxable property of the county to provide a sum sufficient to pay the interest on such bonds and to create a sinking fund for their retirement at maturity. The proceeds of such bonds shall be used exclusively for the payment of the cost and expense of the construction, improvement or repair of the highway for which the bonds are issued. If bids are made for a portion of the proposed issue, the commissioners may accept a combination of bids, if by so doing the bonds will produce the best price to the county, and at the request of the purchaser the bonds may be issued in denominations of one hundred dollars or multiple thereof, notwithstanding a provision of the resolution providing for their issue."

The provisions of section 1223 of the General Code requiring that county commissioners, before issuing the bonds therein provided for, should provide for the levying and collecting annually of a tax upon all the taxable property of the county to provide a sum sufficient to pay the interest on such bonds and to create a sinking fund for their retirement at maturity is in keeping with the provisions of section 5630-1 of the General Code making all bonds of this kind county obligations and in itself, in my opinion, evidences an unmistakable intent to authorize the county commissioners to provide for the issue of the bonds before any tax is levied either by the county commissioners or the township trustees under the provisions of section 1222 of the General Code. The township trustees should, of course, make the assessment on the abutting property in the manner provided for by section 1214 of the General Code to pay the cost and expense of the improvement to be borne by such abutting property, and also make an annual levy of taxes on

the taxable property of the township to pay the township's share of the cost of the improvement.

The county commissioners are required to make an annual levy on the taxable property of the county in an amount sufficient to pay the county's share of the cost of said improvement and any deficiency in the collection of the assessment installments for the township's taxes to the end that said bonds and interest thereon may be paid from time to time as they respectively mature.

In conclusion I note that specifically your question is whether or not the board of county commissioners can issue bonds under section 1223 "before any arrangements have been made" for the levy of county or township taxes and before anything is done towards the assessment against abutting or the owners of the property along the highway to be improved.

As to this I desire to say that I know of no arrangements that the county commissioners or township trustees have to make with reference to said tax other than the actual levy made by them with the rest of the respective budgets which, under the provisions of section 5649-3a, are to be submitted to the auditor on or before the first Monday in June each year except, of course, as just before noted, the county commissioners in the resolution providing for the issue of bonds under section 1223 should by provision therein, in compliance with the provisions of this section (Sec. 5630-1 General Code) and section 11 of article XII of the state constitution expressly direct an annual levy by the county commissioners and township trustees as will be sufficient in amount to pay interest on these bonds as they accrue and provide a sinking fund for their payment as they may mature.

The township trustees should, of course, proceed to assess the owners of abutting property for their shares of the improvement, designating the number of the installments in which said assessments are paid. The issue of bonds, however, under section 1223 is not contingent on prior assessment by the township trustees on the property owners for this is a ministerial duty which the township trustees can be compelled to perform.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

55.

TOWNSHIP TRUSTEES—HAVE NO AUTHORITY TO ISSUE BONDS FOR TOWNSHIP'S SHARE OF COST OF ROAD IMPROVEMENT—WHEN WORK IS DONE UNDER SUPERVISION OF STATE HIGHWAY COMMISSIONER.

The trustees of a township have no authority to issue bonds to cover the township's share of the cost of constructing an intercounty highway improvement when the work is done under the supervision of the state highway commissioner on an application for state aid in such improvement made by the county commissioners.

COLUMBUS, OHIO, February 23, 1917.

HON. G. B. FINDLEY, *Prosecuting Attorney, Elyria, Ohio.*

DEAR SIR:—I am in receipt of your letter of January 27, 1917, asking the opinion of this office, in which you say:

"The trustees of Huntington township, of this county, desire to submit to the electors of their township a proposal to issue bonds for the improve-

ment of an intercounty road lying partially within their township. They desire to issue sufficient bonds to pay to their county 25% of the construction cost, and also the 10% to be later assessed upon the abutting property; the special assessment of 10% to be collected by the county and thereafter returned by it to the township, who will use it toward the retirement of the bonds. The work will be let and managed by Lorain county in conjunction with the state. Has the township authority to issue its bonds, after a favorable vote, for 35% of the cost of the work?"

From what you say in the letter above quoted I assume that the improvement contemplated is one to be constructed under the supervision of the state highway commissioner on an application for state aid in the construction of said improvement made by the commissioners of the county to the state highway commissioner under authority of section 1191 General Code.

The construction and improvement of intercounty highways is provided for by chapter VIII of the Cass road law, which has been carried into the General Code as sections 1178 to 1231-3, inclusive. I do not deem it necessary in answering your question to refer to all of the different sections of the General Code directing the successive steps and proceedings to be taken in the construction of intercounty highway improvements under the Cass law.

I note, however, that section 1214, General Code, provides as to the manner in which the cost and expense of such improvement over and above that to be borne by the state shall be divided between the county, the township or townships and the owners of abutting property.

Section 1217 General Code provides that the county commissioners of a county in which such highway is constructed or improved may, by resolution, waive a part or all of the apportionment of the cost and expense of such highway to be paid by the township or townships, and assume a part or all of the cost and expense of such highway improvement, in excess of the amount received from the state up to the entire cost and expense of such improvement without any assessment or charge whatever upon the township or townships. This section likewise provides that the township trustees of a township in which such highway is constructed may, by resolution, waive a part or all of the apportionment of the cost and expense of such highway to be paid by the county, and assume any part or all of the cost and expense of such highway improvement, in excess of the amount received from the state without any assessment upon the county.

Where application for state aid in the improvement of such highway is made by the commissioners of the county, section 1218 General Code provides that no contract shall be let by the state highway commissioner in a case where the county commissioners or township trustees are to contribute a part of the cost of said improvement, unless the county commissioners of the county in which the improvement is located shall have made a written agreement to assume in the first instance that part of the cost and expense of said improvement over and above the amount to be paid by the state.

By section 1212 General Code it is provided that the state's proportion of the cost and expense of the construction or improvement of such highway shall be paid by the treasurer of state upon the warrant of the auditor of state, upon requisition of the state highway commissioner, and that the proportion of the cost and expense of such construction or improvement to be made by the county, township and property owners shall be paid by the treasurer of the county in which the highway is located upon the warrant of the county auditor, issued upon the requisition of the state highway commissioner.

Upon the facts stated in your communication it is evident that the state has a right to look solely to the county for the payment of that part of the cost and

expense of the improvement not paid by the state itself. Funds for the payment of that part of the cost and expense of the improvement to be borne by the county, township and property owners are provided for by sections 1222 and 1223 General Code, which read as follows:

> *"Section* 1222. For the purpose of providing a fund for the payment of the county's proportion of the cost and expense of the construction, improvement, maintenance and repair of highways under the provisions of this chapter, the county commissioners are hereby authorized to levy a tax, not exceeding one mill, upon all taxable property of the county. Said levy shall be in addition to all other levies authorized by law for county purposes, but subject, however, to the limitation upon the combined maximum rate for all taxes now in force.
>
> "For the purpose of providing a fund for the payment of the proportion of the cost and expense to be paid by the township or townships for the construction, improvement, maintenance or repair of highways under the provisions of this chapter, the township trustees are authorized to levy a tax, not exceeding two mills, upon all taxable property of the township in which such road improvement or some part thereof is situated; such levy shall be in addition to all other levies authorized by law for township purposes and shall be outside of the limitation of two mills for general township purposes, but subject, however, to limitation upon the combined maximum rate for all taxes now in force.
>
> "A county or township may use any moneys lawfully transferred from any fund in place of the taxes provided for under the provisions of this section.
>
> *"Section* 1223. The county commissioners, in anticipation of the collection of such taxes or assessments, and whenever in their judgment it is advisable, are hereby authorized to sell the bonds of any such county in which such construction, improvement or repair is to be made to an amount necessary to pay the respective shares of the county, township or townships, and the lands assessed for such improvement, but the aggregate amount of such bonds issued shall not be in excess of one per cent. of the tax duplicate of such county. Such bonds shall state for what purpose issued and bear interest at a rate not to exceed five per cent per annum, payable semi-annually, and in such amounts as to mature in not more than five years after their issue, as the county commissioners shall determine. Prior to the issuance of such bonds the county commissioners shall provide for levying and collecting annually a tax upon all taxable property of the county to provide a sum sufficient to pay the interest on such bonds and to create a sinking fund for their retirement at maturity. The proceeds of such bonds shall be used exclusively for the payment of the cost and expense of the construction, improvement or repair of the highway for which the bonds are issued. If bids are made for a portion of the proposed issue, the commissioners may accept a combination of bids, if by so doing the bonds will produce the best price to the county, and at the request of the purchaser the bonds may be issued in denominations of one hundred dollars or multiple thereof, notwithstanding a provision of the resolution providing for their issue."

It is evident from the foregoing statutory provisions and others relating to the construction and improvement of intercounty highways that the only bond issue authorized to pay the cost and expense of the improvement other than that paid

by the state is that provided by said section 1223 General Code, which bond issue is to cover not only the amount to be borne by the county and abutting property owners, but the township as well, whether the amount to be paid by the township be the amount apportioned to it by the provisions of section 1214 General Code or an amount assumed by such township under section 1217 General Code.

In arriving at this conclusion I am not unmindful that section 3295 General Code, as amended 106 O. L. 536, provides that the trustees of any township may, among other purposes, issue and sell bonds "for the purpose of providing funds to pay the township's share of the cost of any improvement made under an agreement with the county commissioners." In the enactment of this particular provision into section 3295 the legislature must have had in mind some provisions of then existing statutory law authorizing the trustees of a township and the commissioners of the county to enter into agreement with respect to improvements made under such agreement.

With respect to road improvements, the only statutory provision that I have been able to find in terms authorizing a board of county commissioners and the trustees of a township to make and enter into an agreement with respect to such road improvements was section 6905 General Code (the same being a part of the Dodge road law) providing for the construction by county commissioners of road improvements on the foot frontage plan. However, said section 6905 was repealed by the legislature in the enactment of the Cass road law. There are now no statutory provisions which authorize the construction of road improvements on agreement between the county commissioners and township trustees, nor are there any which in terms authorize an agreement between the county commissioners and township trustees with respect to the division of the cost of a road improvement. I do not, therefore, know anything in the way of road improvements to which the language above quoted from the provisions of section 3295 G. C. can apply.

Moreover, it will be noted that section 3295 General Code is a general statute, conferring power upon the county commissioners to issue bonds for practically all purposes having relation to the needs of the township, and the particular language of section 3295 above quoted has no special reference to road improvements, the language being that the township trustees may issue bonds for the purpose of providing funds to pay the township's share of the cost of any *improvement* made under agreement with the county commissioners.

The Cass road law, which was filed in the office of the secretary of state the same day as the law amending section 3295 G. C. in the above particular, by chapter III thereof makes special and comprehensive provision with respect to the matter of road construction and improvement by township trustees.

Sections 3298-8, 3298-9 and 3298-10 General Code, the same as enacted being a part of said chapter of the Cass road law, make provision for the issue by township trustees of bonds for township road construction, improvement and repair. Inasmuch as the sections of the General Code enacted as chapter III of the Cass road law have special and exclusive reference to the matter of road construction, improvement and repair by township trustees, these sections of the Cass road law, including those providing for issue of bonds by township trustees, should govern rather than the general provisions of section 3295, and for this reason I am inclined to the view that sections 3298-8, 3298-9 and 3298-10 General Code furnish the only authority for the issue by township trustees of bonds for road purposes.

I may add that my conclusion with respect to the want of application of the provisions of section 3295 General Code to bonds issued by township trustees for road improvement purposes accords with that of my predecessor expressed by him in Opinion No. 1520, directed to the industrial commission of Ohio under date of April 27, 1916.

Answering the question made by you categorically, therefore, I am of the

opinion that the trustees of the township named in your communication have no power, either with or without a vote of the electors of the township, to issue bonds for the improvement of the intercounty highway in question.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

56.

APPROVAL—FINAL RESOLUTIONS FOR CONSTRUCTION OF STEUBENVILLE-CAMBRIDGE ROAD.

COLUMBUS, OHIO, February 23, 1917.

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

DEAR SIR:—I have your communication of February 19, 1917, in which you ask my approval of a final resolution of the county commissioners of Jefferson county, Ohio, for the construction of:

"Sec. 'L' Steubenville-Cambridge road, Pet. No. 2538, I. C. H. No. 26."

I have carefully examined these resolutions and find them legal and regular in every respect, and I am, therefore, returning the same to you this day with my approval.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

57.

DEPUTY SEALER OF WEIGHTS AND MEASURES—SERVES AT WILL OF APPOINTING POWER—COMMISSIONERS MAY CHANGE SALARY DURING TERM OF SERVICE—MANDAMUS WILL LIE IF THEY DO NOT FIX SALARY.

A deputy sealer of weights and measures serves at the will of the appointing power. The commissioners have authority to fix his salary and may change same during his time of service. If they refuse to act, mandamus will lie.

COLUMBUS, OHIO, February 24, 1917.

HON. GEORGE F. CRAWFORD, *Prosecuting Attorney, Greenville, Ohio.*

DEAR SIR:—In your letter of February 1, 1917, you request my opinion upon the following proposition:

> "On January 11, 1916, our present county auditor appointed, under the statute, a deputy sealer of weights and measures for the term to end at the time of his own term, to wit: the third Monday of October, 1917. Thereupon, the county commissioners fixed his salary as provided by law at $100.00 per month for the term of one year.
>
> "Differences, political and otherwise, have arisen between the county commissioners and the county auditor; the county commissioners claiming

that some complaints of inefficiency and neglect of duty have come to them regarding the deputy. At any rate, they have so far neglected and refused to make any appropriation for the current year. The deputy sealer and the county auditor, as county sealer, make the claim that the appointment of the deputy, having been made to the third Monday on October, 1917, and the salary having been fixed at $100.00 for the term of one year by the county commissioners, makes it obligatory upon the said county commissioners to fix the same salary for the remainder of the term.

"I wish you would kindly advise me how to take care of the situation."

General Code section 2615 provides in part as follows:

"By virtue of his office, the county auditor shall be county sealer of weights and measures. * * * It shall be the duty of the county auditor to see that all state laws relating to weights and measures be strictly enforced throughout his county and to assist generally in the prosecution of all violations of such laws."

General Code section 2622 provides:

"Each county sealer of weights and measures shall appoint by writing under his hand and seal, a deputy who shall compare weights and measures wherever the same are used or maintained for use within his county, or which are brought to the office of the county sealer for that purpose, with the copies of the original standards in the possession of the county sealer, who shall receive a salary fixed by the county commissioners, to be paid by the county, which salary shall be instead of all fees or charges otherwise allowed by law. Such deputy shall also be employed by the county sealer to assist in the prosecution of all violations of laws relating to weights and measures."

The county auditor by virtue of his office is by law made the county sealer of weights and measures and is charged with the performance of the duties of said office as prescribed by law, and also charged with the enforcement of all laws in relation thereto.

The language of section 2622 G. C. is certain and specific in relation to the appointment of the deputy sealer; the provision, I think, in relation thereto is mandatory and very good reasons are apparent why this should be so because the duties of the sealer in comparing weights and measures, wherever the same are used or kept for use makes it necessary for the person performing those duties to go about the county where such weights and measures are so kept and so used and necessarily makes it impossible on account of the other duties of his office for the county auditor to perform that portion of the duties of the office of county sealer.

The deputy sealer of weights and measures is not protected by the civil service laws. Reasons therefor are set forth in an opinion of my predecessor, No. 943, found in Attorney-General's Reports for 1915, at page 2021, as follows:

"A deputy sealer of weights and measures is a deputy of the county auditor. * * * The former is appointed under the provisions of section 2622 G. C., which considered in connection with the provision of section 2616 G. C., as amended, 106 O. L. 169, gives him ample authority to act for and in the place of the county auditor in all matters relating to weights and measures, and as to such transactions his relation to the county auditor is a fiduciary one coming clearly within the provisions of paragraph 9 of

section 486-8, as amended, 106 O. L. 404, which latter section defines and specifies the positions in the unclassified service. Said paragraph nine provides as follows:

"'The deputies of elective or principal executive officers authorized by law to act for and in the place of their principals and holding a fiduciary relation to such principals.'

"Under the provisions of this paragraph and the sections noted above I conclude that the deputy sealer of weights and measures is in the unclassified service and not protected by civil service laws."

The statute authorizing the appointment does not fix any term of service, and it must, therefore, be held to be within the provisions of General Code section 9 which reads in part as follows:

"* * * A deputy * * * appointed in pursuance of law, shall hold the appointment only during the pleasure of the officer appointing him. * * *"

It would, therefore, follow that such deputy sealer of weights and measures is removable at will, that there is no fixed term of service, but that he serves only during the will of the appointing power.

There is but one difference betweeen the appointment of a deputy sealer of weights and measures by the county auditor and the appointment of any other deputy which he is permitted by law to appoint, that is, that the county commissioners, under the provisions of General Code section 2622, are empowered to fix the salary of the deputy sealer of weights and measures and inasmuch as the county auditor, as county sealer, must make said appointment under the mandatory provisions of said section 2622, and inasmuch as the county commissioners are empowered to fix such salary, their discretion in fixing the same can only be interfered with by a court of equity in case they have acted unreasonably and have abused the power reposed in them.

In re Application of Deimer, 17 O. N. P. (n. s.) 369.

The commissioners, then, having once acted, the question is, is their action *functus officio* or are they permitted to act again. As noted above, there is no fixed term of service and an act is *functus officio* when it is applied to something which once has had life and power, but which has become of no virtue whatever. Such is not the discretionary power of the fixing of a salary for service.

A case very similar to the one in question is Collingsworth County v. Meyers, 35 So. W. Reporter, 414, in which case suit was filed by Myers against the county to recover a balance due him on his *ex officio* salary:

"On the 16th day of February, 1893, the commissioner's court of the county passed, adopted and entered of record the following order: 'In the matter of *ex officio* services to be ordered by the court, that the county judge, P. W. Meyers, be, and he is hereby, allowed the sum of six hundred dollars per annum for two years, and the same shall be paid quarterly at the end of each quarter; * * * on the 13th of November, 1893, said commissioners passed, adopted, and entered of record the following order: 'It is ordered by the court that order No. 16, passed by this court on Thursday, the 16th day of February, 1893, be and the same is hereby rescinded and revoked and it is further ordered by the court that the *ex officio* salaries of county officers be set at the amounts following each

name, to wit: P. W. Meyers, county judge, shall receive the sum of four hundred and twenty dollars per annum on and after the first day of November, 1893 * * * and each officer shall receive his salary quarterly. The county warrants shall be issued by the clerk for their quarterly allowances against the general county fund.' It will be observed that this last order reduces the allowance or *ex officio* services and it is contended by the appellee that the first order having fixed the amount of these services for two years, *or for their full term of office* the commissioners had no jurisdiction or power to change or reduce the salaries and amounts during their terms of office, which would not expire until November, 1894. * * *

"Section 15, article V, constitution of Texas, provides that the county judge 'shall receive as a compensation for his services such fees and perquisites as may be prescribed by law.' The legislature under this provision of the constitution, having fixed certain fees of office, and article 2450, Revised Statutes, 1895, provides as follows: 'For presiding over the commissioners' court, ordering elections and making returns thereof, hearings and determining civil causes and transacting all other official business not otherwise provided for, the county judge will receive such salary from the county treasury as may be allowed him by the order of the commissioners' court.' * * * This order fixing the salary in February, 1892, cannot be regarded as a contract, article 4853 Revised Statutes providing that: 'The salaries of officers shall not be increased or diminished during the term of office of the officers entitled thereto,' does not apply to any officers whose salaries are not fixed by law, * * * and therefore does not apply to the orders of the commissioners' courts auditing and fixing the amounts of the *ex officio* services to be paid the county judge. * * * We are of the opinion that in * * * fixing the amount to be paid such officers for *ex officio* services the commissioners' court acts in a legislative capacity more than in a judicial * * * and that whenever the commissioners conclude, for any reason, that such allowances are too great or too small, they have the right and power at any time before the money is actually paid out, to the officer to change, modify or even entirely repeal or revoke the order. It is necessary that they should have such power and authority in order to properly protect and administer the affairs of the county. * * *"

It is also held in People v. Supervisors, 65 N. Y. 225:

"The boards of supervisors are mere local legislative bodies, in many respects of limited power; but where they have jurisdiction they may act for their county precisely as the legislature may act for the state."

In People, etc., v. Supervisors, 105 N. Y., 180, it is held:

"The board of supervisors of the county of K., in whom was vested the power to fix the compensation of the district attorney, his assistants, clerks and officers, in August, 1877, fixed the salaries, and among them the salary of the chief clerk, at $3,000 per annum. In November, 1877, however, said board fixed the amount to be raised by taxation for the salaries in that office for the current fiscal year, at a sum considerably less than the aggregate of the salaries as fixed in August, 1877. The relator was appointed by the district attorney, whose term of office began January 1, 1878, chief clerk from that date, at a salary of $1,500, the salaries in the office having been scaled down to come within the appropriation. The

relator accepted the appointment and continued in the office until August 1, 1881, receiving and accepting the salary so fixed, making no claim for additional compensation until after his employment had terminated. In an action to recover the difference between the amount received and the amount of salary as fixed by the board, HELD, that the action of the board in November, 1877, plainly indicated an intention on its part to reduce the salaries, and authority was thus impliedly given to the incoming district attorney to make such arrangements with his appointees as would bring the aggregate within the sum to be raised; that it was fairly presumable that, by the voluntary acceptance and retention by the relator of his employment at the reduced salary, the board was led to omit adopting a formal resolution reducing the salary to that fixed by the district attorney; and that, therefore, plaintiff was not entitled to recover."

In Somers v. State, 5 So. Dak., page 321, it is held:

"But the plaintiff contends that section 3, article 12, of the constitution, declaring that 'compensation of no public officer shall be increased or diminished during his term,' was a plain prohibition upon the legislature from passing a law reducing his salary from twelve hundred to nine hundred dollars. This contention is not correct for the reason that under the law plaintiff had no 'term.' He was simply appointed by the superintendent under the powers conferred by section 6, c 56. The law fixed no time for the continuance of such appointment. He had no title or tenure to the office beyond the pleasure of the appointing power. The word 'term' when used in reference to the tenure of office means, ordinarily, a fixed and definite term, and does not apply to appointive offices held at the pleasure of the appointing power. * * * We cannot assent to the theory of the plaintiff that by virtue of the law and his appointment under it his term was co-extensive with that of the superintendent who appointed him. Our conclusion is that the demurrer to plaintiff's complaint must be sustained and is so ordered."

I have quoted at length from the above opinions only for the reason that they are decisions foreign to the state and because of a sometimes lack of accessibility to same. From the above, then, I conclude that the deputy sealer of weights and measures holds at the will of the appointing power, that he has no fixed term of service, that the commissioners having the authority to fix the salary and it being for no term certain, they have the right at any time they desire to do so to change the same, and that their action can only be questioned by a court of equity in case of abuse. If, however, the commissioners refuse either to fix the salary or to appropriate funds for the proper payment thereof, an action in mandamus will lie to compel them to act.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

58.

DEED—CONVEYING LAND AUTHORIZED UNDER 106 O. L. 141 FROM STATE TO P. C. C. & ST. L. RY. CO.—MUST RESERVE "ALL OIL, GAS, COAL, ETC.," UNDER 105 O. L. 9.

The act of April 20th, 1915 (106 O. L. 141), authorizing the auditor of state to execute a deed in fee simple for a strip of land to the P. C. C. & St. L. Ry. Co., is to be read in connection with section 4 of the act of July 20th, 1914 (105 O. L. 9), and requires that such deed contain a reservation of all gas, oil, coal or other minerals under such land.

COLUMBUS, OHIO, February 26, 1917.

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

DEAR SIR:—On January 18, 1917, you addressed an inquiry to this department with reference to a deed directed by an act of the legislature to be delivered by you to the Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co., your communication being as follows:

> "On April 20, 1915, the general assembly enacted a law (106 O. L. 141) requiring the auditor of state to prepare a deed of conveyance for execution by the governor, for certain lands in the Gnadenhutten district.
>
> "The question arises as to the effect, if any, upon this act is had by the act of July 20, 1914 (105 O. L. 6).
>
> "The act of 1915 requires a deed in fee simple of the 'land' in question. While we understand that by the word 'land' is meant the surface and all that lies above and below, and that the act in question requires us to prepare a deed conveying a fee simple title in the subject, namely the land, yet we are in doubt as to whether the general act of 1914 qualifies the special act of 1915.
>
> "Will you kindly advise us whether, in such deed, we should make reservation of minerals as required by the act of 1914."

This inquiry involves an examination and comparison of the two statutes mentioned for the purpose of giving the construction of same in reference to the extent of the subject matter of the deed as to whether it should convey the entire land or merely the surface.

The act first mentioned, being the latter of the two in point of time, in its title professes to authorize a settlement with this railroad company for a *right of way* through two lots of the Gnadenhutten tract. The preamble contains a number of recitals, stating:

First. Ownership by the state in trust for the use of the common schools.

Second. That the railroad and its predecessors have been in possession of a right of way across it since 1852.

Third. That the railroad with permission of the agents of the state borrowed earth from the site of this right of way and that it desires to widen the right of way to one hundred and forty feet and also quiet its title to the entire strip of one hundred and forty feet, and have all claims for such borrowed earth satisfied.

Fourth. That the trustees, in whose hands the state has placed the administrative charge of said school lot, and the railroad have agreed to settle the claim of the state as trustee of said lot by widening the *right of way* to one hundred and forty feet, quieting its title by conveyance from the state and release of all claim

of the state for the earth removed, in consideration of which the railroad was to pay fifteen hundred dollars ($1,500.00), but that the trustees doubt their authority to consummate such agreement.

Fifth. That the trustees have by resolution requested the auditor of state through an act of the general assembly to carry out the settlement.

The above recitals are abbreviated, but the language is, generally speaking, that of the act, which then proceeds in section 1 of the enacting clause to require the auditor of state to prepare a deed conveying *in fee simple* to the Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co., a tract of which a description by metes and bounds follows, but fails to state the section or sections a part of which is conveyed.

The second section requires the railroad to maintain a farm crossing.

The third requires the governor to sign the deed and cause the great seal of the state to be affixed and the secretary of state to countersign it, and requires its delivery to the auditor of state.

The fourth section requires the auditor to deliver the deed to the railroad on the payment of fifteen hundred dollars, in full satisfaction of the claim of the state for the earth so removed, and in full payment for the land so conveyed.

Volume 106 O. L., p. 141-143.

The former act referred to is found in volume 105, pages 6 to 9, which is found in the very beginning of the volume above cited. It is entitled, "An act for the conservation of oil, gas, coal and other minerals upon the school and ministerial lands of the state, and to amend sections 3209-1, 3210, 3214, 3222, 3223 G. C. and enact new sections 3211-1 and 3229-1."

Section 3210 in this revision, found on page 8, authorizes sale of lands in section 16 and all lands instead thereof, granted for school purposes, but makes no reference to section 29 and provides for the manner of effectuating such sale by a conveyance and then contains a proviso that such sales shall exclude all oil, gas, coal and other minerals on such lands, and that the deed by the state to the purchaser shall expressly reserve the same with the right of entry, etc.

Section 4 of the act, found on page 9, is as follows:

> "All sales or leases of canal, public or other state land shall exclude all oil, gas, coal or other minerals on or under such lands, and all deeds executed and delivered by the state shall expressly reserve to the state all gas, oil, coal or other minerals on or under such lands with the right of entry in and upon said premises for the purpose of selling or leasing the same, or prosecuting, developing or operating the same and this provision shall affect and apply to pending actions."

This act was passed July 20, 1914, and approved the same day.

The other act above quoted was passed April 20, 1915, and approved the next day.

Another act was passed upon May 5th, or as it will be noticed, just a half a month after the act requiring the deed from the railroad company and by the same general assembly, which is an amendment of section 4, quoted above, and makes some exceptions to the lands out of which such reservations were to be made.

The answer to your inquiry involves a consideration of the act of April 20, 1915, as affected by the other two referred to above if it is affected by them or either of them. That it is so affected by at least the former act of July 20, 1914, and that the last act, May 5, 1915, may also be looked to for its construction, is a consequence of the intimate connection of all three in point of time and identity

of subject-matter. Even taking the act of May 20th alone, it contains ambiguity and might well be said to involve doubt as to whether the reservation of the minerals is not contemplated by it. This ambiguity arises out of the fact that the subject under consideration was a right of way, simply an easement, and the affirmative enactment requires the execution of a deed in fee simple, which is an expression ordinarily used by laymen and very frequently by lawyers to express the idea of the whole absolute property without reservation or exception. Having the other act, however, to look to, the ambiguity disappears and the legislative intent assumes certainty.

This kind of a question arising in this manner may always best be disposed of by reference to the general maxims for the construction of statutes. These, so far as comparison is involved, are two principal ones:

Ut res magis valeat quam, pereat
Leges posteriores priores contrarias abrogant.

The former signifies that contradictions should be reconciled so that effect may be given to all that the legislature has expressed, if possible. It is more generally used with reference to different parts of the same statute which present apparent conflict, but logically its application is just as strong to different statutes, especially when the intimate connection above referred to exists. The latter is rather of necessity a rule of logic than of positive law, or is such rule of law by reason of its logical character reduced to its ultimate essence, which means no more than what the legislature has said last is to stand against what it said formerly, and is the foundation and initial original statement of repeal by implication. It will be seen that the former maxim always prevails where its application is possible, and the latter only where there is hopeless irreconcilability. If there be such positive contradiction in the present case between the act of April 20, 1915, and the former act of July 14, 1914, then the provision of the last act is to prevail and the railroad gets the minerals.

There is no such contradiction. The provisions of both acts can stand and be given reasonable enforcement. In fact, the whole language of all parts of the act of April 20th, indicates almost with the certainty of expressed reference that it is to be read in connection with the other law. It is true these two laws were passed by different general assemblies, but the last one recognized the full force of the provision on this subject made by the first, when one-half month after the enactment of the act in question it made the slight change in section 4 quoted above. The only language in the act of April 20th, giving rise to any doubt upon the subject is the insertion of the three little words "in fee simple," and then by being too strongly attracted to that which is the ordinary every day import of those words and overlooking their technical signification, or rather their real meaning in law.

The expression "in fee simple" is not used with reference to the amount or description of all the tangible property conveyed, but with reference to the quality of the estate and *its* extent. Right of way and fee simple are not at all autonomous, and it would be perfectly possible to have an estate in fee simple in a right of way or an estate in fee simple in the minerals alone; *a fortiori,* in the land it may be subject to the reservation of the minerals.

This statute upon consideration is subject to the provision of the former statute by such necessary inference that it is almost, if not entirely, as controlling as would be a direct reference. The first recital is that the railroad is in possession of a "right of way." The second, that it seeks to have its title quieted to the entire strip of one hundred and forty feet in width. Now what title, except the title to the thing it was talking about above? The next recital is that they have agreed

with the trustees that the "right of way" shall be widened to one hundred and forty feet and its title *THERETO* quieted by deed.

Now these are all the reasons given for the execution of the deed, and it would be strange, and even remarkable, if the legislature should solemnly set forth a series of recitals for giving a railroad company a right of way over land and then give the whole land, including valuable minerals in no sense necessary to the uses for which the corporation exists and exercises the right of eminent domain. The words "in fee simple" have no such meaning when used by lawyers to express an exact idea, and it is apparent from the whole context in this act, as well as comparison with the others, that they have no such meaning here. It follows consequently, that the deed provided for in such act should reserve to the state "all oil, gas, coal or other minerals on or under said lands, etc.," as set out in said section 4.

Yours very truly,
JOSEPH MCGHEE,
Attorney-General.

59.

ORDINANCE—DETERMINING NUMBER OF POSITIONS IN DEPARTMENT AND FIXING SALARY AND BOND, IS OF A GENERAL NATURE—CANNOT BE PASSED WITH REGULAR SEMI-ANNUAL APPROPRATION ORDINANCE—SEC. 4214 G. C. CONSTRUED.

The act of council of a municipality in appropriating, in the regular semi-annual appropriation ordinance, sufficient moneys to cover the compensation of a certain position in detail, and specifying the title of the position, does not constitute a compliance with the provisions of section 4214 G. C. in creating said position and fixing the compensation thereof.

COLUMBUS, OHIO, February 26, 1917.

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

GENTLEMEN:—Under date of January 27, 1917, you submitted for my opinion the following question, to wit:

> "In view of the provisions of section 4214 General Code:
> "Does the act of council, in appropriating in the regular semi-annual appropriation ordinance sufficient moneys to cover the wages of a certain position, in detail and specifying the title of the position, constitute a compliance with the provisions of section 4214 General Code in creating said position and fixing the compensation?"

Section 4214 G. C. reads as follows:

> "Except as otherwise provided in this title, council, by ordinance or resolution, shall determine the number of officers, clerks and employes in each department of the city government, and shall fix by ordinance or resolution their respective salaries and compensation, and the amount of bond to be given for each officer, clerk or employe in each department of the government, if any be required. Such bond shall be made by such officer, clerk or employe, with surety subject to the approval of the mayor."

It seems to be clear from said section that its force and effect is to require council to act by way of ordinance or resolution in exercising its power and authority, where it has the power and authority of determining the number of officers, clerks and employes in a certain department and fixing their compensation and bond, if any, and we assume such to be the facts in the particular case in question.

The following sections and parts of sections of the General Code are pertinent to a discussion of your question, to wit:

> "Sec. 3797. At the beginning of each fiscal half year, the council shall make appropriations for each of the several objects for which the corporation has to provide, or from the moneys known to be in the treasury, or estimated to come into it during the six months next ensuing from the collection of taxes and all other sources of revenue. All expenditures within the following six months shall be made from and within such appropriations and balances thereof.
>
> "Sec. 5649-3a. * * * each year, * * * the council of each municipal corporation, * * * shall submit. * * *
>
> "Sec. 5649-3d. At the beginning of each fiscal half year the various boards mentioned in section 5649-3a of this act shall make appropriations for each of the several objects for which money has to be provided, from the moneys known to be in the treasury from the collection of taxes and all other sources of revenue, and all expenditures within the following six months shall be made from and within such appropriations and balances thereof, but no appropriation shall be made for any purpose not set forth in the annual budget nor for a greater amount for such purpose than the total amount fixed by the budget commissioners, exclusive of receipts and balances."

The effect of these sections is to place upon the council of a municipality the duty of making appropriations semi-annually for the various municipal purposes, and to provide that all expenditures within the following six months shall be made from and within such appropriations and balances thereof.

Section 5649-3d, in addition to the foregoing, requires that no appropriation shall be made for any purpose not set forth in the annual budget, nor for a greater amount for such purpose than the total amount fixed by the budget commissioners, exclusive of receipts and balances.

The evident intent and purpose of these sections are to place the express duty upon council of handling the finances in a certain way as regards appropriations. Hence the action of council in performing this duty of making appropriations should be considered only as pertaining to the one subject of making appropriations.

The determination of the number of positions in a department of a municipality, the fixing of the compensations and bonds, if any, thereof, would be the exercise of a discretionary power vested in said body by virtue of the provisions of section 4214 G. C. and would be something altogether different from the performance of an express duty as contemplated in the passing of a semi-annual appropriation ordinance.

In consequence, to hold that council could not only appropriate money in the semi-annual appropriation ordinance, but could also determine the number of officers, clerks and employes of a certain department and fix their compensation and bonds, would be in effect to sustain the proposition that more than one subject could be contained in one ordinance.

Section 4226 G. C. provides that no ordinance, resolution or by-law shall contain more than one subject which shall be clearly expressed in its title; and hence such a holding would be contrary to the provisions of said last mentioned section.

Further, an ordinance determining the number of positions in a department and fixing the compensation and bonds thereof would be an ordinance that would be general in its scope. In effect it would operate on the public as a whole, since it would involve the expenditure of money raised by taxation and would grant powers and place duties upon the occupants of said positions that would be public in their nature.

It must necessarily follow, therefore, that an ordinance of such a character would be one of a general nature within the meaning of section 4227 G. C., which provides that ordinances of a general nature or providing for improvements shall be published as hereinafter provided, before going into operation. I am sustained in this view by an opinion rendered by Hon. U. G. Denman, attorney-general, to Hon. Van A. Snider, city solicitor, Lancaster, O., under date of January 10, 1910, found in the Annual Report of the Attorney General of Ohio, 1910-1911, page 1045, in which he held that an ordinance like the one in question was an ordinance of a general nature requiring publication.

As to the nature of a semi-annual appropriation ordinance, the following excerpt from an opinion rendered by Hon. Timothy S. Hogan, attorney-general, to Hon. H. R. Schuler, city solicitor, Galion, O., under date of January 25, 1911, found in Vol. II of the Annual Report of the Attorney-General of Ohio, 1911-1912, page 1501, is in point:

> "I am aware it has been the ruling of this department heretofore that the semi-annual appropriation ordinance was an ordinance of a general nature which required publication in two newspapers of opposite politics of general circulation in the municipality. However, this identical question was decided by the circuit court of Jackson county, Ohio, in the past year, holding that the semi-annual appropriation ordinance was not an ordinance of general nature which required publication in two newspapers of opposite politics of general circulation in the municipality. The style of the case was The Transcript Printing Co. vs. The City of Wellston, Ohio, decided in May, 1910. The case was not taken to the supreme court. I do not think there is any other decision in Ohio upon this question.
>
> "I will, therefore, hold that the semi-annual appropriation ordinance is not an ordinance of general nature requiring publication in two newspapers of opposite politics of general circulation in the municipality."

Hence, assuming that said semi-annual appropriation ordinance had not been published for the reason that publication is not required by law, it would follow that said positions have not been legally determined, nor said compensation legally fixed therein, within the meaning of said section 4214 G. C. since when an ordinance is used as the mode of action the ordinance required by said last mentioned section contemplates an ordinance of a general nature, which to become effective must be published as required by the provisions of section 4227 G. C. as follows:

> "Sec. 4227. * * * Ordinances of a general nature, or providing for improvements shall be published as hereinafter provided before going into operation. No ordinance shall take effect until the expiration of ten days after the first publication of such notice. * * *"

Sec. 4227-2 G. C., as amended in 104 O. L. 239, reads in part as follows:

> "Sec. 4227-2. Any ordinance, or other measure passed by the council of any municipal corporation shall be subject to the referendum except as hereinafter provided. No ordinance or other measure shall go into effect

until thirty days after it shall have been filed with the mayor of a city or passed by the council in a village, except as hereinafter provided. * * *"

Sec. 4227-3 G. C., as enacted in 103 O. L. 212, reads as follows:

"Sec. 4227-3. Whenever the council of any municipal corporation is by law required to pass more than one ordinance or other measure to complete the legislation necessary to make and pay for any public improvement, the provisions of this act shall apply only to the first ordinance or other measure required to be passed and not to any subsequent ordinances and other measures relating thereto. Ordinances or other measures providing for appropriations for the current expenses of any municipal corporation, or for street improvements petitioned for by the owners of a majority of the feet front of the property benefited and to be especially assessed for the cost thereof as provided by statute, and emergency ordinances or measures necessary for the immediate preservation of the public peace, health or safety in such municipal corporation, shall go into immediate effect. Such emergency ordinances or measures must, upon a yea and nay vote, receive the vote of two-thirds of all the members elected to the council or other body corresponding to the council of such municipal corporation, and the reasons for such necessity shall be set forth in one section of the ordinance or other measure. The provisions of this act shall apply to pending legislation providing for any public improvement."

Section 4227-2, supra, provides in effect that all ordinances or measures passed by council shall be subject to the referendum, except as hereinafter provided. It also provides that no ordinance or other measure shall go into effect until thirty days after it has been filed with the mayor of the city, except as hereinafter provided.

The exceptions are set forth in section 4227-3, supra, and while an ordinance providing for appropriations for the current expenses of a municipal corporation is excepted from the referendum, nothing is said about an ordinance determining the number of officers, clerks and employes in a certain department and fixing their compensation and bond, if any. Hence, we must assume that the latter ordinance is subject to the referendum.

It would seem clear, therefore, that it was the intent and purpose of the legislature that an ordinance of such a character, being general in scope, should be subject to the referendum of electors of the municipal corporation, so that they might have a chance to either approve or disapprove of the number of officers, clerks and employes determined by council for a certain department and the amount of compensation and bond, if any, fixed therefor.

Hence, to permit these matters to be determined and fixed in the semi-annual appropriation ordinance would defeat the evident intent and purpose of the legislature to have these matters subject to the referendum of the electors of said corporation, since we have seen that the act of the council of a municipal corporation in making semi-annual appropriations for its needs and in performing this express duty placed upon it by the legislature is not subject to the referendum and goes into immediate effect.

I am, therefore, of the opinion, for the reasons given above, that the act of council in appropriating in the regular semi-annual appropriation ordinance sufficient moneys to cover the compensation of a certain position in detail and specifying the title of the position, does not constitute a legal compliance with the provisions of section 4214 G. C. in creating said position and fixing the compensation thereof.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

60.

DIRECTOR OF REFERENCE AND RESEARCH—AS TEACHER WITHIN MEANING OF SEC. 7838—AND ELIGIBLE TO MEMBERSHIP ON CITY BOARD OF EXAMINERS.

A teacher in the city schools who is assigned to the position of director of reference and research in which capacity all the work he does is in connection with the educational department, may continue to serve as a member of the city board of examiners.

COLUMBUS, OHIO, February 26, 1917.

HON. FRANK R. PEARSON, *Superintendent of Public Instruction, Columbus, Ohio.*

DEAR SIR:—I have your request of January 25, 1917, asking my opinion on the following proposition:

> "Mr. C. W. Sutton is a member of the city board of school examiners of Cleveland, Ohio. He is a regular teacher and was reappointed as teacher last June. He is assigned, however, to the position of director of reference and research, in which capacity all the work he does is in connection with the educational department. The action of the board of education in creating this place required that it be filled by a regular teacher. Until last May Mr. Sutton was supervisor of requisitions and reports. The title of his position was then changed. Is he eligible to serve as a member of the city board of examiners for the city school district?"

General Code section 7838 provides as follows:

> "There shall be a city board of school examiners for each city school district. Such board shall consist of the city superintendent of schools and two other *competent teachers serving full time in the day schools* of such city to be appointed by the city board of education. The term of office of such examiners shall be two years each, one to be appointed each year; and shall expire on the thirty-first day of August."

You will note from the above that the qualifications necessary to be a member of the board of examiners of a city school district are either a superintendent of schools or a competent teacher serving full time in the day schools of such city.

Teacher is defined by "Webster" as one who instructs or one whose business or occupation is to instruct others. The "Century" says:

> "To teach is to point out, to direct, or to show."

It is provided by General Code section 7881:

> "The term 'teacher' in this chapter shall include all teachers regularly employed by either of such boards in the day schools, including the superintendent of schools, all superintendents of instruction, principals, and special teachers. * * *"

While the above definition is given under the teachers' pension laws, yet it is an indication of what our legislators termed as teacher, and the above statutory definition is given verbatim in Vol. 8, Words and Phrases, page 6892, as applying to city schools.

In Venable v. Schafer, 28 O. C. C. R. 202, the following language is used:

"In construing a statute, a word should not be given a limited or specialized meaning, unless such meaning is made by legislative enactment; hence * * * the word 'teacher' not being specifically restricted in its meaning, will comprehend within its purview such instructors as shall have spent a part of the time required in teaching in schools not supported in whole or in part by public taxation."

Again,

"A statute punishing any guardian of any female under the age of eighteen years or any other person in whose care such female shall have been confided, who shall casually know her, includes a *school teacher,* and the relation of 'teacher' and pupil, as well after the child reaches home as it does in the school room. It exists on Sunday as well as on a school day."

State v. Hesterly, 81 S. W. 624.

You state in your letter that Mr. Sutton has been appointed to the position of director of reference and research, a position in the schools and educational in character, created to assist in the cultivation and instruction of the youth who attend such schools, and, that one of the requirements for such place is that he be a regular teacher, so that by the action of the board itself appointing Mr. Sutton to the position of director of reference and research, which position must be filled by a regular teacher, it is only fair to assume that he is not only a regular teacher, but, in the words of the statute, "a competent teacher" as well. The only other qualification found necessary by the provisions of section 7838, above quoted, is that he serve full time in the day schools of said city. There is nothing in your letter to indicate that he is serving in the night schools, and, therefore, I must assume that he is serving in the day schools.

Answering then your question specifically, I advise you that under the statement of facts given in your letter Mr. Sutton is eligible to serve as a member of the city board of examiners of the Cleveland school district.

Yours very truly,
JOSEPH MCGHEE,
Attorney-General.

61

TRUSTEES OF CHILDREN'S HOME—MAY BE REMOVED FOR PROPER CAUSE—DEADLOCK IN SELECTION OF SUPERINTENDENT NOT IN ITSELF SUFFICIENT CAUSE FOR REMOVAL—REPORT TO CIVIL SERVICE COMMISSION AS TO TIME OF MAKING DIRECTORY.

County commissioners may remove trustees of children's homes only for proper cause, a deadlock in the selection of a superintendent is not of itself proper cause but sufficient cause.

Report to civil service commission directory and not mandatory as to time of making.

COLUMBUS, OHIO, February 26, 1917.

HON. E. A. SCOTT, *Prosecuting Attorney, West Union, Ohio.*

DEAR SIR:—I have your communication of January 25, 1917, in which you ask my opinion upon the following statement of facts:

> "Last October, 1916, a vacancy occurred in the superintendency of the Adams county children's home by reason of death. There being no eligible list for the trustees to select from an examination was held in the month of December, and an eligible list of three persons was certified to the trustees by the civil service commission on January 5, 1917. The trustees have had two meetings to employ a superintendent and have failed to do so, being deadlocked, two for one applicant and two for another. They have allowed the time fixed by law to hire and report to the commission to pass and appear to be hopelessly divided, leaving the institution without a head. Can the county commissioners remove a part or all members of the board of trustees and appoint others to fill their places so as to relieve the situation?"

Section 3077 G. C., 103 O. L. 889, is in part as follows:

> "When in their opinion the interests of the public so demand, the commissioners of a county may, or upon the written petition of two hundred or more taxpayers, shall, provided the approval of the board of state charities has been first obtained, at the next regular election submit to the qualified electors of such county, or the counties forming a district, the question of establishing a children's home for such county or district, and the issue of county bonds or notes to provide funds therefor. * * *"

Section 3078 G. C. is as follows:

> "If at such election a majority of electors voting on the proposition are in favor of establishing such home, the commissioners of the county, or of any adjoining counties in such district, having so voted in favor thereof, shall provide for the purchase of a suitable site and the erection of the necessary buildings and provide means by taxation for such purchase and the support thereof. Such institution shall be styled the children's home for such county or district."

Section 3081 G. C. is as follows:

> "When the necessary site and buildings are provided by the county, the commissioners shall appoint a board of four trustees, as follows: One

for one year, one for two years, one for three years, and one for four years, from the first Monday of March thereafter. Not more than two of such trustees shall be of the same political party. Annually thereafter on the first Monday of March, the county commissioners shall appoint one such trustee, who shall hold his office for the term of four years and until his successor is appointed and qualified."

Section 3082 G. C. is as follows:

"The commissioners shall immediately fill a vacancy caused by death, resignation or removal, by appointment for the unexpired term. They may remove any trustee appointed by such board of commissioners for cause impairing faithful, efficient and intelligent administration, or for conduct unbecoming to such office, after an opportunity is given to be heard upon written charges, but no removal shall be made for political reasons."

Section 3084 G. C. is as follows:

"The board of trustees shall designate a suitable person to act as superintendent of the home, who shall also be clerk of such board, and who shall receive for his services such compensation as the board of trustees designates at the time of his appointment. He shall perform such duties, and give security for their faithful performance, as the trustees require."

The above sections and parts of sections quoted contain the statute laws of our state in relation to the organization and management of children's homes, and as noted above, the county commissioners of the county in which the home is located are given the authority to appoint the trustees to manage said home. It is also noted in section 3082 G. C., above quoted, that they (the commissioners) may remove any trustee for certain causes set forth. The causes seem to be two in number.

First, "for cause impairing faithful, efficient and intelligent administration," and second, "for conduct unbecoming to such office." It is also to be noted from the provisions of said section that no trustee can be removed without written charges being filed, and while the section is silent, I take it, the charges must be filed before the appointing board, and that said trustee against whom said written charges are filed is given an opportunity to be heard in relation to said charges and that no removal shall be made for political reasons, but the section is plain that if the appointing board finds that a member of the board of trustees has been unfaithful, inefficient and non-intelligent in the administration of the affairs of his position, or if the appointing board finds that a member of said board of trustees is guilty of conduct unbecoming to such office, such trustee may be removed for either or both of the above causes.

It is for the board of commissioners to say, after hearing the evidence in relation to said charges and acts performed by such trustee against whom said charges are filed, whether or not such trustee is guilty of the act or acts complained of, and whether or not such acts be covered by the above mentioned grounds of removal. In your letter you mention the fact that the board is deadlocked, two voting for one person and two voting for another. This fact of itself is not cause for removal, but the facts which caused the deadlock may or may not be cause for removal, depending on said facts.

It is suggested by you that the time fixed by law to hire and report to the commission has passed. By the above, I take it you mean the report to be

given to the civil service commission, but that provision, I am satisfied, is only directory and not mandatory.

So that, answering your question specifically, I advise you that the mere fact that the board is deadlocked is not cause for removal but that the facts which caused the deadlock may or may not be cause for removal, depending on whether or not the same are within the causes of removal set out in section 3082 G. C.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

62.

APPROVAL—TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE OF THE CITY OF BARBERTOWN, OHIO.

COLUMBUS, OHIO, February 27, 1917.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of the city of Barberton, Ohio, in the sum of $54,443.00, issued for the purpose of paying the city's portion of the expense of abolishing certain grade crossings on Huston St., Robinson Ave., and Tuscarawas Ave., in said city, being one bond of $443.00, and 108 bonds of $500.00 each."

I have examined the transcript of the proceedings of the council and other officers of the city of Barberton in connection with the above bond issue, also the bond and coupon form attached, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds drawn in accordance with the form submitted and signed by the proper officers will, upon delivery, constitute valid and binding obligations of the city of Barberton.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

63.

APPROVAL—RESOLUTION FOR SALE OF CANAL LAND TO FRANK E. WILSON MFG. CO., OF LANCASTER, OHIO.

COLUMBUS, OHIO, February 27, 1917.

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

DEAR SIR:—I have your communication of February 17th transmitting to me certain resolutions providing for the sale of the easement of the state of Ohio in and to a certain basin on the abandoned Hocking Canal property to The Frank E. Wilson Manufacturing Company, of Lancaster, Ohio.

I have examined carefully the different steps leading up to the sale of this property and find that all jurisdictional matters pertaining thereto are legal and regular.

I, therefore, have approved said resolutions and am this day forwarding the same to the governor for his approval.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

64.

MOTOR VEHICLES—NOT IN MOTION NOT REQUIRED TO DISPLAY LIGHTS—FINE PAID UNDER A MISTAKE OF LAW—CANNOT BE RECOVERED UNLESS PAID INVOLUNTARILY.

Section 12614 G. C. is applicable only to motor vehicles which are in motion. There can be no recovery for or restitution of a fine paid under a mistake of law unless the payment of same was made involuntarily under duress.

COLUMBUS, OHIO, February 28, 1917.

HON. CALVIN D. SPITLER, *Prosecuting Attorney, Tiffin, Ohio.*

DEAR SIR:—I have your communication under date of January 15, 1917, enclosing a request from the mayor of Tiffin, Ohio, for an interpretation of section 12614 G. C. on the following point, to wit:

> "The question has been raised in Tiffin as to whether or not under section 12614 G. C. an automobile operated upon the public streets of this city may stop temporarily and have the driver of same put out its front and rear lights without being in violation of said section. It is contended by some auto drivers in the community that the aforesaid section only applies to an automobile which is actually moving, and if it stops in front of a place of business or residence, no matter for what purpose, or how short, or how long it is standing there, that the driver may extinguish his front and rear lights, and not be in conflict or violate the aforesaid section."

Section 12614 G. C., as amended in 103 O. L. 766, reads as follows:

> "Sec. 12614. Whoever operates or drives a motor vehicle upon the public roads and highways without providing it with sufficient brakes to control it at all times and a suitable and adequate bell or other device for signalling, or fails during the period from thirty minutes after sunset to thirty minutes before sunrise to display a red light on the rear thereof and three white lights, two on the front and one on the rear thereof, the rays of which rear white light shall shine upon and illumninate each and every part of the distinctive number borne upon such motor vehicle, the light of which front lamps to be visible at least two hundred feet in the direction in which such motor vehicle is proceeding, shall be fined not more than twenty-five dollars. Provided, that motor vehicles of the type commonly called motor cycles shall display one white light in front to be visible at least two hundred feet in the direction in which such motor

vehicle is proceeding, and one rear combination red and white light, showing red in the direction from which such motor vehicle is proceeding, and such rear light to be so placed that it will reflect its white light upon and fully and clearly illuminate the distinctive license identification mark of such motor vehicle."

Under date of November 13, 1916, my predecessor in office, Hon. Edward C. Turner, considered the particular matter in question in an opinion to Hon. Joseph W. Horner, prosecuting attorney, Newark, Ohio, which opinion provides in part as follows:

"A motor vehicle which is not in motion could not be said to be operated or driven. It might be argued that the provision making it an offense to operate or drive a motor vehicle without sufficient brakes or without a signaling device is not related to the provision making it an offense to fail to display lights and that the latter provision applies to all motor vehicles on the public roads or highways without regard to whether they are being operated or driven. This construction of the statute is, however, rendered untenable by the provision that the light of the front lamps shall be visible at least two hundred feet in the direction in which the motor vehicle *is proceeding*. This latter provision is, to my mind, conclusive of the intention of the legislature to make the provisions of section 12614 G. C. applicable only to motor vehicles which are in motion."

I concur in the reasons given in this opinion and in the decision reached, and am of the opinion that section 12614 supra is applicable only to motor vehicles which are in motion.

Under date of January 29, 1917, you submitted a supplemental request with reference to the above matter, with which was enclosed a communication of the same date addressed to you by the mayor of Tiffin, Ohio, in which the following request for an opinion was made:

"On January 8 last I sent a communication to you asking you to procure an interpretation of section 12614 G. C. as to whether there was an offense under this section when autos were standing and not in motion. At that time I neglected to ask for the additional information as to whether the fines and costs so assessed in such cases could be recovered back by the offenders, some of which plead guilty and some plead not guilty and were tried and found to be guilty, and which fines have all been paid into the county treasury. All of these cases were tried before former Attorney-General Turner had rendered his opinion, which I believe was on November 13, 1916, to Hon. Joseph W. Horner, prosecuting attorney, Newark, Ohio."

As to this last mentioned request, which has reference to the recovery of fines paid under a mistake of the law, the following principles, set forth in volume 19, of Cyc., pages 558-559, are in point:

"A fine illegally imposed may be recovered back where it was paid involuntarily or under duress, for example, where it was paid to avoid or obtain release from imprisonment; but there can be no recovery where the fine, although illegally imposed, was voluntarily paid under a mistake of law, as for instance, where the payment was induced, not because of

threatened imprisonment but to avoid further inconvenience and trouble. The mere fact, however, that the judgment imposing a fine is void as being in excess of the jurisdiction of the court does not, it has been held, constitute a sufficient ground for recovering back money paid without objection or protest.

"Restitution of a fine after the reversal of a judgment imposing it is not a matter of right, but it is for the court to determine whether the payment was voluntarily or involuntarily made, and therefore whether defendant is entitled to a restitution."

The above principles are sustained by numerous authorities. Their applicability to the question presented by you depends upon the particular facts in the cases tried before the mayor of Tiffin. The general principle of law, that money voluntarily paid under a mistake of law cannot be recovered, is unquestioned.

The particular facts in each individual case have not been presented to me and hence it would be impossible for me to apply the principles of law to the facts. As a practical matter, the fines which have been paid under mistake of law should remain in the county treasury until some action is taken by the party who paid same. The party paying same would have no right to insist upon recovery of the amount paid unless he could show that he had been compelled, under duress of threatened imprisonment, to pay said sum.

It is my opinion that the general principles of law above stated will enable you to determine what action should be taken on the fines paid under a mistake of law in case the persons paying same should attempt to bring an action for the recovery of same.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

65.

INDIGENT POOR—TOWNSHIP TRUSTEES MUST MAKE PROVISION FOR IN TOWNSHIP—WHEN CONFINES OF CITY OR VILLAGE THEREIN IS NOT CO-EXTENSIVE WITH SAID TOWNSHIP.

In township wherein either villages or cities, or both, are situated, so long as the confines of such village or city is not co-extensive with the township, the township trustees are required to provide for the indigent poor of such municipal corporations in the same manner as they provide for the indigent poor in the part of the township outside the municipal corporation.

COLUMBUS, OHIO, February 28, 1917.

HON. BENTON G. HAY, *Prosecuting Attorney, Wooster, Ohio.*

DEAR SIR:—In your communication of January 6, 1917, you ask for an opinion on the question of whether it is the duty of the township trustees or of the municipal corporation in said township to take care of the poor who reside within the limits of a municipality, especially if such municipality is a village, the corporate lines not being co-extensive with the township," but there being both a township and municipal organization. You further inquire what the "law is in regard to a city in the township."

Section 3476 G. C. provides:

> "Subject to the conditions, provisions and limitations herein, the trustees of each township or the proper officers of each municipal corporation therein, respectively, shall afford at the expense of such township or municipal corporation public support or relief to all persons therein who are in condition requiring it."

This section was formerly section 1491 G. C., and previous to 1898 read as follows:

> (73 O. L. 233, Sec. 11.) "That the trustees of each township in this state shall afford, at the expense of their township, public support or relief to all persons therein who may be in condition requiring the same, subject to the conditions, provisions and limitations of this act."

In this act of April 12, 1876, there seems to have been attempted a revision of the statutes for the relief of the poor, and in a subheading, under the title of "city infirmaries," section 23 of the act provides certain duties of city infirmary directors of such infirmaries and makes the provisions of the section applicable only to counties in which there is a county and city infirmary. Under that section the directors of the city infirmaries furnished relief and support to persons in the city infirmary applying therefor the same as county directors are required to do and had other like powers that the county infirmary directors had under the law.

In 93 Ohio Laws, at page 261, an act was passed revising and improving the statutes of Ohio relating to the care of the poor, section 957 R. S. providing for a board of county infirmary directors, expressly stating that they are chosen by the electors of the county "unless part of the county is not taxed for the support of the county infirmary. In such case they shall be voted for by the residents of the territory so taxed." This act repealed old section 1491 and amended it so as to read as follows:

Section 1491 R. S.

> "The trustees of each township in the state or the proper officers of the corporation therein shall afford, at the expense of their township or a corporation, public support or relief to all persons therein who may be in condition requiring the same, subject to the conditions, provisions and limitations thereon."

Section 1491 R. S. was carried into the General Code as section 3476, supra, and is, with kindred sections, found in part 1, title II, division 4 "Charity," chapter 1 "Poor."

Section 3480 G. C. reads:

> "When a person in a township or municipal corporation requires public relief * * * complaint thereof shall be forthwith made by a person having knowledge of the fact to the township trustees, or proper municipal officer. * * *"

Section 3481 G. C. provides:

> "When complaint is made to the township trustees or to the proper officers of a municipal corporation that a person therein requires public relief or support * * *"

Section 3485 G. C. provides:

"The township trustees or proper officers of a municipal corporation shall keep accurate accounts of expenses so incurred. * * * The clerk of the township or municipality shall record the accounts in the proper records * * *. Such trustees or proper officers shall issue orders on the treasurer thereof for such demands when they accrue."

In sections 3486, 3487, 3490, 3492, 3493, 3494 and 3495 the same phraseology will be found and the trustees and the proper officers of the municipal corporation are coupled together and the ambiguity appearing in section 3476 continues in the sections of the chapter above quoted.

Section 4089 General Code provides:

"The management of the affairs of corporation infirmaries and the care of the inmates thereof, the erection and enlargement of infirmary buildings and additions thereto, the repair and furnishing thereof, the improvement of the grounds therewith connected, and the granting of outdoor relief to the poor, shall be vested in the director of public safety."

Section 4356 gives to councils of villages the care, supervision and management of public institutions, including infirmaries.

Section 5646 G. C. provides:

"The trustees of each township, on or before the fifteenth day of May, annually, shall determine the amount of taxes necessary for all township purposes, and certify it to the county auditor. * * *"

This section further provides:

"The county auditor shall levy, annually, for township purposes, *including the relief of the poor* * * * such rates and taxes as the trustees of the respective townships certify to him to be necessary, * * *."

Section 5647 G. C. provides:

"In counties where there are no county infirmaries, a township tax in addition to the tax provided in the next preceding section, and not to exceed one mill and five-tenths of a mill on each dollar of the taxable property of the township may be levied for the relief of the poor, to be applied solely to that purpose."

Section 5648 G. C. provides:

"The trustees of any township which incurs liabilities for the relief of the poor, beyond the amount raised by the levy authorized by law, may make an additional levy, for the purpose of discharging such liabilities, not exceeding six-tenths of one mill on the dollar of the taxable property of such township."

It will be noted that the township levy is on all the property of the township, including municipalities situated therein. It certainly could not have been the legislative intent to provide for a levy on the taxable property of the municipali-

ties and then have this tax expended for a purpose limited to persons outside the municipality.

It is my opinion, in view of all the foregoing, that in townships where either cities or villages are situated, so long as the confines of the city or village are not co-extensive with the township, the township trustees are required to provide for the indigent poor of the municipal corporations in the same manner as they provide for the indigent poor who live in that part of the township outside of the municipal corporation.

Section 3512 G. C. provides:

> "When the corporate limits of a city or village become identical with those of a township, all township offices shall be abolished, and the duties thereof shall thereafter be performed by the corresponding officers of the city or village, except that justices of the peace and constables shall continue the exercise of their functions under municipal ordinances providing offices, regulating the disposition of their fees, their compensation, clerks and other officers and employes. Such justices and constables shall be elected at municipal elections. All property, moneys, credits, books, records and documents of such township shall be delivered to the council of such city or village. All rights, interests or claims in favor of or against the township may be enforced by or against the corporation."

A similar statutory provision to section 3512 G. C. was construed in McGill v. State, 34 O. S. 228, and it was held that such provision was intended to comply with the constitutional requirement that justices of the peace should be elected by townships, and that for all other purposes the township organization in municipal corporations was abolished. At that time the office of justice of the peace was a constitutional office and for that reason was excepted in the statute. So it is evident that there would not be any township trustees in cities or villages whose corporate limits become identical with those of a township.

The question you submit was passed on by former Attorney-General Timothy S. Hogan, in an opinion found in the Reports of the Attorney-General for the years 1911-1912, volume 1, page 250. In this opinion I have reached the same conclusion and concur with that opinion.

Very truly yours,
JOSEPH MCGHEE,
Attorney General.

66.

CONTRACT—BETWEEN BOARD OF EDUCATION OF THE RURAL SCHOOL DISTRICT OF SCIOTO TOWNSHIP—PICKAWAY COUNTY AND DEPOSITORY—WAS MADE FOR ONE YEAR—BOARD SHOULD ENTER INTO NEW CONTRACT TO EXTEND TO CONTRACTING PERIOD.

A contract establishing a depository as provided by G. C. 7604-9 was made for one year certain on January 31, 1916.

The board of education should enter into a new contract to extend to the contracting period, i. e., within thirty days after the first Monday of January, 1918.

COLUMBUS, OHIO, February 28, 1917.

MR. J. L. HEISE, *Prosecuting Attorney, Circleville, Ohio.*

DEAR SIR:—In your letter of February 14, 1917, you request my opinion upon the following proposition:

> "The contract between the board of education of the rural school district of Scioto township, Pickaway county, Ohio, and a banking company for the deposit of school funds, was made on form 1807 published by the Ruggles-Gale Company, Columbus, Ohio, a blank form of which is enclosed herewith, and is supposed to comply with Sec. 3968 or Sec. 7604-9 G. C.
>
> "Said contract contains the following statement, to wit: 'It is agreed between said board of education and said Scioto bank that the funds of said school district shall be deposited in and received and safely kept by said bank, from and after the date hereof for the period of one year, and thereafter until this contract is terminated by one of the parties to it, as hereinafter provided.'
>
> "This contract took effect January 31, 1916, continued for one year and terminated January 31, 1917, according to its terms unless it is automatically continued in force by either or both parties neglecting to notify, in writing, the other party of its intention to terminate said contract. Neither party has so notified the other so far as I have been informed. Is this a valid contract under amended sections 7604 and 7605 G. C., on account of the two years mentioned therein?
>
> "Is this contract in force at the present time?
>
> "If the clerk of the board of education of said Scioto township issues a certificate on the county auditor to pay the February distribution of school funds over to said Scioto bank is he safe in doing so, or should he do it?"

From our conversation with you on February 23, 1917, I learn the following additional facts:

> That there is but one bank in Scioto township rural school district, and that is the bank with which the contract for the depository was made in January of 1916, and that it was the only bank located in said rural school district at that time.

Your inquiry involves the construction of those sections of the General Code which provide for the establishment of a depository for the school funds of any school district.

General Code section 7604 provides in part:

"Within thirty days after the first Monday of January, 1916, and every two years thereafter, the board of education of any school district, by resolution, shall provide for the deposit of any and all moneys coming into the hands of its treasurer. * * *"

General Code section 7605 provides in part:

"* * * but no contract for the deposit of school funds shall be made for a longer period than two years."

Section 7607 of the General Code provides:

"In all school districts containing less than two banks, after the adoption of a resolution providing for the deposit of its funds, the board of education may enter into a contract with one or more banks that are conveniently located and offer the highest rate of interest, which shall not be less than two per cent. for the full time the funds or any part thereof are on deposit. Such bank or banks shall give good and sufficient bond, or shall deposit bonds of the United States, the state of Ohio, or county, municipal, township or school bonds issued by the authority of the state of Ohio, at the option of the board of education, in a sum at least equal to the amount deposited. The treasurer of the school district must see that a greater sum than that contained in the bond is not deposited in such bank or banks, and he and his bondsmen shall be liable for any loss occasioned by deposits in excess of such bond."

General Code section 7609 provides in part:

"* * * upon the failure of the board of education of any school district to provide a depository according to law, the members of the board of education shall be liable for any loss occasioned by their failure to provide such depository and in addition shall pay to the treasurer of the school funds two per cent. on the average daily balance on the school funds during the time said school district shall be without a depository. Said moneys shall be recovered from the members of the board of education for the use and benefit of the school funds of the district upon the suit of any taxpayer of the school district."

General Code section 4763 provides in part:

"* * * In * * rural school districts which do not provide legal depositories, as provided in section 7604 and 7608 inclusive, the county treasurer shall be the treasurer of the school funds of such district."

Prior to May 15, 1915, at which time section 7604 was amended to read as above, a board of education could provide for a depository for the school funds of the school district at any time during the year, but under the provisions of the section as it now stands the board of education must, within thirty days after the first Monday of January, in the even numbered years, provide for the deposit of all moneys coming into the hands of its treasurer and a failure to do so makes the members of the board of education personally liable for any loss occasioned by their failure to provide for such depository, and other penalties. The

statute does not say that the contract shall be for any certain length of time, but it does designate the time when the contract for the deposit of said funds shall be made and that it shall be made for not more than two years. I do not believe, however, that the time mentioned for entering into said contracts is such a mandatory proposition as will prevent the board of education from entering into the same after the said period of thirty days, in case there should be a failure to enter into the same within that time, but I do think that the language is clear enough that the contract thus entered into should, when entered into during said period, be so entered into for the term of two years, and I am further of the opinion that said period of thirty days following the first day of January, in the even numbered years, is made a beginning and an ending time for such depository contracts. In your case, however, the contract was not entered into for two years but for one year certain, with a conditional extension, and without passing upon the question as to whether or not such conditional extension is or is not valid, I am of the opinion that under the provisions of section 7607, above quoted, there being only one bank in the district, and from my interpretation that the language is directory and will permit a board of education to enter into such depository contract outside of the thirty-day period, above mentioned, the board of education should at once adopt a resolution providing for the deposit of its funds from now until some time within the thirty-day period from and after the first Monday in January, 1918, and that then a new contract covering said period should be entered into with said bank and that the bank should give a good and sufficient bond, or deposit bonds of the United States, the state of Ohio or county, municipal, township or school bonds, as security for the safe keeping and the return of said money so deposited, and thus avoid all question as to what might or might not happen under the terms of the contract of January 31, 1916.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

67.

TAXES—BECOME LIEN ON REAL PROPERTY AS OF THE DATE PRECEDING SECOND MONDAY OF APRIL—BOARD OF EDUCATION PURCHASING SUCH PROPERTY HOLD SAME SUBJECT TO SAID LIEN—COUNTY COMMISSIONERS HAVE NO AUTHORITY TO REFUND SAID TAXES AFTER PAYMENT.

1. *Taxes lawfully assessed become a lien on real property as of the date preceding the second Monday of April, and a board of education of the school district thereafter procuring such real property for school purposes either by purchase or appropriation holds such property subject to said tax lien until the same is paid.*

2. *The board of county commissioners have no power either to remit said taxes or any part thereof or to refund the same to the board of education after the payment thereof.*

COLUMBUS, OHIO, February 28, 1917.

HON. HARRY S. CORE, *Prosecuting Attorney, Ottawa, Ohio.*

DEAR SIR:—I have at hand your letter under date of January 26, 1917, in which you say:

> "On the 20th day of May, 1916, the board of education of Columbus Grove village school district, passed a resolution appropriating lots Nos.

446 and 452 in said school district for school purposes.

"Thereafter, trial was had in the probate court in appropriate proceedings, in which a judgment for $5,000.00 was awarded in favor of property owners.

"This judgment or verdict included all of the buildings and machinery attached to same, and thereafter, on the ____day of December, 1916, the case and matter was compromised by the said village school district paying to the proprietors or owners the sum of $3,250.00, they taking from the said premises all of the buildings.

"The real estate, as placed on the tax duplicate for the lands is $365.00, and that for the buildings $845.00.

"About December, a quit claim deed was delivered from owners of land to said board of education, and the entry filed in the probate court showing and stating that the said entry acted as a conveyance of the said premises to the board of education.

"Taxes have been levied for the year 1916 against the said premises in the amount of $18.38, this including the whole property. Is the school district liable for the payment of said taxes, or any part of said taxes?

"If yes, the property being appropriated for school purposes only, have the commissioners authority to rebate the taxes if paid, or issue a refunder for the same or any part of the same."

Applicable to a consideration of the question presented by you I note the provisions of sections 7624 and 5671, General Code, which are as follows:

"Sec. 7624. When it is necessary to procure or enlarge a school site or to purchase real estate to be used for agricultural purposes, athletic field or play ground for children, and the board of education and the owner of the property needed for such purposes are unable to agree upon the sale and purchase thereof, the board shall make an accurate plat and description of the parcel of land which it desires for such purposes, and file them with the probate judge, or court of insolvency, of the proper county. Thereupon the same proceedings or appropriation shall be had which are provided for the appropriation of private property by municipal corporations.

"Sec. 5671. The lien of the state for taxes levied for all purposes, in each year, shall attach to all real property subject to such taxes on the day preceding the second Monday of April, annually, and continue until such taxes, with any penalties accruing thereon, are paid. All personal property subject to taxation shall be liable to be seized and sold for taxes. The personal property of a deceased person shall be liable, in the hands of an executor or administrator, for any tax due on it from the testator or intestate."

Inasmuch as no steps were taken by the board of education of the school district to appropriate the property in question until after the day preceding the second Monday of April, 1916, it is not necessary to discuss the question as to the particular time when title to the property passed to the board of education by virtue of the appropriation proceedings, although as to this I may say, inter alia, that it seems clear that title does not pass until full compensation has been paid or secured to be paid to the owner or owners of the property appropriated.

Although taxes on property in your county for the year 1916 were not levied until a date much later than the day preceding the second Monday of April, 1916, nevertheless said taxes when levied related back as a lien on the real property

within the county as of the day preceding the second Monday of April, 1916. (State ex rel. vs. Roose, auditor, 90 O. S. 345). The lien for taxes on the property appropriated by the board of education was not divested by the condemnation proceedings, and although the amount of the tax lien could, and properly should, have been paid out of the compensation awarded the owner or owners of the property appropriated, yet the same not having been done the taxes are still a lien on the property as against the board of education, present owners, and the board is liable for the payment of such taxes. (Cincinnati v. Jones, 24 C. C., n. s. 374.)

As to your second inquiry as to whether or not the commissioners of the county have authority to rebate or refund the taxes if paid by the board of education, I am of the opinion that, under the decision of the supreme court in the case of Peter v. Parkinson, treasurer, 83 O. S. 36, the county commissioners have no power either to remit the taxes before payment or refund them afterwards.

Under section 2416 of the General Code the county commissioners have the power to release in whole or in part any debt to the county, and under section 2589 of the General Code the county commissioners have power under certain circumstances to order refunded taxes that have been erroneously charged and collected. It was held by the supreme court in the case just cited that under neither of the sections of the General Code above noted did the board of county commissioners have power to remit or release, either in whole or in part, taxes that stand charged on the duplicate and are unpaid.

As section 2589 of the General Code, relating back to section 2588, gives the county commissioners power only to refund taxes levied on exempted property or taxes which have been erroneously assessed, it is apparent that inasmuch as the taxes here in question were not exempted at the time the lien therefor became effective and it does not appear that the assessment of taxes on this property was made through error of any kind there is no power in the county commissioners to remit the taxes on this property or refund the same after payment.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

68.

APPROVAL—TRANSCRIPT OF PROCEEDINGS OF COUNTY COMMISSIONERS OF CLARK COUNTY FOR BOND ISSUE.

COLUMBUS, OHIO, February 28, 1917.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of Clark county, Ohio, in the sum of $6,000.00, for the erection of a new barn and silo at the Clark county infirmary."

I have examined the transcript of the proceedings of the board of county commissioners and other officers of Clark county, Ohio, relating to the above bond issue, also the bond and coupon form attached, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds drawn in accordance with the form submitted and signed by the proper officers will, upon delivery, constitute valid and binding obligations of said county.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

69.

STATUTE—WHEN SAME IS REPEALED ALL RIGHTS, ETC., ARE LOST UNDER IT—WHERE OFFICER UNDER REPEALED STATUTE OR REAPPOINTMENT QUALIFIES UNDER NEW STATUTE HE SURRENDERS ALL RIGHTS UNDER FIRST APPOINTMENT—FIRST APPOINTMENT CEASES WHEN NEW ACT TAKES EFFECT—CLINTON COWEN.

1. *When a statute repeals a former statute, all rights, titles and interests in the statute repealed are lost, excepting those embodied in pending suits and executed contracts, unless there is something in the repealing statute which manifests a different intention on the part of the legislature.*

2. *Where there is a simultaneous repeal and re-enactment of a statute and the provisions of the repealing statute are identical or practically identical with those of the statute repealed, and there is nothing in the repealing statute to indicate that the legislature intended to repeal the former act, the repealing statute is an affirmance of the original act and not a repeal in the strict or constitutional sense of that term.*

3. *When the title of the repealing act creates a system or department and provides for the repeal of all sections and acts inconsistent therewith; and the new act provides for a repeal of all acts and sections inconsistent with it; provides that it shall supersede all former acts and parts of acts; provides that certain matters are saved by specifically mentioning them; and the new act is a complete, comprehensive and all inclusive act; providing a complete and comprehensive scheme, and not in any way depending upon the former act, it would be assumed that the legislature intended that nothing whatever of the former act remains effective or in force, other than what is preserved in the saving clause of the act.*

4. *Where the officers, who have to do with the putting into effect of the provisions of the new act, proceed along certain lines and principles in reference thereto, their acts may be taken into consideration in arriving at a conclusion as to what was the real intention of the legislature and those vitally interested in having the new legislation enacted.*

5. *Where an officer was appointed under a former act and he is reappointed to take office under the act repealing the former act, and qualifies under the provisions of the new act, he surrenders all the rights he might have had under the first appointment and is precluded from all rights excepting those he has by virtue of his appointment under the new act. Further, all his rights under the first appointment cease when the new act takes effect, and he is relegated to his rights under the second appointment.*

COLUMBUS, OHIO, February 28, 1917.

HON. JAMES M. COX, *Governor of Ohio, Columbus, Ohio.*

DEAR SIR:—I have your communication of February 1, 1917, in which you ask my opinion upon matters set out in said communication, which reads as follows:

> "On May 27, 1915, under the provisions of section 1178 of the General Code, Clinton Cowen was appointed and commissioned state highway commissioner, for the term ending June 16, 1919, the appointee being confirmed by the senate the day of appointment.
>
> "By act of the general assembly, passed May 17, 1915, approved by the governor June 2, 1915, said section 1178 of the General Code was repealed, and a new section under the same number enacted, the new section under the constitutional provisions becoming effective on or about September 6, 1915.

"Subsequent to May 27, 1915, no highway commissioner has been appointed, Mr. Cowen still acting in that capacity.

"Under the above statement of facts, I beg to be advised as to the present status of the head of this department."

Your inquiry has to do with the construction of what is known as the Cass highway law, which was enacted by the eighty-first general assembly and is found in 106 O. L. 574. In order to understand the provisions of this act, especially the provisions relating to the repeal of former acts, it will be necessary to note briefly the recent history of laws relating to highways.

In 99 O. L. 308 a state highway department was created. In 101 O. L. 200 there is an act providing that the state highway commissioner be directed to recommend a system of highway laws for Ohio, to take the place of all existing road laws. At page 341 of said 101 O. L. there is an act which simply authorized the township trustees to expend certain moneys levied and collected under a former act.

In 102 O. L. 333 there is an act, the title of which is as follows:

"Creating a state highway department, defining the duties thereof, and providing aid in the construction and maintenance of highways, and to repeal certain sections of the General Code."

This act repeals many sections of statutes; then provided in the very last section that:

"This act shall supersede all sections and parts of sections or acts and parts of acts, not herein expressly repealed, which are inconsistent herewith."

But Governor Harmon, when the bill was presented to him, vetoed the section of said act which provided for a levy to create a fund to carry out the provisions of the act, and also vetoed the two sections which repealed all former sections and acts inconsistent with the said act.

Then the legislature, in order to provide for a fund to carry out the provisions of the act found in 102 O. L. 333, enacted the law found in 103 O. L. 155, which merely provided for a levy and did not seek to repeal any former statutes or sections thereof.

Now, with this short history of our recent legislation, in reference to highways and highway departments, in mind, let us turn to the act found in 106 O. L. 574, which is the act now in force. Let us first notice the title of the act, which provides as follows:

"To provide a system of highway laws for the state of Ohio, and to repeal all sections of the General Code, and acts inconsistent herewith."

Let us next look to the repealing clause. In the first part of the repealing section, the legislature repealed over eight hundred sections of statutes, thus endeavoring to repeal all sections of statutes inconsistent therewith, as provided for in the title of the act. But the legislature fearing that it might have omitted something, specifically repealed the entire acts as found in:

101 O. L. 200-201.
101 O. L. 341.
102 O. L. 333-349.
103 O. L. 155.

The language used in said repealing section is as follows:

"An act entitled, 'An act to provide for a new highway law for Ohio to take the place of all existing road laws.' Passed May 10, 1900 (101 O. L. pp. 200-201).

"An act entitled, 'An act to authorize the township trustees to expend certain moneys levied and collected under the authority of an act entitled, 'An act to further supplement section 4889 of the Revised Statutes of Ohio, passed April, 1902,' passed May 10, 1901 (101 O. L. p. 341.)

"Sections 1, 2, 4, 5, 6, 7, 8 and 9 of an act entitled, 'An act providing a levy and to create a fund for the purposes provided in the act passed May 31, 1911, entitled, "An act creating a state highway department, defining the duties thereof and providing aid in the construction and maintenance of highways and to repeal certain sections of the General Code,' approved June 9, 1911 (102 O. L. pp. 333-349), and for other purposes defined herein. (103 O. L. p. 155.)

"An act entitled, 'An act creating a state highway department, defining the duties thereof, and providing aid in the construction and maintenance of highways, and to repeal certain sections of the General Code.'" (102 O. L. p. 333.)

These acts, which are repealed in whole, embody all the recent legislation had in reference to highways and highway departments, as will be noted by referring to the brief history of highway legislation set out herein.

But lest it might have still overlooked some section or provision relating to highways and highway departments, the legislature used the following strong language in the last paragraph of the repealing section:

"This act shall supersede all acts and parts of acts not herein expressly repealed, which are inconsistent herewith."

Then lest a repeal of some act might be construed to revive some law repealed by the act repealed, the legislature further provided as follows:

"And the repeal herein of any acts or sections of the General Code shall not revive a law repealed by any act or section herein repealed."

Thus the legislature swept the statutes of Ohio three times, in order to clear them of every vestige of matter that might in any way relate to highways or officers connected with highway matters. If there ever was a statute enacted by the legislature in which it was the intention of the legislature to clear away everything that ever existed upon the subject-matter with which the statute dealt, and leave itself absolutely a clear field, the statute under consideration did this.

We are safe in assuming that it was the intention of the legislature to leave unrepealed no statutes or sections thereof pertaining to highways or matters relating thereto, other than the act under consideration, commonly known as the Cass highway law.

Now, what force and effect can be given to these repealed statutes and sections thereof, in arriving at a conclusion as to any questions pertaining to the highways or the highway department? None whatever.

Judge Donahue, in rendering the opinion of the court in the late case of The State of Ohio ex rel. v. P. C. O'Brien, et al., has this to say of repealed statutes:

"The repeal of the statute is the end of that statute. To all intents and purposes it is the same as if it had never existed."

This language used by Judge Donahue, in rendering the opinion of the court, is none too strong.

The language used by Judge Donahue in said case is not new or strange. It embodies the principle which has been followed for almost one hundred years in the interpretation of the effect of repealing statutes upon the statutes repealed.

Lord Chief Justice Tindall in Key v. Goodwin, 4 Moore and Payne 341, 351 (decided in 1830), used the following language:

> "The effect of a repealing statute I take to be to obliterate the statute repealed as completely from the records of parliament as if it had never passed, and that it must be considered as a law that never existed, except for the purpose of those actions or suits which were commenced, prosecuted and concluded while it was an existing law."

This language of Chief Justice Tindall has been quoted and approved in many decisions in our own country, of which the following are a few:

36 Wis. 344, 349.
133 Wis. 183.
61 Ill. 31, 34.
4 Kas. 489, 500.
35 Barb. 599, 600.
50 Miss. 677, 681.
4 Ore. 119, 122.

In approving the principle laid down by Chief Justice Tindall, the court in the case reported in 50 Miss. 677 says:

> "Sustained, as this case is, by so great a weight of authority, we accept it as an accurate statement of the general rule."

In 4 Ore. 119 the court, in approving the above language, says:

> "Such is the recognized rule in this country."

Possibly there is no case decided in our country that goes into this matter as fully as the one reported in 1 Hill (N. Y.) 324. In this case the court went to great length in discussing the following question, using the language of the court:

> "The question is thus reduced to one of mere construction on the repealing clause before us."

In the opinion Cowen, J., reviews the cases fully. He approves the finding of Lord Chief Justice Tindall. He quotes from Lord Mansfield; from Best, C. J. He investigates Bracton's and Coke's Institutes. He looks into the Roman law. He investigates the civil law and it is his conclusion that all these, without one dissenting voice, leads to this conclusion as set out by the court, namely:

> "On authority, then, at least, no rights arising under the repealed statutes can be saved, except by express reservation in the repealing statute, or when those rights have been perfected, by taking every step which depended for its force upon the former act. Dwarris expresses the result of the cases this way:

"'When an act of parliament is repealed, it must be considered, except as to those transactions passed and closed, as if it never existed.'"

But I am not unmindful of another line of decisions which have to do with statutes that merely re-enact other statutes and repeal the statutes which have theretofore existed. The principle derived from this line of cases might be stated as follows:

The simultaneous repeal and re-enactment of a statute is a mere affirmance of the original act, and not a repeal in the strict or constitutional sense of the term. But to have this effect the authorities are nearly unanimous that the following conditions must obtain:

1. The language or the provisions of the repealing statute must be identical or practically identical with the language and the provisions found in the act repealed.

2. That nothing is to be found in the repealing statute which would indicate that the legislature intended to repeal the former act.

There are a great many decisions which seem to sustain the aforesaid two propositions, but I want to quote from only a few.

In a case reported in 7 N. D. 135, the court in the syllabus found as follows:

"It is only when the provisions of a repealing statute are identical, or practically identical, with the provisions in the statute repealed, that the provisions can be considered as continuing in force without intermission."

In 45 Neb. 724, the court lays down the law in the syllabus as follows:

"It had before that time (the adoption of the constitution) been definitely settled as a rule of construction that the simultaneous repeal and re-enactment of a statute in terms, or in substance, is a mere reaffirmance of the original act, and not a repeal in the strict or constitutional sense of the term."

In 117 N. C. 753 the syllabus sets forth the finding of the court as follows:

"The re-enactment by the legislature of a law in the terms of a former law at the same time it repeals the former law is not in contemplation of law a repeal, but it is a reaffirmance of the former law, whose provisions are thus continued without intermission."

In the opinion the court says that the re-enacting statute in this case was verbatim with the statute repealed.

To support the second proposition set out above, namely, that the intention of the legislature controls, I desire also to quote from a few cases.

In 138 Ill. App. 297, the following principle was laid down in the syllabus:

"Where there is apparent no conflict or intention to supersede, a re-enactment of an earlier statute has been held a continuance, not a repeal, even though a later act expressly repeals the earlier."

In 115 Iowa 657, 665, the court lays down the following principle:

"But where the prohibitory part of the law in the revision is in substantially the same language as in the original act, and there is a manifest purpose to continue the old law, we do not think such re-enactment repeals the prior law in such sense as to annul or abrogate decrees and proceedings had thereunder."

In 48 N. Y. 540, the court discussed the proposition as to the effect of re-enacted statutes upon statutes in whose place the statutes were re-enacted. The court laid down the rule stated in many cases of this nature, but in the opinion the court gives the reasoning as follows:

> "Although the first seven sections of chapter 29 are contained in this chapter, I do not think it was the intention of the legislature to repeal them or suspend their operation until chapter 41 should go into effect, * * * or they probably would have said so in some appropriate language and would not have left it to mere inference."

In a case reported in 139 Wis. 37, the court finds as follows:

> "Provisions of a prior law retained in an amendatory act are not deemed to have been repealed and again re-enacted, but as having existed and continued from the time of their original enactment."

In the opinion the court reasons as follows:

> "This act is entitled 'An act to amend sections 1, 2, 3, 6 and 7, chapter 30, laws of 1903, etc. * * *' The petitioner avers that the effect of this amendment was to repeal all of chapter 230, laws of 1903, and to enact a new law on the subject of the sanitary regulation of bakeries, which is embraced in chapter 486, laws of 1907. To effect such a result the new legislation must show with reasonable clearness that such was the legislative intent. This we do not find from this chapter. The title declared that it is an act to amend certain provisions of the former law and to enact new sections."

Thus we see that in all these cases we are after all driven to the necessity of going to the law itself and ascertaining what really was the intention of the legislature in enacting the law.

When we look at the language of the act under consideration in order to arrive at the intention of the legislature, it seems to me that there can be no question that the legislature intended not merely to re-enact an old statute, but to enact a new one and repeal everything in conflict with it. This seems evident from the reasons heretofore given in this opinion.

In considering this matter, it must be remembered that Hon. Clinton Cowen was appointed state highway commissioner for a term of four years, under and by virtue of section 1 of the act found in 102 O. L. 333, which section reads as follows:

> "Section 1. There shall be a state highway department for the purpose of affording instruction, assistance, and co-operation in the construction, improvement, maintenance and repair of the public roads and bridges of the state, under the provisions of this chapter. This department shall be divided into three bureaus to be known as the bureau of construction, the bureau of maintenance and repair, and the bureau of bridges. The governor, with the advice and consent of the senate, shall appoint a state highway commissioner who shall serve for the term of four years. He shall be a competent civil engineer and experienced in the construction, improvement, maintenance and repair of roads and bridges, and shall give his whole time and attention to the duties of his office."

This act created a highway department and placed a state highway commissioner at the head of the department, with a four-year tenure of office. As said before, Hon. Clinton Cowen was appointed as head of the department under the provisions of this act. But when the act was repealed, the department fell and necessarily the head of the department fell at the same time, and this, notwithstanding the fact that the term of office for which he had been appointed had not expired.

It is true that the language used in sections 171 and 174 of the act (106 O. L. 574, 623) creating the present state highway department is very similar to the language used in sections 1 and 4 (102 O. L. 333). The language used in the latter two sections is as follows:

"Section 1. There shall be a state highway department for the purpose of affording instruction, assistance, and co-operation in the construction, improvement, maintenance and repair of the public roads and bridges of the state, under the provisions of this chapter. This department shall be divided into three bureaus to be known as the bureau of construction, the bureau of maintenance and repair, and the bureau of bridges. The governor, with the advice and consent of the senate, shall appoint a state highway commissioner who shall serve for the term of four years. He shall be a competent civil engineer and experienced in the construction, improvement, maintenance and repair of roads and bridges, and shall give his whole time and attention to the duties of his office.

"Section 4. Subject to the approval of the governor, the state highway commissioner shall appoint three deputy highway commissioners, not more than one of whom shall be of the same political party as himself, who shall be competent civil engineers, and serve during the pleasure of the commissioner. One of these deputy highway commissioners shall be experienced in road construction and improvement, and acting under the direction of the highway commissioner, shall have supervision of all matters pertaining to road construction and improvement as provided for in this chapter. Another of said deputies shall be experienced in road maintenance and repair, and acting under the direction of the highway commissioner shall have supervision of all matters pertaining to road maintenance and repair. Another of said deputies shall be experienced in the design, construction, and maintenance and repair of culverts and bridges, and acting under the direction of the state highway commissioner, shall have supervision of all matters pertaining to the design, construction, maintenance and repair of culverts and bridges. The deputy highway commissioner in addition to performing the duties above assigned to them, shall perform such other duties in connection with this department as may be designated by the state highway commissioner. The salary of each of said deputy highway commissioners shall be $3,000 per annum. In addition to their salaries, the deputy highway commissioners shall each be paid their actual traveling expenses not to exceed $1,200 in any one year. The highway commissioner shall require each deputy highway commissioner to give bond in the sum of $5,000 with such sureties as he approves."

The language used in the former is as follows:

"Section 171. There shall be a state highway department for the purpose of affording instruction, assistance and co-operation in the construction, improvement, maintenance and repair of the public roads and bridges of the state, under the provisions of this chapter. The governor, with the

advice and consent of the senate, shall appoint a state highway commissioner who shall serve for the term of four years, unless sooner removed by the governor. He shall give his whole time and attention to the duties of his office.

"Section 174. The state highway commissioner shall appoint three deputy highway commissioners, one of whom he shall designate as chief highway engineer and all of whom shall be competent civil engineers and serve during the pleasure of the commissioner. One of these deputy highway commissioners shall be experienced in road construction and improvement, and acting under the direction of the highway commissioner, shall have supervision of all matters pertaining to road construction and improvement as provided for in this chapter. Another of said deputies shall be experienced in road maintenance and repair, and acting under the direction of the state highway commissioner shall have supervision of all matters pertaining to road maintenance and repair. Another of said deputies shall be experienced in the design, construction, maintenance and repair of culverts and bridges, and acting under the direction of the state highway commissioner, shall have supervision of all matters pertaining to the design, construction, maintenance and repair of culverts and bridges. The deputy highway commissioners in addition to performing the duties above assigned to them, shall perform such other duties in connection with this department as may be designated by the state highway commissioner. The salary of each of said deputy highway commissioners shall be three thousand dollars per annum. In addition to their salaries, the deputy highway commissioners shall each be paid their actual traveling expenses not to exceed one thousand two hundred dollars in any one year. The state highway commissioner shall require each deputy highway commissioner to give bond in the sum of five thousand dollars with such sureties as he approves."

But the mere fact that the wording of the act creating the present highway department is much the same as the language used in the act creating the former highway department, and under which Hon. Clinton Cowen on May 27, 1915, was appointed state highway commissioner, has no further bearing other than to aid in arriving at the intention of the legislature in enacting the new law, which after all is what controls.

Whether the language in the two acts is similar or dissimilar, the department created under the act now in force entirely and completely replaces the department provided for in the act repealed by the act now in force. An entirely new order of business is adopted and under this new order of business the governor of the state is authorized to appoint a state highway commissioner. Not the state highway commissioner appointed under the act repealed is to perform the duties and carry out the provisions of the present act, but a state highway commissioner appointed by the governor of the state, under the authority of the act now in force, is to perform the duties and carry out the provisions of the present act.

That this was the intention of the legislature when it enacted the Cass highway law seems evident from the "saving provisions" of the act, found in sections 302 and 303 thereof (106 O. L. 663).

Section 302 reads as follows:

"This act shall not affect pending actions or proceedings, civil or criminal, pertaining to the construction, improvement, maintenance, supervision or control of highways, bridges or culverts, brought by or against the county commissioners, county surveyor, township trustees, or road superintendent under the provisions of any statute hereby repealed, but the same may be

prosecuted or defended to final determination in like manner, as if such statute had not been repealed."

Section 303 reads in part as follows:

"This act shall not affect or impair any contract or any act done, or right acquired of any penalty, forfeiture or punishment incurred prior to the time when this act or any section thereof takes effect, under or by virtue of any law so repealed, but the same may be asserted, completed, enforced, prosecuted or inflicted as fully and to the same extent as if such laws had not been repealed. * * *"

By these sections the legislature aimed to save pending suits and also to save contracts already entered into, but there is no effort made on the part of the legislature to save any other provisions or parts of former acts, and it is proper to assume that the legislature did not intend to save any other parts or provisions of former acts.

Another circumstance that has a direct bearing upon the question submitted is this:

The act now in force is a complete, comprehensive and all inclusive act. It not only repeals all previous acts and sections thereof having to do with highway matters, but it provides a complete and entire scheme for road building and necessary officials for carrying out the same.

Hence, from any angle we may view the question, from any standpoint we may consider it, the conclusion is reasonably inferable that the highway department created under the act found in 102 O. L. 333 was entirely repealed and superseded by the highway department created under the act now in force (106 O. L. 574); and at the same time that the old department fell, the officer at the head of the department fell and his term of office ceased.

In 57 O. S. 415, the court lays down the law in the syllabus as follows:

"An office created by an ordinance is abolished by the repeal of the ordinance, and the incumbent thereby ceases to be an officer."

At page 423 of the opinion we have the following language:

"There is no question but that the council had the power to repeal the former ordinance; and this being so, and all the offices created by it, whatever they were, being thus abolished, the incumbents ceased to be officers, for there can be no incumbent without an office."

In rendering this opinion I am mindful of the fact that a former attorney-general of the state rendered an opinion in which he held the opposite view in reference to this act. His opinion is found in Vol. II of the Opinions of the Attorney-General for the year 1915, page 1814. While I am aware that there is some authority in law which would warrant a conclusion such as he draws, and while there might be some doubt as to the correctness of my conclusion reached herein, yet it seems to me that the weight of authority sustains the opinion herein reached. He bases his opinion upon the fact that the Cass highway law does not provide that the new department shall succeed to all the rights, powers and duties of the old department. A part of his opinion reads as follows:

"There is, however, one omission in said bill which is so potent, in my judgment, as to preclude any construction other than that the legislature

intended the new department merely to succeed the old. This omission is the failure of the legislature, in said bill, to make any provisions that said new department shall succeed to all the rights, powers and duties of the old department."

But it must be remembered that the Cass highway law repeals specifically every section and every act that theretofore had anything to do with highway matters, excepting those matters set out in the saving clause of the new act. There were no rights, powers and duties of the old department left to be performed; the acts providing for the old department had all been repealed; and if the legislature had made such provisions, they would have been unconstitutional under the ruling of the supreme court in the late case of The State of Ohio ex rel v. P. C. O'Brien et al.

The opinion so rendered by the former attorney-general, was based mainly upon the opinion which he rendered, found on page 1704 of said second volume of the 1915 Opinions of the Attorney-General. The meat of this opinion is found on page 1709, in the following language:

"Upon this analysis of section 1082, therefore, it appears that though designed for the purpose of providing for the transition of activities and functions from the one state board to the other, it does not preserve the continuity of the subordinate bureaus, departments, etc., or the personnel of the departmental force as it formerly existed, in the face of the fact that the general assembly had before it, in the shape of original section 1089 as enacted in 1913, language appropriate for such a purpose.

"The conclusion irresistibly follows, then, that the general assembly did not intend that the subordinate positions in the department of the agricultural commission should continue to exist, notwithstanding the abolition of the commission itself; but that, on the contrary, the whole departmental organization should be abolished and a new one should be provided for by the board of agriculture."

His opinion holds that the act creating the agricultural board did not preserve the continuity of the subordinate bureaus, departments, etc., of the act creating the agricultural commission or the personnel of said bureaus or departments. Let us take this argument as correct. As shown in my opinion above, there is nothing whatever in the Cass highway law to preserve the continuity of the state highway department, or the personnel of said department, from the act under which the Hon. Clinton Cowen was appointed state highway commissioner and the law now in force.

Hence, I am of the opinion as above set forth, notwithstanding the opinion heretofore rendered.

Further, in arriving at the conclusion as to what was the intention of the legislature in passing the said Cass highway law and the intention of those vitally connected with the passage of the same, there is another circumstance which to me is very significant and which strengthens my opinion that it was the intention of the legislature, in enacting said law, and the intention of Hon. Frank B. Willis, governor of the state of Ohio, in signing the same and filing it with the secretary of state and thus making it a law, that said law should supersede and take the place of all former acts and parts of acts in every respect. And especially was it the intention of the legislature and those vitally connected with the passage of said law that it should supersede the act found in 102 O. L. 333, as it related to the head of the state highway department, namely, the state highway commissioner.

This circumstance is to be found in the state records. The said records show that on April 1, 1915, Hon. Clinton Cowen was appointed to the position of state highway commissioner, to take the place of Hon. James R. Marker. The said

records show that on April 1, 1915, Hon. Frank B. Willis, governor, appointed Hon. Clinton Cowen to the position of state highway commissioner, to take the place of Hon. James R. Marker, resigned, said Clinton Cowen's term to begin on April 1, 1915, with no limit fixed as to when his term of appointment should expire. Under the appointment his bond was fixed at $10,000.00.

On May 27, 1915, Hon. Frank B. Willis, governor, appointed Hon. Clinton Cowen to the position of state highway commissioner, term to begin on June 17, 1915, with no limit fixed as to when his term of appointment should expire, so far as the report made to the state auditor shows. Under the appointment his bond was fixed at $10,000.00.

On August 31, 1915, Hon. Frank B. Willis, governor, appointed Hon. Clinton Cowen to the position of state highway commissioner, term to begin on September 4, 1915. Under this appointment the term of said Clinton Cowen was to end September 3, 1919, and his bond was fixed at $20,000.00.

Under each one of these appointments the records show that Hon. Clinton Cowen gave bond and took the oath as provided by law.

Let us further remember, in connection with the above facts, that Hon. James R. Marker's term as state highway commissioner would have expired on June 16, 1915, had he served until the end of the term for which he was originally appointed. This the said records show. Further, the Cass highway law was passed May 17, 1915; was approved by the governor June 2, 1915; and was filed with the secretary of state, June 5, 1915, which would make said law become effective under the constitution at the end of ninety days after filing the same with the secretary of state, or on September 4, 1915.

Now, let us recapitulate:

1. Hon. James R. Marker's term expired June 16, 1915, had he served his full term under his appointment.

2. On April 1, 1915, Hon. Clinton Cowen was appointed for a term to begin on April 1, 1915, but no time was fixed at which it should expire. Why? Because he was appointed to fill the unexpired term of Hon. James R. Marker.

3. On May 27, 1915, Hon. Clinton Cowen was appointed to the position of state highway commissioner, term to begin on June 17, 1915, and in the report to the state auditor no time limit was fixed as to the length of his term. Why was his term to begin June 17, 1915? Because Hon. James R. Marker's term would have expired June 16, 1915, which term was completed by Hon. Clinton Cowen. Why was no time fixed in the report to the state auditor at which his term of office would expire under the second appointment? Because at the time of his second appointment a new highway law had been enacted by the legislature and would, unless referred to the people, become effective in due course of time; and it was the intention of the parties interested at that time that said Clinton Cowen should merely serve up until the time that the new act would become effective.

4. On August 31, 1915, Hon. Clinton Cowen was appointed to the position of state highway commissioner, his term to begin September 4, 1915, and to end September 3, 1919. Why was he reappointed? Why was he reappointed with his term to begin on September 4, 1915? Because it was the intention of those connected with the enactment of the new highway law that the new law should supersede and replace the old, and that it was necessary, therefore, to reappoint him to take his place under the new law because he could no longer hold under the old, it expiring on September 3, 1915.

5. The bond under the first two appointments was fixed at $10,000.00, which is the bond provided for under the old act, but under his third appointment, to take effect on September 4, 1915, the bond was fixed at $20,000.00, the amount fixed under the new law.

6. Hon. Clinton Cowen under each appointment took the oath and subscribed to the affidavit as provided for by law.

The conclusion to be drawn from all the above is irresistible, and that is, that it was the intention of the legislature and those vitally concerned with the enactment of the Cass highway law, that it should supersede and take the place of all former acts in reference to all matters, except those matters provided for in the saving clause.

Some of these latter facts set out in the opinion are not embraced in your communication, but they are matters of record and are important in the matter of answering your query.

Now, what is the status of Hon. Clinton Cowen in reference to the position of state highway commissioner? He was appointed state highway commissioner by Hon. Frank B. Willis for a term of four years, with his term of office to begin on September 4, 1915, and to end on September 3, 1919. His bond was fixed at $20,000.00, which bond he gave. He also took the oath of office as provided by law under and by virtue of his appointment.

As said before, Septemebr 4, 1915, was the day upon which the Cass highway law became effective. The Cass highway law provided for a bond of $20,000.00, while the old law provided for bond of $10,000.00. Hence, on September 4, 1915, Hon. Clinton Cowen began his duties under and by virtue of the Cass highway law, and he is still serving under said appointment and under said law.

But section 171 of the Cass highway law, being section 1178 G. C., provides that the appointment must be made with the advice and consent of the senate. The records develop that the appointment of Hon. Clinton Cowen for the term beginning on September 4, 1915, has never been confirmed by the senate. Hence, his appointment must be sent to the senate for confirmation.

I am aware that the Hon. Frank B. Willis on December 29, 1916, in almost the last act he performed while governor, placed upon the records of the governor's office an order revoking his appointment of Hon. Clinton Cowen to the position of state highway commissioner, for the term beginning September 4, 1915, but this order could have no legal effect. Mr. Cowen had taken his position under the appointment, had given bond in the sum of $20,000.00 and filed the same with the secretary of state as provided by law, had taken the oath of office and had performed the duties of the office under said appointment for almost sixteen months. No mere order, placed upon the journal in the governor's office, could have any effect upon all this, in the way of revoking said appointment.

Furthermore, even though we should assume that the Cass highway law did not entirely supersede the act under which Hon. Clinton Cowen was appointed state highway commissioner to take effect on June 16, 1915, yet when he elected to take office under the appointment to become effective on September 4, 1915, he gave up the office and position he was holding under the appointment effective on June 16, 1915, and all the rights he had under and by virtue of said appointment. Hence, it is clearly evident that Hon. Clinton Cowen has no rights to the office which he now holds, excepting under the appointment which became effective on September 4, 1915. And if this appointment could be considered as revoked under the order of Hon. Frank B. Willis, governor, made on December 29, 1916, he would have no rights in the office and would simply be performing the duties of the same as a *de facto* officer.

That Hon. Clinton Cowen cannot hold his present position under the appointment made to become effective June 17, 1915, but only under the appointment made to become effective on September 4, 1915, is sustained by the courts, from a few of which I desire to quote. In Handy, et al., v. Hopkins, et al., 59 Md. 157, we find the following facts were before the court: Four persons were elected county commissioners in 1879, and were in office at the time of the election in 1881. Their

term not having expired, these same four persons with a fifth were returned as elected and commissioned under the election of 1881. The court afterwards declared the election of 1881 null and void. The question then was as to the status of these four officials. Upon this matter the court held in the syllabus as follows:

"Four persons were elected county commissioners at the general election of 1879, and were in office at the time of the election of 1881. They were candidates for re-election, and together with a fifth person were returned as elected, at the last mentioned election; and they were thereupon duly commissioned as such newly elected commissioners. They accepted the commissions thus issued, and professed to enter upon the discharge of the duties of their office, in pursuance and by virtue of the last election and commissions. They in no manner claimed that they were in office, or were entitled to hold office, by virtue of the election of 1879, but, on the contrary, they distinctly claimed that they had been duly elected at the election of 1881, and that they were rightly holding under that election. Held:

"That under such circumstances, the court having declared the election of 1881 null and void, these parties could not be heard to claim that they were entitled to hold over by virtue of the election of 1879."

Upon page 171 of the opinion the court say:

"Four of the five appellants, were elected county commissioners at the general election of 1879, and were in office at the time of the election of 1881. They were candidates for re-election, and were returned as elected, at the last mentioned election, and they were thereupon duly commissioned as such newly elected commissioners. They accepted the commission, thus issued, and professed to enter upon the discharge of the duties of their office, in pursuance and by virtue of the last election and commission. These facts were distinctly charged by the contestants, and were as distinctly admitted by the appellants. They in no manner claimed that they were in office, or were entitled to hold office, by virtue of the election of 1879; but on the contrary, they distinctly claimed that they had been duly elected at the election of 1881, and that they were rightly holding under that election. Now, under such circumstances, how is it possible that they can be heard to claim that they are entitled to hold over by virtue of the election of 1879? Their acts and professions must be allowed their full meaning and import, and by those all claim to hold by virtue of the election of 1879, is shown to have been surrendered and given up. Good faith to the public required that there should be no doubt or equivocation as to the authority by virtue of which the parties claimed to hold their office, and having assumed and professed to hold under the election of 1881, they are not at liberty to repudiate their own acts and professions, and attempt to resume a title that they had abandoned or surrendered, if, under other circumstances, such title could be maintained. Nor is it any answer to say that because the court, after investigation, declared the election of 1881 null and void, therefore, they were remitted to their former right to hold by virtue of their election in 1879, and that they are entitled to be regarded as having continuously held office by virtue of that election. The election of 1881 was not in effect null and void, until declared so, by the judgment of a competent tribunal; it was in all respects good and valid until declared otherwise; and the appellants were fully authorized to act in the discharge of the duties of their office, and all their official acts are as valid as if the election had been declared in all respects legal. They had not

only the color of a due election, but they had all the forms necessary to invest them with full authority of the office; and these they accepted and complied with, with an intention to hold under the last election and none other."

It will be noted that this case is even stronger than the case which is presented to me for an opinion because in this case the officers were elected by the people of the county while in the case before me it is merely an appointive office.

There is also a case reported in 45 Conn. 191 (Farrell v. The City of Bridgeport) which is very much in point with the case before me. In the syllabus of this case we find the following facts and conclusions of law set out:

"The charter of the city provided for the appointment of policemen to hold office until regularly removed or suspended. F had held the office of policeman for three years under the charter, when the common council, under a power given by the charter to make ordinances relative to the city police, passed an ordinance that the appointments should be for one year. F was nominated and confirmed under the ordinance for one year, and accepted and exercised the office. Held that, if the commissioners and council had no right by a mere new appointment of F for the limited term, to terminate his tenure of office under his former appointment, yet as he accepted and exercised the office under the new appointment, he could not claim that his tenure of the office was a continuance of his original tenure."

And in the opinion of the court at page 193 we find the following language:

"The council could not of itself, by the enactment of an ordinance declaring that a policeman should hold his office by virtue of an annual appointment, put an end to the right of Farrell to hold the office to which he had been duly appointed in 1869; but the commissioners accepted the ordinance as the rule of their conduct, and subsequently to the passage thereof made all nominations for policemen for the term of one year; and Farrell, in consideration of the new and limited appointment, waived all claim to hold office under the former one; he accepted in 1872 an office for one year expressly established in place of and as a substitute for one of a different tenure; he intentionally discharged the duties and received the salary belonging to it; and by his acceptance and exercise of this new and substituted office surrendered all claim to, and must be holden to have resigned, the former one. It will not, therefore, now avail him to insist that the commissioners and council were not authorized to allow him to exercise the last one."

This case also is directly in point to the effect that Hon. Clinton Cowen cannot be holding under the appointment to become effective June 17, 1915.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

70.

CITY COUNCIL—OF CITY OF SPRINGFIELD—MAY CHANGE SALARY OF POLICE JUDGE—DURING TERM OF OFFICE—ARTICLE II, SECTION 20 OF CONSTITUTION DOES NOT APPLY.

The city council of the city of Springfield may change the amount contributed by the city to the salary of the police judge of that city, so as to make such change effective during the term of the incumbent, provided that the amount of such contribution does not exceed two thousand dollars.

COLUMBUS, OHIO, February 28, 1917.

HON. GOLDEN C. DAVIS, *Police Judge, Springfield, Ohio.*

DEAR SIR:—I acknowledge receipt of your letter of February 3rd in which you state that you are the judge of the police court of the city of Springfield, serving by virtue of an election for a term of four years, ending December 31st, 1919; and inquiring whether if the city commission of the city of Springfield should increase the compensation paid by the city to the judge of the police court, such increase would affect the compensation to which you are entitled during your present term. You state in this connection that no change in the amount paid by the city to the judge of the Springfield police court has been made since some time prior to the year 1900.

I assume in the consideration of your question that the police court of the city of Springfield has a legal existence, although my attention has not been directed to the act under which it exists. The special compensation referred to by you is payable under the provisions of section 4568 of the General Code, which is as follows:

> "The judge of the police court shall receive no fees or perquisites, but shall receive such annual compensation, not to exceed two thousand dollars, as the council prescribes, payable quarterly, from the city treasury, and such further compensation, payable from the county treasury, as the commissioners of the county deem proper. Nothing in this section shall prohibit the police judge from receiving the fees for or taking the acknowledgment of instruments, depositions, and affidavits which are allowed to justices of the peace for like services."

If Springfield were governed by the general municipal code of the state, the question which would arise here would be whether or not in the exercise or the power and duty prescribed by the section which is quoted its council would be governed or limited by section 4213 of the General Code, which is as follows:

> "The salary of any officer, clerk or employe shall not be increased or diminished during the term for which he was elected or appointed, and, except as otherwise provided in this title, all fees pertaining to any office shall be paid into the city treasury."

I think that there is grave doubt as to whether there is any relation between these two sections. As it originally stood in the municipal code of 1902 (96 O. L. 61), the provision now found in section 4213 G. C. was a part of section 126 thereof, which provided as follows:

> "Council shall fix the salaries of all officers, clerks and employes in the city government, except as otherwise provided in this act, and, except as

otherwise provided in this act, all fees pertaining to any office shall be paid into the city treasury. The salary of any officer, clerk or employe so fixed, shall not be increased or diminished during the term for which he may have been elected or appointed. * * *"

I do not think that the judge of the police court was to be considered as an officer "in the city government" within the meaning of said original section 126. The police courts owed their existence to special acts of the legislature establishing courts. Their judges were not in every sense of the word municipal officers, certainly not officers of the municipal corporations as such. Rather, they were officers of courts established by the legislature. It is true that sections 190 to 192 of the municipal code of 1902 in a way referred to existing police courts as if the general assembly had regarded them as constituting the judicial departments of the municipalities in which they existed. However, no change whatever was made and all laws relating to police courts were expressly continued in effect by section 192.

For these reasons, I would incline strongly to the opinion that original section 126 of the municipal code did not apply to the council in fixing the contribution of a municipal corporation to the salary of the police judge.

Section 4213 G. C. is merely a revision of section 126 of the municipal code, no amendment of the section having taken place otherwise than in process of codification; it must, therefore, be given the same meaning as that of the original section.

But, whether or not section 4213 G. C. would apply were the city of Springfield governed by the general municipal code, I am satisfied that it does not apply to that city because it is part of the municipal code, whereas Springfield is governed by a charter. I find the following provision in the charter of Springfield, section 27:

"The city commission shall fix by ordinance the salary or rate of compensation of all officers and employes of the city entitled to compensation, other than their own; and may require any officer or employe to give a bond for the faithful performance of his duty, in such an amount as it may determine, and it may provide that the premium thereof shall be paid by the city."

There is no limitation here respecting a change of compensation during the term of office of the officer affected thereby. It is apparent, therefore, that the commission of the city of Springfield may change the compensation of an officer of the city and make the change effective during the term for which he was elected or appointed.

It seems clear that the city commission of the city of Springfield is the "council" referred to in section 4568 of the General Code. It has all legislative power of the city. Section 2 of the charter provides as follows

"There is hereby created a city commission to consist of five electors of the city elected at large, who shall hold office for a term of four years beginning January 1st after their election, excepting that the two members elected at the first election by the lowest vote shall hold office for the term of two years only.

"All the powers of the city, except such as are vested in the board of education and in the judge of the police court, and except as otherwise provided by this charter or by the constitution of the state, are hereby vested in the city commission; and, except as otherwise prescribed by

this charter or by the constitution of the state, the city commission may by ordinance or resolution prescribe the manner in which any power of the city shall be exercised. In the absence of such provision as to any power, such power shall be exercised in the manner now or hereafter prescribed by the general laws of the state applicable to municipalities."

It is my opinion, therefore, that so far as municipal questions are concerned the city commission of Springfield, acting as the "council" for the purpose of section 4568 of the General Code, may within the limits of that section change the compensation payable by the city to the judge of the police court of Springfield at any time, making the change effective during the term of office of the judge who is in office.

Article II, section 20 of the Constitution of the state provides:

"The general assembly, in cases not provided for in this constitution, shall fix the term of office and the compensation of all officers; but no change therein shall affect the salary of any officer during his existing term, unless the office be abolished."

Clearly, the limitation in the latter part of this section is coextensive only with the duty laid down in the first part. That is to say, the provision that "no change therein" shall affect the salary during the existing term, etc., relates only to changes made by the general assembly in salaries fixed by the general assembly.

Whether or not it is competent for the general assembly in creating a court such as a police court to authorize the county commissioners and the council of a municipal corporation to fix the salary of the judge thereof, instead of fixing such salary itself is a question which might be raised and upon which authority perhaps on both sides might be found. (See State ex rel. v. Board of Education, 21 C. C. 785); to decide this question would be to pass upon the constitutionality of section 4568 G. C., which has been in force for a considerable period of time and has been acted upon during that period. I have no disposition to consider this question, but will assume that section 4568 G. C. is constitutional. If it is valid and it is competent for the council of Springfield, or any other city acting under it, to fix the salary of the police judge, payable from the city treasury, then it is clear that the last part of section 20 of article II of the Constitution does not apply to the city council and the judge for the reason that such salary is not one of those to which the section applies at all.

I may add that on the authority of State ex rel. v. Madigan, 16 C. C., n. s., 202, the municipal questions above discussed might be decided the other way and yet the same result reached because of the fact, as stated by you, that no change has been made in the city's portion of the salary of the police judge of Springfield since before the municipal code of 1902 was adopted.

It is not necessary, however, to rely upon this decision, but for the other reasons above stated, I am of the opinion that assuming the constitutionality of section 4568 of the General Code and the legality of the existence of the police court of Springfield, the city commission of that city, acting under said section, may at any time change the salary payable by the city to the judge of the court, provided that such contribution may not exceed two thousand dollars; and that such change would affect the salary of the incumbent in office at the time it was made and apply to him during the remainder of his term.

Very truly yours,
JOSEPH McGHEE,
Attorney-General.

71.

VALENTINE ANTI-TRUST LAW—SENATE BILL No. 152 WOULD EFFECT RADICAL CHANGE THEREIN AND RENDER IT OF UNCERTAIN AND VARIABLE APPLICATION.

The operation of senate bill No. 152 upon the Valentine Anti-Trust Law would effect a radical change in the enforcement of such law and render it of uncertain and variable application by submitting to a jury or court in every case the question of what acts are violative of its provisions.

COLUMBUS, OHIO, March 1, 1917.

HON. HUGH R. GILMORE, *Ohio Senate, Columbus, Ohio.*

DEAR SIR:—Your communication of date February 27, 1917, is received, which is an inquiry as to the effect of a bill, a copy of which is enclosed, upon existing law. The inquiry is as follows:

> "Senate bill No. 152, now pending in the senate, provides for a new or supplemental section of the General Code, relating to 'Trusts,' commonly known as the 'Valentine Law.'
>
> "A copy of the bill is herewith enclosed, and you will note that it does not change or amend the 'Valentine Law,' but attempts to provide that in any suit or proceedings under that chapter, a reasonable restraint of trade is a question for the jury.
>
> "Kindly advise me what effect senate bill No. 152 would have, if passed, on the 'Valentine Law.'

The proposed bill is as follows:

> "Section 1. That section 6401 of the General Code be supplemented by the enactment of section 6401-1 to read as follows:
>
> "Section 6401-1. In any suit or proceeding, civil or criminal, brought by or on behalf of the state, or by or on behalf of any person, under the provisions of this chapter, the jury shall acquit the defendants, and each and all of them, or the court or jury shall find for the defendants and each and all of them, if it appear that the combination of capital, skill, or acts complained of, was in reasonable restraint of trade; or not to acquire private monopoly, or fix a figure or standard whereby prices to the public or consumer are unreasonably controlled or established."

The Valentine anti-trust law was passed April 19th, 1898, and was in response to an urgent need and universal public demand for restraint upon the evil of constant formation and growth of combinations in restraint of trade, the tendency of which was to subject the common mass of people to economic and industrial domination of aggregations of capital.

It has remarkable clearness and perspicuity, and carries intrinsic evidence of being drawn by some person, or persons, well acquainted with the law as to transactions in restraint of trade, and also familiar with the remedial law and practice.

It commences with a succinct, though comprehensive, enumeration, or rather description, of the practices which it proposes to restrain, regulate or prevent, which it makes under the form of a definition of the much used word "trust." This is defined as follows:

"Section 6391. A trust is a combination of capital, skill or acts by two or more persons, firms, partnerships, corporations or associations of persons, for any or all of the following purposes."

These purposes are five and the examination of the effect of the proposed act may be made by taking them up in order with that end in view, without complete references to the other thirteen sections which further define the harmful practices set out, and, with greater particularity, fix and determine the application of the law to concrete conditions, and especially provide penalties for and consequences of its violation, and adequate remedies for its enforcement.

Reverting to the five paragraphs of definition of "trust," which are descriptive of the unlawful practices under the purview of the act, the first is generic and includes the other four, which in turn describe, define and limit it. They are as follows:

"1. To create or carry out restrictions in trade or commerce.

"2. To limit or reduce the production or increase, or reduce the price of merchandise or a commodity.

"3. To prevent competition in manufacturing, making, transportation, sale or purchase of merchandise, produce or a commodity.

"4. To fix at a standard or figure, whereby its price to the public or consumer is in any manner controlled or established, an article or commodity of merchandise, produce or commerce intended for sale, barter, use or consumption in this state.

"5. To make, enter into, execute or carry out contracts, obligations or agreements of any kind or description, by which they bind or have bound themselves not to sell, dispose of or transport an article or commodity, or an article of trade, use, merchandise, commerce or consumption below a common standard figure or fixed value, or by which they agree in any manner to keep the price of such article, commodity or transportation at a fixed or graduated figure, or by which they shall in any manner establish or settle the price of an article, commodity or transportation between them or themselves and others, so as directly or indirectly to preclude a free and unrestricted competition among themselves, purchasers or consumers in the sale or transportation of such article or commodity, or by which they agree to pool, combine or directly or indirectly unite any interests which they have connected with the sale or transportation of such article or commodity that its price might in any manner be affected. Such trust as is defined herein is unlawful, against public policy and void."

Let us now take up each of these four paragraphs which embody the ultimate effect of the law, and inspect it with the purpose of determining the effect of the proposed addition to the law, as follows:

"2. To limit or reduce the production or increase, or reduce the price of merchandise or a commodity."

Is it proposed now to submit to a jury the question of whether or not a combination of capital is in reasonable restraint of trade, when that combination is formed for the purpose of "reducing the production of merchandise." Right here you encounter the very thing you are looking for. The Valentine law makes that act unlawful, so to speak, *per se*, or rather in all cases, but this bill proposes to

change that and leave it in each case to a jury or court, or both. The one prohibits it by positive immutable law; the other tests it in each and every case by the transient and variable judgment of men. The question to each one, doubting and hesitating over a contemplated act would not be "Is it lawful or criminal?" but "What will be done about it?"

The same condition will exist as to "such combination to increase or reduce price." Also the same when the combination is to prevent competition in manufacture, transportation, and in dealing. Also when the combination is to fix a price to hold up the consumer.

Down to this point this wise, beneficial law, positively, inhibits the indicated acts as being necessarily harmful and essentially wrong. They are briefly stated and absolutely prohibited.

The fifth class of acts is enumerated and defined in detail and the legislature evidently considered that they might not all be universally baneful, for after the enumeration of certain prohibitions in the section, it fixes a qualification which is here put in italics:

> "5. To make, enter into, execute or carry out contracts, obligations or agreements of any kind or description, by which they bind or have bound themselves not to sell, dispose of or transport an article or commodity, or an article of trade, use, merchandise, commerce or consumption below a common standard figure or fixed value, or by which they agree in any manner to keep the price of such article, commodity or transportation at a fixed or graduated figure, or by which they shall in any manner establish or settle the price of an article, commodity or transportation between them or themselves and others, *so as directly or indirectly to preclude a free unrestricted competition among themselves, purchasers or consumers in the sale or transportation of such article or commodity,* or by which they agree to pool, combine or directly or indirectly unite any interests which they have connected with the sale or transportation of such article or commodity, that its price might in any manner be affected. Such trust as is defined herein is unlawful, against public policy and void."

None of the contracts specified are unlawful unless they have the effect of restricting competition. And this would be in each case a question for a jury or court.

The framers of this act, therefore, carefully determined what question should, in their judgment, be submitted to a jury, and those things which in and of themselves were considered a general public injury, were declared so and inhibited as a matter of law. The proposed supplement to the law is, therefore, not a mere change in detail as to the mode or degree of its enforcement, but an essential change in the character of the law itself, taking away from it the certainty of illegality as to every act forbidden by it, and making it in every case either a question of fact for a jury or court or of mixed law and fact for a court *and* jury.

There may have been decision on cases arising under the provisions of this law where its enforcement worked a hardship, but in such brief examination as I have been able to give to the subject, I have found none that seems to work injustice, by applying the hard and fast definition and prohibition of the statute, or suggests the necessity of putting an equity into it by legislation. Whether such attempts have been made heretofore in the nineteen years it has been in force I do not know, but the statute has stood for that period in its integrity and it is now proposed by this supplementary matter to modify it in its very nature and essence and take away at least some of the certainty it possesses, and remove some part of the fear that might attend its infraction.

Contracts in partial restraint of trade have always been permitted, the degree of restraint to make the contract void, as against public policy, being generally a question of law, sometimes of mixed law and fact. This privilege of partial restraint of trade is preserved in the qualification above referred to in the fifth paragraph of section 6391, and indeed no strictly common law right is taken away by it, the whole effect of the act being rather to restore what might properly be termed a case of arrested judicial development than to create new doctrines of law. All equivalent abuses had been capable of correction, in a more primitive condition of society, by punishment for the common law offenses of forestalling, engrossing and regrating, all of which became obsolete, and conspiracy. Had the three former been retained in the law, and developed along with the last, no statute would have been necessary to prevent unlawful combinations in restraint of trade.

A learned and exhaustive discussion of the subject of contracts in restraint of trade is found in the opinion of Judge Minshall in

Lufkin Rule Co. v. Fringeli et al. 57 C.B. 596.

On page 607 he says:

> "All monopolies, combinations and agreements of whatever nature, formed for the purpose of controlling the production and manufacture of commodities are generally considered against public policy, as thereby prices may be unreasonably increased to the consumer, and are almost uniformly entered into for such purpose. Heretofore the right of any trade or business to determine for itself the extent of production and the price that shall prevail, has been stoutly denied by the public. This can only be done by the government, and then only in extreme cases, amounting to a necessity. So general have these agreements become and their attendant evils, as to have arrested the attention of the legislatures of some of the states; and laws have been passed to correct, as far as possible, the evils."

The learned judge commenting on the disposition of selfishness creating the necessity for such laws, seriously remarks:

> "Certainly we are not called on to relearn how little human cupidity can be trusted when it has the opportunity to enrich itself at the expense of others."

The opportunity of human cupidity to enrich itself at the expense of others, in respect to the subject of this law, is greatly curtailed by the law itself, but will be perceptibly relieved of restraint by the enactment of this bill.

Answering the inquiry directly, the effect of this bill upon the Valentine law will be to render it less efficacious and its enforcement more difficult by removing all acts now in contravention of its terms as pure matter of law, and making them only conditionally so when found by the verdict of a jury or judgment of a court.

Very truly yours,

JOSEPH MCGHEE,
Attorney-General.

72.

PAUPERS—COUNTY COMMISSIONERS MUST PAY BURIAL EXPENSE WHEN NOTIFIED BY TOWNSHIP TRUSTEES OR PROPER MUNICIPAL OFFICERS.

Under section 3495 *G. C., providing the trustees of the township or the proper officials of the municipality notify the county commissioners, said county commissioners must pay the burial expenses of all deceased paupers required to be buried at public expense. Opinions of former attorney-generals in volume I, page* 547, *Attorney-General's Report for* 1915, *and volume II, page* 1357, *Attorney-General's Report for* 1912 *followed.*

COLUMBUS, OHIO, March 2, 1917.

HON. FRANK B. GROVE, *Prosecuting Attorney, Cadiz, Ohio.*

DEAR SIR:—I am in receipt of yours of January 27 in which you state:

"On April 24, 1915, ex-Attorney-General Turner, at my request, rendered an opinion as to the proper construction of section 3495 G. C. This opinion is found in volume I, page 547, Opinions of Attorney-General for 1915.

"Under this opinion and rulings of the state bureau of accounting prior thereto, the county commissioners have been paying the burial expenses of all deceased paupers required to be buried at public expense.

"Recently they have been objecting to paying these burial expenses, claiming that they have been informed by the state board of charities, indirectly, that the expenses of burial of a deceased pauper must be borne by the township in which he had a legal settlement at the time of his death.

"I am aware of no ruling on the question except that cited above. I would ask that you refer to above opinion and state whether or not you concur in the view therein expressed, and whether, in your opinion, the county or the township must pay the burial expenses of a deceased pauper having a legal settlement in a township, and who is required to be buried at public expense."

In the opinion of my predecessor he says:

"Section 3495 provides for burial at public expense of the body of a person having a legal settlement in the county or whose legal settlement is not in the state or is unknown, provided such deceased person may not have been at the time of his death an inmate of a penal, reformatory, benevolent or charitable institution, and provided said body is not claimed by any person *for private interment at his own expense* or delivered to a medical college.

* * * * * * * *

"To my mind, the statute is clear that it is the duty of the county commissioners, they being the successors of the county infirmary directors, to cause to be buried, not only the body of a person who has a legal settlement in the county, but also the body of a person who did not have a legal settlement in the state or who is unknown."

Section 3495 G. C. provides:

"When information is given to the trustees of a township or proper officer of a municipal corporation, that the dead body of a person, having a legal settlement in the county, or whose legal settlement is not in the state or is unknown, and not the inmate of a penal, reformatory, benevolent or charitable institution, has been found in such township or corporation and is not claimed by any person for private interment at his own expense or delivered for the purpose of medical or surgical study or dissection in accordance with law, they shall cause it to be buried at the expense of the township or corporation, but, if such trustees or officer notify the infirmary directors, such directors shall cause the body to be buried at the expense of the county."

In an opinion of Hon. T. S. Hogan, found in Vol. II of the Annual Report of the Attorney-General for 1912, page 1357, construing sections 3495 and 3496 G. C., he uses this language (p. 1358):

"The fact that the county is saved the expense of providing for the indigent poor who are taken care of by private benevolent institutions, is no reason why these institutions should have the burden of burying the pauper dead. A pauper may be kept at some private residence without extra expense to the county out of the goodness of heart of the owner. On his death, he may not desire to have the expense and trouble of burial and he can notify the proper authorities and burial will be provided for by law."

It will be seen that the above ruling of Attorney-General Turner was based upon the same reasonings in a similar construction of the statute as was the opinion of 1912.

It seems to me the meaning of sections 3495 G. C. is plain, especially when reference is made to the latter part of the section which provides that if trustees or other officer notify the infirmary directors, such directors shall cause the body to be buried at the expense of the county. There may be some ambiguity, owing to the fact that the term "infirmary directors" is used and probably the legislature when it amended section 3496 G. C. would have also amended section 3495 G. C., had attention been called to the fact that the notice was to the infirmary directors.

Section 3496 G. C., prior to the last amendment, read as follows:

"In a township in which is located a state benevolent institution, the trustees of the township shall pay all expenses of the burial of a pauper that dies in such institution, and send an itemized bill of the expenses thereof to the infirmary directors of the county from which the pauper was sent to the institution. Such infirmary directors shall immediately pay the bill to such township trustees."

The above section was amended in 103 O. L. 58, and now reads:

"In a county in which is located a state benevolent institution, the board in control of said institution shall pay all expenses of the burial of a pauper that dies in such institution, except when the body is delivered in accordance with the provisions of section 9984 of the General Code, and send an itemized bill of the expenses thereof to the county commissioners of the county from which the pauper was sent to the institution. Such

county commissioners shall immediately pay the bill to such board in control."

Sections 3495 and 3496 G. C. were formerly one section, namely section 1500a Revised Statutes, and the codifying commission separated them.

The amendment of section 3496 supra evidences an intention on the part of the legislature that the expense of the burial of paupers should be taken care of by the county commissioners, for it provides that the bill of a pauper dying in such institution be finally paid by the county commissioners.

In Rockel's Complete Guide, 15th Ed. 1916, compiled after the amendment in 103 O. L. supra, will be found a form of certificate to county commissioners to be signed by the trustees of the township, notifying the commissioners of the expenses incurred in the burial of the dead body of the pauper found in their township and who was not the inmate of a penal, reformatory, benevolent or charitable institution, and whose body was not claimed by any person for private interment at his own expense, or delivered for the purpose of medical or surgical study or dissection in accordance with law.

As Judge Rockel says at p. 456, immediately following section 3495 G. C.:

> "The trustees had better notify the infirmary directors before acting under this section if they expect the county to reimburse them, for if they go ahead and act without so doing, they cannot compel the infirmary directors to reimburse them for the amount expended."

This admonition applies, now that the office of infirmary directors has been abolished, and the duties formerly provided by law for infirmary directors have been by statute imposed upon county commissioners as shown in sections 2522 *et seq.* G. C.

In view of all the foregoing, I concur in the ruling of the opinion found in Vol. I, page 547 of the Opinions of the Attorney-General for 1915.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

73.

MOTHER'S PENSION—WOMAN DOES NOT LOOSE LEGAL RESIDENCE BY REMOVING TO ANOTHER STATE FOR LIMITED TIME * * * UNLESS ACCOMPANIED BY INTENTION TO REMAIN IN SUCH OTHER STATE.

A mother who with her family has acquired a legal residence in a county of this state within the purview of section 1683-2 *General Code, providing for mothers' pensions, does not loose such legal residence by moving with her family to another state for a limited time, in the absence of facts or circumstances showing unequivocally an intention on the part of such mother and family to make such other state their legal residence.*

COLUMBUS, OHIO, March 2, 1917.

HON. WILBERT J. BISSMAN, *Probate Judge, Mansfield, Ohio.*

DEAR SIR:—I have the honor to acknowledge receipt of your letter of February 19, 1917, asking opinion, in which you say:

> "The mothers' pension act provides that the residence of the applicant must be two years; we also have an opinion as to the liberal construction

that shall be given some parts of this law, but I desire your opinion and direction of an application under the following circumstances and facts, as follows:

"The applicant has been a resident of the state since last April, 1916, and for two years prior to that date because of the health of the husband they were in the south (in Florida), and prior to that time they lived in this city for a period of about 15 years. At the time of leaving the state for the two years, they left the state not knowing whether they would return and the question now is whether by their leaving they have now lost their residence so as to bar the wife from getting a pension. This is a very worthy case, the husband being sick and unable to earn anything for the support of the children.

"Please give me your opinion in this matter."

Applicable to the consideration of the question made by you section 1683-2 General Code provides that for the partial support of women whose husbands are dead, or become permanently disabled by reason of physical or mental infirmity, or whose husbands are prisoners or whose husbands have deserted, and such desertion has continued for a period of three years, when such women are poor, and are the mothers of children not entitled to receive age and schooling certificate, and such mothers and children have a legal residence in any county of the state for two years, the juvenile court may, for the purpose of affording such partial support, make an allowance to each of such women in monthly amounts as therein specified.

This section of the General Code and those immediately following, composing the "Mothers' Pension Law" so-called, were originally enacted (103 O. L. 877) as a part of the juvenile court act, a liberal construction of the provisions of which is enjoined by the provisions of section 1683, General Code, and I doubt not that the provisions of the mother's pension law are to be so liberally construed in order to secure the ends for which the law was enacted, to wit, such support as will enable women coming within its provisions to maintain their homes and keep their children together—things which they might not be able to do without such support.

Hon. T. S. Hogan, attorney-general, in an opinion to the bureau of inspection and supervision of public offices, under date of June 29, 1914, held that the two years' residence qualifications mentioned in section 1683-2, General Code, bore no proper analogy to the settlement statutes in the poor laws providing for relief to paupers, but that in contradistinction to such settlement statutes the provisions of the mothers' pension law were to be liberally rather than strictly construed; and applying such principle of construction to the provisions of section 1683-2 Mr. Hogan held that the phrase "in any county of the state," as used in the first sentence of section 1683-2, is to be given its broad and primary meaning, and that as a result thereof legal residence on the part of the mother and child in any county of the state would entitle the mother to an allowance by the juvenile court in any county of the state, whether that county be the county in which the two years' residence has been established or not.

Likewise applying this principle of liberal construction to the provisions of section 1683-2 as to residence qualification, my predecessor, Hon. Edward C. Turner, in an opinion to Hon. George M. Hoke, probate judge of Seneca county, under date of December 13, 1915, held that a woman who was the mother of children and who had theretofore always resided in said county was not deprived of her right to apply for a mother's pension therein by reason of the fact that she and her husband and family had moved to another county in this state, where they resided for about a year, and thereafter moved to Michigan, where they

resided more than a year, but that it appearing that the husband had died while the family were living in Michigan she was entitled to make application for and receive support under this act upon her return with her family to Seneca county.

I do not find it necessary to express any opinion on the facts under consideration in the opinions of my predecessors just noted, although I may say I am convinced that their views, that the provisions of section 1683-2 G. C. under consideration are to receive a liberal rather than a strict construction, are correct and in keeping with the manifest purpose and intent of the mothers' pension act.

In the instant case, however, I have no difficulty in reaching the conclusion that the applicant is entitled to relief as far as the question made by you is concerned, when that question is viewed in the light of the facts stated by you.

With respect to the question under consideration the qualification named in the statute is not merely residence, but legal residence, and as here used is practically synonymous with the term "domicile," and in this view it does not appear that the applicant and her family lost their legal residence by going to Florida for the period of time mentioned by you.

In the case of Smith v. Delton, 1 Cin. Sup. Ct. Rep., page 150, it was held that mere non-residence for any length of time, unless aided by some unequivocal act showing intention not to return, will not cause the loss of domicile in the state; and on application of this principle of law it was held that where a man left Ohio with his family for New York with the intention to return if he could compromise with his creditors there, or to remain in New York if he could not do so and could there get employment, neither of which contingencies happened, he did not thereby become a non-resident of Ohio.

There is nothing in the facts stated by you to indicate any intention on the part of the applicant and her family to make the state of Florida their future legal residence or domicile. On the contrary, the very reason for which they went to that state in itself tended to make the question as to the place of their future residence uncertain, and mere uncertainty as to such future residence would not operate to defeat their legal residence in Richland county.

I am therefore of the opinion that if the applicant is otherwise qualified under the statute to apply for and receive relief under the section of the General Code above considered the same should be awarded to her.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

74.

APPROVAL—TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE OF THE CITY OF NELSONVILLE, OHIO.

COLUMBUS, OHIO, March 2, 1917.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of the city of Nelsonville in the sum of $4,500.00 for waterworks improvement, being ten bonds of $450.00 each."

I have examined the transcript of the proceedings of council and other officers of the city of Nelsonville relative to the above bond issue, also the bond

and coupon form attached, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds drawn in accordance with the form submitted and executed by the proper officers will, upon delivery, constitute valid and binding obligations of the said city.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

75.

FARM LOAN BONDS—COMMERCIAL BANKS NOT AUTHORIZED TO INVEST IN SAME—SAVINGS BANKS AND TRUST COMPANIES MAY INVEST IN SAME—STATE BANKS WHICH ARE MEMBER BANKS UNDER FEDERAL RESERVE ACT MAY INVEST—INSURANCE COMPANIES MAY INVEST UNDER SECTION 9519 G. C.

1. *Farm loan bonds issued under the provisions of the "Federal Farm Loan Act," being the act of congress approved July 17, 1916, are not included in the list of securities in which commercial banks of Ohio are authorized to invest.*

2. *Investments in such bonds by savings banks and trust companies allowable by savings banks and trust companies.*

3. *Such bonds are proper investments for all state banks which are member banks under the Federal Reserve Act.*

4. *Such bonds are not proper investments for insurance companies, except under section 9519 G. C.*

COLUMBUS, OHIO, March 2, 1917.

HON. PHIL. C. BERG, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—I am in receipt of a request from you, for my opinion, under date of February 6, 1917, which is as follows:

> "Will you please give me your opinion as to whether or not the funds of commercial banks, savings banks, trust companies and insurance companies, organized under the laws of Ohio, may be loaned upon or invested in farm loan bonds to be issued under provisions of the act of congress approved July 17, 1916?"

The act of congress to which you refer, is commonly known as the "Federal Farm Loan Act." It provides, among other things, for a new kind of bank, with power to issue an entirely new kind of bonds; two classes of banks are provided for, known respectively as federal land banks and joint stock land banks, both of which have power to issue bonds. National farm loan associations are also provided for, but have not the power to issue bonds. For the purpose of your inquiry, there is no difference between the bonds issued by federal land banks and joint stock land banks. It may be said in regard to these farm loan bonds, that they are to be issued in series of $50,000.00 or more, in denominations of $25.00, $50.00, $100.00, $500.00 and $1,000.00 and to bear a maximum rate of interest of 5%. The act provides in detail for conditions which must be complied with before bonds may be issued; the essential condition being that when any federal land bank, or joint stock land bank, applies to the federal farm loan board

for authority to issue farm loan bonds it must tender to the farm loan registrar (an official provided for by the Federal Farm Loan Act) first mortgages on farm lands or United States government bonds, not less in aggregate amount than the sum of the bonds proposed to be issued. The act provides conditions and restrictions as to first mortgages which can be acquired by farm loan banks and used for this purpose. If the application to issue bonds is granted, then the first mortgages or government bonds tendered to the farm loan registrar are held by him as collateral security for the farm loan bonds authorized to be issued; and the land bank which is to issue the bonds is required to transfer to the said farm loan registrar, by assignment, in trust, all such first mortgages or government bonds, as such collateral security. The farm loan bonds when issued are non-taxable. What has been stated is sufficient to show that these farm loan bonds are quite different from what are commonly known as mortgage bonds or collateral trust bonds, which are directly secured by a mortgage or deed of trust. These farm loan bonds are issued to the applicant bank upon the deposit by it of first mortgages given to secure a loan from the applicant bank. That is, the prospective borrower gives a first mortgage to a land bank to secure a loan from it; and the land bank uses that mortgage to make a deposit against which to issue bonds on its own account. The mortgages are collateral security for the farm loan bonds; United States government bonds may be used as such collateral instead of first mortgages if desired by the land bank issuing the farm loan bonds.

The fact that land banks can only make loans upon first mortgages, the careful restrictions and limitations that are made by the act in regard to such loans, as well as to the issuance of the farm loan bonds, makes it apparent that these bonds will prove a desirable and safe investment, of much higher character than some of the securities in which our state banks are now permitted to invest their funds, but an examination of our statutes shows that they are not included, specifically, in the list of securities which the legislature has designated as proper investments for the banks of this state.

Section 9758 specifies the securities in which the capital, surplus and deposits of commercial banks may be invested. This section is as follows:

> "Subject to the provisions of the preceding section commercial banks may invest their capital, surplus and deposits in, or loan them upon:
>
> "a. Personal or collateral securities.
>
> "b. Bonds or other interest-bearing obligations of the United States, or those for which the faith of the United States is pledged to provide payment of the interest and principal, including bonds of the District of Columbia; also in bonds or other interest-bearing obligations of any foreign government.
>
> "c. Bonds or interest-bearing obligations of this or any other state of the United States.
>
> "d. The legally issued bonds or interest-bearing obligations of any city, village, county, township, school district or other district, or political subdivision of this or any other state or territory of the United States and of Canada.
>
> "e. Mortgage bonds or collateral trust bonds or any regularly incorporated company, which has paid, for at least four years, dividends at the rate of at least four per cent. on their capital stock. Such loan shall not exceed eighty per cent. of the market or actual value of such bonds, the purchase of which first has been authorized by the directors. All such securities having a fixed maturity shall be charged and entered upon the books of the bank at their cost to the bank, or at par, when a premium is paid, and the superintendent of banks shall have the power to require

any security to be charged down to such sum as in his judgment represents its value. The superintendent of banks may order that any such securities which he deems undesirable be sold within six months.

"f. Notes secured by mortgage on real estate, where the amount loaned thereon inclusive of prior incumbrances does not exceed forty per cent. of the value of the real estate if unimproved, and if improved sixty per cent. of its value, including improvements, which shall be kept adequately insured. Not more than fifty per cent. of the amount of the paid in capital, surplus and deposits of such bank at any time shall be invested in such real estate securities."

Section 9765 G. C. specifies the securities in which savings banks may invest. This section is as follows:

"A savings bank may invest the residue of its funds in, or loan money on, discount, buy, sell or assign promissory notes, drafts, bills of exchange and other evidences of debt and also invest its capital, surplus and deposits in, and buy and sell the following:

"a. The securities mentioned in section ninety-seven hundred and fifty-eight, subject to the limitations and restrictions therein contained, except that savings banks may not loan more than seventy-five per cent. of the amount of the paid-in capital, surplus and deposits on notes secured by mortgage on real estate. But all loans made upon personal security shall be upon notes with two or more signers or one or more indorsers, payable and to be paid at a time not exceeding six months from the date thereof. In the aggregate, not exceeding thirty per cent. of the capital, surplus and deposits of a savings bank shall be so invested.

"b. Stocks, which have paid dividends for five consecutive years next prior to the investment, bonds, and promissory notes of corporations, when this is authorized by an affirmative vote of a majority of the board of directors or by the executive committee of such savings bank. No purchase or investment shall be made in the stock of any other corporation organized or doing business under the provisions of this chapter. The superintendent of banks may order any such securities which he deems undesirable to be sold within six months.

"c. Promissory notes of individuals, firms, or corporations, when secured by a sufficient pledge of collateral approved by the directors, subject to the provisions of sections ninety-seven hundred and fifty-four and ninety-seven hundred and fifty-five."

Section 9813 authorizes savings banks to invest in first mortgage bonds of steamship companies, under certain conditions.

Section 9781 specifies the securities in which trust companies may invest. This section is as follows:

"Moneys or properties received on deposits or in trust by such corporations, unless by the terms of the trust some other mode of investment is prescribed, together with its capital and surplus, excepting such as is required to be kept as a reserve, shall be invested in or loaned only on the following:

"a. The securities mentioned in paragraphs b, c, d, e, f of section ninety-seven hundred and fifty-eight, subject to the limitations and restrictions contained in said paragraphs, except that trust companies shall

not loan more than sixty per cent. of the amount of their paid-in capital, surplus and deposits on notes secured by mortgage on real estate;

"b. Stocks, which have paid dividends for five consecutive years next prior to the investment, and bonds of corporations when they are authorized by the affirmative vote of the majority of the board of directors or of the executive committee of such trust company; but the superintendent of banks may order that any such securities which he deems undesirable shall be sold within six months;

"c. Promissory notes of individuals, firms or corporations, when secured by a sufficient pledge of collateral, approved by the directors, subject to the provisions of sections ninety-seven hundred and fifty-four and ninety-seven hundred and fifty-five."

Trust companies may also purchase, lease, hold and convey real estate in the same manner as commercial banks.

It will be seen that the farm loan bonds provided for by the federal farm loan act do not come under any of the specifications of section 9758, and, therefore, cannot be classed as proper investment for commercial banks.

Section 9765, which details the list of securities in which savings banks may invest, gives a wider latitude to such banks as to investments than is given to commercial banks by section 9758. It will be noted, under paragraph b (9765) investment may be made in "stocks * * * bonds and promissory notes of corporations." This provision undoubtedly was intended to refer to the bonds of ordinary commercial corporations, rather than banks, for, at the time of its enactment, the only banks authorized by law in this state, were national banks, which are not actually corporations, but banking associations, and state banks, neither of which had, nor now has, the power to issue ordinary bonds, and, in addition banking corporations are covered by special provisions of our corporation code and have always been regarded as a class of corporations distinct from the corporations governed by our general laws; but, the language of the section is general, and as it stands would authorize investment in the bonds of any corporation; and so could be held to include bonds issued by federal land banks and joint stock land banks; for while neither these institutions nor their bonds were in existence or thought of at the time of the passage of section 9765, still these banks, as a matter of fact, are "corporations" and the "farm loan bonds" issued by them are "bonds."

Section 9781, above quoted, specifies the securities in which trust companies may invest, and it will be noted that paragraph (b) of this section gives the same power to invest in "bonds" of "corporations" as does paragraph (b) of section 9765, and what I have said as to that section, also applies to this.

It thus appears that while it may possibly be held that these farm loan bonds may be included as legitimate investments for savings banks and trust companies, they are prohibited as such for commercial banks. That is, to classify these farm loan bonds as investments listed by the legislature in sections 9758, 9765 and 9781, we must assume that the legislature, knowing that federal land banks and joint stock land banks were to be established with power to issue farm loan bonds, provided that savings funds and trust funds could be invested in such bonds, but that funds of the ordinary, or commercial bank, could not be so invested. This is a violent assumption, and leads me to the conclusion that the safe course to follow in determining what are proper investments for banks—as the legislature has seen fit to specify in detail the different securities in which state banks may invest their funds—is to construe the statutory provisions strictly and only allow investments which are clearly authorized: that farm loan bonds cannot be classed as authorized investments for commercial banks, and, while they may

be allowed as investments for savings banks and trust companies, it would be preferable if they were specifically designated as such by law.

Section 27 of the Federal Farm Loan Act is as follows:

> "That farm loan bonds issued under the provisions of this act by federal land banks or joint stock land banks shall be a lawful investment for all fiduciary and trust funds, and may be accepted as security for all public deposits.
>
> "Any member bank of the federal reserve system may buy and sell farm loan bonds issued under the authority of this act.
>
> "Any federal reserve bank may buy and sell farm loan bonds issued under this act to the same extent and subject to the same limitations placed upon the purchase and sale by said banks of state, county, district and municipal bonds, under subsection (b) of section 14 of the Federal Reserve Act approved December 23, 1913."

Section 9796-2 of the General Code grants the right of state banks to become a member bank under the federal reserve act. This section is as follows:

> "Every state bank, in addition to the powers, rights and privileges possessed by it under the laws of Ohio shall have the right and power to become a member bank under the federal reserve act upon the terms and conditions set forth in said federal reserve act, or hereafter provided by law, in order to become a member bank as contemplated by said federal reserve act. Every state bank which becomes a member bank shall have the right and power to do everything required of or granted by said federal reserve act to member banks which are organized under the state laws; and compliance by state banks with the requirements of said federal reserve act shall be accepted in lieu of the reserve requirements provided by the laws of Ohio. Nothing contained in this section of the act shall in any way or manner affect or have reference to state banks which do not become member banks under said federal reserve act except as provided in this act."

My opinion, therefore, upon this branch of your inquiry, is that farm loan bonds issued under the provisions of the act of congress, approved July 17, 1916, entitled "The Federal Farm Loan Act" are not included by the laws of Ohio now in force, in the list of securities or evidences of debt in which the funds of a commercial bank may be invested, nor directly included in the list of investments for savings banks or trust companies, or upon which said funds may be directly loaned. Loans made directly by such banks upon promissory notes of individuals, firms, or corporations, secured by the deposit of farm loan bonds as collateral, would probably be valid under paragraph (a) of section 9759; paragraph (c) of section 9765 and paragraph (c) of section 9780; but it would be preferable (though no question might be raised as to such loans or investments on account of the high character of farm loan bonds as security) that such bonds be specifically included in the list of lawful investments for the banks of this state.

Commercial banks, savings banks, or trust companies, which have become member banks under the federal reserve act, may invest their funds in, and buy and sell farm loan bonds, by virtue of section 9796-2 G. C. and section 27 of the Federal Farm Loan Act, above quoted.

The second part of your inquiry is whether the funds of insurance companies may be loaned upon or invested in farm loan bonds. The main provisions of the General Code governing the investment of the funds of insurance companies,

life, and other than life, domestic and foreign, are 9343, 9357, 9358, 9367, 9373, 9518, 9519, 9520, 9565 and 9569. I do not deem it necessary to incorporate these sections in this opinion, for, from an examination of the same, I am convinced that only one section, viz.: 9519, relating to domestic insurance companies other than life, could be construed as authorizing an investment in farm loan bonds. This section is as follows:

> "Funds accumulated in the course of business, or surplus money over and above the capital stock of a company, may be loaned on or invested in the above named securities, or:
>
> "1. Bonds and mortgages on unincumbered real estate within this or any other state of the United States worth fifty per cent. more than the sum loaned thereon, exclusive of buildings, unless buildings are insured in some company authorized to do business in this state, and the policy is transferred to a company making the investment.
>
> "2. Bonds of any state, county, township, municipal corporation, school district, or other political subdivision in the United States, issued in conformity with law and upon which default in the payment of interest has not been made;
>
> "3. Stocks, bonds, or other evidences of indebtedness of any solvent, dividend-paying institution incorporated under the laws of this or any other state, or of the United States, except its own stock;
>
> "4. Negotiable promissory notes maturing in not more than six months from the date thereof, secured by collateral security through the transfer of any of the preceding sections, with absolute power of sale within twenty days after default in payment at maturity."

This section, by virtue of sections 9568 and 9569, also relates to the deposit required of domestic and foreign guaranty companies.

What I have said as to the propriety of farm loan bonds being specifically designated as proper investments for banks, also relates to the question as to their being proper investments for insurance companies: and, as the legislature has carefully listed the securities in which insurance companies may invest, and as these bonds cannot be included even by inference, in any of the lists except that given by section 9519, my opinion is that farm loan bonds should not be classed as authorized investments for the funds of insurance companies, except in so far as the same may be authorized by section 9519 G. C., until specifically designated as such by law.

Very truly yours,
JOSEPH McGHEE,
Attorney-General.

ADDENDA.

I desire to call your attention to paragraph (b) of section 9765 quoted on page five of this opinion; the first part of the first sentence of this paragraph is as follows: "Stocks, which have paid dividends for five consecutive years next prior to the investment, bonds, and promissory notes of corporations * * *." The comma which appears after the word "bonds" has evidently been inserted by mistake in codifying this section, for as originally passed, this particular provision appears as follows (99 O. L. 282): "Stocks, which have paid dividends for five consecutive years next prior to the investment, bonds and promissory notes of corporations * * *." This error should be corrected and the original provision followed: otherwise it could be contended with much force that investments could be made by savings banks in any kind of bonds.

76.

MILK BOTTLES—ACT OF MARCH 24, 1915 (106 O. L. 108), RELATIVE TO USE OF SAME BY COMPANIES OTHER THAN OWNERS—CONSTITUTIONAL.

The act of the legislature passed March 24, 1915 (106 O. L. 108) being an amendment of section 13169 G. C. and for the registration of bottles, is a police regulation, within the power of the legislature and not unconstitutional.

Said act is free from the objections to the former law upon the same subject for which the same was found unconstitutional by the supreme court in State v. Schmuck, 77 O. S. 438.

COLUMBUS, OHIO, March 3, 1917.

The Board of Agriculture, Columbus, Ohio.

GENTLEMEN:—Your inquiry to this office under date of January 22, 1917, through the chief of the dairy and food division, in reference to the validity of the bottling act, is as follows:

> "I have been receiving a great many complaints from milk companies and bottling works relative to other dealers using their bottles without their permission, and they seem to feel that this department ought to assist them in getting relief in this matter.
>
> "I would appreciate very much if you would give me an opinion relative to bringing cases against these violators under section 13169, 13169-1, 13169-2 and 13169-3.
>
> "There seems to be some question about the validity of this law and I would like to be placed right before getting into any litigation."

The statutes in question are section 13169 and sub-sections 1, 2 and 3, and are of considerable length, and it is not necessary that they be set forth herein.

The question as to the validity of this law arises from the fact that a former act on the same subject was held unconstitutional by the supreme court.

State v. Schmuck, 77 O. S. 438.

The syllabus of that case is as follows:

> "Sections 4364-42, 4364-43, 4364-44, 4364-45, Revised Statutes, making it a crime to have in possession for use or sale certain bottles or other vessels without the written consent of the owner, and providing for search warrant to seize and restore such property to the owner, are invalid, being in conflict with sections 1, 14 and 19 of article I of the constitution of Ohio."

It would seem sufficient to remark that there is nothing in the present act contrary to the letter or spirit of the sections of the constitution referred to above, but it is also true that the framer of this act has been careful to eliminate all provisions condemned or criticised by Judge Price in the opinion in the case, which were principally the following:

The search-warrant feature. The provision that buying and selling such bottles as are mentioned in the act, or possession of the same by any person without the written consent of the owner, as shown by the stamp on the bottle, should be prima-facie evidence of unlawfully receiving the same.

The provision that taking a deposit or compensation for the non-return of a bottle should not be construed as a sale.

And the omission of any exception in a case where the original owner of the bottle had parted with such ownership that it might be thereafter dealt in as other property.

All these things have been carefully avoided in the new statute, and inasmuch as it was stated in the opinion that the decision was rather out of line with the current of authority and followed the doctrine laid down by the Illinois supreme court, these modifications undoubtedly remove from the present statute all objection found by the supreme court with the former one.

Yours very truly,
JOSEPH MCGHEE,
Attorney-General.

77.

OHIO REFORMATORY FOR WOMEN—MAGISTRATES SENTENCING WOMEN THERETO MUST SPECIFY AMOUNT OF FINE AND COSTS —ALSO CREDIT PER DAY TO BE GIVEN PRISONER—MUST RELEASE PRISONER WHEN FINE AND COSTS ARE PAID—IF PRISONER IS CONFINED FOR SAID REASON.

When a woman is committed to the Ohio reformatory for women for non-payment of fine and costs, the sentencing court or magistrate must specify the amount of the fine and costs and the rate of credit per day to be given the prisoner, so that the superintendent of the reformatory can compute the number of days to be served from the commitment.

When the sentencing court or magistrate certifies to the superintendent of the Ohio reformatory for women that a woman committed to that institution for non-payment of fine and costs has fully paid the same, it is the duty of the superintendent of such reformatory to release such prisoner.

COLUMBUS, OHIO, March 3, 1917.

The Ohio Board of Administration, Columbus, Ohio.

GENTLEMEN:—Several attorneys have written this department asking how the superintendent of the Ohio reformatory for women at Marysville is to determine the length of time to be served by prisoners committed to that institution because of non-payment of fines and costs; also whether prisoners committed to the Ohio reformatory for women for non-payment of fines and costs may be discharged from such institution at any time during their imprisonment upon the payment to the proper authorities of such fines and costs. I am addressing the answer to these questions to you since your board has charge of the reformatory for women and am sending copies of the same to the parties asking the question.

Sections 1445, 4559, 12376, 12387 and 13717 G. C. provide:

"*Sec.* 1445. Whoever violates any provision of sections fourteen hundred and nine to fourteen hundred and forty-four, both inclusive, shall be fined not less than twenty-five dollars nor more than two hundred dollars, and the costs of prosecution, and upon default of payment of fine and costs shall be committed to the jail of the county or to some workhouse and there confined one day for each dollar of the fine and costs against him. He shall

not be discharged or released therefrom by any board or officer except upon payment of the portion of the fine and cost remaining unserved or upon the order of the board of agriculture.

"*Sec.* 4559. When a fine is the whole or part of a sentence, the court or mayor may order that the person sentenced shall remain confined in the county jail, workhouse, or prison, until the fine and costs be paid, or secured to be paid, or the offender be otherwise legally discharged.

"*Sec.* 12376. When, under the provisions of law, a convict may be imprisoned in the county jail, the court, upon the recommendation of the prosecuting attorney, may sentence such convict to hard labor therein; and when a person may be committed to jail for the non-payment of fines and costs, the court may commit him to hard labor therein until the value of his labor at the rate of one dollar and fifty cents a day equals such fine and costs, provided that no commitment under this section shall exceed six months, and this section shall not affect the laws relating to workhouses.

"*Sec.* 12387. In cases where a fine may be imposed in whole or part in punishment of an offense, or for a violation of an ordinance of a municipality, and such court or magistrate could order that such person stand committed to the jail of the county or municipality until the fine and the costs of prosecution are paid, the court or magistrate may order that such person stand committed to such workhouse until such fine and costs are paid, or until he is discharged therefrom by allowing a credit of sixty cents per day on the fine and costs for each day of confinement in the workhouse, or until he is otherwise legally discharged.

"*Sec.* 13717. When a fine is the whole or a part of a sentence, the court or magistrate may order that the person sentenced remain imprisoned in jail until such fine and costs are paid or secured to be paid, or he is otherwise legally discharged, provided that the person so imprisoned shall receive credit upon such fine and costs at the rate of sixty cents per day for each day's imprisonment."

It is clear from a reading of these sections that different rates are provided by statute for serving out fines and costs and it is for the sentencing court to determine under what statute sentence is to be imposed and to specify in such sentence at what rate the fine and costs are to be paid.

In the case of Hamilton v. State, 78 O. S. page 76, the statute provided that in default of payment of fine and costs the defendant "shall stand committed to such workhouse until the fine and costs are paid or until he be discharged therefrom by allowing a credit of sixty cents per day on such fine and costs." The court held it was error for the sentence to simply provide and require that the accused "shall stand committed to such workhouse until the fine and costs are paid" without adding thereto the further words of the statute "or until he be discharged therefrom by allowing a credit of sixty cents per day on such fine and costs." The court said at page 85:

"The sentence of imprisonment in a criminal case, to be a valid sentence, must in and of itself be definite and complete in all its material terms, and so certain and accurate as to the time of its commencement and proper termination as that it shall not be necessary for either the prisoner, or the officers charged with its execution, to apply to a court to ascertain its meaning. Pickett v. State, 22 O. S. 405. In other words, to borrow the language of Norris J. in re Moore, 14 C. C. R. 244, 'a man who is compelled to have a law suit to get into jail ought not, by reason of the uncertainty of his sentence, be compelled to have another law suit to get out. * * *'

We are of the opinion that the sentence of imprisonment pronounced by the court in the above case is not the one provided and required by law, in that, it does not include therein all the conditions of release prescribed by the statute. Such sentence is, therefore, unauthorized and erroneous and should be reversed."

This case indicates plainly, I think, that in commitment for nonpayment of fine and costs, the sentencing court or magistrate must specify in its order the rate of credit to be allowed the prisoner and section 13716 G. C. makes it his duty to send a copy of such judgment to the jailer when committing the prisoner.

Section 13716 G. C. reads:

"When a person convicted of an offense is sentenced to imprisonment in jail, the court or magistrate shall order him into the custody of the sheriff or constable, who shall deliver him, with the record of his conviction, to the jailer, in whose custody he shall remain, in the jail of the county, until the term of his imprisonment expires or he is otherwise legally discharged."

In view of the foregoing, therefore, it is my opinion, in answer to your first question, that when a woman is committed to the Ohio reformatory for women for nonpayment of fine and costs, the sentencing court or magistrate must specify the amount of the fine and costs and the rate of credit per day to be given the prisoner, so that the superintendent of the reformatory can compute the number of days to be served from the commitment.

Answering the second question in regard to the release of such prisoners from the Ohio state reformatory for women, upon the payment of fine and costs, the common law rule is laid down in 19 Cyc., p. 555, as follows:

"At common law commitment is until the fine be paid."

In the case of Ex parte Kelly, 28 Cal. 414, it was held that where the court sentenced an offender to pay a fine of $5,000.00, and directed that he be imprisoned in the county jail at the rate of $2.00 per day until the same was paid, the prisoner was entitled to a credit of $2.00 per day for each day he remained in prison, and that he might at any time pay the sum then remaining unsatisfied and claim his discharge from custody.

The court say:

"The former (imprisonment) by way of enforcing payment or satisfaction of the fine, is no part of the punishment *per se,* but is merely one of the modes by which the law enforced the satisfaction of a fine which is in itself the punishment or a part of it. The punishment fixed by the statute is imprisonment in the state prison, or fine, or both; all beyond is mere mode and manner of enforcement. The first is to be satisfied by serving out the prescribed term in the state prison and in that way only; but the latter may be satisfied in either of three ways, by voluntary payment of the amount of the fine, or by its collection under execution, as in the case of a judgment in a civil action, or by imprisonment in the county jail not exceeding one day for every two dollars of the fine. The alleged incongruity is apparent only when the mere mode and manner of enforcing the punishment is confounded with the punishment itself and regarded as part of it, but it wholly disappears when the obvious distinction between the two is kept in view.

"There is no force in the point that the defendant is bound to satisfy the whole fine by imprisonment, and cannot be allowed to pay the unsat-

isfied portion of his fine and be thereupon discharged from custody. For each day which he does, or may hereafter pass in prison, he is entitled to a credit of $2.00 upon his fine, and he may at any time pay the sum then remaining unsatisfied and claim his discharge from custody."

In the case of Brock v. Georgia, 22 Ga. 98, the court, speaking of a defendant imprisoned to enforce the payment of a fine, said:

"A penalty for the offense of which the defendant was convicted is pecuniary altogether. The court, on imposing the penalty, may enforce its payment by adjudging that the party convicted be committed until the fine and costs are paid. The imprisonment is no part of the penalty imposed, but is the means and the legal means of enforcing the judgment of the court. Such is the judgment in this case. The imprisonment is not ordered as penalty, and the judgment is not in the alternative, and the imprisonment, when suffered, is not a discharge of the penalty. That still remains. The judgment, as pronounced, is milder and more favorable to the prisoner than the ordinary judgment—to stand committed until the fine is paid, for under this sentence if he pays the fine and costs before the expiration of three months, he is to be discharged, and whether he pays or not, at the expiration of three months he is to be discharged."

Our statutes providing for imprisonment for any default in payment of fines, to my mind, clearly indicate that the imprisonment is simply a means of enforcing the judgment of the court, and no part of the penalty imposed. This being the case the order of commitment has accomplished its purpose whenever the defendant pays the fine and costs, and it is, therefore, my opinion that when the sentencing court or magistrate certifies to the superintendent of the Ohio reformatory for women that a woman committed to that institution for nonpayment of fine and costs, has fully paid the same, it is the duty of the superintendent of such reformatory to release such prisoner.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

78.

JOINT BOARD OF COUNTY COMMISSIONERS—MUST PROVIDE SAME METHOD OF ASSESSING COSTS OF IMPROVING AND CONSTRUCTING HIGHWAY ALONG COUNTY LINE AGAINST THE DIFFERENT TOWNSHIPS.

A joint board of county commissioners in constructing or improving a highway along the county line are not authorized in law to choose different methods to provide for the proportion of the costs and expenses assessed against the different townships interested, but the same method must be pursued as to all the townships. Opinion No. 1441, *Hon. Edward C. Turner, affirmed.*

COLUMBUS, OHIO, March 5, 1917.

HON. EARL K. SOLETHER, *Prosecuting Attorney, Bowling Green, Ohio.*

DEAR SIR:—Your communication of February 3, 1917, in which you ask my opinion in reference to certain matters therein set out, has been received. Your communication reads as follows:

"I herewith submit to you the following facts and ask that you give me an opinion thereon:

"Proceedings for a joint county road improvement are being contemplated by the boards of county commissioners of Wood and Seneca counties. The proposed road improvement is on the county line between Wood and Seneca county for a distance of six miles, and lying between Jackson township in Seneca county and Perry township, in Wood county. This county line road runs northerly from the city of Fostoria, and if the same could be improved, would be a very important road to the citizens of northern Ohio, as the same would be a direct connection with the city of Fostoria and other roads leading to the city of Toledo and other towns in northern Ohio.

"Heretofore Jackson township, Seneca county, have improved their roads by a general levy over Jackson township, while the roads in Perry township, Wood county, have been built and constructed by a levy of two-fifths of the costs against the land owners within one mile of the improvement and three-fifths of the cost assessed against the township. Both Jackson township and Perry township have been constructing roads for some time under their respective plans of assessment.

"The joint board of county commissioners of Wood and Seneca county desire to construct this improvement by resolution, and wish to apportion the costs of constructing the same by allowing Jackson township, Seneca county, to pay their share of the cost of the improvement by a general levy over their township, and the cost assessed against Perry township, Wood county, to be paid by a levy of two-fifths against the land owners within one mile of the improvement and three-fifths of the cost against the township.

"The land owners residing in Jackson township, Seneca county, along this proposed improvement, are unwilling to pay for the cost of constructing the road other than by a general levy over Jackson township, for the reason that they have been making a general levy for a number of years to pay for the improvement of roads in Jackson township, and they think it unfair to compel them to pay special assessments for the construction of this road inasmuch as they have been paying the general assessment for a number of years to build roads in other parts of their township.

"The joint county board of commissioners of Wood and Seneca counties desire to know whether the joint board, after granting the improvement under a resolution, can, under the law, allow each county to choose its own method of assessment for the payment of the cost of constructing said improvement. If you answer this question in the affirmative, then will you advise the procedure which the joint board should take in making their respective assessments.

"The opinions above requested call for a construction of the so-called 'Cass Road Law,' and I wish to call your attention to Opinion No. 1441, dated March 30, 1916, and Opinion No. 2118, dated December 21, 1916, rendered by former Attorney-General Edward C. Turner, upon facts which are identical with the situation which I herein present to you.

"You will note from reading Opinion No. 1441 of former Attorney-General Edward C. Turner, no mention is made of sections 6921, 6927 and 6928 of the General Code, and it would seem from reading these sections that the legislature has enacted a law which is applicable to just such a case as we have here.

"If you are unable, for any reason, to give a favorable opinion upon the facts hereinbefore presented, I would further request that this matter be called to the attention of the legislature which is now in session with the idea in view that the Cass road law should be amended or new sections enacted to take care of cases of this kind.

"I am quite sure that there are a great many county line roads in the state of Ohio which are in the same situation, and in the future improvements will be desired for these roads, and some relief will be needed, either in the way of a favorable opinion under the present law, or the enacting of new sections applying to such cases."

I note that you are familiar with the opinions rendered by my predecessor in office, being Opinions Nos. 1441 and 2118, rendered in 1916. One of the questions decided in said opinions is the following:

Where the joint boards of county commissioners of two counties resolve to improve a highway upon the line of said two counties, is each county at liberty to choose its own method of assessment, or must the respective proportions of the costs and expenses payable by each county be raised by the same method of assessment in each county? That is, could a township on one side of the county line raise the full amount assessed by a levy upon the whole property of the township, and a township on the other side of the county line provide for its assessment by assessing a part of the costs and expenses against the property owners and raise the other part by a levy upon all the property of the township?

This question was answered by my predecessor in office, to the effect that the proportion of the costs and expenses of the said improvement assessed against each would have to be raised by the same method of assessment in each county.

In your communication you call attention to the fact that my predecessor in office seemed to give no force or effect to sections 6921, 6927 and 6928 G. C., which sections you feel would give authority for a different method of raising the amount proportioned to each county.

Before noticing the provisions of section 6921 G. C., I would like to call attention to section 6910 G. C. This section provides that:

"The county commissioners may, without the presentation of a petition, take the necessary steps to construct, improve or repair a public road or part thereof as hereinbefore provided upon the passage of a resolution by unanimous vote declaring the necessity therefor, and the cost and expense thereof may be paid by either of the methods hereinafter provided."

That is, by one of the methods provided for in section 6919 G. C.

Now you will note that section 6921 in part is very similar to this section 6910, other than that it does not provide that the cost and expense under said section shall be paid by one of the methods provided for in section 6919. Section 6921 in short provides that the county commissioners, or joint board, upon a unanimous vote, may without a petition order that *all* the compensation and damages, costs and expenses of constructing any improvement be paid out of the proceeds of any levy or levies for road purposes on the grand duplicate of the county, that is, the county commissioners may provide that all of the cost and expense will be paid by the county. Such is the first part of section 6921. Now the latter part of this section provides that the county commissioners, or joint board, may agree with the trustees of the township or townships in which said improvement is in whole or in part situated, to the effect that said county and township, or one or more of them,

may pay such proportion or amount of the damages, costs and expenses as may be agreed upon between them. In other words, in the latter part of this section the county and the township pay the total cost of the improvement, while in the first part of the section the provision is made for the county commissioners paying the total cost themselves. But there is no provision in this section whatever as to assessing a part of the costs against benefited property owners, so that I do not feel that this section warrants a conclusion that the joint board of county commissioners could proceed in the manner suggested by you in your communication.

You call attention also to section 6927 G. C. This section provides merely that the county commissioners, in order to provide by taxation a fund for the payment of the costs and expense of an improvement to be paid by the township or townships interested, are authorized to levy a tax upon all the taxable property of the township or townships, but this section has nothing to do as to the matter of assessing all or any part of the cost and expense of an improvement against benefited property owners. So that I am of the opinion that the provisions of said two sections, or the provisions of said section 6928, do not warrant the joint board of county commissioners to proceed in the manner suggested by you in your communication.

Therefore, in answering your communication directly, I am of the opinion that Hon. Edward C. Turner's opinion in reference to this matter is correct.

You suggest that it would be advisable for the general assembly to take this matter up at this session and provide a method by which highways may be constructed along the plan which your joint board of county commissioners desire to follow. I will say that such provision is made in the bill which has to do with highways and which is now before the legislature.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

79.

APPROVAL—TRANSCRIPT OF PROCEEDING FOR BOND ISSUE OF THE BOARD OF EDUCATION OF MIAMI TOWNSHIP RURAL SCHOOL DISTRICT.

COLUMBUS, OHIO, March 6, 1917.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN :—

"RE:—Bonds of Miami township rural school district, Hamilton county, Ohio, in the sum of $4,500.00, issued for the purpose of remodeling and repairing certain school houses in said school district."

I have examined the corrected transcript of the proceedings of the board of education and other officers of Miami township rural school district, Hamilton county, Ohio, in connection with the above bond issue; also the bond and coupon form prepared, and find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds, drawn in accordance with the form submitted and signed by the proper officers, will, upon delivery, constitute valid and binding obligations of the said school district. Very truly yours,

JOSEPH MCGHEE,
Attorney-General.

80.

COUNTY COMMISSIONERS—MUST KEEP COURT HOUSE CLEAN INCLUDING LAW LIBRARY—JANITORS NOT ENTITLED TO EXTRA COMPENSATION.

It is the duty of the county commissioners to keep the entire court house clean, law library and all, and the court house janitor is not entitled to extra compensation for cleaning the law library.

COLUMBUS, OHIO, March 6, 1917.

HON. HARRY S. CORE, *Prosecuting Attorney, Ottawa, Ohio.*

DEAR SIR:—I have your letter of February 1, 1917, as follows:

"Putnam county has at its court house room lighted, heated and partly shelved for library purposes. There is a library association, as provided by law, librarian and assistant librarian and custodian.

"The court house is cared for by two janitors, both required to take civil service examination before entering upon their duties.

"Will the janitors be required to do the janitor work in and about the above mentioned room? If not, are they entitled to extra compensation for services if they should perform the duty of janitor of this room?"

Section 2410 General Code reads:

"The board may employ a superintendent, and such watchmen, janitors and other employes as it deems necessary for the care, and custody of the court house, jail, and other county buildings, and of bridges, and other property under its jurisdiction and control."

Section 3055 G. C. reads:

"For the use of such law library, the board of county commissioners of the county shall provide at the expense of the county, a suitable room or rooms with sufficient and suitable bookcases, in the county court house, or if there is no suitable room or rooms to be had therein, any other suitable room or rooms at the county seat, and shall heat and light them. The books and furniture of the law library association used exclusively in such library, shall be exempt from taxation."

The county commissioners are the legal custodians of the court house and it is their duty to see that the entire building, law library and all, is kept clean. The particular duties of each janitor are fixed by the commissioners. There is nothing statutory about their duties, and if in the case you refer to the commissioners order the janitors in question to keep the law library clean, it is my opinion that they must do so without any increase in compensation.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

81.

PROBATE JUDGE—REQUIRED TO PROVIDE CLOTHING FOR PATIENTS COMMITTED TO INSTITUTION FOR FEEBLE MINDED—COSTS TO BE PAID FROM COUNTY TREASURY.

When a person is committed to the institution for feeble minded, the probate judge is required to furnish such patient with clothing, provided for in section 1963 *G. C., when the same is not otherwise provided, and the cost of the same shall be paid on the certificate of the probate judge and the order of the county auditor from the county treasury.*

COLUMBUS, OHIO, March 6, 1917.

HON. MELL G. UNDERWOOD, *Prosecuting Attorney, New Lexington, Ohio.*

DEAR SIR:—I have your letter of February 14, 1917, as follows:

"It is a prerequisite condition to their admission into the institution for feeble-minded youth, that each patient be furnished with necessary and proper clothing.

"Has the probate judge the power to furnish each patient sent to that institution with proper clothing to be paid for on his certificate and the order of the county auditor on the county treasury?

"If he should not have the power to furnish the patient with the necessary clothing, how and by whom should the same be furnished?"

Sections 1902, 1962 and 1963 of the General Code read:

"*Sec.* 1902. Feeble minded persons of such inoffensive habits as to make them proper subjects for classification and discipline in the institution may be admitted, on pursuing the same course of legal commitment as governs admission to the state hospital for the insane.

"*Sec.* 1962. If not otherwise furnished, the probate judge shall supply each patient sent to a hospital for the insane with proper clothing, which shall be paid for on his certificate and the order of the county auditor from the county treasury. Such clothing shall be new or as good as new, the woolens of dark color, and with such patient be delivered in good order to the superintendent. The superintendent will not be bound to receive the patient without such clothing.

"*Sec.* 1963. The clothing required by the preceding section is as follows: For a male patient, a coat, vest and two pairs of pantaloons, all of woolen cloth, two pairs of woolen socks, two pocket handkerchiefs, two cravats, one hat or cap, a pair of shoes or boots, a pair of slippers, three cotton shirts, two pairs of drawers, two undershirts and an overcoat or other outside garment sufficient to protect him in severe weather;

"For a female patient, two substantial gowns or dresses, two flannel petticoats, two pairs of woolen stockings, one pair of shoes, one pair of slippers, two handkerchiefs, a good bonnet, two cotton chemises, and a large shawl or cloak."

It will be noted that section 1902, above quoted, provides for the admission of patients to the institution for feeble minded and states that they "may be admitted on pursuing the same course of legal commitment as governs admission to the state hospital for the insane." Section 1902, therefore, adopts the same method

for admitting patients to the feeble minded institution as to the state hospitals of the state. It will be noted that section 1962 provides that each patient admitted to a hospital for the insane shall be supplied with certain clothing by the probate judge, not otherwise furnished, and that *"the superintendent will not be bound to receive the patient without such clothing."* This being a provision of law in connection with admission of patients to state hospitals, it applies with equal force by reason of section 1902 to the admission of patients to the feeble minded institution, and I am, therefore, of the opinion that when a patient is committed to the institution for the feeble minded, the probate judge is required to furnish such patient with the clothing provided in section 1963 G. C., when the same is not otherwise provided, and the cost of such clothing shall be paid on the certificate of the probate judge and the order of the county auditor from the county treasury.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

82.

HOUSE BILL NO. 386—EFFECT OF SAME AS INTRODUCED IN 82ND GENERAL ASSEMBLY.

House bill No. 386, as introduced in the 82nd general assembly, has the practical effect of creating limited partnerships with perpetual succession as corporations. Said house bill is vague in its terms and lacks provisions necessary to give certainty to its operation.

COLUMBUS, OHIO, March 6, 1917.

HON. JAMES M. COX, *Governor of Ohio, Columbus, Ohio.*

MY DEAR GOVERNOR:—Under date of February 6, 1917, you submitted the following request for opinion to this office:

> "Will you please let me have your opinion on the enclosed bill to amend section 8667 of the General Code, etc.? Also have your legal survey supplemented by report from the secretary of state as to the probable effects that might come to the state from its passage. I would be glad also to have your unofficial statement as to what effect it might have on the revenues of the state."

The bill referred to is H. B. No. 386, and is as follows:

> "Section 1. That section 8667 of the General Code be amended to read as follows:
>
> "Section 8667. If a corporation be organized for profit, it must have a capital stock, which may consist of common and preferred, or common only; but at no time shall the amount of preferred stock at par value exceed two-thirds of the actual capital paid in cash or property.
>
> "Any corporation for profit, except a public utility, banking, safe deposit and trust, safe deposit or trust company, building and loan association, collateral loan company, savings and loan association, title guarantee and trust company, or insurance company, may provide in its articles of incorporation for the issuance of shares of common capital stock without any nominal or par value, each of which shares shall be equal to every

other share of such stock, and without stating the amount of such capital stock. When, upon organization, ten per cent. of the capital stock without nominal or par value, of a corporation, is subscribed, the subscribers to the articles of incorporation, or a majority of them, shall at once so certify in writing to the secretary of state; and such certificate shall be in lieu of the certificate provided for by section 8633 of the General Code. The fee payable to the secretary of state for the filing of articles of incorporation, or a certificate of increase, providing for shares without nominal or par value, shall as to such shares be computed and paid at the rate of five cents for each such share, and in no event shall such fee be less than ten dollars, and the annual franchise tax provided for by section 5498 of the General Code shall, as to such shares, be computed and paid at the rate of seven and one-half cents for each such share. The number of shares of such stock may be increased or decreased in the same manner as is provided with respect to shares of stock having par value. A corporation issuing stock without par value may borrow such sums of money as its board of directors may approve, and may issue its notes or coupons or registered bonds therefor bearing any legal rate of interest and secure their payment by a mortgage upon its property, real or personal, or both. All other provisions of law relating to stock having par value, so far as applicable, shall apply to and govern stock without par value.

"Section 2. That said original section 8667 of the General Code be, and the same is hereby repealed."

The first paragraph of this bill down to and including line 7 is the existing section verbatim. All the balance of it is an addition to the law, in effect giving partnerships perpetual succession like corporations, and limiting, or rather extinguishing the liability of individual partners.

One serious objection to the form of expression of this bill appears at the very outset. It is that lines 8 to 14 contain a virtual contradiction of the first thirteen words. Those words make the express, mandatory, positive and necessary requirement of capital stock. It MUST have capital stock. The new portion of the statute excuses this requirement except so far as in the nature of the case capital stock is represented by actual assets. The corporation formed under this permission would have no stated amount of capital stock. Like an individual or firm it would have property, or possibly, very frequently, like many individuals, it would have none. The corporation would have shares, but just what these shares would be, or what they would represent is entirely indefinite. In corporations, as at present existing, the intrinsic value of shares varies possibly from hour to hour, although not absolutely capable of ascertainment. In the proposed corporation, having no nominal value, exactly the same thing would be true, but they would lack even the semblance of certainty given by this nominal value, which, under safeguarding regulations, always represents their actual original value.

The first expression upon this subject is in lines 11 and 14 providing for articles of incorporation which must provide for shares. The shares must be equal, must have no nominal value, and the articles of incorporation shall not state the amount of the capital stock. As there is no express revocation of that requirement of section 8625 which requires the articles of incorporation to state the number of shares into which the capital stock is divided, and as the new bill follows with a provision requiring a certificate when ten per cent. of the stock has been subscribed, this requirement of the articles must be construed to be still in effect, although it is only the latter part of paragraph four of section 8625, and is in and of itself an incomplete sentence, so that in construing the new law and reading it

in connection with the old, you have to read into the new bill the end of paragraph 4 beginning after the comma. The probable effect of this would be immediate and continued litigation, and the law, instead of being enacted by this bill would be made hereafter by the decision of courts, until which time it was so established, it would have no certainty and could not be said to have any definite existence.

A very important provision is inserted in lines 27-31, giving the directors control of borrowing, and issuing bonds and obligations. They may have that authority at present; do have it within certain limits, but one familiar rule in the construction of statutes is that new words inserted are intended to have additional meaning. This is incontrovertible where a new provision is inserted. Just what the legislative intent will be as to the power of directors over this important branch of corporate activity is only left to conjecture, and like the other feature of the case will be moulded into law by the practice of corporations and decisions of the courts in the future.

The bill is modeled after the New York statute upon the same subject, but differs from it in some important particulars which give a degree of certainty to a portion of the New York law.

The New York law provides that every stock certificate shall have plainly written or printed upon its face "the number of shares which it represents and the number of such shares which the corporation is authorized to issue." The absence of a provision to this effect in the bill in question is very important, as lacking certainty, which the New York law has in that respect.

The New York law has a provision restricting the increase of indebtedness upon an increase of stock which is absent in the proposed bill. The New York law provides that the corporation shall have capital of not less than the amount of the preferred stock authorized to be issued, and an additional five dollars, or some multiple of five dollars, for every share of common stock.

The omission of all these requirements, and in fact of every provision or regulation requiring or producing any certainty as to the capital stock, size of share, number of stockholders, or in fact anything in reference to the actual assets of such proposed corporation, or the manner in which it is held and owned, makes the proposed act of such indefinite character as scarcely to amount to legislation at all, except to invite proceedings of every species and character of vagary, until the law take tangible shape in actual practice.

I am not called upon to advise the legislative and executive departments of the government farther than to state the nature of the apparent purposes of the proposed act and the manner in which it is proposed by it to effectuate them.

As to its effects upon the state's income from this source, it is evident that it will be reduced. An estimate of the amount of such loss can most readily and accurately be given by the auditor of state.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

83.

TREASURER OF TOWNSHIP AND VILLAGE FUNDS—LAW PROVIDING SAID OFFICER TO BE TREASURER OF SCHOOL FUNDS REPEALED —NOT ENTITLED TO COMPENSATION AFTER DEPOSITORY HAS BEEN PROVIDED.

The treasurer of village and township funds who continues to act as treasurer of the school funds after a depository has been provided under 7604-7608 G. C. is not entitled to compensation for such services.

The law providing that the treasurer of the village or township shall be treasurer of the school funds having been repealed makes the act of such treasurer an unlawful act for which no compensation can be had.

COLUMBUS, OHIO, March 7, 1917.

HON. GEORGE S. MAY, *Prosecuting Attorney, Napoleon, Ohio.*

DEAR SIR:—In your letter of February 12, 1917, you ask my opinion upon the following statement of facts:

> "The board of education of the Malinta village school district designated a depository for its school funds in accordance with the provisions of section 7604 of the General Code, but failed to adopt any resolution dispensing with the treasurer of the school moneys belonging to said school district, as required by section 4782 General Code.
>
> "The treasurer of the village and township funds continued to act as treasurer of the school funds belonging to said district after the designation of a depository, and the question arises as to whether or not he is entitled to compensation for the services rendered after the designation of such depository."

The above mentioned section 7604 G. C. provides that within thirty days after the first Monday in January, 1916, and every two years thereafter, the board of education of any school district shall provide a depository for all of the moneys coming into the hands of its treasurer and section 4782 provides:

> "When a depository has been provided for the school moneys of a district, as authorized by law, the board of education of the district, by resolution adopted by a vote of a majority of its members, shall dispense with a treasurer of the school moneys, belonging to such school district. In such case, the clerk of the board of education of a district shall perform all the services, discharge all the duties and be subject to all the obligations required by law of the treasurer of such school district."

But I note by your letter that your board of education neglected or failed to adopt any such resolution, as is provided by section 4782, and that the treasurer of the village has been performing the duties of the treasurer of the school district.

I cannot understand, however, how the village treasurer can act as the treasurer of your school district in any event. Under the provisions of section 4747 G. C. the board of education of each village school district shall organize on the first Monday of January after the election of members of such board, and elect one member as president, one member as vice-president and a person who may or may not be a member shall be elected clerk. Now, said scheme of organization provides

for no election of treasurer, and section 4763 provides that in village school districts not having a depository, as provided by section 7604, the county treasurer shall be the treasurer of the school funds of such districts.

You say in your letter that after designating a depository for its school funds, in accordance with the provisions of section 7604 of the General Code, and as I take it, the succeeding sections thereto relating, the board of education failed to adopt the resolution provided for in section 4782, dispensing with the treasurer of the school moneys. I am satisfied that the language of section 4782 is such that an action in mandamus will not lie to compel a board of education to adopt such a resolution, for the section provides "by resolution adopted by a vote of a majority of its members," but I do not understand that a board of education can neglect and refuse to perform an act provided for by law and thus have any greater powers by such neglect than such board would have had by acting or than is given it by law.

In 1904, what is now section 4763 G. C., then 4042 R. S., was amended to read as follows:

> "In each city, village and township school district, the treasurer of the city, village and township funds shall be respectively the treasurer of the school funds. * * *"

Said section was carried into the General Code at the time of its enactment in the above identical form, but in 1914, 104 O. L. p. 159, said section 4763 was amended to read as follows:

> "In each city school district, the treasurer of the city funds shall be the treasurer of the school funds. In all village and rural school districts which do not provide legal depositories, as provided in section 7604 to 7608, inclusive, the county treasurer shall be the treasurer of the school funds of such districts."

Said above mentioned section became a law May 20, 1914, and has remained in its present form from that time until now. The same year and on the same day, 104 O. L. 139, section 4737 was amended to read as follows:

> "The board of education of each city, village and rural school district shall organize on the first Monday of January after the election of members of such board. One member of the board shall be elected president and one as vice-president, and a person who may or may not be a member of the board shall be elected clerk. * * *"

No provision was made for the election of a treasurer and said section remained a part of the General Code in the above form until now.

Section 4773 G. C. provides:

> "At the expiration of his term of service, each treasurer shall deliver to his successor in office all books, papers, money and other property in his hands belonging to the school district. * * *"

So that when the village and township treasurer at Malinta kept possession of the property of said school district following the establishment of the depository which was designated under the provisions of General Code Section 7604, he was then performing an unlawful act. If he was the treasurer prior to the first day

of January, 1916, then under section 4773 he was bound to turn over the property in his possession belonging to the school district to his successor, which was one of two persons, either the clerk of the board of education, who was made the acting treasurer under section 4782 G. C., or the county treasurer who was made the acting treasurer under section 4763 G. C. If, on the other hand, he was elected as village and township treasurer at the regular election held in 1915, then any property which came into his hands came there wrongfully and any duties which he performed as such treasurer were unlawfully performed.

In Conner v. Board of Education, 8 Ohio Dec. Rep. 672, it is held that a person who by virtue of the office of city treasurer has possession of school moneys and who is compelled to act as such treasurer after his term of office, as city treasurer, has expired, because the treasurer elected fails to give bond as required by the board of education, he is not permitted to draw compensation for his services as such treasurer. The court said:

> "If he was city treasurer during that time the law denies compensation; if he was not, *his holding the school funds was an unlawful act.*"

So that I advise you that the township and village treasurer cannot receive compensation for the duties performed as school treasurer since the establishment of the depository provided for in General Code section 7604 and the subsequent sections thereto related.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

84.

CONTIGUOUS TERRITORY—TERRITORY WHICH SIMPLY TOUCHES AT THE EXTREME CORNERS NOT CONTIGUOUS TERRITORY WITHIN MEANING OF SECTION 4685 AND 4738 G. C.

Territory which simply touches at the extreme corners as the apex of a triangle and the corner of a rectangle is not contiguous territory as contemplated in G. C. 4685 *and* 4738.

COLUMBUS, OHIO, March 7, 1917.

HON. FRANK B. PEARSON, *Superintendent of Public Instruction, Columbus, Ohio.*

DEAR SIR:—In your letter of February 8, 1917, you request my opinion upon the following state of facts:

> "A triangular tract of land containing 80 acres touches in one point the corner of another square tract of land containing 40 acres. Said tracts of land lie in Londonderry township rural school district, Guernsey county, and touch in one point Oxford township rural school districts. Said tracts of land are owned by one man who is petitioning the county board of education of Guernsey county to transfer said land from Londonderry township rural school district to Oxford township rural school district, under the provisions of section 4692 G. C. (The enclosed diagram gives the situation of the land described above.) Under such conditions could annexation be made by the county board without conflicting with the provisions of section 4685 G. C., which reads:

"'The territory included within the boundaries of a city, village or rural school district shall be contiguous except where an island or islands form an integral part of the district.'

"The answer to this question will depend upon the definition of contiguity as used in sections 4685 and 4738 G. C. May we have your definition of the word contiguous as used in the sections noted above?"

The above inquiry and the diagram which accompanies same show that the only place the land described in said diagram touches is where the apex of the triangle touches the corner of the rectangle and the question then is, are the tracts thus described contiguous?

The whole question resolves itself into a legal definition of the word "contiguous" as applied to territory which is joined for school purposes.

General Code section 4685 provides as follows:

"The territory included within the boundaries of a city, village or rural school district shall be contiguous except where an island or islands form an integral part of the district."

The word "contiguous" is defined in Webster's dictionary as:

"Any actual or close contact."

And is defined in the Century dictionary as:

"Meeting or joining at the surface or border."

Bouvier's Law dictionary defines the same as:

"In close proximity, in actual close contact."

It cannot be said of the territory described in your diagram that it is in actual or close contact or that it joins at the border. The word "contiguous" is considered in the case of Wild v. People ex rel. Stephens, 81 N. E., 707, and in a case in which the facts are very similar to the facts stated in your request. The court uses the following language:

"Neither two tracts which merely corner on each other, nor two tracts with a strip fifty feet wide included merely for the purpose of connecting them, constitute 'contiguous' territory, * * * authorizing the incorporation into a village of contiguous territory."

It is held in Griffin v. Dennison Land Company, 119 N. W. 1041, that the word "contiguous" in the statute defining "tract" as applied to land, when used in the revenue law, as any contiguous quantity of land in the possession of, owned by, or recorded as the property of the same claimant, means land which touches on the sides; and two quarters of the same section, which only touch at the corner, do not constitute for the purposes of taxation one tract or parcel of land.

It would seem from the above that territory, in order to be contiguous, must be territory not only that is near to or in the same neighborhood, but territory which actually touches and joins and is connected as distinguished from territory which is separated by other territory. The intent of the legislature, it seems to me, was not that the territory should be separated in any manner by other ter-

ritory, but that the districts for school purposes should be just what the language indicates, that is, uniting or joining at the surface or border.

Reasoning, then, from the above, I advise you that territory which simply touches at the extreme corners, as indicated in your diagram, cannot be said to be contiguous territory, as contemplated in General Code section 4685.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

85.

APPROVAL—TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE OF COMMISSIONERS OF DARKE COUNTY, OHIO.

COLUMBUS, OHIO, March 7, 1917.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of Darke county, Ohio, in the sum of $11,164.00, issued for the purpose of creating a fund for the payment of the compensation, damages, costs and expense of the improvement of the Grubbs-Rex and Love roads, being two bonds of $582.00 each, and twenty bonds of $500.00 each."

I have examined the transcript of the proceedings of the county commissioners and other officers of Darke county relative to the above bond issue, also the bond and coupon form submitted to me, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds drawn in accordance with the form submitted and signed by the proper officers will, upon delivery, constitute valid and binding obligations of Darke county.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

86.

ARTICLES OF INCORPORATION—DISAPPROVAL THE LEONARD COMPANY—REAL ESTATE, INSURANCE AND SECURITIES BUSINESS CANNOT BE CARRIED ON BY SAME CORPORATION.

A real estate business, an insurance business and a securities business are not so related that they can be carried on by a single corporation.

COLUMBUS, OHIO, March 7, 1917.

HON. W. D. FULTON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I have the honor to acknowledge receipt of your letter of February 9, 1917, asking opinion, in which you say:

"We are herewith enclosing articles of incorporation of The Leonard Company, with check for fifty dollars; also correspondence and waivers

attached to same, and ask that you give us an opinion in regard to the purpose clause and whether the same should be accepted and filed by this office."

The articles of incorporation referred to in your communication disclose a purpose clause therein which reads as follows:

"Said corporation is formed for the purpose of carrying on, doing and conducting a general insurance, bonding, real estate, brokerage and investment business together with the doing of all lawful things in connection therewith including the soliciting and receiving of applications and premiums for all kinds of insurance and bonds and a general agency and brokerage business for itself and for others, in the buying, selling, negotiating, exchanging, dealing and trading in real estate, personal property, stocks, bonds, debentures and securities of all kinds, the negotiating of loans thereon and the managing and improving of property, renting, constructing, erecting, equipping and repairing houses and buildings and making contracts for the same and to promote, finance, develop and otherwise further the lawful enterprises of others, acting as financial agent and generally to promote the aforesaid in all lawful ways and the doing of all things necessary and/or incident thereto."

Applicable to the consideration of the question made by your communication sections 8623 and 8625, General Code, provide as follows:

"Sec. 8623. Except for carrying on professional business, a corporation may be formed for any purpose for which natural persons lawfully may associate themselves.

"Sec. 8625. Any number of persons, not less than five, a majority of whom are citizens of this state, desiring to become incorporated, shall subscribe and acknowledge articles of incorporation, which must contain:

"* * * * * * *

"3. The purpose for which it is formed.

"* * * * * * *"

The supreme court in the case of State ex rel v. Taylor, 55 O. S., 61, 67, construing the above statutory provisions, held that the use of the word "purpose" therein instead of the word "purposes" implied a limitation, and that except where specially authorized by statute a corporation can be organized for one main purpose only.

A diligent perusal of the purpose clause in the articles of incorporation tendered to you fails to disclose any one main purpose to which all the other purposes therein stated relate themselves as incidental powers. On the contrary, consideration of this purpose clause discloses at least three main business purposes, to one or other of which all the other purposes therein mentioned are related as incidents, to wit, an insurance business, a securities business and a real estate business.

Accompanying your communication and the proposed articles of incorporation I find a letter addressed to you by the attorney for the proposed corporation, which letter is in part as follows:

"As I stated to you in my former letter, we have one charter for The Leonard Agency Company which authorizes it to do a general insur-

ance, bonding and real estate business, and we also have a charter for The Leonard Investment Company which is authorized to sell stocks, bonds and insurance of all kinds. Both companies are run from the same office with practically the same overhead expenses and by reason of there being so many reports to the county, state and federal governments, it has become somewhat confusing and annoying, and we have concluded that it was desirable to run the two companies under one charter and dissolve the other two companies. In view of the objects contained in the separate charters as we now have them, I could not quite understand why the articles which I sent a week ago should be refused unless it perhaps was because of the crude manner in which they were drawn."

I can well appreciate the advantages of having the lines of business now conducted by The Leonard Agency Company and The Leonard Investment Company, respectively, united and conducted by one corporation, but in this connection it must be observed that whatever lines of business now conducted by one of these existing corporations above named which are in legal contemplation distinct from those conducted by the other corporation will not essentially be any the less separate and distinct by having all of the business of the two existing corporations united under one charter.

With respect to the question here presented it will be noted that by the provisions of section 8648, General Code, a corporation formed to buy or sell real estate shall expire by limitation in twenty-five years from the date on which its articles of incorporation were issued by the secretary of state. The provisions of this section in themselves import a distinction between real estate business and other business purposes which, under appropriate corporate charter, may be carried on without reference to the twenty-five-year limitation.

The foregoing considerations compel the conclusion that you should not file the articles of incorporation submitted to you, for the reason, as above indicated, that the purpose clause thereof discloses a number of main business purposes which cannot legally be embodied in nor conducted under one corporate charter.

I am returning to you herewith the articles of incorporation, together with check for fifty dollars and correspondence submitted with your communication of February 9th.

Very truly yours,
JOSEPH McGHEE,
Attorney-General.

87.

POLICE PENSION FUND—WHEN COUNCIL HAS ABOLISHED SAME—NO PERSONS DRAWING PENSIONS AND NO ONE ENTITLED TO DRAW FROM SAID FUND—SURPLUS SHOULD BE TRANSFERRED TO CREDIT OF SINKING FUND OF MUNICIPALITY.

When the council of a municipality has decided that it is no longer necessary to maintain a police relief or pension fund and has abolished the positions of trustees of the police relief fund, and said fund was created by special tax levies under section 4621 G. C., and there are no persons drawing pensions out of the police relief fund or entitled to draw same, any balance or surplus remaining in the treasury to the credit of said police relief fund should be transferred by the council to the credit of the sinking fund of said municipality, as provided in section 5654 G. C.

COLUMBUS, OHIO, March 7, 1917.

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

GENTLEMEN:—Under date of January 8th you submitted for my opinion the following request:

> "The council of the city of Bellaire, Ohio, three-fourths of all the members elected thereto concurring, on December 12, 1916, passed ordinance No. 991, providing as follows:
>
> "'Section 1. That by reason of the provisions of the workmen's compensation act, of the state of Ohio, this council deems that it is no longer necessary to maintain the police relief fund for the city of Bellaire, and the same together with the trustees of the police relief fund are hereby abolished from and after January 1, 1917.'
>
> "In view of the provisions of said ordinance, we respectfully ask:
>
> "In case the balance of money at present to the credit of the police relief fund, amounting to $1,500.00, consists of tax levies made under section 4621 G. C., what disposition shall be made of such balance? Is it subject to transfer ordinance of council? Does it go to the general fund, to the sinking fund trustees, or where?"

The following sections of the General Code with reference to the police relief fund are pertinent to your question:

> "Sec. 4616. In any municipal corporation, having a police department supported in whole or in part at public expense, the council by ordinance may declare the necessity for the establishment and maintenance of a police relief fund. Thereupon a board of trustees, who shall be known as 'trustees of the police relief fund' shall be created, which in cities shall consist of the director of public safety, and in villages of the marshal, and five other persons, members of such department. But upon petition of a majority of the members of the police department, such director or marshal may designate a less number than five to be elected trustees.
>
> "Sec. 4619. The members so elected shall serve for one year, or until their successors are elected, and the election for such successors shall be held each year upon the second Monday of the same month in which the first election is held. In case of vacancy by death, resignation, or otherwise, among the members so elected, the remaining members shall

choose a successor until the next election. Such board of trustees shall administer and distribute the police relief fund.

"Sec. 4621. In each municipality availing itself of these provisions, to maintain the police relief fund, the council thereof each year, in the manner provided by law for other municipal levies, and in addition to all other levies authorized by law, may levy a tax of not to exceed three-tenths of a mill on each dollar upon all the real and personal property as listed for taxation in the municipality. In the matter of such levy, the board of trustees of the police relief fund shall be subject to the provisions of law controlling the heads of departments in such municipality, and shall discharge all the duties required of such heads of departments.

"Sec. 4626. The treasurer of the municipality shall be the custodian of the police relief fund, and shall pay it out upon the proper order of the trustees thereof. The treasurer shall execute a bond in such sum and form as is satisfactory to the trustees, conditioned for the faithful performance of his duties with respect to the fund.

"Sec. 4631. The trustees of the police relief fund shall make a report to the council of the municipality of the condition of the fund on the first day of January of each year."

Section 4616, supra, provides for the establishment of the police relief fund as a separate fund and for the official agency to have charge of the same. The term of office, the filling of vacancies and the general duties of the trustees in charge of same are set forth in section 4619. Section 4621 authorizes the levying of a special tax to provide moneys for the maintenance of a police relief fund. The treasurer of the municipality is made the custodian of the fund and authorized to pay same out upon the proper order of said trustees under the provisions of section 4626. The duty is placed on such trustees by section 4631 to make an annual report to council of the condition of said fund.

It is apparent from the provisions of the above sections that the trustees of the police relief fund or pension fund are charged with the performance of public duties, and are in effect agents of the municipality in supervising and distributing said fund.

The trustees of the police relief fund came into existence through the passage of an ordinance by the council of the municipality creating said positions, and their official powers and duties would cease upon the repeal of said ordinance. As to this, the law is clear as is apparent from the following syllabus in State ex rel. v. Jennings et al., 57 O. S. 415:

> "An office created by an ordinance is abolished by the repeal of the ordinance and the incumbent thereby ceases to be an officer."

The decision in this case is merely an illustration of the general principle that the power to enact an ordinance includes also the power to repeal it.

Where the council of a municipality has authority to create an office or a position by ordinance the right to repeal said ordinance and thereby abolish the office and position is unquestioned, unless some express duty of creating and maintaining same is placed on council by the legislature or its power in that respect is specifically limited. An examination of the General Code does not reveal any such limitation or duty in the particular case.

The question then presents itself as to whether or not any vested rights have been acquired in the pension fund. In order that this matter may be determined, it is necessary first to have in mind the general principles of law applicable to pensions. They are well stated as follows:

"Pension is not a vested right. A pension is a matter of bounty which may be given or withheld at the pleasure of the sovereign power, and is not a matter of contract or vested right."

Eddy v. Morgan, 216 Ill., 437, 75 N. E. 174.

"That a law providing pensions for officers and their dependents may be repealed or altered any time before the happening of the contingency upon which the right to the pension rests is not and cannot be denied."

Cohorn v. Henderson (Cal.) 124 Pac. 1037.

It may be well at this time to state, since the facts are not given in your request, that the conclusion reached later in this opinion is based upon the assumption that there were not any persons drawing pensions out of the police relief fund, or entitled to draw same, at the time the repealing ordinance went into effect, and hence I have not considered the matter of any vested right in a particular pension fund after the contingency, upon the happening of which said pension is based, has occurred.

As has been stated heretofore, the trustees of the police relief fund were vested with public powers and charged with public duties. The fund they were authorized to administer was created by the levy and collection of a special tax and was placed in the custody of the treasurer of the municipality, subject to distribution upon the proper order of the trustees thereof. Hence, when their official existence was at an end through the repeal of the ordinance by which their offices were created, and the purpose for which the special tax was levied ceased to exist for the reason that other means had been provided for taking care of such contingencies, any balance or surplus of the proceeds derived from such special tax should be transferred by the council to the credit of the sinking fund of said city as provided in section 5654, General Code, as amended 103 O. L. 521, which reads as follows:

"Sec. 5654. The proceeds of a special tax, loan or bond issue shall not be used for any other purpose than that for which the same was levied, issued or made, except as herein provided. When there is in the treasury of any city, village, county, township or school district a surplus of the proceeds of a special tax or of the proceeds of a loan or bond issue which cannot be used, or which is not needed for the purpose for which the tax was levied, or the loan made, or the bonds issued, all of such surplus shall be transferred immediately by the officer, board or council having charge of such surplus, to the sinking fund of such city, village, county, township or school district, and thereafter shall be subject to the uses of such sinking fund."

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

88.

BONDS—SALE UNDER SECTION 6929 G. C. SHOULD BE ADVERTISED IN ACCORDANCE WITH SAID SECTION—SECTION 2294 G. C. DOES NOT APPLY.

Bonds issued under section 6929 General Code should be advertised for sale in accordance with the provisions of said section. The provisions of section 2294 General Code do not apply to such bonds.

COLUMBUS, OHIO, March 7, 1917.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—I have the honor to acknowledge receipt of your favor of February 13, 1917, asking opinion, in which you say:

"In view of the laws relative to the publication of bond sales as contained in section 2294 G. C., passed May 27, 1915, approved June 3, 1915, and filed in the office of the seretary of state on June 4, 1915, together with the provisions of section 6929 G. C. passed May 17, 1915, approved June 2, 1915.

"QUESTION:

"Which section should govern the procedure in publication of advertisement of bond sale by the county commissioners under authority of section 6929 G. C.?"

Sections 2294 and 6929 General Code, referred to in your communication, read as follows:

"All bonds issued by boards of county commissioners, boards of education, township trustees, or commissioners of free turnpikes, shall be sold to the highest bidder after being advertised once a week for three consecutive weeks and on the same day of the week, in a newspaper having general circulation in the county where the bonds are issued, and, if the amount of bonds to be sold exceeds twenty thousand dollars, like publications shall be made in an additional newspaper having general circulation in the state. The advertisement shall state the total amount and denomination of bonds to be sold, how long they are to run, the rate of interest to be paid thereon, whether annually or semi-annually, the law or section of law authorizing the issue, the day, hour and place in the county where they are to be sold.

"Sec. 6929. The county commissioners in anticipation of the collection of such taxes and assessments may, whenever in their judgment it is deemed necessary, sell the bonds of said county in the aggregate amount necessary to pay the estimated cost and expenses of such improvement. Such bonds shall state for what purpose they are issued and shall bear interest at a rate not to exceed five per cent. per annum, payable semi-annually and in such amounts and to mature at such times as the commissioners shall determine, subject to the provision however that said bonds shall mature in not more than ten years prior to the issuance of such bonds, the county commissioners shall provide for levying and collecting annually a tax upon all the taxable property of the county to provide a

sum sufficient to pay the interest on such bonds and to create a sinking fund for their retirement at maturity. The sale of such bonds shall be advertised once not later than two weeks prior to the date fixed for such sale in a newspaper published and of general circulation within such county, if there be any such paper published in said county, but if there be no such paper published in said county then in a newspaper having general circulation in said county. Such bonds shall be sold to the highest responsible bidder for not less than par and accrued interest. The county commissioners may reject any or all bids. The proceeds of such bonds shall be used exclusively for the payment of the costs and expenses of the improvement for which they are issued."

It is plain from a reading of these sections that the respetive provisions are in conflict with respect to the time and manner in which bonds therein referred to are to be advertised for sale, and if there were likewise a conflict in the operation of these respective provisions a question of some perplexity would be presented as to which of these sections is the later, and, therefore, effective statute. I do not find it necessary to determine this particular question, although as both of these statutes went into effect as laws ninety days from and after the time they were respectively filed in the office of the secretary of state, the case of Ohio v. Lathrop, 93 O. S. 79, seems to me authority for the conclusion that section 6929 General Code is the later statute. However this may be, it will be noted that section 2294 General Code is a statute of general import providing in general terms as to the manner in which all bonds issued by the board of county commissioners and the other authorities therein mentioned shall be advertised for sale. Section 6929 General Code on the contrary, as enacted, is a part of chapter 6 of the Cass road law, which chapter covers the matter of road construction and improvement by the county commissioners, and section 6929 General Code makes provision for the issue by county commissioners of bonds in anticipation of taxes and assessments to cover the cost of the road improvements constructed by the county commissioners under this chapter; while the provisions of said section with reference to the time and manner in which said bonds are to be advertised for sale have reference only to the particular bonds provided for in said section:

It is an accepted rule of statutory construction that:

"If there are two acts, or two provisions of the same act, of which one is special and particular, and clearly includes the matter in controversy, whilst the other is general and would, if standing alone, include it also, and if reading the general provisions side by side with the particular one the inclusion of that matter in the former would produce a conflict between it and the special provision, it must be taken that the latter was designed as an exception to the general provision."

(Endlich on the Interpretation of Statutes, section 216, cited in Doll v. Barr, 58 O. S. 113, 120.)

"It is a settled rule of construction, that special statutory provisions for particular cases operate as exceptions to the general provision which might otherwise include the particular cases, and such cases are governed by special provisions."

(Gas Company v. Tiffin, 59 O. S. 420, 441.)

Otherwise stated, the rule of statutory construction under consideration is that where the general provisions of a statute conflict with more specific pro-

visions of another, or are incompatible with its provisions, the latter is to be read as an exception to the former.

Cincinnati v. Holmes, 56 O. S. 104, 114;
State ex rel. v. McGregor, 44 O. S. 628, 631;
State ex rel. v. Perrysburg, 14 O. S. 472;
State v. Newton, 26 O. S. 206;
Commissioners v. Board of Public Works, 39 O. S. 632.

The application of the rules of statutory construction before noted clearly compels the conclusion that bonds issued by county commissioners under section 6929, General Code, are to be advertised for sale for the time and in the manner therein provided, and that the provisions of section 2294 General Code have no application to such bonds.

My conclusion in this matter accords with that of my predecessor, Mr. Turner, on the same question expressed by him in opinion 1575, addressed to your department on May 15, 1916.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

89.

CONDEMNATION PROCEEDINGS—BY MUNICIPALITY—JURY FEES PAID AS IN CIVIL ACTIONS—NOT TAXED AS COSTS IN CASE—BY PRIVATE CORPORATION TAXED AS COSTS IN CASE.

In an appropriation case by a municipal corporation the fees of the jury are to be paid as in civil actions and not taxed in the costs of the case, as is done in such appropriations by private corporations.

COLUMBUS, OHIO, March 7, 1917.

HON. O. E. LYTLE, *Probate Judge, Akron, Ohio.*

DEAR SIR:—Under date of March 3, 1917, you addressed the following inquiry to this office:

> "What is your construction of the statute as to jury fees in appropriation cases by municipalities?
>
> "In the case of Detroit Southern Railroad v. Commissioners of Lawrence, et al. (71 O. S. 454), the opinion of the court would be construed that jury fees are paid differently in such cases than they are in appropriation by private corporations. Should jury fees be taxed as part of the costs or paid out of the county fund at the time of the trial?"

The proceeding by a municipal corporation to appropriate property is entirely different from that by a private corporation. The former is under part 1, title 12, division 3, chapter 1, of the General Code, while the latter is under chapter 5, title 3, part 3.

In case of a private corporation it is what is known as a special proceeding. In the case of a municipal corporation it proceeds under the law governing municipal corporations, and section 3681 G. C. provides as to the beginning of the proceeding:

"* * * the solicitor shall make application to the court of common pleas, or to a judge in vacation, to the probate court, or to the insolvency court, in the county in which the land sought to be taken is located * * *."

Section 3683 G. C. provides that:

"* * * the jury shall be drawn and the trial proceed as in other civil actions."

So that you have here two entirely separate and distinct provisions, one by civil action, the other in a special proceeding.

Section 3693 G. C. provides:

"The costs of the inquiry and assessment shall be paid by the corporation, and all other costs taxed as the court directs. * * *"

So that you have here an ordinary civil action with a provision for payment of costs, in which case, of course, it does not include jury fees. Such fees are paid out of the county fund under the provisions of section 3008 G. C.

This then explains the discussion in the opinion of Spear J. in the case cited from 71 O. S., which discussion is on pages 458 and 459, referring to the difference between municipal and private corporations.

In a case of condemnation by a municipal corporation the jury is the same as the ordinary jury in a civil action and paid in the same way.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

90.

APPROVAL—TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE OF THE BOARD OF EDUCATION OF NORTON TOWNSHIP RURAL SCHOOL DISTRICT.

COLUMBUS, OHIO, March 8, 1917.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of Norton township rural school district, Summit county, Ohio, in the sum of $20,000.00, issued for the purpose of purchasing a site and erecting an elementary school building thereon, being twenty bonds in the sum of one thousand dollars each."

I have examined the transcript of proceedings of the board of education and other officers of Norton township rural school district in connection with the above bond issue, also the bond and coupon form attached thereto, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that the bonds drawn in accordance with the form submitted and executed by the proper officers will, upon delivery, constitute valid and binding obligations of said school district.

The bond and coupon form have been returned directly to the president of the said board of education.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

91.

COMMITTEE—CREATED BY JOINT RESOLUTION—TO REPORT TO GOVERNOR AFTER ADJOURNMENT SINE DIE—NOT A LEGISLATIVE COMMITTEE—GENERAL ASSEMBLY MAY NOT AUTHORIZE PAYMENT OF EXPENSES OF SUCH COMMITTEE BY JOINT RESOLUTION FROM APPROPRIATION FOR EXPENSES OF LEGISLATIVE COMMITTEES.

The general assembly may not by joint resolution authorize the payment of the expenses of a body, which is not a legislative committee, from the appropriation for the expenses of legislative committees.

A committee created under authority of a joint resolution to revise and codify a part of the laws of the state and to report to the governor, after the adjournment sine die, with authority to do work and incur expenses after such adjournment, is not a legislative committee.

COLUMBUS, OHIO, March 8, 1917.

HON. JOHN H. CHESTER, *Member House of Representatives, Columbus, Ohio.*

DEAR SIR:—I have your letter of March 5, 1917, in which you ask me to examine house joint resolution No. 5, as amended by the senate and at present pending in the house, on the question of concurrence in said amendments; and to advise you (1) as to whether or not it would be lawful to pay the expenses of the committee provided for by the joint resolution from the fund for the expense of legislative committees; and (2) as to whether or not the auditor of state might lawfully withhold his warrant therefor.

The joint resolution provides for the appointment of a committee to revise, consolidate and recommend changes in the ditch laws of the state. After stating the need of such revision and codification, the measure, which, as stated, is styled a "joint resolution" recites: "Be it enacted by the general assembly of the state of Ohio." This form of words is not appropriate to a joint resolution, and if it stood alone great doubt would exist in my mind whether or not, though styled a joint resolution, this measure would not have to stand or fall as a bill, and if it should not be passed by both houses in the manner required by the constitution for the passage of bills, and receive the approval of the governor, or be presented to him for that purpose, it would not be effectual for any purpose; however, not only the title of the measure, but the introductions of the subsequent paragraphs or clauses thereof show it to be intended as a joint resolution and that the enacting language, above quoted, was an inadvertence. Therefore, I shall consider the measure as a joint resolution only.

The resolution goes on to authorize the governor to appoint a committee to consist of members of the house and senate, to be selected by him, whose duty it shall be to revise and consolidate the laws mentioned in the title, to complete their work not later than September 1, 1917, to serve without compensation and to file their report with the governor not later than January, 1918, the report to be transmitted by the governor to the next session of the general assembly, with such recommendations as he may desire to make. The resolution provides that a thousand copies of the report shall be printed by the supervisor of public printing and shall be transferred to the general assembly with the original report; that the committee may employ stenographers, clerks, expert advice and assistance; and that the necessary expense of its members, together with the compensation of employes or expert assistants, and the incidental expenses incurred by the com-

mittee, shall be paid upon detailed statements of such expense, duly certified by such committee by warrant of the auditor of state, as other such expenses are paid, from the fund for the expense of legislative committees.

As above pointed out, this joint resolution is not a law. It cannot, therefore, have such force and effect as to control the action of the executive branch of the government. While the general assembly, by joint resolution, may take any action that it is competent for the general assembly to take, in so far as it represents the state, without the concurrence of executive officers, it cannot affect the duties of the latter save by passing a law. This distinction creates a difference between the effect of this measure and that of the somewhat similar language respecting the payment of expenses from the fund for the expense of legislative committees, which is found, for example, in the appropriation bills which have, for the past several years, provided that the expenses of the "auditing committee" and "controlling boards" shall be paid from this source. All such provisions are laws and are binding upon the auditor of state, as such. Moreover, of their own force and effect they qualify and define the meaning of the appropriation to which they refer.

On the other hand, it is perfectly competent for the general assembly, by a resolution, to control the expenditure of one of its own appropriations for the expense of legislative committees, within the natural purview of such appropriation, as fixed by law. That is to say, the general assembly may create a special investigating committee, or a special committee, to frame legislation such as the one contemplated by the joint resolution, authorize it to employ assistants, and direct that its expenses be paid out of the appropriation for the expenses of such committees; but in order to be subject to the influence of this principle, the committee, the expenses of which are so authorized to be paid, must be a legislative committee.

In short, the General Assembly, by *law*, may direct that expenses not naturally within the purview of expenses of a legislative committee, be paid from an appropriation for the latter purpose, though such appropriation would otherwise not naturally apply to such expenses; but when the general assembly acts by joint resolution, it cannot thereby enlarge the natural scope of an appropriation for the expenses of legislative committees.

This brings us to the consideration of whether or not the codifying committee, provided for by the joint resolution, is a legislative committee. I think a negative answer must be given to this question for two reasons:

The governor is directed to appoint the committee. While its appointment is provided for by the resolution of the assembly, it is not made in the way in which the appointments of legislative committees ordinarily are made. It is true that the purpose for which the committee is to be appointed is essentially legislative, and for that reason, perhaps, little weight is to be given to the point just mentioned. In the second place, however, it is apparent that this committee will not, in any sense, be a committee of the present general assembly for the reason that it will, in all likelihood, and in point of fact, to a certainty, discharge its functions after the adjournment of the present general assembly *sine die*. While I cannot now, as a matter of law, advise that the general assembly will adjourn *sine die* before the first day of September, 1917, yet I cannot shut my eyes to the fact that such adjournment is almost morally certain.

In the case of State ex rel. v. Gayman, 11 C. C. (n. s.) 257, it was held that a legislative committee, as such, has no authority or legal existence after the adjournment of the general assembly *sine die*. The effect of this decision, which was affirmed without report by the supreme court, was not altered, in my opinion, by the amendment in 1912 of article 11, section 8, of the Constitution. This section, as amended, so enlarges the powers of each *house* of the general assembly

as to authorize such house "to obtain, through committees, or otherwise, information affecting legislative action under consideration or in contemplation * * *." It was adopted to overthrow the restrictive rule as to the separate power of the respective houses, laid down in State ex rel. v. Gulbert, 75 O. S. 1, but it does not in any way affect the rule of the Gayman case.

It follows that inasmuch as the joint resolution clearly contemplates the doing of work by this committee, after the adjournment of the general assembly *sine die,* it must be held either that the committee contemplated by the legislature is not a "legislative committee" or, if it is to be regarded as a legislative committee, the object contemplated by the joint resolution cannot be achieved because beyond the power of the general assembly.

For the foregoing reasons, then, I am of the opinion that it will not be lawful to pay the expenses of the proposed committee from the fund for the expenses of the legislative committees and that the auditor of state might lawfully withhold his warrant therefor. It would be otherwise if the measure were a bill instead of a joint resolution; for in that event, as above pointed out, the authorization of the payment of expenses from this fund would rest upon the same foundation as the payment of expenses of the controlling board and special auditing committees from the same source, which is at least sanctioned by long usage.

Yours very truly,
JOSEPH MCGHEE,
Attorney-General.

92.

APPROVAL—FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN HARRISON AND HOCKING COUNTIES.

COLUMBUS, OHIO, March 9, 1917.

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

DEAR SIR:—Your communication of March 5, 1917, was duly received, in which you transmitted to me for approval the following final resolutions:

Harrison county—Sec. 'J' Bridgeport-Cadiz road. Pet. No. 2456, I. C. H. No. 100.

Hocking county—Sec. 'E' Lancaster-Logan road. Pet. No. 2496, I. C. H. No. 360,

the one for Harrison county being simply an original; the one for Hocking county being original together with a duplicate copy.

I have carefully examined these two final resolutions and find them correct in form and legality, and am therefore returning same to you with my endorsement.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

93.

PROBATION OFFICER—CHIEF AND FIRST ASSISTANT—ARE ASSISTANTS OF JUVENILE COURT—MAY BE APPOINTED AS SUCH, AS IN UNCLASSIFIED SERVICE.

Whether the chief probation officer and first assistant probation officer of juvenile courts are in the classified or unclassified service of the state, is a question of mixed law and fact to be submitted, in the first instance, to the civil service commission.

Such officers are assistants of such courts and may be appointed as such, under favor of subsection 8 of the civil service law, as in the unclassified service.

COLUMBUS, OHIO, March 8, 1917.

HON. BEN. A. BICKLEY, *Prosecuting Attorney, Hamilton, Ohio.*

DEAR SIR:—Under date of February 15, 1917, you addressed the following inquiry to this office:

> "I am writing you at the request of the probate judge who took office on February 9, 1917, and who desires that I submit the following questions for your consideration and opinion:
>
> "The probate judge has been selected to act as judge of the juvenile court; the former judge of this court on August 13, 1914, named a chief probation officer, and thereafter named a chief assistant probation officer. The incoming judge desires to discharge said probation officer and the chief assistant probation officer and name other officials for said positions.
>
> "He desires to know if he has such right under section 1662 of the General Code or whether said officials come under the civil service, as provided in section 496-8 of the General Code.
>
> "Your early consideration of this case will be appreciated by the party who has requested this opinion."

There is no section 496-8 of the General Code. Your inquiry must intend to refer to section 486-8, either subsection 8 or 9.

Subsection 8 and 9 provide as follows:

> "Section 486-8.
>
> "8. Three secretaries, assistants or clerks, and one personal stenographer for each of the elective state officers; and two secretaries, assistant or clerks and one personal stenographer for other elective officers and each of the principal appointive executive officers, boards or commissions, except civil service commissions, authorized by law to appoint such secretary, assistant or clerk and stenographer.
>
> "9. The deputies of elective or principal executive officers authorized by law to act for and in the place of their principals and holding a fiduciary relation to such principals."

A probation officer would not come under the description of the latter of these two provisions, as he, or she, is not a deputy and holds no fiduciary relation. It cannot be said as a matter of law that their merit or fitness cannot be determined

by an examination, and, therefore, these officers would generally come under the provisions of the civil service law. This, however, does not hold if they be selected under said subsection 8, which provides some of the exceptions to the classified service.

It is admitted under said section that county officers are such "other elective officers," as may select two secretaries, assistants or clerks and one personal stenographer. In this statement the state civil service commission coincides.

A probation officer is not a secretary or a clerk, or a stenographer, but such officer is provided for in section 1662 G. C., the pertinent part of which is as follows:

> "The judge * * * may appoint one or more discreet persons * * to serve as probation officers, during the pleasure of the judge. One of such officers shall be known as chief probation officer and there may be first, second and third assistants. * * The judge may appoint other probation officers, with or without compensation. * * *"

The duties of the probation officer are provided in section 1663 G. C. as follows:

> "When a complaint is made or filed against a minor, the probation officer shall inquire into and make examination and investigation into the facts and circumstances surrounding the alleged delinquency, neglect or dependency, the parentage and surroundings of such minor, his exact age, habits, school record, and every fact that will tend to throw light upon his life and character. He shall be present in court to represent the interests of the child when the case is heard, furnish to the judge such information and assistance as he may require, and take charge of any child before and after the trial as the judge may direct. * * *"

This designation of duties seems clearly to constitute the officer performing them an assistant of the court. True, he is not called such, the word "assistant" being used only with reference to the subofficers who are designated as assistants to the probation officer himself. However, the things that the probation officer is authorized and required to do are so directly in line with that which is within the jurisdiction and power and duty of the court, that such officer is, in the general and ordinary acceptation of the word, an assistant of the court, as he performs such duties as inquiring into and making examination and investigation of facts, etc., furnishing the judge information and *assistance*, taking charge of the child as the judge may direct, etc.

You, are, therefore, advised that the probation officer and his first assistant, who undoubtedly takes the place of the probation officer himself in his absence, and performs the same or similar duties, may be selected by the court as assistants, as authorized by said subsection 8, whom he may select or appoint without taking their names from the eligible list furnished by the civil service commission.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

94.

COUNTY BOARD OF EDUCATION—MAY REDISTRICT DURING YEAR TO TAKE EFFECT THE FIRST OF THE FOLLOWING SEPTEMBER—DISTRICT SUPERINTENDENT HAS NO VESTED RIGHT IN CONTRACT FOR MORE THAN ONE YEAR—DOES NOT HOLD OVER WHEN DISTRICT IS DIVIDED.

The county board of education has the authority to divide the county school district into supervision districts during any year, the same to take effect on the first day of the following September, and the district superintendent has no such vested right in a contract for more than one year which will prevent such redistricting or which will compel a continuation of such contract.

COLUMBUS, OHIO, March 9, 1917.

HON. CHARLES H. JONES, *Prosecuting Attorney, Jackson, Ohio.*

DEAR SIR:—In your communication you ask my opinion upon the following facts:

> "Has a county board of education the power, legally, after dividing a county school district into three supervision districts, and district superintendents have been duly elected therefor, to redistrict the county school district into a less number of supervision districts, to take effect before the expiration of the term for which said district superintendents were elected?
>
> "If the county board has such power, what will be the status of the district superintendents upon such redistricting?"

The section of the General Code which provides for the county school district being divided into supervision districts is section 4738 and was amended in 106 O. L. 396 as follows:

> "The county board of education shall divide the county school district, any year, to take effect the first day of the following September, into supervision districts, each to contain one or more village or rural school districts. The territory of such supervision districts shall be contiguous and compact. In the formation of the supervision districts consideration shall be given to the number of teachers employed, the amount of consolidation and centralization, the condition of the roads and general topography. The territory in the different districts shall be as nearly equal as practicable and the number of teachers employed in any one supervision district shall not be less than thirty. The county board of education shall, upon application of three-fourths of the presidents of the village and rural district boards of the county, redistrict the county into supervision districts. The county board of education may at their discretion require the county superintendent to personally supervise not to exceed forty teachers of the village or rural schools of the county. This shall supersede the necessity of the district supervision of these schools."

The language of the above section, especially that part which reads "the county board of education *shall* divide" and that part which provides that the "number of teachers employed in any supervision district shall not be less than thirty," I am

convinced is mandatory. If, at the time of the enactment of said section, there was any county school district that was not divided into supervision districts, the county board of education was compelled to divide the same as provided by said section, as amended, and if the county school district had theretofore been divided into supervision districts, but under the section as originally enacted, which provided that the number of teachers employed in any one district should be not less than twenty, then I am convinced, under the amendment aforesaid, that it is the duty of the county board to divide the same into supervision districts having not less than thirty teachers in each district and it is also provided that the redistricting shall take effect on the first day of September following the designation of such supervision districts. The redistricting may be performed by the county board of education any year and upon application of three-fourths of the presidents of the village and rural district boards of the county the county board of education must redistrict the county into supervision districts; but I am convinced that the supervision districts formed by the county board of education, upon its own motion or upon the application of three-fourths of the presidents of the village and rural boards of the county, would become effective from and after the first day of the following September.

Answering your first question, then, I am of the opinion that the county board of education has the power to divide the county school district into supervision districts after it has once been divided and under the conditions above mentioned it is their duty to do so.

Coming now to your second question as to what will be the status of the district superintendent upon such redistricting, General Code section 4739 provides that each supervision district shall be under the direction of a district superintendent, but it should be noticed here that under the provisions of section 4738 G. C. the county superintendent may be compelled by the county board of education to personally supervise not to exceed forty teachers and this shall supercede the necessity of district supervision of those schools. That is to say, if territory was so located that proper supervision districts could not be formed or if, after dividing the county into districts which in the judgment of the county board of education are proper districts, there was still some territory which was left not connected with any supervision district, it is within the power of the county board to direct the county superintendent to so supervise such territory, but where supervision districts have been formed, each district, as above mentioned, shall be supervised by a district superintendent. The term of the district superintendent, under the provisions of section 4741 G. C., shall be not longer than one year at the time such district superintendent is first elected. If, however, such district superintendent be *re-elected in the same district,* he may be so re-elected for a term not to exceed three years and under the provision of section 4743 G. C. the compensation of the district superintendent shall be fixed at the same time that the appointment is made. So that the term of the district superintendent being for at least one year, and the time designated for the division of the county school district into supervision districts being fixed at a particular time in the year, it is fair to presume, I think, that the legislature intended such districts and such supervision to extend over each school year without change, and that being true the contracts with your superintendents who were elected for the first year in any supervision district would not be affected by any change of the district lines during said year. But, suppose the district superintendents had been re-elected in the same supervision district and for a term of more than one year, but not to exceed three years, and suppose the district lines were changed during any one year, to take effect the first of the following September, and during the term not yet completed of a

district superintendent, the question then is, how would such redistricting affect the position of the district superintendent?

In the first place, the redistricting is in the nature of legislative enactment by the county board of education and the contracts entered into between the supervision district boards of education and the superintendent are contracts of employment which gives the district superintendents a vested right in the contract, which right cannot be impaired by legislation unless the principle set forth herein after applies, but before I go into that matter let me suggest that where, after the passage of legislation which would have a tendency to abolish his office, a superintendent of schools accepts another position under the school authorities, which position is created by law, he thereby voluntarily relinquishes his former position and the emoluments thereof and cannot recover for his salary under the original contract, but only under the contract entered into for the new position. That is to say, if a new district were formed and the old superintendent accepts the district superintendency of the new district, he cannot recover his salary under the contract covering the old district but only under the contract covering the new district, and an acceptance under the new relinguishes his rights under the old.

But, suppose now in the redistricting that the number of districts were reduced and some one or more district superintendents were left without employment, just what then would be their rights. This last above condition could only attach in case the district superintendent had been re-elected in the same district and for a term exceeding one year and not more than three. At the time that the district superintendent entered into such contract of more than one and not more than three years, he did so with the knowledge that a board of education, other than the boards of education with which he contracted, *might in any* year, redistrict the county into supervision districts and thus change supervision district lines. The question is, can such change, when actually made, affect the term for which he was elected by the local boards, or, in other words, can the local boards, by electing district superintendents, defeat that provision of law giving three-fourths of the presidents of the village and rural districts of the county the right to apply to have the county redistricted or defeat the right of the county board to redistrict the same in any one year. I think not. I believe the principle laid down by my predecessor, Hon. Timothy S. Hogan, in the Attorney-General's Reports of 1911-1912, page 519, will apply here. In that case a township treasurer, who by law was also made the treasurer of the school funds, was elected for a term certain and qualified as such treasurer. During his term the school board established a depository, as provided by law, and the treasurer insisted that the board was without authority to dispense with the treasurer during his term. It was there held, however, that "when the township treasurer was elected, he was or should have been aware that his duties of treasurer of the school fund were of indefinite duration and that his services could be dispensed with at any time by a majority vote of the board of education upon a depository for the school moneys being provided for," and I believe in this case that when the contracts entered into with the district superintendents were made, said superintendents knew, or should have known, that the district lines of such supervision districts are liable to be changed in any one year, and when such changes occur, if their term was thereby affected, they cannot complain. So that, answering your second question, I advise you that the district superintendents would stand in the new districts as though no contract for more than one year had been entered into.

To recapitulate, then, I am of the opinion that the county board of education has power to divide the county school districts into supervision districts in any

year, but the same must take effect on the first day of September in each year and that the district superintendents of such districts have no such vested right in a contract for more than one year that would defeat such redistricting legislation, or, in other words, that they cannot hold over. Very truly yours,

JOSEPH MCGHEE,
Attorney-General.

95.

APPROVAL—CONTRACT AND BOND FOR ERECTION OF LIVE STOCK EXHIBIT BUILDING AT OHIO STATE FAIR GOUNDS.

COLUMBUS, OHIO, March 9, 1917.

Ohio Board of Administration, Columbus, Ohio.

GENTLEMEN:—I have carefully examined the contract entered into between your board and John W. Heckart, an individual, of Columbus, Ohio, on the 6th day of March, 1917, for the construction and completion of the live stock exhibit building at the Ohio state fair grounds, Columbus, Ohio, including alternate No. 5 set out in the specifications, and the bond to secure the same, and finding both to be in compliance with law have this day approved the said contract and filed the same together with the bond in the office of the auditor of state.

I am herewith handing you a copy of said contract together with the letters received by Mr. Heckart from the Toledo Bridge & Crane Co., the M. J. Bergin Lumber Co. and The Ironclay Brick Company, which you submitted to me for my inspection, and have also this day forwarded a copy of the contract to Mr. Heckart.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

96.

TOWNSHIP TRUSTEES—MAY EMPLOY ATTORNEY OTHER THAN PROSECUTING ATTORNEY—ORDER MUST BE ENTERED ON THEIR JOURNAL—OTHERWISE CONTRACT VOID.

An injunction suit was brought by a party assessed upon a ditch improvement, attacking the jurisdiction of township ditch supervisor to clean out a ditch. The prosecuting attorney declined to act for said ditch supervisor. The township trustees authorized him to employ other counsel, but neglected to place this order fixing the compensation upon their record. HELD: That the trustees are not compelled to pay the attorney for his services.

COLUMBUS, OHIO, March 10, 1917.

HON. GEORGE F. CRAWFORD, *Prosecuting Attorney, Greenville, Ohio.*

DEAR SIR:—I have your letter of January 17, 1917, as follows:

> "I should be pleased to have an opinion upon the following facts as to the right of township trustees to employ counsel for a township officer who has been sued in his official capacity, the prosecuting attorney declining to act.

"An injunction suit is brought by a party assessed upon a ditch improvement attacking the jurisdiction of township ditch supervisor to clean out a ditch. The prosecuting attorney, having only a few weeks to serve, declines to act for said ditch supervisor. The township trustees authorize him to employ other counsel and fix the fees but neglect to place the order on their record. Counsel is employed and wins in three courts. Are the trustees compelled to pay the attorney?

"The only authority I have been able to find is in Opinions of the Attorney-General, Vol. 4, page 216, and Vol. 3, page 814.

"If it is absolutely necessary that the order to employ other counsel and fix the compensation should be placed upon the journal, can the records be amended to speak the truth, if the order was actually made, by placing such order on at this time? Only two of the trustees then serving are now acting."

Section 2917 of the General Code provides:

"He (the prosecuting attorney) shall be the legal adviser for all township officers, and no such officer may employ other counsel or attorney except on the order of the township trustees duly entered upon their journal, in which the compensation to be paid for such legal services shall be fixed. Such compensation shall be paid from the township fund."

It will be noted from the above section that the law does not say "except on the order of the township trustees, which shall be duly entered, etc." If it did it might possibly be claimed that that part of the section relating to the recording of the order was merely directory. The statute, however, says that legal counsel may be employed only on the "order duly entered." The words "duly entered upon the journal" are descriptive of the order, so that the order contemplated by section 2917 G. C. is one "duly entered upon the journal," which is very similar to those provisions of law making it necessary to contract on written orders.

McQuillin on Municipal Corporations, volume 3, section 1181, page 2619, says:

"Where a contract of a municipality is not entered into in the manner and form prescribed by statute or charter, the corporation is often sought to be held liable where the other contracting party has wholly or in part performed his side of the contract and the municipality has accepted the benefits thereof without objection. The grounds for recovery relied on are either ratification, estoppel, or implied contract, and inasmuch as the three are often confused, the law applying where acceptance of benefits is urged as constituting the ratification, creating the estoppel, or authorizing a recovery on an implied contract, is practically the same without regard to whether the court refers to it as one or the other. The question has arisen in many cases, but the great majority of them fall within one of the following classes: (1) Contract not let on competitive bidding or to the lowest bidder as required by statute or charter; (2) contract not made by ordinance or resolution as required by statute or charter; (3) contracts not in writing as required by statute or charter.

"The general rule is that if a contract is within the corporate power of a municipality but the contract is entered into without observing certain mandatory legal requirements specifically regulating the mode in which it is to be exercised, there can be no recovery thereunder. If a statute or charter says that certain contracts must be let to the lowest bidder, or that

they must be made by ordinance, or that they must be in writing, or the like, there is a reason therefor based on the idea of protecting the tax payers, and inhabitants, and these provisions are mandatory, and while it is undoubtedly true that mere irregularities in making the contract are not fatal to a recovery, yet if the contract is entered into or executed in a different manner, the mere fact that the municipality has received the benefits of the contract which has been performed by the other party, does not make the municipality liable, either on the theory of ratification, estoppel, or implied contract in order to do justice and pay the reasonable value of the property or services.

"The prevailing rule undoubtedly is that if the powers of a municipality or its agents are subjected by statute or charter 'to restrictions as to the form and method of contracting that are limitations upon the power itself, the corporation cannot be held liable by either an express or an implied contract in defiance of such restrictions.'

"The theory on which these cases are decided is that if any substantial or practical results are to be achieved by the restrictions upon the powers of municipal officers or boards to incur liabilities, as contained in the statutes or charter, no recovery on an implied contract can be allowed, notwithstanding that there is apparent injustice in some cases in adhering strictly to statutes or charter provisions. 'It is better that an individual should occasionally suffer from the mistakes of public officers or agents, than to adopt a rule which, through improper combination or collusion, might be turned to the detriment and injury of the public.' "

Under this section the following is stated in the notes:

"RATIFICATION. Where a contract cannot be made by the council without advertising for bids the council cannot ratify a contract not so made. La France Fire Engine Co. v. Syracuse, 68 N. Y. S. 894, 33 Misc. Rep. 516; Santa Cruz Rock Pavement Co. v. Briderick, 113 Cal. 628, 635; 45 Pac. 863; Smeltzer v. Miller, 125 Cal. 41, 57 Pac. 668.

"IF STATUTE REQUIRES CONTRACT TO BE IN WRITING, but an oral contract is made, and therefore the express contract is invalid, the question arises, if services are rendered or property delivered thereunder, whether the municipality which has received the benefits is liable for the reasonable value thereof. Most of the states hold that there is no liability."

In Basshor v. St. Paul, 26 Minn. 110, the charter provided that purchases of fire department engines and apparatus should be "made upon the written order of the committee on fire department," and it was held that the committee on fire department could make such purchases only upon a written order and that a purchase made otherwise was unauthorized and did not bind the city.

The court said:

"Such purchase is not only simply unauthorized, as made without authority, but it is void because made in direct contravention of the city charter and ordinance, and, therefore, prohibited to be made. The plaintiffs were bound to inquire for the authority of those who assumed to act for the municipal corporation in this instance, and are just as much affected by their want of authority as if it had in fact come to their knowledge."

In Savage v. Springfield, 83 Mo. App. Rept. 323, section 3157 Revised Statute of 1889 provided that:

"No county, city, town, village, school, township, school district or other municipal corporation shall make any contract * * * unless it shall be in writing and dated when made, and shall be subscribed by the parties thereto, or their agents authorized by law and duly appointed and authorized in writing."

The fire committee purchased horses without written agreement and the court said:

"This section (R. S. 3157) deprived the city of power to make a contract with the fire company for the purchase of horses for the city, in any other manner than by a contract in writing, etc. Having no power to contract in this matter otherwise than in writing, it could not create an agent to make a contract otherwise than in writing. To hold otherwise would be to say that a city can make a contract by an agent in a manner it cannot do directly. The agreement made by the fire committee with the fire company to purchase the horses, was void, not being in writing, nor authorized by a writing. Crutchfield v. Warrensburg, 30 Mo. App. 456; Inhabitants of Schell City v. Rumsey Mfg. Co., 39 Mo. App. 264; Woolfolk v. Randolph County, 83 Mo. 501. The contract being void, the city was without power to ratify it."

In the case of Woolfolk v. Randolph, 83 Mo. 501, the plaintiff was appointed by the county court of Randolph county, Mo., by proper order of record of said court, its agent for and on behalf of said county to compromise and settle the bonded indebtedness of Sugar Creek township in Randolph county, Missouri; by the terms of said order, plaintiff was to have and receive a reasonable compensation for his services. At said time Sugar Creek township had outstanding a legal bonded indebtedness to the amount of ninety-five thousand dollars, which, by said order, plaintiff was directed to proceed to compromise and take up for defendants. Plaintiff, in pursuance of said employment by defendant, and by defendant's direction, expended a vast amount of labor and time in getting the compromise bonds lithographed, registered and sold as required by defendant, all of which plaintiff did; and plaintiff alleged that he had expended time, labor and work in such service, of the reasonable value of seven thousand dollars and that the defendant accepted, received and appropriated plaintiff's said labor by order of record and then had refused to compensate him. By section 5360 R. S. it was provided that:

"No county, city, town, village, school township, school district or other municipal corporation, shall be bound or held liable upon any contract, unless the contract, including the consideration, shall be in writing, and dated when made, and subscribed by the parties thereto, or their agents, authorized by law, or duly appointed and authorized in writing."

The court said:

"The manifest purpose of this requirement is that the terms of the contract shall, in no essential particular, be left in doubt, or to be determined at some future time, but shall be fixed when the contract is entered into. This was one of the precautions taken to prevent extravagant demands, and to restrain officials from heedless and ill-considered engagements, * * * but we think this difference we have mentioned shows

the wisdom of the statute, requiring the consideration to be first ascertained, agreed upon and expressed in a contract for services of this description."

The court held that the county could not be held liable.

In Peterson v. The Mayor, etc., of New York, 17 N. Y. 449, the court said at page 454:

> "No sort of ratification can make good an act without the scope of the corporate authority. So where the charter or a statute binding upon the corporation, has committed a class of acts to particular officers or agents, other than the general governing body, or *where it has prescribed certain formalities as conditions to the performance of any description* of corporate business, the proper functionaries must act, and the designated forms must be observed, and generally no act of recognition can supply a defect in these respects."

Similar view of the law has been taken by the supreme court of this state in the case of City of Wellston v. State, 65 O. S. 219, and cases there cited.

That this limitation upon the municipality or its officers to contract applies to contracts for legal services is evident. It is stated in McQuillin, on Municipal Corporations, Vol. 2, section 503:

> "If the law prescribes a particular method by which the employment of the person is to be made, of course such requirement should, in substance, be observed; as where it should be in writing, or, where it is made by a board the board must act as a unit when legally convened, or where the employment is to be approved or confirmed, failure renders the employment void."

And in Vol. 3, section 1173, page 2589:

> "Where the method of contracting is provided for by statute or charter, it must be substantially followed in the employment of legal services."

In view of section 2917 of the General Code, above quoted, and the authorities herein cited, I am of the opinion that the failure of the township trustees to enter the order referred to upon their journal, showing the employment of the attorney and the compensation fixed, is fatal and that said attorney cannot be paid for the services rendered out of the township funds, and that it is without the power of the trustees to now ratify the contract by *nunc pro tunc* entry or otherwise.

In this opinion I have not discussed sections 5660 and 5661 of the General Code for the reason that you have not stated whether or not the township clerk had filed his certificate under this section with the trustees of the township at the time they attempted to contract with the attorney referred to for his services.

Section 5660 G. C. reads in part:

> "* * * The trustees of a township * * * shall not enter into any contract, agreement, or obligation involving the expenditure of money, or pass any resolution or order for the appropriation or expenditure of money, unless the auditor or clerk thereof, respectively, certifies that the

money required for the payment of such obligation or appropriation is in the treasury to the credit of the fund from which it is to be drawn, etc."

Section 5661 G. C. provides:

"All contracts, agreements or obligations, or orders or resolutions entered into or passed contrary to the provisions of the next preceding section, shall be void. * * *"

In Stone Company v. Trustees, 18 Ohio Dec., N. P., 136, it was held that section 5660 is a

"general provision relating to townships and applies to trustees of every township in the state;"

and that

"a contract entered into with the trustees of a township, calling for the expenditure of money, is absolutely void if the clerk has not filed a certificate certifying that there are unappropriated funds in the treasury; and it is, therefore, necessary to allege in a petition, in an action on such a contract, that this certificate was made by the clerk before a recovery may be had thereon."

At page 137 the court said:

"It has been held time and again under the municipal provisions of the statute, that contracts entered into in violation of the provisions of that statute, without the certificate having been filed, are void, and the person who performs labor or work or furnishes material under such contracts cannot recover."

Buchanan Bridge Co. v. Campbell, 60 Ohio St. 406;
Lancaster v. Miller, 58 O. S. 558.

At page 140, in Stone Company v. Trustees, the court say:

"The question is, when are the township trustees authorized to enter into the contract? Now, if this Rev. Stat. 2834b governs, they are only authorized to enter into a contract upon being advised that that certificate is at least filed with the township trustees; and no person can make a contract with them, * * * except at his peril, without knowing that that certificate is filed. If he is making a contract with the township trustees, he can inquire if the certificate of the clerk is made, and if the fund is at hand, and if it has been filed, he can enter into a contract; and if not, he can say, I have no authority to enter into a contract with you. He can make all those inquiries and ascertain whether the trustees have a right to make a legal, binding contract with him for whatever may be under consideration."

It will be seen from the above authorities that if the certificate under section 5662 is not filed in the case you refer to, this would be additional reason for holding that the contract of employment, entered into with the attorney you refer to by the township trustees, is void.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

97.

CONSERVANCY ACT—TAKES PRECEDENCE OVER ALL OTHER DRAINAGE LAWS—AUTHORITY OF COUNTY UNDER DITCH LAWS SUBORDINATE TO CONSERVANCY DIRECTORS—COMMISSIONERS HAVE POWER TO CHANGE TERMINUS OF IMPROVEMENT OF LIVING STREAM.

The conservancy act of Ohio takes precedence over all other drainage laws in conservancy districts after their establishment and if any authority be left in county commissioners under the ditch laws of the state, such authority is subordinate to that of the conservancy directors and cannot be exercised without their acquiescence.

The county commissioners have authority under section 6443 to change the terminus of the improvement of a living stream.

COLUMBUS, OHIO, March 10, 1917.

HON. THOMAS F. HUDSON, *Prosecuting Attorney, Springfield, Ohio.*

DEAR SIR:—You make inquiry of this office under date of January 27, 1917, as to whether by the organization of a conservancy district the conservancy authorities acquire exclusive jurisdiction over the territory of the district, and to the exclusion of the county commissioners, in constructing a drainage improvement which they have already located; i. e., where they have made their finding in favor of it. And in the event of a determination of the above question in the negative, whether or not the commissioners have the right to change the terminus of such improvement (being of a living stream) so as to omit that portion thereof which is in the conservancy district. And you further inquire as to the status of the real estate in the conservancy district and the necessary action of the county commissioners in reference to the same, the last question being really involved in the others and capable of being answered in the discussion of them.

Your communication is as follows:

"In 1912, a proceeding was commenced before the board of commissioners of Clark county, Ohio, for widening, deepening, straightening and removing drift, etc., from Mad river between the bridge at Snyderville in Clark county and the Green county line.

"In the same year the commissioners found in favor of the improvement and ordered the county surveyor to make the necessary surveys, which he proceeded to do and was engaged in so doing when the conservancy law of Ohio was enacted, since which time no further work has been done on the improvement.

"The Miami conservancy district has been organized so as to include a portion of Mad river and adjacent lands in Clark county, and about 1 38-100 miles of the route comtemplated in said proceedings before the commissioners of Clark county, and the question arises whether the conservancy authorities thereby acquired exclusive jurisdiction over Mad river and adjacent lands for the purpose of making any and all improvements incident to protection from floods.

"If the answer is in the affirmative, then of course, the commissioners of Clark county would be precluded from proceeding any further in the proposed improvement of that portion of Mad river included in said conservancy district.

"If in the negative, to the extent of holding that in so far as the conservancy authorities had not proceeded to improve all of Mad river in Clark county, the county commissioners might still exercise the authority they had before the enactment of the law over such part of the river as was not thus included.

"Now assuming that the commissioners still have jurisdiction over the remainder of the route, the question arises whether the commissioners now have the right to change the terminus of the proposed improvement, and proceed as to the rest of the original improvement.

"It is conceded under the law that the commissioners have power to change either terminus of a county ditch, but such concession is not made in the case of the improvement of a river, where authority to make such change is denied, in the case of Abel v. Commissioners, 6 N. P. 349; Gease v. Carlisle, 15 O. D. 435. In the case of Skillman v. State, however, 93 O. S. page 210, the supreme court announces an obiter to the contrary.

"A hearing on this matter before the county commissioners scheduled for January 26th, was postponed thirty days pending a decision from your department.

"The further question arises as to the status of the real estate, now in the conservancy district and to be appropriated for use of the reservoirs. Should these property owners be dismissed from the Mad river improvement, or will the conservancy authorities merely take their place and be subject to the assessment, etc?"

You are aware as to your first question that it is new and that there are no precedents upon it and that, therefore, the best you can get from any one outside the courts is the expression of a mere opinion. The same thing is true of your second question for a different reason, which will appear in the discussion of it.

The history of drainage legislation and of drainage itself, up to the enactment of the conservancy law, is that it has always been treated in detail and never comprehensively. That is to say, all such legislation provided for isolated improvements accommodating larger or smaller districts, but never including more than one ultimate watershed system, which was to be drained into a stream, or toward it, into a natural water course, through a single outlet. It was simply a system of emptying out higher lying lands onto or across lower, the effect of which was continually to dump water off such higher lands onto those of the next lower level without making any provision for a sufficient ultimate outlet.

The certain consequence of persistence in this course for two generations culminated in the flood of 1913.

It was this that furnished the occasion for the passage of the conservancy law, which proceeds upon directly the opposite plan to all preceding legislation. Theretofore they had begun at the head and come down stream, in the necessity of the case, the wrong way from the standpoint of general public benefit.

The conservancy act goes to the lowlands and provides essentially the means of preventing this damage, and incidentally fulfills all of the other purposes to such lands that have been supplied heretofore by drainage legislation, which is of moment in the consideration of the present question.

Among the objects for the establishment of conservancy districts are found the following:

"(b) Of regulating stream channels by changing, widening and deepening the same:

"(c) Of reclaiming or of filling wet and overflowed lands;

"(e) Of regulating the flow of streams;

"(f) Of diverting, or in whole or in part eliminating water courses."

It will be seen that these four purposes include all the possible purposes of any previous drainage legislation. Now the main provision of the act as declared in this section is the establishment of conservancy districts. These districts have as exact lines as political divisions, but they exist for this one purpose alone. After providing for the appointment of conservancy directors the act makes it their first duty, after organization, "to prepare * * * a plan for the improvements for which the district was created." This indicates still further that this district is created in pursuance of a definite plan for preventing floods and irrigating lands and doing all the other things enumerated above in it, in accordance with one connected, homogeneous plan including all the lands in the district and all the purposes in the act. (Section 6828-12).

This power is made efficient and far reaching by making the board a corporation and giving it a dominant right of eminent domain superior to the right of eminent domain of public service corporations. (Sec. 17.)

Its power is extended to advanced limits and rendered almost arbitrary and autocratic by other provisions. (Sections 15 and 19.)

Section 15 in stating the general powers of the directors mentions this specific purpose and empowers them:

> "To clean out, straighten, widen, alter, deepen or change the course or terminus of any ditch, drain, sewer, river, water course, pond, lake, creek or natural stream in or out of said district; to fill up any abandoned or altered ditch, drain, sewer, river, water course, pond, lake, creek or natural stream, and to concentrate, divert or divide the flow of water in or out of said district; * * *"

This includes all the purposes mentioned in the section giving to county commissioners such authority, and, read in connection with section 2, gives them the power for the same purpose.

The question then becomes, first, whether this power supersedes the power of the commissioners upon the same subject upon the establishment of the district, and, second, whether, if it does, it does so in a case where the commissioners have made their finding in the nature of a final judgment requiring the construction of the work. The finding of the commissioners in favor of the improvement does have the effect of creating vested rights therein and it will be out of the power of the county commissioners on their own motion to abandon a proceeding after such finding, but they might be compelled by mandamus to proceed and sell out the construction of the work. The conservancy act, however, without expressly taking away the power hitherto existing in the commissioners superimposes another and a dominant power, for by the language of the conservancy act itself as well as by necessary implication from all its terms, the conservancy directors, for the purposes of the act, control all property in the district absolutely in the manner in which it then exists, both as to its tangible condition and constructed improvements, and as to its intangible rights. Therefore, if a man has land in such district to which the right has attached to construct an improvement, he can be in no better situation than the man with an improvement already constructed. Under the provisions of section 15 it would be possible for the directors to destroy this improvement if it had already been made. Even further than that, it would be possible for them to fill up the stream as improved and locate it some place else, so that if it be determined that there are concurrent powers existing in the county commissioners and in the conservancy district, as there are to a certain extent between the county commissioners and the township trustees, yet the relation of the

one power to the other is seen to be different. In one case they are on terms of equality, depending upon which is first exercised, and in the other the one power is absolutely dominant and superior over the other, and if it be determined that the commissioners still have a right to make improvements in lands included in the conservancy district, the right would always be of very precarious and doubtful value to those for whose benefit it may be exercised. As previously stated, none but the courts can declare the absolute existence of such right, or the extinguishment of it on the part of the county commissioners. Each authority is entitled to its own opinion as it is absolutely a case of first impression.

As to the second question, whether the commissioners have the power to change the terminus of a proposed improvement of a stream. Although it is not like the other, a case of first impression, it is probably involved in equal doubt. It is held in one of the cases cited in your inquiry that they have not.

Abel v. Commissioners, 6 N. P. 349.

You are mistaken, however, as to there being a statement to the contrary by the supreme court. Skillman v. State, 93 O. S. 210. The court in the latter case, referred only to ditch improvements. However, Abel v. Commissioners is of slight consequence in view of the fact that it was decided previous to an important decision of the supreme court upon the subject of improving streams.

Harbine v. Commissioners, 74 O. S. 318.

Previous to this last decision it was the common practice to consider all drainage improvements by the county commissioners in exactly the same light, making no difference whether the improvement included a stream or whether it was an entirely new channel where theretofore there had been no water course. It is true Judge Summers in the opinion states to the contrary.

Speaking of an earlier period, Judge Summers says (p. 324):

> "Then streams were not converted into ditches and such is not now the practice."

Buck creek flows through Clark and Champaign counties and on it originally was located the water power which built up the city of Springfield. The upper part of Buck creek had been made into what was known as the Buck creek ditch. It is probable there was not a stream in Clark county that in some part of its course had not been, as everybody believed at least, changed into a county ditch. There was no such stream in the county immediately north of Clark county of which the same thing is not true. That is, the county commissioners had improved them; had given them all of the tangible attributes of a ditch; had constructed canals, upon the banks of which if you stood and looked you saw nothing different from any other ditch with water flowing down it, and all county commissioners and all the land owners at all times believed that they had the legal attributes of county ditches. This was especially true of all lawyers having any connection with the proceedings in which they were constructed. For of all the injunction cases to prevent their construction and of all the litigation involved in it, no case is known where previous to the Harbine case the jurisdiction and power of the commissioners in that respect had been questioned. By this it is not meant to criticise the decision of the court in that case. The real question was whether a mill dam could be removed or destroyed by a proceeding to construct a county ditch, which

with evident correctness it was decided could not be done. The decision, however, took the form of defining the term "water course" stating that it did not include streams and was synonymous with drain, and in holding that "the county commissioners are without authority to convert a living stream of water into a ditch by proceedings for the location and construction of a ditch." This phase of the decision, though it was unnecessary in the case then before the court, has produced great confusion and been the occasion of much controversy to the extent of unsettling all preconceived ideas as to the law before that time. It could not have been meant literally by the court as that would have amounted to a repeal of the plain and direct language of the statutes. It, therefore, must mean that they cannot construct a county ditch. That is to say, that their power to straighten, widen and deepen streams conferred in G. C. 6443, does not give the improvement, when constructed, the legal status and condition of a county ditch over which the right of eminent domain has been exercised by taking land and by which a continuing jurisdiction is given to the public over the improvements when made, but that when the stream has been improved in accordance with the plain statutory authority, the commissioners and other public authorities are *functus officii* and that you have then, what you had before, a stream, though in an improved condition.

This interpretation of this decision and this alone is possible, otherwise, as stated above, the statute is repealed or rather abrogated by the decision, for it is not contended that it is unconstitutional. No objection is urged to the statute itself and the whole opinion contains the understanding that the statute is in force and effect. However, that decision and Judge Summers' opinion have been cited by inferior courts as destroying the statute. It was so held by the common pleas court of Union county in a case now pending in the court of appeals on appeal. Broderick, J., in his opinion in a case in which it is sought to improve Little Darby, after finding that the proceedings were all regular and in accordance with the statute, says:

> "And the decision of the supreme court in the Harbine case still holds good, and to improve a living stream under the authority of said section would be to convert it into a county ditch and under the authority of said case the county commissioners have no jurisdiction to so make the improvement. * * * Since the decision in the Harbine case was made the legislature has fully provided for such improvements as this one in what is commonly known as the conservancy law of Ohio, where a full and complete method has been given to provide adequate relief in such cases, and where there are no territorial limits imposed upon the improvement. * * * The general assembly of Ohio has now made ample provision under the conservancy act of Ohio, where this improvement can be properly made, and continued for such distance down Little Darby creek as to provide a good and sufficient outlet. * * *"

It is perfectly evident from what has been stated above that this decision in this respect is wrong, but it illustrates the views and the doubts upon the subject that the courts have discovered and evinced by reason of the Harbine case.

It follows, however, from that decision that there is a sharp line of demarcation between ditch improvements and the improvement of streams; and that that which has application to one by express terms, or in the nature of the case, is not necessarily applicable to the other. One provision, however, that does equally apply to both and without which neither would have any practical effect is where the authority is originally given for both. Sec. 6443 says that it is to be done "in the manner provided in this chapter" then follows one connected plan as to the

proceedings which in the nature of the case must be applied to either proceeding as far as it is applicable.

Anel v. Commissioners, as has been stated, was decided when the proceeding was considered as identical. In that case Dow, J. held that the commissioners were without authority to change the terminus of a river improvement because the express authority is only so to change the terminus of a "ditch." That provision, however, was in the law before the commissioners had power to improve streams and when it would apply to ditches alone and the provision for improving streams was afterwards inserted by way of amendment after the provision as to the terminus. It may, therefore, be presumed that the use of the word "ditch" in that instance instead of the more generic term "improvement" is purely accidental as being continued without change and that thereby an express exclusion was not intended of such power over a river improvement, but that the legislature took this view in exact accordance with ordinary common sense. That is, that the provision as to an outlet has no application whatever to the improvement of a stream. There is no such thing as a stream without an outlet. A stream without an outlet becomes a lake. The power to the commissioners to improve a stream before the last codification was to cause the channel of a river, creek or run, or *any* part thereof, etc., to be improved by straightening, etc. There has no change been made by substituting the word "a" for "any." Evidently no such change was intended in the general codification so that the commissioners are given the most ample authority to improve any part of the stream. If they can improve any part of the stream no reason is apparent why they are confined to the exact portion that the petitioner sees fit to ask for. He would ask for what he wanted. The commissioners would grant that which was best for the public; and if the provision were not connected with the ditch law with its express authority to change the terminus of a ditch, no one would conceive of any limitation upon their power to improve any part of the channel of a stream.

But besides this argument or indeed in further pursuance of it, ditch may very properly be regarded as a generic term, including river improvement along with "ditch" proper wherever necessary to carry out the legislative intent. It must be so in section 6451 where both "ditch" and "improvement" are found within four lines of each other and where no other interpretation is possible than to consider them synonymous as they are used interchangeably. Besides, to refuse to let "improvement" in under the name of "ditch" in this section would be necessarily to defeat the express authority to improve the channel of streams, as it must be done "in the manner provided in this chapter." and this is the only manner provided. You must, therefore, improve the stream in the same manner, so far as the form of the proceeding goes, as you locate and construct a ditch; and in doing this you make ditch include improvement. Q. E. D. Further, there would be no appeal from a finding in favor of an improvement under 6469 unless you give the word this extended meaning.

In the opinion in the Harbine case the statutes governing the subject are collated, not without some omissions, which may be partly supplied by the following references:

68 O. L. 60-67;
80 O. L. 9-10;
80 O. L. 109;
94 O. L. 163;

and possibly some others.

If this view be correct, they could still proceed with that portion of the improvement which is outside the conservancy district. But as above stated one common pleas court has found to the contrary and the matter is not decided in any court of appellate jurisdiction and nothing better than a mere opinion in the nature of the case can be given.

The conclusions above intimated, however, are reinforced by other decisions upon the subject. Judge Summers himself, who rendered the opinion in the Harbine case, in a more recent case passed by the subject in silence. That is what is known as the Bean creek case (Mason v. Commissioners, 80 O. S. 151). In this case the channel of a river was sought to be improved forty miles below its source for a distance of ten miles and the proceeding was a county ditch proceeding and the county commissioners converted it into a county ditch. The question arose on the subject of assessments and in a most interesting and very lengthy opinion in which the subject of the burdens and benefits of ditching is exhaustively and ably considered, Judge Summers never once refers to this defect in the power of the commissioners as held in the Harbine case.

You are, therefore, advised that in my opinion the county commissioners can proceed no further with that part of the improvement located within the conservancy district without the acquiescence of the conservancy directors; that they may proceed with that part of the improvement which lies outside the conservancy district; but subject to the qualification and caution in respect to the value of such opinion as is stated above.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

98.

STATE FAILURE—TERMINATION OF PROSECUTION BY MEANS OTHER THAN PROSECUTION CONSTITUTES SAME—FILING OF AFFIDAVIT INSTITUTES PROSECUTION FOR FELONY—COMMISSIONERS MAY MAKE ALLOWANCE TO OFFICERS IN PLACE OF FEES UNDER SECTION 3019.

The prosecution for felony is instituted as soon as the affidavit charging the crime has been presented to and filed by the magistrate, and if at any time thereafter the prosecution is terminated by any means other than conviction, the state has "failed" within the meaning of section 3019 G. C. and county commissioners may make an allowance to officers in place of fees under such section.

COLUMBUS, OHIO, March 10, 1917.

HON. C. M. CALDWELL, *Prosecuting Attorney, Waverly, Ohio.*

DEAR SIR:—I have your letter of January 11, 1917, as follows:

> "Please refer to section 3019, General Code, which provides in part:
> "'In felonies wherein the state fails, * * the county commissioners, at any regular session, may make an allowance to any such officers in place of fees.'
> "I do not find any authority which settles definitely what is known as a 'state failure.' Suppose a warrant is issued by a magistrate and the constable arrests a man for burglary, for instance. No indictment is found and defendant is discharged. Is this considered a 'state failure,'

and can the county commissioners make an allowance in lieu of fees in this case? I would like to have your opinion stating definitely just when the county commissioners may make such an allowance in place of fees. Some have held that there must be an indictment found before anything whatever can be allowed under this section, but I do not find any authority on which to base that position whatever."

Section 3019 G. C. reads:

"In felonies wherein the state fails, and in misdemeanors wherein the defendant proves insolvent, the county commissioners, at any regular session, may make an allowance to any such officers in place of fees, but in any year the aggregate allowances to such officer shall not exceed the fees legally taxed to him in such causes, nor in any year shall the aggregate amount allowed an officer exceed one hundred dollars."

The words "in felonies wherein the state fails," I think, mean when a prosecution for a felony has been begun and the state has either abandoned the same or has been defeated in its contention. In other words, I think the statute refers to all cases wherein the state has started a prosecution for a felony and has not concluded the same successfully. This being so, it is important to ascertain just when a prosecution for felony is commenced.

In Cyc., page 290, it is stated:

"MODES OF INSTITUTING PROSECUTION—a. IN GENERAL. Broadly speaking there are four modes by which an offender may be brought to justice. The accuser may give information to the public prosecuting officer, which will result in an indictment being prepared and sent to the grand jury, or he may file a written complaint on oath before the examining magistrate, obtain a warrant of arrest, followed by a preliminary examination, and the binding over of the accused; or the grand jury may act upon its own knowledge that a crime has been committed, or upon information from others, and make a presentment against the offender; or the prosecuting attorney may file an information. By statute minor offenses may be prosecuted summarily on complaint before a magistrate."

Now it seems clear to me that when an affidavit has been presented to the magistrate charging a person with a felony and the same is filed by the magistrate, the wheels of the prosecution have begun to turn and from that moment on, through all of its various phases, the prosecution of the defendant for felony continues. This was the view taken by the court in State v. Williams, 34 La. Annual, p. 1198, in which it was held:

"As soon as the affidavit or charge against an accused and other proceedings had in the case before the committing magistrate are forwarded to the proper criminal court, prosecution must be construed as having been instituted in the latter court."

In this case the court said:

"Counsel argues that the meaning attached to the word 'prosecution' in the constitution, is indicated by Art. 5, which provides that 'prosecu-

tions shall be by indictment or information,' etc., and hence he concludes that before indictment or information, there can be no prosecution instituted for the purpose of being apportioned.'

"We think that this is too narrow a definition of the word 'prosecution,' which is defined to be 'the means adopted to bring a supposed offender to justice and punishment by due course of law.' Bouvier, p. 396.

"Under our system of criminal law, a prosecution has several phases or steps of proceeding; the first being usually an affidavit or charge; next a warrant of arrest, and so on through the hands of the committing magistrate, *whose committal transfers the prosecution to the proper criminal court,* where it undergoes the other phases of presentment, arraignment, trial and conviction or acquittal.

"* * * * * * *

"If the proceedings had before the committing magistrate are not a 'prosecution' in the legal sense, where would be the authority for detaining the accused in legal custody, or what would be the legal value of the bond furnished by the accused for his appearance before the criminal court? It is elementary, in our jurisprudence, that such proceedings are the basis and primary inception of the prosecution, and that the order of the committing magistrate, accepting the bond of the accused, is a judicial act which is the basis of the judgment of the criminal court in case of a forfeiture of the bond."

Taking this view of the law, I am of the opinion that prosecution for felony has been instituted as soon as the affidavit charging the crime has been presented to and filed by the magistrate, and if any time thereafter the prosecution is terminated by any means other than conviction, the state has "failed" within the meaning of section 3019 G. C. and county commissioners may make an allowance to officers in place of fees under such section.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

99.

TREASURER—NO PROVISION OF LAW FOR SELECTION OF SCHOOL TREASURER—WHEN DEPOSITORY PROVIDED, CLERK OF BOARD OF EDUCATION BECOMES ACTING TREASURER—LANGUAGE OF SECTION 4782 G. C. DIRECTORY.

When a depository has been provided for the school moneys, the clerk of said board becomes acting treasurer, and while the language of section 4782 G. C. is directory, yet there is no provision of law for the selection of a school treasurer by a board of education.

COLUMBUS, OHIO, March 12, 1917.

HON. A. V. BAUMAN, *Prosecuting Attorney, Fremont, Ohio.*

DEAR SIR:—In your letter of February 7, 1917, you request my opinion upon the following statement of facts:

"When a depository has been provided for the school moneys, is it mandatory that the board of education dispense with the school treasurer?

"On the one hand it is contended that the word 'shall' must be construed as 'must.' It is claimed on the other hand that the legislature in enacting this section had no such intent, because of the clause 'By resolution adopted by a vote of a majority of its members.' It is claimed that had the legislature intended to make such action mandatory, it would not have included this clause and that there is no way to compel a majority of the members or any particular member of the board of education to vote for or against any proposition.

"It is further contended that the clause 'in such case' therein contained, tends to show that the legislature did not intend to make this action mandatory."

The section of the General Code pertinent to the above inquiry is section 4782, and reads as follows:

"When a depository has been provided for the school moneys of a district, as authorized by law, the board of education of the district, by resolution adopted by a vote of a majority of its members, *shall* dispense with a treasurer of the school moneys belonging to such school district. In such case the clerk of the board of education of a district shall perform all the services, discharge all the duties and be subject to all the obligations required by law of the treasurer of such school district."

It would seem, from the bare reading of the sections above quoted that it was the clear intention of the legislature to give such effect to the amended section as would make it mandatory, but if that was its intention there was unfortunately used by it such language which cannot be construed as having that effect. A statute is only mandatory when its terms may be enforced by mandamus and it is perfectly clear that mandamus will not lie to enforce that provision of the above quoted section, viz., "by resolution adopted by a majority of its members," for which members would a court of equity order to act. The acts of the individual members cannot be controlled, but only the act of the board where the act to be performed is one for the board and not the individuals thereof. A board may act when a quorum only is present, but the above act, under the language quoted, can only be performed by a majority of the members of the board.

My predecessor, Hon. Edward C. Turner, in Opinion No. 656, Attorney-General's Reports for the year 1915, page 1355, uses the following language:

"It occurs to me that a statute like 4782 may logically have any one of four different effects, viz.:

"(1) It may be self-executing.

"(2) It may be mandatory.

"(3) It may be directory.

"(4) It may be permissive.

"Section 4782 was once permissive and has been amended as to make it clear that it is no longer so. * * * I think that it cannot be regarded as mandatory. Its effect, therefore, is either self-executing or directory. * * *; for if the statute is self-executing, then there must be a time certain at which, under given circumstances, it will go into execution. If the statute is to be regarded as self-executing, then the statute will go into execution, in a given case 'when a depository has been provided for the school moneys of the district.' But if this be true, then the provision of the statute to the effect 'that the board of education of the district, by resolution adopted by a vote of a majority of its mem-

bers, shall dispense with the treasurer,' etc., is of no effect whatever. It cannot be deemed the intention of the legislature to strike this language out of the statute, because the only amendment which the legislature made was inserted in this very phrase. It is manifest, therefore, that the legislature intended that the board of education should act, and did not intend the treasurer should be dispensed with and the clerk should commence to perform the services formerly devolving upon the treasurer, when and as soon as a depository has been provided. In other words, the statute is not self-executing, but must be carried into execution by the board of education, acting by resolution adopted by a vote of a majority of its members.

"These considerations all tend to dictate the choice of that interpretation of section 4782 which regards it as directory. It is true that section 4782 does not fall within any of the well recognized classes of directory provisions. In this case, however, the conclusion that the statute is directory is enforced by the necessary consequences of attempting to hold it mandatory or self-executing. It being the intention of the legislature that the thing contemplated by section 4782 shall be done, but the legislature not having made it possible to compel that thing to be done, it necessarily follows that it could only be regarded as directory; and while it is the duty of the board of education, when it provides for a depository for the moneys of the district, to dispense with the office of treasurer, such duty is one that can be enforced by political action only and not by the courts."

I cannot see, however, how the language referred to in section 4782 is controlling at this time. Section 4782, as above noted, was enated February 6, 1914, and the day previous, that is, February 5, 1914, setion 4747 was amended to read as follows:

"The board of education of each city, village and rural school district shall organize on the first Monday in January after the election of members of such board. One member of a board shall be elected president, one as vice-president and a person who may or may not be a member of the board shall be elected clerk. The president and vice-president shall serve for a term of one year and the clerk for a term not to exceed two years * * *."

No provision is made for the election of a treasurer and section 4763, which provided that in each city, village and township school district the treasurer of the city, village and township funds should be the treasurer of the school funds, had been amended in 104 O. L., 159, to read as follows:

"In each city school district, the treasurer of the city funds shall be the treasurer of the school funds. In all village and rural school districts which do not provide legal depositories as provided in sections 7604 to 7608, inclusive, the county treasurer shall be the treasurer of the school funds of such district."

So that we then have the scheme provided that where a depository is established, the clerk of the school district shall act as the treasurer of the school funds and where the depository is not established, the county treasurer shall act as treasurer of the school funds and no provision of law exists for the election or selection of a school treasurer. I can see how, prior to the organization of

the board in January of 1916 there might have been such treasurer holding over, but following that date there was no such treasurer holding over, a new one having been elected in 1915 or a new term of an old one beginning in 1916, and no provision of law for such new treasurer or for such treasurer during a new term to have possession of the school property, and he would, therefore be, in the language of Judge Force, in Knorr v. Board of Education, 8 O. Dec. Rep. 672, "holding the school funds unlawfully," which property, under the provisions of section 4773, he is bound to deliver to his successor in office; that is, either the clerk, who is the acting treasurer, or the county treasurer, acting as such.

I reason, then, from the above, that (1) the language of said setion 4782 is directory only, and (2) there is no occasion for the board to pass any such resolution, because under the law there is no treasurer who can lawfully have possession of the school funds outside of the clerk of the school board or the county treasurer, acting as such school treasurer.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

100.

MAINTENANCE AND REPAIR FUND—CAN ONLY BE USED FOR UP-KEEP AND REPAIR OF INTER-COUNTY AND MAIN MARKET ROADS—NOT FOR RECONSTRUCTION OF SAME—FUND DERIVED FROM REGISTRATION OF AUTOMOBILES.

The funds derived from the registration of automobiles creating what is known as the "maintenance and repair" fund can be used only for the up-keep of the intercounty and main market roads of the state and not for the reconstruction and rebuilding of the same.

COLUMBUS, OHIO, March 12, 1917.

HON. JAMES P. WOOD, JR., *Prosecuting Attorney, Athens, Ohio.*

DEAR SIR:—I have your communication of February 21, 1917, and also the communication of the county commissioners of Athens county to you as prosecuting attorney. In these communications you ask my opinion in reference to certain matters which are set out therein. Your communication reads as follows:

> "I shall be glad if you will furnish me an opinion as to whether our county commissioners may use brick in the repair of the Athens-Hockingport road, I. C. H. No. 156, said road to be paid for in part out of the maintenance and repair fund of the state.
>
> "An adverse opinion on this same subjet was rendered by the attorney-general of Ohio which appears in 'Opinions of the Attorney-General,' volume 1, page 990, 1915.
>
> "I enclose copy of communication addressed to me by the county commissioners together with my opinion as to this question."

The letter addressed to you by the county commissioners is as follows:

> "We have arranged with the state highway department to repair a portion of the Athens-Hockingport road, I. C. H. No. 156, a portion of the money with which this expense is to be met to come from the mainte-

nance and repair fund of the state. The part that is to be repaired is an old macadam road, and under the existing ruling of the attorney-general, the same kind of material must be used as was used in construction of same.

"We do not think macadam is the proper kind of material for this road as it is a through road between Athens and Parkersburg, and macadam would not stand the traffic. After the road is completed, the state highway department is to maintain it, so we think it would be better for all concerned if a more substantial material were used. We think the best interests of both the county and state would be subserved by the use of brick, as the cost of future maintenance to the state would in this case be but a small fraction of what it would be in case limestone were used; and the cost of the present repairs will be only slightly more."

In the first place I know that you are familiar with the opinion of my predecessor in office in reference to this same matter, which opinion is found in volume 1, page 990, of the Opinions of the Attorney-General for 1915. I might say that I have studied the reasoning of said opinion very carefully and will not in this opinion refer to the arguments therein used, but desire to make a few observations of my own in reference to the matter about which you inquire. I desire to say also that I have noted carefully the opinion given by you to the county commissioners and have given the arguments therein used the full weight to which they are entitled.

Before answering your question I desire further to say that I feel that you and your county commissioners are altogether right in deciding that the road suggested ought to be built of brick rather than of macadam, and that the object you are seeking to accomplish is altogether a worthy one.

Now in addition to the observations made by my predecesor in office, I desire to add a few of my own.

First, let us note the exact provisions of our statutes in reference to the question as to how the different funds credited to the highways of our state are to be used. Section 1221 G. C. provides as follows:

"The state highway improvement fund produced by the levy hereinafter provided for, shall be applied to the construction, improvement, maintenance and repair of the intercounty and main market road systems as follows, etc."

Section 6309 of the General Code provides as follows:

"The revenues derived by registration fees * * * shall be used for the repair, maintenance, protection, policing and patrolling of the public roads and highways of this state, under the direction, supervision and control of the state highway department."

Now let us remember in the further discussion of this question that it is the aim of your county commissioners to provide for the improvement of said highway by using the funds accumulated from the automobile license fees, viz., the maintenance and repair fund.

Further, I note that in your brief to the county commissioners you are willing to admit that there is no word found in section 6309 which could apply to your situation in Athens county other than the word "repair" so that in the further discussion of this matter I shall pay attention to no other term excepting this one term "repair." It will be noted that the word "repair" is used in section 1221

of the General Code as well as in section 6309. In section 1221 the group of terms used is as follows: "construction, improvement, maintenance and repair." In section 6309 G. C. the group used is as follows: "repair, maintenance, protection, policing and patrolling." Now, just as you can judge much of the worth of a man by the company which he keeps, so you can judge much of the meaning of a word by the company in which it is found. To my mind the word "repair" in section 1221 has a different and broader meaning than the word "repair" in section 6309. This, for the reason that all the terms used in section 1221 are much broader and fuller in meaning than the terms used in section 6309, having to do with the general subject of road *building,* and if we use the terms in the ascending series as to meaning we would use them in the following order: repairing, maintaining, improving and constructing, the word repairing being the weakest term in the large plan of road building. But the words in section 6309 have merely to do with the general subject of road *upkeeping,* and if we use the terms in the ascending series as to meaning we should use them in the following order: policing, patrolling, protection, maintenance and repair, the word "repair" being the strongest term in the general term of road upkeeping. But we must always keep in mind that the word "repair" in section 1221 has to do with the general subject of road building, while the word "repair" as used in section 6309 has to do with the general subject of road upkeeping. With this distinction in mind I feel that the word "repair" as used in section 1221 is much broader and fuller than the word "repair" used in section 6309, and I am of the opinion that your discussion of the meaning of the word "repair" is exactly correct if it were used in connection with the provisions of section 1221, but that it is giving the word too broad a meaning when used in connection with the provisions of section 6309 G. C.

I am driven the more firmly to this conclusion from the following considerations: We all know that the use of the automobile has been a powerful impetus towards a demand for better roads for the state of Ohio. It has been considered that automobile owners are the special beneficiaries of good roads; also that the traffic upon the roads by automobiles is very destructive of roads, especially certain kinds of roads; and therefore that the owners of automobiles ought to bear a special tax in the matter of providing good roads. But our state courts have very much curtailed this right to levy a special tax upon automobile owners, which tax has been levied frequently by our legislature in the past. The court has held this special tax can be assessed against automobile owners only upon the theory that it is a special privilege tax. That is, the state is permitted to levy a special tax upon automobile owners because of the fact that they have certain privileges and work certain hardships which cannot be imputed to owners of other vehicles. For example, for the reason that automobiles are very destructive to the public highways of the state and are also very dangerous to traffic in general upon said highways. Hence, on the theory that, owing to the speed at which automobiles travel, they are very dangerous to traffic in general and very destructive to roads, the legislature has seen fit to levy a special privilege tax, but at the same time made provision that the funds derived from the tax should be used "to police, patrol, protect, maintain and repair" the highways. That is, the funds derived from the license fees must be used as far as possible to remedy the very evils incident to automobile traffic, viz., the evils of "danger to traffic" and "destruction to highways." Not to be used to build roads, but to keep up the roads already built and to protect the traffic on the same. This is in harmony with the plain construction of the terms used in the two sections of statutes above referred to, in harmony with the spirit of the holding of our state courts and in harmony with the evident intention of the legislature. Hence, I am of the opinion that the funds derived from the automobile license fees cannot be used for the purposes

set out in your communication. And if you desire to reconstruct said road by the use of brick it will be necessary for you to use the distributive share of funds coming to your county from the intercounty highway fund of the state.

I affirm the opinion of my predecessor rendered to Hon. Clinton Cowen on June 10, 1915, to which opinion you refer in your communication.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

101.

LICENSE—CITY OF CLEVELAND DOES NOT HAVE TO TAKE OUT SAME FOR SELLING BY-PRODUCTS OF CITY REDUCTION PLANT.

The board of agriculture cannot compel the city of Cleveland to take out a license and pay the fee therefor, for selling the by-products of the city reduction plant for fertilizing purposes.

COLUMBUS, OHIO, March 12, 1917.

The Board of Agriculture, Bureau of Inspection, Columbus, Ohio.

GENTLEMEN:—I have your letter under date of February 5, 1917, in which you state:

> "The city of Cleveland maintains a municipal reduction plant. City garbage, after being cooked under live steam to remove the grease, is placed upon the market as garbage tankage and sold for fertilizing purposes. This plant shipped goods to greenhouses at Toledo, but has never taken license, and objects to doing so, believing the law exempts municipal reduction plants.
>
> "Our contention is that the city of Cleveland can sell garbage tankage to fertilizing companies who afterwards mix it in with their materials for sale as a fertilizer without paying the license fee, as this amount would practically be covered by the goods later placed upon the market, but when sold to firms which otherwise buy of a company having license, we feel that the city of Cleveland should also pay the $30.00.
>
> "A letter before us from the superintendent of the municipal reduction plant states that the question of liability was taken up last December with the attorney-general's department. Will you kindly advise if any ruling has been rendered and whether or not this department is justified in requiring the city of Cleveland to take out license when selling fertilizers? Enclosed please find copy of the law."

Section 1154 G. C., as amended 106 O. L. 143, provides:

> "Before selling or offering for sale within this state a commercial fertilizer, a person, firm or corporation shall pay each year a license fee to the board of agriculture for the sale of each brand thereof thirty dollars. Upon application and payment of such fee, the board shall issue a license for the current year. All licenses shall expire on the 31st day of December of each year. The payment of such license fee by a person, firm or corporation shall exempt an agent thereof from the requirements of this section."

Section 1163 G. C., as amended in 106 O. L. 143, provides:

"Whoever sells, offers for sale, or keeps for the purpose of selling within this state, a commercial fertilizer without complying with the provisions of this chapter relating to commercial fertilizers, or permits an analysis to be attached to any package thereof, stating that it contains a larger percentage of any constituent thereof than it does in fact contain, except as provided in section 1153 of the General Code, shall be fined not less than fifty dollars nor more than two hundred dollars for a first offense, and for a subsequent offense not less than two hundred dollars, nor more than five hundred dollars or imprisoned not more than six months or both. The possession of commercial fertilizers, except by a person who has the same for his private use, without complying with the provisions of this chapter relating to commercial fertilizers, in any building room, railroad car, store, storeroom, warehouse or other place within this state shall be prima facie evidence of keeping of the same for the purpose of selling. In all prosecutions under this act, a justice of the peace, police judge or mayor, shall have final jurisdiction as in cases of violation of laws relating to the adulteration of food and drink and dairy products. The board of agriculture shall rest its prosecution under this act on samples drawn, as provided in section 1156 of the General Code."

These two sections cover the matter of your inquiry, and the other sections pertaining to the manufacture, sale and analysis of fertilizers are found in section 1150 G. C. and the following sections.

Your question practically resolves itself into whether or not the city of Cleveland, making sales in the open market of its by-products from the municipal reduction plant and selling for fertilizing purposes to firms which otherwise buy of a company having a license, would be compelled to pay the license fee provided in section 1154 G. C.

I have been unable to find any adjudication on this question, in the examination I have been able to make, but it is my opinion, upon well settled principles of law, that the city would not be liable for the license fee. The board of agriculture is a state agency, acting for and in the name of the state, within the powers conferred upon it by the legislature. The political subdivision of the city of Cleveland is likewise a state agency, and while, as appears from State ex rel. v. Gilbert, 56 O. S. 575, the functions of the state and likewise its various political subdivisions, are governmental only with such proprietary rights as may become incident to the exercise of the primary functions, it is clear to my mind that if the state or any of its agencies were to be included under section 1154 G. C. and the other sections, express mention thereof would have been made. The state or any of its agencies are not bound by a statute unless named therein.

Endlich on Interpretation of Statutes, Sec. 161.

It is a well established rule that in general the acts of the legislature are meant to regulate and direct the acts and rights of citizens, and in most cases the reasoning applicable to them applies with different and frequently contrary force to the government itself.

Looking at the provisions of the fertilizer license sections with a view to discovering the mischief to be avoided and the remedy to be provided, it is apparent that the legislature only intended the sections to apply to such manufacturers and dealers who were primarily in the business sought to be regulated.

At least no legislative intent can be gleaned from a reading of the statutes that would include either the state or any of its political subdivisions.

The penal section provides a fine or imprisonment for

> "Whoever sells, offers for sale, or keeps for the purpose of selling within this state, a commercial fertilizer without complying with the provisions of this chapter relating to commercial fertilizers, etc."

All of this fertilizer act was for the purpose of preventing fraud and deceit and protecting the public therefrom. It was aimed to punish those persons who might by misrepresentation and in a fraudulent manner deceive the citizens of the state. It certainly would be a violent inference if the state thought that either itself or its agencies would have to be regulated against such fraudulent practices as called these fertilizer acts into being.

From all the foregoing, it is my opinion that your department is without authority to compel the city of Cleveland to pay the thirty dollar license fee for the sale of fertilizer under the circumstances mentioned in your request.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

102.

SHERIFF—SERVING SEPARATE AND DISTINCT WRITS ON DEFENDANT MAY CHARGE MILEAGE ON EACH.

When separate and distinct writs are served on the defendant in the same proceeding and at the same time, the sheriff may legally tax mileage on each of said writs.

COLUMBUS, OHIO, March 13, 1917.

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

GENTLEMEN:—I have your letter of February 2, 1917, as follows:

> "Kindly let us have your written opinion upon the following proposition at your earliest convenience:
> "In an injunction proceeding wherein three separate and district writs are served on the defendant in the same case and at the same time, may the sheriff legally tax mileage on each of said writs?'"

Section 2845 of the General Code reads:

> "* * * in addition for the fee for service and return the sheriff shall be authorized to charge on each summons, writ, order or notice, except as otherwise specifically provided by law, a fee of eight cents per mile going and returning, provided that where more than one person is named in such writ, mileage shall be charged for the shortest distance necessary to be traveled; * * *"

On February 2, 1905, former Attorney-General Ellis rendered an opinion as follows:

"Your communication dated February 30, 1905, in which you request a construction of section 1230b R. S., relative to the right of the sheriff of Champaign county to charge mileage on each of two writs served on William Wooley in the Ohio state reformatory at Mansfield, when both writs were served at the same time, is received. In reply I beg leave to say that while the supreme court has held in the case of Richardson v. The State, 66 O. S., p. 111, that the 'mileage' allowed a public officer is intended to compensate him for the expense of his travel on official business and that where mileage is provided the officer is not entitled to any other compensation for personal expenses, yet there has been no decision of the court touching the question you submit. Section 1230b contains this provision:

" 'For the service of every writ or summons and return thereof * * * when only one defendant is named therein twenty-five cents; * * * and mileage as in other cases.'

"If mileage is claimed by the officer on both these writs it must be based upon this language contained in this provision, viz.: 'every writ or summons.' While it is true the officer makes but one trip for the service of both writs, yet if mileage is to be allowed on only one writ, we are met with the pertinent query upon which writ is it to be allowed?

"Take for instance where two subpoenas are issued in a criminal case and served upon the same person and at the same time, one on behalf of the state, and the other on behalf of the defendant. If mileage is to be allowed only for the one trip actually taken by the officer, upon which subpoena shall the mileage be allowed? Manifestly, under the language of the statute just quoted the claim for mileage attaches to the one as strongly as the other and were it sought to compensate for only the miles actually traveled, it could only be accomplished by reducing the mileage to one-half upon each subpoena. This, I think, the law would not permit. I am, therefore, of the opinion that the only construction to be placed upon the language of section 1230b, as above quoted, is to allow the statutory mileage upon both writs."

On October 8, 1913, former Attorney-General Hogan rendered an opinion to your bureau, expressly affirming the above opinion and holding that:

"Where an officer serves more than one writ in either civil or criminal cases on the same trip, he is entitled to receive mileage for the actual number of miles traveled and is to receive this mileage on each writ served."

In view of the above I am of the opinion that the sheriff may legally tax mileage on each of the writs served on the defendant in the injunction proceeding referred to.

Respectfully,
JOSEPH MCGHEE,
Attorney-General.

103.

BONUSES AND PENALTIES—IN CONTRACT FOR IMPROVEMENT AND REPAIR OF ROADS—CONDITIONED ON WHETHER OR NOT CONTRACT IS COMPLETED WITHIN TIME SPECIFIED THEREIN—CONTRARY TO LAW AND AGAINST PUBLIC POLICY.

1. *To place a clause in a contract for the construction, improvement and repair of roads providing for giving bonuses to the contractor or imposing penalties upon him, depending upon the question as to whether he completes the work set out in the contract in a shorter or longer time than that provided for in the same, is contrary to law and against a sound public policy.*

2. *The legality or illegality of contracts, containing provisions that a certain sum per day for the time the work extends over the time provided in the contract shall be considered as stipulated damages but not as a penalty, is not passed upon.*

COLUMBUS, OHIO, March 13, 1917.

HON. T. R. ROBINSON, *Prosecuting Attorney, Mansfield, Ohio.*

DEAR SIR:—I have your communication of February 13, 1917, in which you ask my opinion in reference to a certain communication which you received from your county highway superintendent, E. A. Merkel. Your communication reads as follows:

> "I enclose you a letter from our county surveyor, asking you to please give us an opinion relative to same.
>
> "Mr. Merkel and myself have both examined former opinions of the attorney-general, but cannot find where this question has ever been asked."

And the communication received by you from your county highway superintendent reads as follows:

> "Relative to a conversation that I had with you some time ago concerning a section that I wish to insert in my contract for road improvement for this year, I am submitting to you this section in about the form that I wish to insert the same in the contract. If you are unable to give me an opinion on this matter as to the legality of the question, I wish you would submit this to the attorney-general as soon as convenient, that I may complete my specifications for the year's work, and if possible, use this section.
>
> "In addition to the use and operation of this section in connection with my contract, I also wish to be informed as to how the bonus should be paid and as to the legality of assessing this bonus upon the assessed property, also the townships. Or should this be paid by the county commissioners as their share of the improvement as a public benefit by inducing the full completion of the job before the date fixed?
>
> "An early reply to these questions will be very much appreciated and I believe if it can be legally operated, will be a big advantage to the public in hastening the improvements. The section as I have contemplated its use reads as follows:
>
> "'BONUS AND PENALTY.
>
> "'It is hereby agreed by the party of the first part and the party of the second part, that in case this contract is not fully completed on or before

the time fixed in the contract and bond for the completion of this contract, that a penalty of $50.00 per day shall be deducted from the total contract price. And it is further agreed that in case the contract is fully completed any time before the time fixed in the contract and bond for the completion of the contract, that a bonus of $50.00 per day shall be paid to the contractor by the county for the full time the contract is complete before the agreed time.'

"The question of the increased amount of the contract caused by the possibility of the bonus and how this should be taken care of, appears to be the most important, so that in submitting this question, do not overlook this matter."

The question submitted to you by the county highway superintendent is as to whether it would be lawful to include in contracts for the construction, improvement and repair of highways a clause in which it is agreed that a bonus of $50.00 per day shall be given to the contractor for the time he may be able to reduce the time fixed in the contract for the completion of the same, and to provide a penalty of $50.00 per day, to go to the county, for each day that the completion of the contract extends beyond the time set out in the contract for the completion of the work.

Let me say in the first place that the object which your county highway superintendent has in mind is a worthy one and that is to have this clause put in the contract with a view to spurring the contractor on to a speedy completion of the work provided for in the contract, but it is my opinion that such a clause ought not to be placed in said contracts for the following reasons:

1. The statutes nowhere make provision for such a clause in these contracts.
2. The general tenor and spirit of the statutes seem to be against the idea of such a clause being placed in these contracts.
3. The placing of such a clause in these contracts would be against sound public policy.

The first proposition above stated needs no argument as it is quite clear that the statutes make no provision for such a clause.

As to the second proposition, I desire to call your attention to the provisions of several sections of the General Code. Section 6911 of the General Code provides that the first step to be taken after the county commissioners decide to proceed with the matter of constructing, improving or repairing a road is to order the making of surveys, plats, profiles, cross-sections, *estimates* and specifications.

Section 6912 G. C. provides that the surveyor shall transmit his *estimate of the cost and expense*, together with a copy of his surveys, plats, profiles, *estimates* and specifications, which are to be filed with the county commissioners. Notice is then given that these different items are so filed. Based upon these different items, the *estimate* as well as the other items, objections may be raised to the matter of the improvement.

Section 6917 G. C. provides that when the county commissioners adopt a final resolution to proceed with the improvement, they adopt the plans, profiles, specifications and *estimates* therefor, either as reported by the county surveyor or as modified by the county commissioners. After this the further proceedings leading up to the construction, improvement or repair of roads are based upon the estimates of the county surveyor or as they are modified by the county commissioners. The *estimate* as to the cost and expense must be used by the surveyor in making assessments against the benefited property owners as provided in setion 6919 and 6922

of the General Code. If bonds are issued in anticipation of tax levies, as provided in section 6929, the amount of bonds sold is based upon the estimated cost and expense.

Section 6946 of the General Code provides that:

> "No contract for any improvement shall be awarded at a greater sum than the estimated cost thereof. The bids received shall be opened at the time stated in the notice. If no bids are made within the *estimate,* the county commissioners may amend the *estimate,* and again proceed to advertise at the original *estimate,* for bids, but the county commissioners shall have the right to reject all bids."

From all of the above it is readily seen that the estimated cost and expense of the improvement is a very vital factor in the progress of the matters leading up to the contract for the improvement as well as the contract itself. Now the question arises, how could the county highway superintendent make an estimate of the cost and expense of the improvement that would be in any way reliable and certain, if such a bonus as suggested in your communication is to be given? In making the *estimate* of the cost and expense of the improvement he could not take into consideration at all the matter of the bonus to be given to the contractor in case the work were completed before the time specified in the contract. This would be a mere matter of conjecture and yet this bonus would be a part of the total cost of said improvement and ought to be included in the various steps taken as enumerated above.

Furthermore, let us consider the question of the penalty very briefly. Section 6947 of the General Code provides that the contractor shall, before entering into a contract, give a bond in a sum equal to the contract price. The conditions of said bond are fully set out in said section and said conditions are for the faithful performance of the work in accordance with the plans and specifications; that the bond shall indemnify the county against the damages that may be suffered by failure to perform such contract according to the provisions thereof and in accordance with the specifications for such improvement, and the bond shall also be conditioned for the payment of all material and labor furnished for or used in the construction of the road. But there is no condition that the bond shall be liable for any such a matter as a penalty imposed upon the contractor. It must be remembered that all the penalties imposed upon the contractor would ultimately rest upon the bond in case the contractor should default in the completion of the road according to the contract, because he would receive just so much less from the county commissioners and the bond would be liable for just so much more.

Hence, in view of all the above, I am of the opinion that the statutes do not contemplate such a clause as you suggest in these contracts, neither would they permit of the same.

Now coming to the third proposition above laid down, viz., that such a clause in the contract would be contrary to sound public policy. Such a clause would make every contract a sort of gambling proposition with all the best cards in the hands of the road contractor. It would be to his advantage to have the longest time limit possible placed in the contract for the completion of the work set out therein. While, on the other hand, it would be to the advantage of the county commissioners to have the shortest time limit possible placed in the contract for the completion of the work. In entering into every contract there would be a sort of contest between the county commissioners and the contractor as to the time limit placed in the contract within which the work should be completed. Who would be most apt to win out in such a game? Usually the contractor,

because he is more familiar with all the elements that enter into the performance of the work set out in the contract than are the county commissioners

Furthermore, the amount of the bonus and the penalty provided for in the contract would be a matter of great uncertainty and variation. If such a clause were permitted to be placed in the contract, one set of county commissioners might fix the bonus and the penalty at one hundred dollars; another set at fifty dollars, and another at twenty-five dollars. Some might refuse even to place any amount within the contract as a bonus and penalty.

Hence, it is my opinion, based upon all the above, that such a provision as you suggest cannot legally be placed in a contract for the construction, improvement or repair of roads. Neither would it be conducive to a sound public policy.

In rendering an opinion upon the statement of facts set out by you, I am not unmindful of the fact that certain counties in the state, how many I do not know, include in their contracts a provision similar to the following:

> "The parties hereto, in recognition of the fact that substantial damages will accrue to the said parties of the first part and to the public in the event that the said work is not completed within the time specified, and that the exact amount of such damages is not capable of ascertainment otherwise, it is not stipulated and agreed by and between the parties hereto that the sum of ---------- dollars ($----------) per day for each and every day that may elapse between the time specified for the completion of said work and the final completion thereof, shall be stipulated damages suffered and incurred by the party of the first part by reason of the failure of the said contractors to complete the said work within the time specified and that the said contractors shall pay to said commissioners as said stipulated damages, and not as penalty, ---------- dollars, ($----------) for every day of time that may elapse between the time specified and the final completion of the said contract. Such stipulated damages may be retained by the commissioners from any moneys due the contractor on this contract after the final completion thereof."

It will be noted that in this provision it is especially specified that the amount agreed upon as liquidated damages shall not be considered as a penalty assessed against the contractor, but merely stipulated damages. I am not in this opinion passing upon the legality of such a provision, but merely upon the statement of facts as presented to me by you for consideration.

Very truly yours
JOSEPH MCGHEE,
Attorney-General.

104.

EXPENSES—COUNTY COMMISSIONERS AND ENGINEERS ARE ENTITLED TO SAME, ONLY WHEN JOINT COUNTY DITCH PROCEEDINGS ARE UNDER SECTIONS 6563-1 TO 6563-48 G. C., INCLUSIVE.

The provisions of section 6563-44 G. C. are expressly limited in effect to proceedings under sections 6563-1 to 6565-48 G. C., both inclusive, and do not apply to the entire chapter on joint county ditches, beginning with section 6536 G. C.

COLUMBUS, OHIO, March 13, 1917.

HON. CHESTER PENDLETON, *Prosecuting Attorney, Findlay, Ohio.*

DEAR SIR:—Under date of February 19, 1917, you addressed the following inquiry to this office:

> "The county commissioners of Hancock county have requested me to secure an opinion from you as to whether they are entitled to receive their actual expenses while engaged in joint county work. Also whether the payment of their actual expenses under 6563-44 G. C. is limited to operation under 6563-1 G. C. et seq. or whether it applies to the whole chapter on joint county ditches."

Under date of March 9, 1917, at the request of this department you submitted the following supplemental explanation of the original question:

> "In submitting this question I intended it to apply only to joint county ditch work. Section 6563-44 G. C. provides for the payment to the commissioners of their actual expenses. Is this section limited in its effect to proceedings under 6563-1 G. C. et seq., that is, to joint county ditch work initiated under a petition filed by fifty or more interested persons, or does said section 6563-44 apply to the entire chapter on joint county ditches, beginning with section 6536 G. C.?"

Section 6563-44 G. C. reads as follows:

> "Said surveyors named in section 8 shall meet with the joint board of county commissioners whenever required by said board and said surveyors and auditors shall be paid their necessary expenses while employed under this act and shall be allowed the same fees as are allowed in ditch work generally and said commissioners shall receive the sum of three dollars a day and their actual expenses while employed under this bill."

Under date of March 11, 1916, my predecessor, Hon. Edward C. Turner, rendered an opinion to Hon. D. F. Mills, prosecuting attorney, Sidney, Ohio, found in the Opinions of the Attorney-General for the year 1916, Vol. 1, page 450, in which he discussed and passed on the question which you submit for my opinion. The following from said opinion is in point:

> "An examination of the statutes governing the activities or proceedings of county commissioners, in respect to joint county ditches, in force and operation at the time of the enactment of said house bill No. 489, being sections 6536 to 6563 G. C., inclusive, fails to disclose any provision for

the payment of the expenses of county commissioners, incurred in the discharge of their duties in relation to joint county ditches under said section, nor is there found any provision for payment of the expenses of commissioners in joint county ditch matters in the amendment of a number of said last mentioned sections of the General Code, enacted in 103 O. L. 836.

"It will be readily observed that the provision for the payment of the expenses of county commissioners, found in section 6563-44 G. C. quoted by you, is expressly limited by its terms to *'actual expenses while employed under this bill.'* The application of this provision is specifically limited by its terms to the expenses of commissioners employed under the act of the legislature in which said section of the General Code was originally enacted. The language of this provision is too plain to require interpretation and cannot be given such construction as to render it applicable to cases clearly not within its terms. It may be difficult to assign a satisfactory reason for a provision for the payment of expenses of public officials in a given case and a failure to make such provision in another similar case. It is, however, a sufficient reason for such distinction, in the present instance, that the legislature has seen fit to make provision for the payment of expenses in the one case and omitted to do so in the other.

"It is a principle well established that public officials are entitled to receive only such compensation, fees and salaries as are authorized by law. Since, then, the legislature has chosen to make specific provision for the payment of expenses of county commissioners when employed under the provisions of sections 6563-1 to 6563-48, inclusive, of the General Code, but has not chosen to make provision for the payment of expenses when engaged in similar service under other statutory provisions, it follows from the familiar principle just referred to that in the latter case there is no authority for the payment of the expenses of county commissioners.

"I am therefore of opinion, in answer to your inquiry, that the expenses of county commissioners in proceedings under the provisions of section 6536, 6537, 6540 and 6556, as amended, 103 O. L. 836, or section 6559 G. C., are not authorized by law to be paid."

I concur in the reasoning given in said opinion and in the conclusion reached, and am of the opinion, in answer to your inquiry, that the provisions of section 6563-44 G. C. are expressly limited in effect to proceedings under sections 6563-1 to 6563-48 G. C., both inclusive, and do not apply to the entire chapter on joint county ditches, beginning with section 6536 G. C.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

105.

STENOGRAPHER—AT CORONER'S INQUEST—COUNTY COMMISSIONERS NOT LIABLE FOR SUCH SERVICES—COURT STENOGRAPHER—NOT ENTITLED TO ADDITIONAL COMPENSATION FOR SERVICES RENDERED IN TRANSCRIBING TESTIMONY TAKEN BEFORE GRAND JURY.

The county commissioners are not authorized to pay for services rendered by a stenographer in taking testimony at a coroner's inquest.

The prosecuting attorney is not authorized to expend a part of the money drawn by him under section 3004 G. C., for the payment of extra compensation to the official stenographer for services rendered in transcribing testimony taken before the grand jury.

COLUMBUS, OHIO, March 13, 1917.

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

DEAR SIR:—I have your letter of February 15, 1917, as follows:

"I desire to inquire whether or not county commissioners are authorized to pay the bill for stenographic services rendered by a stenographer in taking testimony at a coroner's inquest and whether or not the prosecuting attorney is authorized to expend a part of the money drawn by him under section 3004 of the General Code for the payment of the official stenographer for his services in transcribing testimony taken by him before a grand jury, as provided by law, and if not is there any provision of law by which such stenographer's services may be paid, or are they part of the duties of the official stenographer?"

Also your letter which reads:

"Touching the question of compensation to the stenographer in my letter referred to, I know of no other means by which the stenographer of a coroner can be paid than the allowance of the bill by the county commissioners. And in as much as the statute speaks of the taking of testimony by a stenographer, it would seem proper for the commissioners to allow such bill, even though the stenographer happened to be the official stenographer of the court of common pleas. The same reasoning would apply for the payment, under section 3004, for transcriptions of testimony taken before a grand jury."

Answering your first question, sections 2856 and 2866 of the General Code read:

"Sec. 2856. When informed that the body of a person whose death is supposed to have been caused by violence has been found within the county, the coroner shall appear forthwith at the place where the body is, issue subpoenas for such witnesses as he deems necessary, administer to them the usual oath, and proceed to inquire how the deceased came to his death, whether by violence from any other person or persons, by whom, whether as principals or accessories before or after the fact, and all circumstances relating thereto. The testimony of such witnesses shall be reduced to writing, by them respectively subscribed, except when steno-

graphically reported by the official stenographer of the coroner, and, with the finding and recognizances hereinafter mentioned, if any, returned by the coroner to the clerk of the court of common pleas of the county. If he deems it necessary, he shall cause such witnesses to enter into recognizance, in such sum as may be proper, for their appearance at the succeeding term of the court of common pleas of the county to give testimony concerning the matter. The coroner may require any and all such witnesses to give security for their attendance, and if they or any of them neglect to comply with his requirements, he shall commit such person to the prison of the county, until discharged by due course of law.

"Sec. 2866. Coroners shall be allowed the following fees: For view of dead body, three dollars; for drawing all necessary writings, and return thereof, for every one hundred words, ten cents; for traveling, each mile, to the place of view, ten cents; when performing the duties of sheriff, the same fees as are allowed to sheriffs for similar services."

Since there is nothing in the statutes making it the duty of the official stenographer to take notes at coroner's inquests, the thing to be determined is, can the coroner employ a stenographer for that purpose.

On August 19, 1911, former Attorney-General Hogan rendered an opinion, D-326, found in volume 1 of the Attorney-General's Report for the year 1911-1912, page 320, in which it was held:

"There is no statute authorizing the coroner to engage a stenographer and when he does it must be at his own expense."

In construing section 2856, above quoted, it was said in this opinion:

"This section provides that when the testimony of a witness at an inquest is stenographically reported by the official stenographer of the coroner, the witness need not sign the same. It does not authorize the payment from the county of the compensation of the stenographer. There is no statute empowering a coroner to employ a stenographer, and if he does so it must be at his expense.

"It is a well-known principle of law that no officer, or person, can draw compensation from public funds except by authority of statute or ordinance.

"The allowance to the coroner of ten cents per one hundred words for a necessary writings is the only proper charge to be paid from the county for such writings. The amount paid to the stenographer was illegal. The allowance was made upon certificate of the coroner for work for which he drew the full pay. The payment by such certificate was unauthorized and the finding should be made against the coroner for the amount so paid."

Answering your second question, in regard to how the official stenographer should be paid for services in transcribing testimony taken by him before a grand jury, I have to call your attention to section 13561 G. C., which reads:

"The official stenographer of the county, at the request of the prosecuting attorney, shall take shorthand notes of the testimony and furnish a transcript thereof to him and to no other person, but the stenographer shall withdraw from the jury room before the jurors begin to express their views or give their votes on a matter before them. The stenographer shall

take an oath, to be administered by the court after the grand jurors are sworn, imposing an obligation of secrecy to not disclose any testimony taken or heard except to such jury or prosecutor, unless called upon in a court of justice to make disclosures."

In an opinion dated April 15, 1910, Attorney-General's Reports for the year 1910-1911, page 857, it was held that an official stenographer was not entitled to additional compensation for taking notes of testimony before a grand jury. In this opinion it was said:

"Section 13561 General Code makes it the duty of the official stenographer, at the request of the prosecuting attorney, to take shorthand notes of testimony before the grand jury, and to furnish a transcript thereof to the prosecuting attorney. Both of these duties devolve upon the stenographer in his official capacity and are compensated, so far as he is concerned, by his annual salary receivable under section 1550 General Code."

I agree with both of the opinions above quoted and in direct answer to your two inquiries it is my opinion that county commissioners are not authorized to pay for services rendered by a stenographer in taking testimony at a coroner's inquest, and that the prosecuting attorney is not authorized to expend a part of the money drawn by him under section 3004 G. C. for the payment of extra compensation to the official stenographer for services rendered in transcribing testimony taken by him before the grand jury.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

106.

VILLAGE SCHOOL DISTRICT AND TOWNSHIP RURAL SCHOOL DISTRICT UNITING FOR HIGH SCHOOL PURPOSES UNDER SECTION 7669 G. C.—MAY ISSUE BONDS THEREFOR ON VOTE OF ELECTORS OF RESPECTIVE DISTRICTS IN MANNER PROVIDED BY SECTIONS 7625, 7626 AND 7627 G. C.

A village school district and a township rural school district uniting for high school purposes under section 7669 of the General Code may each issue bonds under said section on a vote of the electors of the respective school districts in the manner provided by sections 7625, 7626 and 7627 of the General Code for the purpose of erecting a high school building for joint high school district. Such separate issue of bonds by a vote of such school districts so uniting for high school purposes will be in compliance with the provisions of said section 7669, which reads as follows:

> *"Each board also may submit the question of levying a tax on the property in their respective districts for the purpose of purchasing a site and erecting a building and issue bonds as is provided by law as in the case of erecting or repairing school houses, but such question of tax levy must carry in each district before it may become operative in either."*

COLUMBUS, OHIO, March 13, 1917.

HON. JOHN C. D'ALTON, *Prosecuting Attorney, Toledo, Ohio.*

DEAR SIR:—I have at hand your letter of January 2, 1917, addressed to this department and asking for an opinion, in which you say:—

> "The board of education of the village school district of Sylvania and the board of education of Sylvania township rural school district have united for high school purposes under section 7669 of the General Code. Both boards now desire to purchase a site and erect a high school thereon at a cost of $50,000.00, $35,000.00 to be paid by the township rural school district and $15,000.00 by the village school district.
>
> "Section 7669 provides that the question of *levying a tax* for the purchase of a site and erecting a building shall first be favorably voted on by each district. The rate that Sylvania village could levy so as to come within the provisions of 5649-2 and 5b—and the same is true of the township—would necessarily extend over the period of five years, as provided by section 5649-5; and for the reason that the total aggregate value of property for taxation in each district is so small, the aggregate levy that could be made within the limits of 5649-2 and 5649-5b would not be sufficient to raise the necessary $15,000.00 and $35,000.00 respectively in said five years, provided by 5649-5.
>
> "The question now is:
>
> "1. Would each district, by submitting a bond issue for the amount needed, viz.: $15,000.00 in the village school district, and $35,000.00 in the township school district, under the provisions of G. C. 7625, 6, 7 and 5649-2 and 5b, comply with the provisions of section 7669 of submitting the question of *'levying a tax.'* Or, put in another way, if the village school district submitted the question of an issue of bonds in the sum of $15,000.00 for a period of 20 years, and the township school district submitted the

question of an issue of bonds in the sum of $35,000.00 for a period of 20 years, would the provisions of 7669 be complied with?

"2. If question 1 is answered in the affirmative, are the provisions of 7669, 7670 and 7671 broad enough to, and do they, contemplate that the managing committee of four members could proceed to purchase a site and let a contract for the building of a high school thereon in the same manner, perhaps, as is authorized for the building of a high school by a board of education, if the respective boards of education granted, or attempted to grant, the right to the managing committee?

"3. If both questions 1 and 2 are answered in the affirmative, in whose name would the title to the real estate be taken—the real estate about to be purchased lying within the limits of the village school district?"

Section 7669 of the General Code, referred to by you, provides as follows:

"The boards of education of two or more adjoining rural school districts, or of a rural and village school district by a majority vote of the full membership of each board, may unite such districts for high school purposes. Each board also may submit the question of levying a tax on the property in their respective districts, for the purpose of purchasing a site and erecting a building, and issue bonds, as is provided by law in case of erecting or repairing school houses; but such question of tax levy must carry in each district before it shall become operative in either. If such boards have sufficient money in the treasury to purchase a site and erect such building, or if there is a suitable building in either district owned by the board of education that can be used for a high school building it will not be necessary to submit the proposition to vote, and the boards may appropriate money from their funds for this purpose."

With respect to your first enquiry it may be observed, as I view the provisions of section 7669 applicable to your enquiry, the provisions thereof authorizing each board of education of school districts united for high school purposes to

"* * * submit the question of levying a tax on the property in their respective districts, for the purpose of purchasing a site and erecting a building, * * *"

has no reference to or connection with the election authorized and provided for by sections 5649-5 and 5649-5a on the question of an increased tax rate in a school district (or other political subdivision) over the maximum external and internal rates prescribed by sections 5649-2 and 5649-3a respectively.

That the provisions of section 7669 above noted have no reference to the provisions of the Smith law, so-called, is evidenced from the fact that the provisions of section 7669 above noted were a part of the statutory law of the state a number of years before the enactment of the Smith one per cent. law. (See R. S. 4009-15; 97 O. L. 359.)

As far as your question is concerned, I am inclined to view the provisions of section 7669 authorizing each board of education to submit the question of a tax levy on the property of each district for the purpose of purchasing a site for and erecting a high school building, and requiring such question to carry in both districts before becoming operative in either, expend their force on the further provisions of section 7669 authorizing the issue of bonds for such purposes. This language of section 7669 as to a tax levy and the issue of bonds for the purpose of purchasing a site for and erecting a high school building must be read to-

gether, and so read this section clearly authorizes the board of education of each school district united with another for high school purposes to submit to the electors thereof the question of an issue of bonds for the purpose of purchasing a site for and erecting a high school building for the use of the joint district, and a tax levy therefor, it being the duty of each board to determine the amount of the bond issue to be submitted to the electors of its district; and the bond issue question would have to carry in both districts before a favorable vote in either would go into effect.

In this connection it may be observed that section 7669 of the General Code, authorizing as it does the electors of each school district on the submission of the board of education thereof to vote a bond issue therein in the manner provided by law (Sec. 7625 G. C.) for the purpose of purchasing a site for and erecting a high school building for the use of joint district, section 11 of article XII of the State Constitution in itself not only authorizes but directs an annual tax levy to pay bonds issued in pursuance of such vote as they mature and interest thereon. This section of the Ohio Constitution reads as follows:

> "No bonded indebtedness of the state, or any political subdivision thereof, shall be incurred or renewed, unless, in the legislation under which such indebtedness is incurred or renewed, provision is made for levying and collecting annually by taxation an amount sufficient to pay the interest on said bonds, and to provide a sinking fund for their final redemption at maturity."

(See Link v. Karb, 89 O. S. 326.)

The same purpose disclosed by the section of the state constitution above quoted is also served by the provisions of section 5649-1 of the General Code, which reads as follows:

> "In any taxing district, the taxing authority shall, within the limitations now prescribed by law, levy a tax sufficient to provide for sinking fund and interest purposes for all bonds issued by any political subdivision, which tax shall be placed before and in preference to all other items, and for the full amount thereof."

The annual levy necessary to pay such bonds voted by the electors of each district and the interest thereon would, as an indebtedness incurred by a vote of the people, be in addition to the maximum levy provided in section 5649-2 and 5649-3a, but subject, of course, to the limitations of the combined maximum rate prescribed by section 5649-5b.

From the provisions both constitutional and statutory above noted it is clear that the authority, and duty as well, of each board of education to levy annually taxes to meet the payment of bonds issued therein follows the issue, and in the light of said provisions it is difficult to see that the provisions of section 7669 authorizing each board to submit the question of levying a tax on the property in its district has any independent force when bonds are voted and issued therein as authorized by said section and in the manner prescribed by sections 7625, 7626 and 7627 of the General Code.

In answer to your first question, I am of the opinion that if the village school district mentioned in your communication submits the question of an issue of bonds in the sum of $15,000.00 for a period of twenty years, or other number of years, and the township school district submits the question of an issue of bonds in the sum of $35,000.00 for a period of twenty years, or other number of years,

such action on the part of said board would be in compliance with the provisions of section 7669 of the General Code.

With respect to your second question it will be noted that the sole authority of the managing committee of the high school of the joint district provided for by section 7669 is that conferred by the provisions of sections 7670 and 7671 of the General Code, which are as follows:

> "Sec. 7670. Any high school, so established shall be under the management of a high school committee, consisting of two members of each of the boards creating such joint district, elected by a majority vote of such boards. Their membership of such committee shall be for the same term as their terms on the boards which they respectively represent. Such high school shall be free to all youth of school age within each district, subject to the rules and regulations adopted by the high school committee, in regard to the qualifications in scholarship requisite for admission, such rules and regulations to be of uniform operation throughout each district.
>
> "Sec. 7671. The funds for the maintenance and support of such high school shall be provided by appropriations from the tuition or contingent funds, or both, of each district, in proportion to the total valuation of property in the respective districts, which must be placed in a separate fund in the treasury of the board of education of the district in which the school house is located, and paid out by action of the high school committee for the maintenance of the school."

It is clear from the provisions of these sections that the only authority conferred upon the high school committee is that of managing the high school established by the boards of education, and I am, therefore, of the opinion that the high school committee of four members provided for by section 7670 of the General Code would have no authority to purchase a site for and let a contract for the erection of a high school building thereon either with or without an attempted grant of authority to do so on the part of the respective boards of education, for I see nothing in the provisions of any of the sections above considered authorizing the respective boards of education to delegate the authority imposed on them to provide for the erection of or to otherwise establish a high school.

With respect to the questions just discussed I believe that the conclusions reached by me are in substantial accord with an opinion of my predecessor, Hon. Edward C. Turner, under date of June 20, 1916, and addressed to Hon. Hugh F. Neuhart, prosecuting attorney, Caldwell, Ohio, a copy of which opinion is herewith enclosed.

As to your third question, I am of the opinion that the title to the real estate secured for a site for the high school building should be taken in the name of the boards of education of both districts for use of the joint district for high school purposes.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

107.

COUNTY COMMISSIONERS—MAY ISSUE BONDS FOR ROAD IMPROVEMENT UNDER SECTION 6929 G. C. WHEN PART OF COST OF IMPROVEMENT IS TO BE BORNE BY TOWNSHIP—WITHOUT RESOLUTION OF TRUSTEES THEREOF AUTHORIZING THE SAME.

County commissioners may, under section 6929 G. C., issue bonds covering the cost and expense of constructing a road improvement under chapter 6 of the Cass road law, a part of which cost and expense is to be borne by a township, without a prior resolution by the trustees of such township, authorizing the county commissioners to make a levy annually upon all the taxable property of the township, to pay the proportion of the cost and expense of the improvement to be paid by such township.

COLUMBUS, OHIO, March 13, 1917.

HON. JOHN L. HEISE, *Prosecuting Attorney, Circleville, Ohio.*

DEAR SIR:—I have the honor to acknowledge your letter of February 16, 1917, asking the opinion of this department, in which you say:

> "The board of county commissioners of Pickaway county, Ohio, by unanimous vote, adopted a resolution to provide for improving the Duvall county highway in Madison township, Pickaway county. Forty per cent. to be paid by the county, thirty per cent. by the township and thirty per cent. to be assessed upon the owners of real estate lying within one mile on either side of said road according to benefits accruing to such real estate, as provided for by section 6910 General Code.
>
> "For the purpose of providing money with which to pay the respective shares of Pickaway county, Madison township and of the lands to be assessed, it will be necessary to issue bonds of the county in the sum of $20,000.00 as provided for by section 6929 of the General Code.
>
> "The auditor tells me that when he and the former prosecuting attorney submitted a transcript for a former issue of bonds to your department, which the industrial commission had agreed to purchase, that one of the attorneys in attorney-general's office told them that it was necessary that the trustees of the township adopt a resolution authorizing the county commissioners to make a levy annually upon all the taxable property of the township, to pay the portion of the bonds and interest to be paid by the township and also to provide against any default in payment by the property owners.
>
> "* * * * * * *
>
> "Our question therefore is, does the law require such a resolution from the trustees of Madison township, or can the commissioners issue these bonds and without such a resolution, levy on all the property of Madison township, annually a tax sufficient to pay the township's portion of this bond issue and the amount due from any of the property owners in case they fail to pay."

In answering your question, I do not deem it necessary to discuss or even note all of the sections of the General Code which were originally enacted as chapter 6 of the Cass road law, relating to road construction and improvement by county commissioners.

Section 6910 G. C. in terms provides for the initiation of road improvement by county commissioners on unanimous vote, without a petition therefor. The cost and expense of road construction or improvement projected by county commissioners under section 6910 G. C. are to be apportioned according to some one of the plans provided for by section 6919 G. C.

Plan 1, under which it is evident the cost and expense of the improvement in question was apportioned by the board of commissioners of your county, is as follows:

> "1. Not less than thirty-five per cent. nor more than fifty per cent. thereof, shall be paid out of the proceeds of any levy or levies for road purposes upon the grand duplicate of all the taxable property in the county or out of any funds available therefor. Not less than twenty-five per cent. nor more than forty per cent. thereof shall be paid out of the proceeds of any levy or levies for road purposes upon the grand duplicate of the county to be levied upon the taxable property of any township or townships in which said improvement may be in whole or part situated, and the balance thereof which shall not be less than twenty per cent. nor more than thirty-five per cent., shall be assessed upon and collected from the owners of real estate abutting upon said improvement, or within one mile of either side thereof according to benefits accruing to such real estate as may be determined upon by said commissioners."

Section 6922 to 6925 inclusive, G. C. provide for making, apportioning and certifying to the duplicate, assessments according to benefits upon property lying within the particular district adopted.

Sections 6926, 6927 and 6929 G. C. provide as follows:

> "Sec. 6926. The proportion of the costs and expenses of such improvement to be paid by the county, shall be paid out of any road improvement fund available therefor. For the purpose of providing by taxation a fund for the payment of the county's proportion of the costs and expenses of constructing, improving, maintaining, dragging and repairing roads under the provisions of this chapter, the county commissioners are hereby authorized to levy annually a tax not exceeding two mills upon each dollar of the taxable property of said county. Said levy shall be in addition to all other levies authorized by law for road purposes, but subject to the limitation on the combined maximum rate for all taxes now in force.
>
> "Sec. 6927. For the purpose of providing by taxation a fund for the payment of the proportion of the costs and expenses of such improvement to be paid by the township or townships interested, in which such road may be in whole or part situated, the county commissioners are hereby authorized to levy a tax not exceeding three mills in any one year upon all the taxable property of such township or townships. Such levy shall be in addition to all other levies authorized by law for road purposes, but subject to the limitation on the combined maximum rate for all taxes now in force.
>
> "Sec. 6929. The county commissioners in anticipation of the collection of such taxes and assessments may, whenever in their judgment it is deemed necessary, sell the bonds of said county in the aggregate amount necessary to pay the estimated cost and expenses of such improvement. Such bonds shall state for what purpose they are issued and shall bear interest at a rate not to exceed five per cent. per annum, payable semi-

annually and in such amounts and to mature at such times as the commissioners shall determine, subject to the provision however that said bonds shall mature in not more than ten years. Prior to the issuance of such bonds, the county commissioners shall provide for levying and collecting annually a tax upon all the taxable property of the county to provide a sum sufficient to pay the interest on such bonds and to create a sinking fund for their retirement at maturity. The sale of such bonds shall be advertised once not later than two weeks prior to the date fixed for such sale in a newspaper published and of general circulation within such county, if there be any such paper published in said county, but if there be no such paper published in said county then in a newspaper having general circulation in said county. Such bonds shall be sold to the highest responsible bidder for not less than par and accrued interest.

"The county commissioners may reject any or all bids. The proceeds of such bonds shall be used exclusively for the payment of the costs and expenses of the improvement for which they are issued."

It is apparent from the foregoing statutory provision, as well as from all others enacted as a part of chapter 6 of the Cass road law relating to the matter of road construction and improvement by county commissioners, that, save where the cost and expense of constructing or improving a road is apportioned between the county and a township therein by agreement between the county commissioners and the township trustees of such township, under section 6921 G. C., and save in cases where such road construction or improvement is projected by the county commissioners through a municipality by an agreement with the council thereof, all the proceedings relating to the construction and improvement of roads under chapter 6 of the Cass road law are within the untrammeled power and jurisdiction of the board of county commissioners.

Your specific question is, whether or not, before issuing bonds under section 6929 G. C., covering the cost and expense of constructing or improving this road, to be borne by the county, township and property assessed, it is necessary that the township trustees by resolution authorize the county commissioners to make the annual levy upon all the taxable property of the township provided for by section 6927 G. C. It is clear that there is no provision in terms making such resolution, on the part of the township trustees, a condition precedent to the right of the county commissioners either to make an annual levy upon the taxable property of the township, to pay such township's share of the improvement, or to the right of the county commissioners to issue bonds under section 6929 G. C.

It is just as clear that if these sections are to be interpreted as requiring such resolution of authority by the township trustees before the county commissioners can make the levy on township property provided for by section 6927 G. C., a veto power will be given to the township trustees as to all road improvements, the cost and expense of which, either under petition therefor or by resolution of the county commissioners under section 6910 G. C., is to be borne in part by the township.

I am of the opinion that no such power is granted to township trustees, either with respect to improvements granted by the county commissioners on petition, or projected by the county commissioners under section 6910 G. C.

The provision of section 6927 G. C., authorizing the county commissioners to make an annual levy upon the taxable property in the township, to pay the township's share of road construction or improvement, was taken from section 6956-14 G. C., which was a part of the Braun road law and which was repealed in the enactment of the Cass road law. The power of the county commissioners to make such annual levy has not to my knowledge been in any manner challenged,

and answering your question categorically I am of the opinion that the board of county commissioners of your county may issue bonds in the manner provided for by section 6929 G. C., without any resolution of authority by the township trustees with respect to the annual levy to be made by the county commissioners on the property in the township, to pay the township's share of the improvement.

With respect to that part of your letter in which you say that some attorney in the attorney-general's office advised the former prosecuting attorney of your county and the county auditor that such resolution by the trustees of the township was necessary, I am informed that an attorney in this department under Attorney-General Turner advised these officers that before the county commissioners of a county could issue bonds under section 1223 G. C., covering the part of an inter-county highway improvement to be borne by the county, township and abutting property owners, the trustees of the township would have to adopt a resolution, under section 1222 G. C., providing for an annual levy upon the taxable property in the township, to pay the township's portion of such improvement.

I do not deem it necessary at this time to express any opinion with respect to this view as to the construction of sections 1223 and 1222 G. C. applying to inter-county highway improvement. It is sufficient to note that there is an obvious distinction between the provisions of section 1222 G. C. and those of section 6927 G. C. In one case the levy on the taxable property in the township for the purpose of the improvement is to be made by the township trustees; in the other the levy is made by the board of county commissioners; and, as before noted, I am clearly of the opinion that the commissioners may issue bonds under section 6929 G. C. without any resolution of authority by the township trustees with respect to the annual levy to be made by the county commissioners on taxable property in the township, under section 6927 G. C.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

108.

MEETING—HELD UNDER SECTION 4747-1 G. C.—EXPENSES THEREOF CANNOT BE PAID FROM BOARD OF EDUCATION FUND, OR ANY OTHER FUND.

No expenses, fees or salaries can be paid from the county board of education fund, or any other fund, by reason of a meeting held under the provisions of section 4747-1 G. C.

COLUMBUS, OHIO, March 13, 1917.

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

GENTLEMEN:—In your letter of February 28, 1917, you submit for my opinion the following statement:

> "May any payments be made from the county board of education fund, or from any other public fund, for any expenses that might have been incurred by reason of a meeting held under the provisions of section 4747-1 General Code, 104 O. L., page 139?"

Section 4747-1 G. C. provides:

> "Once each year all the members of the boards of education of the various village and rural school districts within any county school district

shall hold a meeting for the purpose of discussing matters relating to the schools of such county school district. The county superintendent shall arrange for the time and place of holding such meeting and shall also act as chairman."

The above section of the General Code is a part of what is commonly called the "new school code" and its provisions relate to duties of members of boards of education of the various village and rural school districts, being additional duties to those duties theretofore devolving upon such boards.

The compensation of members of boards of education is provided for in General Code section 4715, as follows:

"Each member of the board of education of rural school districts, except such districts as contain less than sixteen square miles, shall receive as compensation two dollars for each regular meeting actually attended by such member, but for not more than five meetings in any year. The compensation allowed members of the board shall be paid from the contingent fund,"

and nothing therein refers to expenses either of the board or of the individual members thereof while in the performance of their several duties.

General Code section 4734, which provides that each member of the county board of education shall be paid his actual and necessary expenses incurred during his attendance upon any meeting of the board, was enacted at the same time as the above quoted section 4747-1 and it would seem to follow that the legislative intent might be drawn from the circumstances that, having provided for the expenses of one board, it intended the other boards to have no such expenses, else they would have been provided for also.

I believe it is a well settled principle of law in Ohio that where fees and compensation are provided for by law for public officials, such laws must be strictly construed and the officials are permitted no other or further remuneration except that which is especially provided. A few of the numerous decisions upon this subject might well be noted and considered:

In Richardson v. State, ex rel., etc., 66 O. S. 108, the plaintiff, the county commissioners, claims that in addition to his compensation and mileage he is entitled to be reimbursed out of the county treasury for certain expenses such as traveling expenses, livery hire, etc., but the court held that the statute must be strictly construed and that he could charge only that amount which was specifically provided for by statute.

In Debolt v. Trustees, 7 O. S. 237, the township treasurer endeavored to charge fees upon money received and disbursed and the court held that no officer, whose compensation is regulated by fees, can charge for a particular service unless the law specifically gives him fees for that service.

In Strawn v. Commissioners, 47 O. S. page 404, a county surveyor charged for making a record of a survey and the court held that no statutory provision having been shown directly authorizing payment out of the public funds of the fees of a county surveyor for recording a private survey, no fees could be charged. The fact that a duty is imposed upon a public officer will not be enough to charge the public with an obligation to pay for its performance, for the legislature may deem the duties imposed to be fully compensated by the privileges and other emoluments belonging to the office, or by fees permitted to be charged and collected for services connected with such duty and service, and hence provides no compensation therefor.

In Jones v. Commissioners, 57 O. S. 189, a county auditor endeavored to secure extra compensation for making certain statistical reports, but the court held where

there is no provision of law for the auditor to charge and collect fees for services, no charge shall be made therefor and the auditor's service in making the reports for the commissioners must be deemed, if not gratuitous, at least satisfied by the salary attached to his office, and he cannot be paid extra compensation out of the county treasury.

In Anderson v. Commissioners, 25 O. S. 13, the prosecuting attorney appointed an assistant to examine into the annual report of the county commissioners. The court held the statute under which the appointment was made, and in pursuance of of which the service was rendered, makes no provision for compensation for such services. Where a service for the benefit of the public is required by law and no provision for its payment is made, it must be regarded as gratuitous and no claim for compensation can be enforced.

In Clark v. Commissioners, 58 O. S. 107, the clerk of courts endeavored to charge for indexing and other services. The court held it to be well settled that a public officer is not entitled to receive pay for services out of the public treasury unless there is some statute authorizing the same, and that services performed for the public, where no provision is made by statute for payment, are regarded as a gratuity or as being compensated by fees, privileges and emoluments accruing to such officer in the matters pertaining to his office.

I must, therefore, hold that for the duties to be performed under section 4747-1 G. C. no expenses, fees or salaries can be paid from the county board of education fund or any other fund provided by law.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

109.

OFFICES INCOMPATIBLE—TOWNSHIP TRUSTEE AND MEMBER OF BOARD OF EDUCATION.

The duties of a member of a township board of education and the township trustee are incompatible and the two offices cannot be held contemporaneously by the same person.

COLUMBUS, OHIO, March 13, 1917.

HON. PHIL H. WIELAND, *Prosecuting Attorney, Mt. Gilead, Ohio.*

DEAR SIR:—I am in receipt of your communication February 20, 1917, as follows:

> "I desire to submit the following question to your department for an opinion:
>
> "Can a member of a township board of education also hold the office of township trustee or are those two offices incompatible?"

My predecessor, Edward C. Turner, on December 9, 1915, rendered an opinion to Hon. T. B. Jarvis, prosecuting attorney, Mansfield, O., found in volume 3, page 2357, Opinions of the Attorney-General, for the year 1915, wherein he held that the office of township trustee and member of the board of education, in and for the said township are incompatible for the reason, that the same may be and frequently are adverse in the matter of levying and the adjustment of tax rates as provided in section 5649-3A and 5649-3B the General Code.

Section 5649-3A provides, that on or before the first Monday in June in each year, the trustees in each township and each board of education and other taxing officials, shall submit to the county auditor an annual budget setting forth an estimate stating the amount of money needed for the ensuing year.

It further provides the matters that the budget shall specifically set forth and the limit of the rate to be fixed by each of the taxing authorities, named in said section.

Section 5649-3B provides for a budget commission composed of county auditor, prosecuting attorney and county treasurer for the purpose of adjusting the rates of taxation and the amount of taxes to be levied in each county.

Section 5649-3C provides as follows:

> "The auditor shall lay before the budget commissioners the annual budgets submitted to him by the boards and officers named in section 5649-3A of this act. * * * The budget commissioners shall examine such budgets and estimates prepared by the county auditor, and ascertain the total amount to be raised in each taxing district for state, county, township, city, village, school district, or other taxing district purpose. * * * If such total is found to exceed such authorized amount in any township, city, village school district, or other taxing district in the county, the budget commission shall adjust the various amounts to be raised so that the total amount thereof shall not exceed in any taxing district the sum authorized to be levied therein. In making such adjustment the budget commissioners may revise and change any or all the items in any such budget, but shall not increase the total of any such budget, or item therein. The budget commissioners shall reduce the estimates contained in any or all such budgets by such amount or amounts as will bring the total for each township, city, village, school district, or other taxing district, within the limits provided by law."

In case it becomes necessary for the budget commissioners to reverse the estimate contained in the budget, provided for in section 5649-3A, the commissioners call the members of the board of education and the township trustees before them for conference for a discussion of the merits of their respective claims, under which circumstances the members of the board of education and the township trustees necessarily represent adverse interests which is not permissible in the same individual.

I concur in the opinion rendered by my predecessor, Hon. Edward C. Turner, and, therefore, advise you that a member of a township board of education, may not, at the same time, hold the office of township trustee.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

110.

APPROVAL—ARTICLES OF INCORPORATION OF THE OWNERS MUTUAL LIVE STOCK INSURANCE COMPANY.

COLUMBUS, OHIO, March 14, 1917.

HON. W. D. FULTON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I am herewith returning to you the articles of incorporation of "The Owners Mutual Live Stock Insurance Company." The purpose clause in said articles of incorporation is in legal effect in substantial compliance with the third paragraph of section 9609 of the General Code. Inasmuch as said certificate is otherwise in accord with the sections of the General Code providing for live stock insurance corporations, said certificate is approved and you are advised to receive and record the same.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

111.

RETIRED OFFICER—ENTITLED TO LIKE PAY AS OFFICERS ON ACTIVE LIST—WHEN ORDERED ON DUTY BY ADJUTANT GENERAL—PAID FROM APPROPRIATION FOR CAMP PAY.

A retired officer ordered on duty by the adjutant general of Ohio is entitled under section 5201 G. C. to like pay and allowance as officers on the active list and by virtue of section 5296 G. C. may be paid from appropriation for camp pay.

COLUMBUS, OHIO, March 14, 1917.

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

DEAR SIR:—Under recent date you wrote me to the following effect:

> "Enclosed you will find a voucher made payable to Lt. Col. Miletus Garner in the sum of $781.67, to be paid from Personal Service O. N. G.—Camp Pay.
>
> "There is some doubt in my mind as to whether this is a proper charge against this fund, and I, therefore, request that you advise me as to whether or not you would consider this a proper charge against the appropriation made to the Ohio National Guard for Personal Service, classification A-2, Wages—Camp Pay."

The voucher which you submitted is one made in favor of Lt. Col. Miletus Garner and has attached thereto a certified account stating as follows:

> "For services per S. O. No. 141, Par. 8 A. G. D. July 1st to Sept. 7th incl.
>
> | | |
> |---|---|
> | "For month of July | $350 00 |
> | "For month of August | 350 00 |
> | "7 days in September at $11.67 per day | 81 67 |
> | | "$781 67" |

The sole question presented by you is as to the fund out of which the said voucher shall be paid.

The special order referred to in the certified account is to the following effect:

"COLUMBUS, July 1st, 1916.

"Special Orders No. 141.

"Par. 8—Lieutenant Colonel Miletus Garner, Ohio National Guard, retired, is restored to the active list of officers, O. N. G., and will report to Brigadier-General Benson W. Hough, the Adjutant General, Ohio, for assignment to duty."

It appears, therefore, that Lt. Col. Garner was on the retired list of officers prior to the issuance of Special Order No. 141.

Section 5201 G. C. provides:

"Any commissioned officer who has served as a member of the national guard for a period of ten years, five of which have been as a commissioned officer, at his own request may be placed upon the retired list, which shall be kept in the office of the adjutant general. Officers so retired shall receive no compensation for their services except as hereinafter provided, but shall be permitted on all occasions of ceremony, to wear the uniform of the grade upon which retired. The commander-in-chief may detail officers so retired upon duty other than in the command of troops, and when so detailed, they shall receive like pay and allowances as officers on the active list detailed or employed under like conditions."

Section 5296 G. C. provides:

"For service and attendance upon general courts-martial, courts of inquiry, and boards appointed by the commander-in-chief, as member, judge, advocate, recorder or witness, or upon inspection or other duty when ordered by the commander-in-chief, officers shall receive as pay the amount allowed by law for duty at annual encampments, together with transportation in kind and actual expenses for each day's service and the time actually employed in going to and returning from such duty, courts or boards."

Under the provisions of section 5201 a retired officer, when detailed for duty, is entitled to receive "like pay and allowances as officers on the active list detailed or employed under like conditions" and, under section 5296, such officer is entitled to receive as pay "the amount allowed by law for duty at *annual encampments,*" etc.

Although the appropriation made in house bill 701, 106 O. L. 666, to the Ohio National Guard, under Personal Service (709 and 790) reads as follows:

"A-2 Wages—	
"Drill pay	$50,000 00
"Camp pay	60,000 00
	"$110,000 00"

Nevertheless, since under the provisions of section 5296 officers when ordered on duty are entitled to "the amount allowed by law for duty at annual encampments," it would seem to me that the appropriation made for camp pay could lawfully be used to pay for such services.

I, therefore, advise you that the appropriation for "Personal Service, O. N. G., Camp Pay" may be used in payment of services rendered by retired officers when detailed upon duty under the provisions of sections 5201 and 5296 of the General Code.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

112.

TERRITORY IN ONE TOWNSHIP WHICH IS A PART OF THE RURAL SCHOOL DISTRICT OF AN ADJOINING TOWNSHIP DOES NOT CEASE TO BE A PART OF SAID DISTRICT BY REASON OF RESIDENTS THEREOF VOTING AT AN ELECTION CALLED BY BOARD OF EDUCATION IN THE CIVIL TOWNSHIP IN WHICH THEY ACTUALLY RESIDE.

HELD: Territory in Lenox civil township, Ashtabula county, Ohio, which territory is a part of Morgan township rural school district, adjoining, does not cease to be a part of the said school district by reason of the fact that the electors residing in such territory participated in a school election called by the board of education of Lenox township school district, and that the only way in which territory can be transferred from Morgan township school district is by some proceeding in accordance with the statutes providing for such transfer.

COLUMBUS, OHIO, March 15, 1917.

HON. F. J. BISHOP, *Prosecuting Attorney, Jefferson, Ohio.*

DEAR SIR:—I have the honor to acknowledge receipt of your letter of February 12, 1917, asking opinion, in which you say:

> "A question as to taxation has arisen between the townships of Lenox and Morgan in this county concerning which I would be very pleased to have your opinion and the board of education of both townships also desire your opinion in the matter. Following are the facts:
>
> "Lenox township joins Morgan township on the east. In the year 1908 lots Nos. 79 and 80 in Lenox township were included in Morgan township school district and a school tax was of course at that time levied on that part of Lenox township for the benefit of Morgan township school district, but on the 26th day of September, 1908, the board of education of Lenox township passed a resolution, a copy of which I herewith enclose, and on the 3rd day of November, 1908, at a general election the township of Lenox voted upon the proposition set forth in the resolution and also the electors residing in that part of Morgan township school district which lay in the township of Lenox (lots 79 and 80) voted at that election and the proposition submitted at the election was carried and the bonds were duly issued and sold and a school building was erected at the center of Lenox township and the school was centralized.
>
> "I herewith enclose a blue print showing the township line, Morgan township school district and the disputed territory in Lenox township.
>
> "Now the question submitted to you for your determination is this: Has Morgan township school district any right to still levy a tax for school

purposes upon that property in Lenox which was formerly included in the Morgan township school district? Or was the territory, to wit, lots 79 and 80 in Lenox township cut out of Morgan school district by virtue of the election held under the enclosed resolution, or to put in another way, which one of the two school districts, (to wit, Morgan township school district and Lenox township school district) has a right to the school tax levied upon lots 79 and 80 in Lenox township?

"I might add incidentally that no pupils in lots 79 and 80 attend Morgan township district school."

From the resolution referred to by you, a copy of which is attached to your communication, it does not appear that any question of centralization of the schools of Lenox township school district was submitted to the electors, but that the only question submitted was with respect to an issue of bonds in the sum of $8,000.00 for the purpose of erecting a school building.

You state that the electors residing within said lots 79 and 80 in Lenox civil township, voted at the election called pursuant to this resolution. This they had no right to do, for although they were legal residents and electors of Lenox civil township, they were not legal residents and electors of Lenox township school district, it being clear in legal contemplation that Lenox township and Lenox township school district were separate and distinct political subdivisions.

Further, wholly irrespective of the rights of electors residing within said lots 79 and 80 in Lenox civil township to vote at said school election, it seems clear that the fact that said electors participated in the election in Lenox township school district called by the board of education of such school district was not effective to transfer the territory included within said lots 79 and 80 to Lenox township school district, for then as now the only manner in which territory could be transferred from one school district to another was by compliance with the provisions of the statutes providing for such action. At that time and until the adoption of the General Code in 1910 the only way territory could be transferred from one school district to another was by proceedings taken in accordance with the provisions of section 3894 or 3895, Revised Statutes. These sections of the Revised Statutes were carried into the General Code as sections 4692 to 4695 thereof. In 1914 section 4736, General Code, was amended so as to make provision for the transfer by the county board of education of territory from one school district to another within the county; while at the present time section 4692, General Code, makes effectual provision for such transfers.

I am therefore of the opinion, and so advise, that unless some action has been taken since the time of said school election transferring the territory included within said lots 79 and 80 to Lenox township school district, such territory and property therein contained are still in Morgan township school district, and there taxable under levies made by the board of education of said school district, the correct designation of which, it is hardly necessary to say, is now Morgan township rural school district.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

113.

ARTICLES OF INCORPORATION—THE PHYSICIANS AND SURGEONS INFORMATION EXCHANGE COMPANY—PURPOSE CLAUSE DOES NOT INDICATE PURPOSE TO DO PROFESSIONAL BUSINESS.

The purpose clause of the articles of incorporation of the Physicians and Surgeons Information Exchange Company does not indicate a purpose to do professional business.

COLUMBUS, OHIO, March 15, 1917.

HON. WILLIAM D. FULTON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I have the honor to acknowledge receipt of your favor of February 20, 1917, enclosing articles of incorporation of the Physicians and Surgeons Information Exchange Company, in which you ask my opinion as to whether or not the purpose clause of this company is one indicating the conduct of professional business. The purpose clause is as follows:

> "Said corporation is formed for the purpose of rendering service to individuals, firms and corporations, in giving assistance in the answering of telephone calls, furnishing messenger service and otherwise aiding and assisting the said individuals, firms and corporations in taking care of telephone calls, office calls and other communications or inquiries, which may come to them professionally or otherwise, furnishing servants and employes for the said parties as above, and generally assisting the public at any and all times to get into communication with their physician, surgeon, nurse, druggist, hospital or others with whom they may desire to communicate, and doing any and all things which may be necessary or incidental thereto."

Section 8623 of the General Code provides as follows:

> "Except for carrying on professional business, a corporation may be formed for any purpose for which natural persons lawfully may associate themselves."

The term "professional" as used in the section above quoted means that which pertains to a profession, and Webster's New International Dictionary defines "profession" as

> "that of which one professes knowledge; the occupation if not purely commercial, mechanical, agricultural, or the like to which one devotes oneself; a calling in which one professes to have acquired some special knowledge used by way either of instructing, guiding or advising others or of serving them in some art; calling; vocation: employment; as, the profession of arms; the profession of chemist."

The Standard Dictionary defines the term "profession" as follows:—

> "An occupation that properly involves a liberal education or its equivalent and mental rather than manual labor; especially one of the three learned professions."

In the Century Dictionary the meaning of the word "profession" is given the meaning, among other things, as:

> "a vocation in which a professed knowledge of some department of science or learning is used by its practical application to the affairs of others, either in advising, guiding or teaching them, or in serving their interests or welfare in the practice of an art founded on it. Formerly theology, law and medicine were specifically known as the professions; but, as the applications of science and learning are extended to other departments of affairs, other vocations also receive the name. The word implies professed attainments in special knowledge, as distinguished from mere skill; a practical dealing with affairs, as distinguished from mere study or investigation, and an application of such knowledge to uses for others as a vocation, as distinguished from its pursuit for one's own purposes."

On consideration of the above definitions of the term by the standard authorities herein noted, the court in the case of Cummings v. Pennsylvania Fire Insurance Company, 153 Iowa, 579, in its opinion says:

> "It is apparent from these definitions that, to constitute a profession, something more than a mere employment or vocation is essential; the employment or vocation must be such as exacts the use or application of special learning or attainments of some kind, and this seems to be the conclusion of the courts."

In the case of Pennock v. Fuller, 41 Mich., 153, the court held that one who operates a real estate agency is not engaged in a professional employment. The court in its opinion in this case says:—

> "Professional employment can only relate to some of those occupations universally classed as professions, the general duties and character of which courts must be expected to understand judicially. Real estate agencies are no more professions than any other business agencies. A commission merchant, or an agent for the sale of any particular kind of personal property, acts in an analogous capacity. Any one can assume and lay down such business at pleasure, and any one can conduct it in his own way, on such terms and conditions as he sees fit to adopt. There is nothing in our laws which would enable any court to draw a line between such business agencies. They are not classed as professions by popular usage or by law."

To the same point that the term "professional" relates only to such occupations as are universally classed as professions and the duties and character of which courts take judicial notice is the case of O'Reilly v. Erlanger, 95 N. Y. Sup. 760.

In the case of State ex rel. The Physicians' Defense Company v. Laylin, 73 O. S. 90, the court held that a foreign corporation, the sole business of which was that of defending physicians and surgeons against civil suits for malpractice, was not entitled to have or receive from the secretary of state a certificate authorizing it to transact such business in this state for the reason that the general purpose was professional business and as such expressly prohibited to corporations by section 3235 of the Revised Statutes, which section is now section 8623

of the General Code. The court in its opinion noted that the services necessary to be rendered by the company in the pursuit of its proposed business was such as in this state could only be performed by a member of the legal profession—an attorney, who shall have been first duly authorized and licensed to perform such services. The court said that such services are professional services, and a business which in its conduct or transaction requires and permits only that character of service, is essentially and certainly, a professional business.

Measured by the standards above noted as to the proper meaning and application of the terms "profession" and "professional," I am wholly unable to perceive how on any view the proposed business of the Physicians and Surgeons Information Exchange Company, as indicated by the purpose clause of its articles of incorporation, as above quoted, can be classed as professional business.

The business proposed to be conducted is peculiar in its nature, and it may be quite difficult to anticipate just what the practical scope of its business is going to be, notwithstanding its purpose is set out in some detail in the articles of incorporation. In this connection it may perhaps be properly suggested that before filing these articles it might be well if you would give some consideration to section 8628 of the General Code, which provides that the secretary of state shall not file or record any articles of incorporation wherein the corporate name is likely to mislead the public as to the nature or purpose of the business its charter authorizes. Whatever may be said on this point, however, with respect to the proposed business of the company, I am clearly of the opinion that the business contemplated is not professional business within the meaning of that term as used in section 8623 of the General Code.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

114.

COSTS—IN PURSUIT OF PERSONS CHARGED WITH FELONY—CHARGEABLE AGAINST COUNTY—IN PURSUIT OF PERSON CHARGED WITH MISDEMEANOR—WITHIN THE STATE CHARGEABLE AGAINST COUNTY—POLICE CHIEF HAS NO AUTHORITY TO ADVANCE SUCH MONEY—WHETHER OR NOT PERSON APPREHENDED HAS NO BEARING ON PAYMENT OF COSTS—PROSECUTING ATTORNEY MIGHT ADVANCE SAID MONEY FROM FUND ALLOWED HIM UNDER SECTION 3004 G. C.

(1) *The costs incurred in the proper pursuit of persons charged with the commission of felonies within and without the state are properly chargeable to the county and not to the city and that the costs of pursuing a person charged with a misdemeanor within the state are properly chargeable to the county. There is no provision for the payment of such costs incurred in pursuing a person without the state charged with a misdemeanor.*

(2) *There is no authority in law for the chief of police to advance money to cover such expenses.*

(3) *The fact as to whether or not persons charged with the violation of state laws are apprehended has no bearing on who shall pay the expense.*

(4) *There is no authority for county officers advancing money to cover the expenses in pursuit of such persons unless it might be advanced by the prosecuting attorney from the fund allowed him under section* 3004 *G. C.*

COLUMBUS, OHIO, March 15, 1917.

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

GENTLEMEN:—I have your letter of January 9, 1917, as follows:

"We respectfully request your written opinion upon the following matters relative to the chief of police of the city of Lorain, Ohio.

"(1) Is the expense connected with the pursuit of criminals who have violated state laws, a legal payment from the municipal funds of the city of Lorain, or should such expense be paid from the funds of Lorain county?

"(2) Can money to cover expenses of pursuit of criminals be advanced to the chief of police by the city of Lorain, Ohio?

"(3) Does the question of whether they are able to apprehend such criminals or not have any bearing on who should pay such expense?

"(4) Can such money be advanced by the county officers, or should same only be paid after the actual expenses have been ascertained?"

It is a general rule of law that neither the state, county or municipality can be charged with the costs unless the statute so provides. In order to determine to whom the expense of pursuing criminals who violate state laws should be charged, it is necessary to examine the statutes, if any, providing for the payment of such expenses. The proper pursuit of a prisoner by an officer authorized to pursue him would be properly included in the costs and the answer to your question will be determined by what statutory provision we may find for the payment of costs in the cases referred to.

There are four different phases of your question, as follows:

(1) Expense of officer pursuing a prisoner charged with a felony within the state:

Section 13493 G. C. covers the situation as follows:

"When a felony has been committed, any person without warrant may arrest another whom he has reasonable cause to believe is guilty of the offense, and detain him until a warrant can be obtained. If such warrant directs the removal of the accused to the county in which the offense was committed, the officer holding the warrant shall deliver the accused to a magistrate of such county, to be dealt with according to law. The necessary expense of such removal, and reasonable compensation for his time and trouble, shall be paid to such officer, out of the treasury of such county, upon the allowance and order of the county auditor."

(2) In regard to the pursuit of felons without the state:

Section 13722 provides:

"Upon sentence of a person for a felony, the officers, claiming costs made in the prosecution, shall deliver to the clerk itemized bills thereof, who shall make and certify under his hand and the seal of the court, a complete bill of the costs made in such prosecution, including the sum paid by the county commissioners for the arrest and return of the convict on the requisition of the governor, or on the request of the governor to the president of the United States. Such bill of costs shall be presented by such clerk to the prosecuting attorney who shall examine each item therein charged, and certify to it if correct and legal."

Section 3015 G. C. provides:

"The county commissioners may allow and pay the necessary expense incurred by an officer in the pursuit of a person charged with felony, who has fled the country."

(3) Section 13502 G. C. provides:

"If the accused flee from justice, the officer holding the warrant may pursue and arrest him in any county of this state, and convey him before the magistrate or court issuing the warrant, or other magistrate or court of the county having cognizance of the case."

Section 3016 G. C. provides:

"In felonies, when the defendant is convicted the costs of the justice of the peace, police judge, or justice, mayor, chief of police, constable and witnesses, shall be paid from the county treasury and inserted in the judgment of conviction, so that such costs may be paid to the county from the state treasury. In all cases, when recognizances are taken, forfeited and collected and no conviction is had, such costs shall be paid from the county treasury."

Section 3019 G. C. reads:

> "In felonies wherein the state fails, and in misdemeanors wherein the defendant proves insolvent, the county commissioners, at any regular session, may make an allowance to any such officers in place of fees, but in any year the aggregate allowances to such officer shall not exceed the fees legally taxed to him in such causes, nor in any year shall the aggregate amount allowed an officer exceed one hundred dollars."

These sections authorize the officer to pursue a prisoner charged with a misdemeanor throughout the state of Ohio, and the latter two sections, I think, authorize the payment of the costs in all state misdemeanor cases, as follows: If the state wins and the defendant proves insolvent, the costs are paid by the county under section 3019 G. C. If the state loses and recognizance has been taken, the cost can be paid under section 3016. If no recognizance has been taken and the court has required no security, I know of no way to collect.

(4) There is no authority in law, that I am aware of, for the payment of costs incurred in the pursuit of persons charged with misdemeanors outside of the state of Ohio.

It is therefore my opinion, in answer to your first question, that the costs incurred in the proper pursuit of persons charged with the commission of felonies within and without the state, are properly chargeable to the county and not to the city, and that the costs of pursuing a person charged with a misdemeanor within the state are properly chargeable to the county.

In answer to your second question, I know of no authority in law for the city to advance money to the chief of police to cover expenses in pursuing criminals in the above cases.

In answer to your third question, I am of the opinion that the fact as to whether or not persons charged with the violation of state laws are apprehended has no bearing on who should pay the expenses. If the effort made is in good faith, whether successful or not, I think it is properly chargeable to the cost in the case and paid as above outlined.

In answer to your fourth question, I am not aware of any statute authorizing any advance of money to county officers for the pursuit of persons charged with the violation of state laws, unless it might be advanced by the prosecuting attorney from the fund allowed him under section 3004 General Code.

Very truly yours,
JOSEPH McGHEE,
Attorney-General.

115.

WIDOW OF UNNATURALIZED PERSON—ENTITLED TO MOTHER'S PENSION.

Under the provisions of the law relating to mothers' pensions, the widow of an unnaturalized person is entitled to a pension under the same conditions as is the widow of a naturalized citizen.

COLUMBUS, OHIO, March 15, 1917.

HON. BERNARD M. FOCKE, *Prosecuting Attorney, Dayton, Ohio.*

DEAR SIR:—I have a communication signed by the assistant prosecuting attorney of your county, dated February 13th, in which you ask an opinion in reference to certain questions therein set out. Said communication reads as follows:

> "I would like for your department to give a ruling on the following questions:
>
> "1st. Can a widow of an unnaturalized citizen receive a mother's pension?
>
> "2nd. If a man takes out his first papers before his death, can his widow receive a mother's pension?
>
> "3rd. Can a widow whose husband was never naturalized receive a pension by accepting the oath of allegiance?"

The law which controls in the matter of the questions suggested in your communication is to be found in sections 1683-2 and 1683-3 of the General Code.

Section 1683-2 reads in part as follows:

> "For the partial support of women whose husbands are dead, or become permanently disabled by reason of physical or mental infirmity, or whose husbands are prisoners or whose husbands have deserted, and such desertion has continued for a period of three years, when such women are poor, and are the mothers of children not entitled to receive age and schooling certificate, and such mothers and children have a legal residence in any county of the state for two years, the juvenile court may make an allowance to each of such women as follows:"

Section 1683-3 sets out the conditions which must obtain before a mother's pension can be allowed to any mother. They are as follows:

> "First, the child or children for whose benefit the allowance is made must be living with the mother of such child or children; second, the allowance shall be made only when in the absence of such allowance, the mother would be required to work regularly away from her home and children, and when by means of such allowance she will be able to remain at home with her children, except that she may be absent for work for such time as the court deems advisable; third, the mother must in the judgment of the juvenile court be a proper person, morally, physically and mentally for the bringing up of her children; fourth, such allowance shall in the judgment of the court be necessary to save the child or children from neglect and to avoid the breaking up of the home of such woman; fifth, it must appear to be for the benefit of the child to remain with such mother;"

Now it will be noted that in section 1683-2 the object and purpose of the enactment of this statute is set out, while in section 1683-3 the conditions under which the pension may be granted are set out. Neither in the object or purpose as set out nor in the conditions named in said section does there seem to be any distinction whatever in reference to the homes and children of unnaturalized persons as distinguished from naturalized persons. The broad term "mother" is used in these statutes, and the "children of the mother" is used in its broadest sense, and when the term "home" is used there seems to be no aim whatever in distinguishing between the homes of different classes of citizens. So that so far as the statutes themselves are concerned it seems that there should be no distinction made between the mother, the home, the children of naturalized persons and unnaturalized persons.

Furthermore, when we consider these statutes in reference to their spirit rather than in reference to their letter, we must conclude that it is just as important that the homes of the unnaturalized persons be maintained in all their fullness and integrity as it is for the homes of the citizens of our state to be so maintained. It is just as important that the children of the unnaturalized persons be reared with every advantage the state can afford and with all the care and nurture that the mother in the home can give, as it is that the children of naturalized citizens be given these advantages. To a great extent, I believe that the children of immigrant parentage are even more in need of all these advantages than are the children of our citizens, whether by birth or by naturalization. To them and their mother this is a strange country. The customs and institutions are foreign to them. The habits and customs of the people are not understood. Hence, every advantage possible must be given to the mother and her children that they may become a part of our own state and country, not alone in body but also in spirit.

Furthermore, it would be contrary to a sound public policy to differentiate between the homes of the unnaturalized and the homes of the naturalized. What this state and nation must do is to make these people feel that this is their home; that all the advantages this state affords are theirs; that they are on an equality with every other citizen of the state; that in this state and nation all men are created free and equal. This principle cannot be implanted in the minds and hearts of our foreign born citizens if we make a distinction between the most vital element that enters into the life of all of our citizens, viz., the homes of the state.

Furthermore, it would be contrary to the spirit and teachings of our state and nation as founded upon the principles and truths of the Bible. To a christian people all men are brothers. There is no distinction between the Jew and the Gentile, the educated and the ignorant, the bond and the free. Without distinction as to color, race or birth, those who are strong must bear the infirmities of those who are weak.

All these things must have been in the minds of the legislators when the mothers' pension law was enacted and it must have been their intention that this law was enacted to aid those homes that may be needy no difference whether it should be the homes of the naturalized or the homes of the unnaturalized.

Therefore, answering your first question specifically, I am of the opinion that a widow of an unnaturalized person is entitled to a mother's pension, if all the conditions set out in the law obtain.

Having answered your first question in the affirmative, your second and third questions need no answer.

Respectfully,
JOSEPH MCGHEE,
Attorney-General.

116.

BOARD OF EDUCATION—HAS AUTHORITY TO EMPLOY COUNSEL UNDER SECTION 2918 G. C. WHEN PROSECUTOR REFUSES TO ACT—PAID FROM CONTINGENT FUND PROVIDED BY SECTION 4744-3 G. C.

Section 2918 of the General Code authorizes county boards of education to employ counsel when the prosecuting attorney refuses to act under the provisions of section 4761 G. C.

Such counsel so employed by county boards of education are paid from the contingent fund provided by section 4744-3 G. C.

COLUMBUS, OHIO, March 16, 1917.

HON. S. E. WALTERS, *Prosecuting Attorney, Van Wert, Ohio.*

DEAR SIR:—In your letter of February 3, 1917, you ask my opinion on the following statement of facts:

"Venedocia village school district, in this county, embraces territory of York township and Jennings township. The county board of education some time ago enlarged the Venedocia village school district by adding to it more territory taken from both York and Jennings townships.

"A taxpayer brought suit and procured temporary injunction restraining the county board of education, the Venedocia village board of education, the York township board of education and the Jennings township board of education from making the enlargement of the Venedocia village school district.

"The case has not been heard on its merits but among the answers filed by the defendant boards are the answers of the York township board and the Jennings township board, in which they ask that the temporary injunction be made perpetual; in other words, in this action, the plaintiff, a taxpayer, defendant York township board and the defendant Jennings township board, are asking perpetual injunction, and the defendant, the county board, and the defendant, Venedocia village board, are wanting the change of district made by the county board to be sustained.

As prosecuting attorney of the county, I have declined to act as attorney for any of these boards, their interests in this case being antagonistic, because section 4761 G. C. defining the duties of prosecuting attorney with respect to being counsel for boards of education, says:

" 'When a civil action is between two or more boards of education in the same county, the prosecuting attorney shall not be required to act for either of them.'

"The county board of education, under section 4744-3 G. C., have set apart for contingent fund this year, the sum of $300, which sum has already been partly spent and there are no other funds out of which they can pay counsel for looking after their interests in this case and the amount on hand at the present time is insufficient to pay for employment of counsel.

"The attorney-general's opinion, No. 336, under date of May 6, 1915, says:

" 'The board of education of a county school district has no authority in law to employ counsel other than the prosecuting attorney of the county.'

"With this situation in mind, I would like to have your answer to the following questions:

"(1) Does section 2918 or any other section of the Code authorize these boards of education, including the county board, to employ counsel?

"(2) If there is any authority for the county board to employ counsel, from what fund and in what manner can they make payment for such services?"

General Code section 2918 provides in part:

"Nothing in the preceding two sections shall prevent a school board from employing counsel to represent it, but such counsel, when so employed, shall be paid by such school board from the school fund. * * *"

The "two preceding sections" in the above section mean, I take it, sections 2916 and 2917 of the General Code. Section 2916 G. C. sets forth the powers and duties of the prosecuting attorneys and section 2917 provides that the prosecuting attorney shall be the legal adviser of the county and township officers, except that township officers may employ other counsel "on the order of the township trustees, fully entered upon their journal," and this section was supplemented by adding section 2917-1 G. C., which simply provides that the prosecuting attorney shall be the legal adviser of certain election officials. The language of the above portion of section 2918 G. C., above quoted, permits any board of education to employ counsel to represent it, provided such counsel so employed is paid by such board of education from the school fund. The above language is made an exception to the rule laid down that the prosecuting attorney should represent all officials.

General Code section 4761 provides in part:

"Except in city school districts, the prosecuting attorney of the county shall be the legal adviser of all boards of education of the county in which he is serving. He shall prosecute all actions against a member or officer of a board of education for malfeasance or misfeasance in office, and he shall be the legal counsel of such boards or the officers thereof in all civil actions brought by or against them, and shall conduct such actions in his official capacity. Where such civil action is between two or more boards of education in the same county, the prosecuting attorney shall not be required to act for either of them. * * *"

In your case, while the action was not originally commenced by one board against another, the issues are so framed that there is a contest between two or more of the boards and you have a proper right to refuse to represent any one or more or all of said boards, and upon such refusal it is perfectly proper that the language of section 2918 G. C. should apply, for it is held in Caldwell v. Marvin, 8 Ohio N. P. (n. s.) 390:

"The ordinary and necessary method of conducting a legal proceeding is with the assistance of legal counsel. If the right of a board of education to exercise some single power was challenged in a *quo warranto* proceeding, there would be no question of the implied right to employ counsel in the absence of legally constituted counsel, or upon the failure or refusal of such counsel to act."

If, then, there should be any question about a board of education having authority to employ counsel, under the provisions of General Code section 2918, above quoted, and I think there is not, the board, under the reasoning of Caldwell v. Marvin would, and should have the implied power to employ such counsel.

You call my attention to opinion 336, rendered by my predecessor, and quote therefrom. That opinion was rendered on May 5, 1915, and held in part as follows:

> "The authority of the local board * * * to employ counsel other than the prosecuting attorney to represent it, provided it has sufficient funds in its treasury for such purpose, is clear, but the county school district has no school fund within the meaning of section 2918 G. C. out of which counsel, other than the prosecuting attorney, might be paid by the county board of education for services rendered to said board, and there is no authority in law to create such fund."

On May 27, 1915, General Code section 4744-3 was amended to read in part as follows:

> "The county auditor, when making his semi-annual apportionment of the school funds of the various village and rural school districts, shall retain the amount necessary to pay such portion of the salaries of the county and district superintendents and for *contingent expenses* as may be certified by the county board. Such money shall be placed in a separate fund to be known as the 'county board of education fund.' * * *"

I have no doubt but that the language "county board of education fund," used in section 4744-3, and the language "school fund" used in section 2918, as far as the county board of education is concerned, mean one and the same thing. So that, when the board of education certified to your county auditor that the sum of $300.00 was needed for contingent expenses, and a portion of that fund is yet unexpended, the county board of education has a perfect right to spend the remainder of said fund. The county board of education also has a right to certify to the county auditor the amount which will be required for contingent expenses for the following year, which amount should include the probable amount of the balance of attorney fees needed by the said board in the proper prosecution or defense of said actions mentioned.

In the case in question we have a school board with a lawsuit on its hands. The legal adviser provided for it by statute refuses to act. The rights of the people whom the school board represent are affected. The board has authority to contract with counsel to legally represent it and the county board should pay the counsel hired by it from the contingent fund provided for in G. C. section 4744-3.

In answer to your first question, then, I advise you that section 2819 does authorize your boards of education to employ counsel and, in answer to your second question, the same shall be paid from the contingent fund of said board

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

117.

SHERIFF—HAS NO AUTHORITY TO SERVE SUBPOENAS IN ADJOINING COUNTY.

When a common pleas court issues a subpoena in a civil case for a witness in an adjoining county, the sheriff of the county in which such court is sitting has no authority to serve the writ in such adjoining county.

COLUMBUS, OHIO, March 17, 1917.

HON. E. E. LINDSAY, *Prosecuting Attorney, New Philadelphia, Ohio.*

DEAR SIR:—I have your communication in which you ask my opinion upon the following statement of facts:

> "I would like to have an opinion as to whether a sheriff has jurisdiction or is required to serve subpoenas in a civil action pending in the court of common pleas of his county, on witnesses or persons residing in an adjoining county.
>
> "The statute or the decisions seem to be plain enough in reference to his jurisdiction in regard to serving summons in an adjoining county, but I am unable to find anything definite in regard to his serving subpoenas in adjoining counties. My opinion is that he is not required so to do but will be pleased to have your opinion on this subject."

Section 11504 General Code reads:

> "A subpoena may be served by the sheriff, coroner, or any constable of the county, by the party, or other person; but if service is not made by a sheriff, coroner or constable, proof of it shall be shown by affidavit, and no costs shall be taxed."

Section 11506 General Code reads:

> "A witness shall not be compelled to go out of the county where he resides, or is subpoenaed, except to an adjoining county, to testify in a civil action, except where the case has been removed from the county in which such witness resides by change of venue. But no witness shall be required to go out of the county in which he resides or is subpoenaed to so testify, in the trial of a civil action, unless the party subpoenaing him, upon demand, shall pay him at the time he is subpoenaed, his legal mileage and per diem fees. When such witness is the official custodian of a paper or document necessary to be produced in the trial as evidence in any cause, which paper or document can not lawfully be attached as an exhibit to a deposition, the judge of the court in which such cause is pending, upon being satisfied of the necessity thereof, by his order to that effect, may compel a witness from another county to bring such paper or document into his court to be used as evidence in such case. A person subpoenaed to any other county as such official custodian, may demand the legal fees for attendance and mileage as in other cases, and need not attend unless such fees are paid."

Under authority of section 11506 G. C. the common pleas court of a county may compel the attendance of witnesses from an adjoining county, but no statutory

authority is given to the sheriff of the county in which the court is sitting to serve subpoenas in an adjoining county.

In the case of Washoe County v. Humboldt County, 14 Nevada 123, the court held that "the sheriff is not authorized by the statute to serve a subpoena on witnesses residing in any other county except it is within the same judicial district." In that case the court said at page 131:

> "The statute only provides for the service of process by the sheriff within his county, except where another county is attached to the same judicial district. It provides that 'a peace officer must serve within his county or district any subpoena delivered to him for service.' The district court had no authority to order the sheriff of Washoe county to serve a subpoena in the county of Humboldt, that county not being within his judicial district. The statute compels witnesses from other counties to attend the place of trial whenever the judge of the court where the cause is to be tried, or the justice of the supreme court, shall endorse on the subpoena an order for the attendance of witnesses; but in such cases the service must be made in the manner pointed out by the other provisions of the statute which I have cited."

In Morrell v. Ingle, 23 Kansas, 32, it was held:

> "In the absence of express provisions to the contrary, the powers of an officer are limited to the territory to which he is an officer."

In that case the court said at page 35:

> "We therefore think it may be considered as established by the testimony that this judgment remained, at the dates of the execution and sale, a valid judgment of the district court of Shawnee county, with power in that court to enforce it by execution to any county in the state; and also, that the county of Osage was an organized county. Under those circumstances, had the sheriff of Shawnee county power to execute the process issued to him by a levy and sale of the real estate situated in the county of Osage? We think not. A sheriff is an officer of the county, and in the absence of express provision his powers do not go beyond the territorial limits of his county. It is not necessary to rest this lack of power in the sheriff of Shawnee county upon the language of section 10 just quoted. It grows out of the general doctrine that the powers of any officer are limited to the territory of which he is an officer. He who affirms the existence of powers beyond such limits must show a grant of such powers; it is not enough to show that there is no express denial of them."

From a consideration of these authorities, it is my opinion that when a common pleas court issues a subpoena for a witness in an adjoining county, the sheriff of the county in which such court is sitting has no authority to serve the writ in such adjoining county.

Yours very truly,
JOSEPH MCGHEE,
Attorney-General.

118.

COMMON CARRIERS—MAY CARRY PERSONS EMPLOYED, EXHIBITS AND EQUIPMENT USED IN AGRICULTURAL EXTENSION WORK FREE OR AT REDUCED RATES—SECTION 7974 G. C. NOT REPEALED BY IMPLICATION BY SECTION 516 G. C.

The provision of section 7974 G. C. permitting common carriers to carry persons employed, and exhibits and equipment used, in agricultural extension work, free, is not repealed by implication by section 516 G. C.

A railroad company may carry such persons, exhibits or equipment free or at reduced rates.

COLUMBUS, OHIO, March 17, 1917.

HON. CLARK S. WHEELER, *Director of Extension Service, College of Agriculture, Ohio State University, Columbus, Ohio.*

DEAR SIR:—Under date of February 9th you addressed the following inquiry to this department:

> "Enclosed I hand you a copy of letter sent to the public utilities commission of Ohio and a copy of the reply received from Mr. Freeman T. Eagleson, attorney for the commission.
>
> "In his letter Mr. Eagleson suggests that this matter should be taken up with your office. Your opinion is therefore respectfully requested on the following points:
>
> "(1) Whether a railroad company may transport free or at reduced rates persons engaged in agricultural extension work;
>
> "(2) Whether a railroad company may transport free or at reduced rates a car or cars containing demonstration matter to be used in agricultural extension work;
>
> "(3) Whether, if agricultural extension workers were paid by the railroad company a nominal salary they might be transported free or at reduced rates, and in such cases whether the equipment used by such workers could be transported free or at reduced rates."

The copy of the letter sent to the public utilities commission, referred to, is as follows:

> "December 14, 1916.
>
> "Mr. A. W. Waltermire, Chairman Public Utilities Commission of Ohio. New First National Bank Building, Columbus, Ohio.
>
> "Dear Sir:—Your attention is directed to the following extract from the General Code:
>
> "'Section 7973. The college of agriculture and domestic science of the university shall arrange for the extension of its teachings throughout the state, and hold schools in which instruction shall be given in soil fertility, stock raising, crop production, dairying, horticulture, domestic science and kindred subjects.
>
> "'Section 7974. In addition to the holding of such schools, such college shall give instruction and demonstration in various lines of agriculture, * * *. Any common carrier is authorized and empowered to carry the persons employed and the equipment and exhibits used in such instruction and demonstrations, free or at reduced rates.'

"The Cincinnati, Cleveland, Chicago and St. Louis Railroad Company desires to co-operate with the university in demonstrations of improved methods of poultry husbandry by means of exhibit and lecture cars. These cars would contain only matter used in educational demonstrations. The railroad company desires to haul such cars and convey free of charge employes of the university actually engaged in furthering the demonstrations.

"We desire to inquire whether the railroad company may furnish such free transportation without violating any laws now in force.

"Very sincerely yours,
"(Signed) C. S. Wheeler,
Director."

The following reply is made to the above letter by the attorney of the public utilities commission:

"January 15, 1917.

"Mr. Clark S. Wheeler, College of Agriculture, Ohio State University.

"Dear Sir:—Your letter of December 14, 1916, to Mr. Waltermire, in which you asked for the construction of sections 7973 and 7974, with reference to free transportation, was referred to me for answer, but owing to the press of matters I have been unable to give it the attention necessary to the question before now. My opinion is that because of the fact that section 516 of the General Code expressly provides that no railroad company shall issue free transportation except as therein specifically designated and having been enacted subsequently to the enactment of said sections 7973 and 7974, that the provisions for free transportation as found in said sections 7973 and 7974 are thereby repealed. The legislature seems to have paid no attention to said sections 7973 and 7974 in its re-enactment of its said section 516 and the question you ask is, therefore, one open to difference of opinion.

"I might suggest that you send your inquiry direct to the attorney-general with the request that he give you an official opinion from his department, as to which of the provisions controls with reference to free transportation.

"Yours very truly,
"(Signed) Freeman T. Eagleson,
"Attorney for the Public Utilities Commission of Ohio."

The statutory provision, General Code section 516, governing the subject is:

"No railroad company, owning or operating a railroad wholly or partly within this state, shall directly or indirectly, issue or give a free ticket, free pass, or free transportation for passengers except,----------

"(here we will tabulate the exceptions)

"to its employes and their families, its officers, agents, surgeons, physicians, and attorneys at law;

"to ministers of religion, traveling secretaries of railroad young men's christian associations, inmates of hospitals and charitable and eleemosynary institutions, and persons exclusively engaged in charitable and eleemosynary work; to indigent, destitute and homeless persons, and to such persons when transported by charitable societies or hospitals, and the necessary agents employed in such transportation;

"to inmates of the national homes or state homes for disabled volunteer soldiers, and soldiers' and sailors' homes, including those about to enter

and those returning home after discharge, and boards of managers of such homes;
"to necessary caretakers of live stock, poultry and fruit;
"to employes on sleeping cars, express cars, and to linemen of telegraph and telephone companies;
"to railway mail service employes, postoffice inspectors, custom inspectors and immigration inspectors;
"to newsboys on trains, baggage agents, witnesses attending any legal investigation in which the railroad is interested, persons injured in wrecks and physicians and nurses attending such persons."

The above general provision purports on its face to give a complete list of all classes of persons whom the railroads may allow to ride free. This law is found in the chapter on the "Public Service Commission" (now the public utilities commission.) Title 5 of the General Code provides for "Public Schools," and chapter 2 of said title has the heading "Colleges and Universities" under which the subheading, beginning with section 7942, is "The Ohio State University."

Section 7973 and 7974 under said heading provide for the college of agriculture and domestic science and for the extension of its teachings throughout the state, authorizing it to hold schools in which instructions in agriculture, etc., are given: and section 7974 provides for giving instructions and demonstrations in various lines of agriculture at fairs, granges, etc., for the purpose of extending agricultural knowledge, and concludes as follows:

"Any common carrier is authorized and empowered to carry the persons employed by, and the equipment and exhibits used in such instruction and demonstrations, free, or at reduced rates."

Both sections 7974 and 516 are given in the General Code as statutes still in force. As stated in the communication from the attorney for the public utilities commission, section 516 G. C. was enacted after the other and, if there is any necessary conflict between the two, takes precedence. The universal rule, however, is that repeals by implication are not favored, and if it be possible, or at least fairly practicable, to give effect to both of two provisions apparently in conflict, such construction will be adopted as will do so.

"Ut res magis valeat quam pereat."

It is first important to determine whether they are really in conflict, or whether any of the exceptions contained in section 516, above, may be construed to include the persons engaged in this agricultural extension work. Such persons should clearly not be included unless they come under the designation "engaged in charitable and eleemosynary work." The words "charitable" and "eleemosynary" are frequently, if not generally, used in law as synonymous or interchangeable, and have a broader signification than is implied in the general use of the word "charity," which is commonly employed to indicate assistance to the needy. Eleemosynary and charitable institutions, or eleemosynary and charitable statutes or provisions in wills are held to include, generally speaking, all those things that are for public benefit as contra-distinguished from private or public gain.

A discussion of this meaning is found in People ex rel. Ellert v. Cogswell, 113 Cal. 149. See opinion of Henshaw, J.

In this sense it is commonly held to include institutions of learning and would undoubtedly include the persons and agencies engaged in this agricultural extension work if used in such sense. It is rendered doubtful, however, from the connection in which it is here found whether it has this extended meaning or not. It is found in direct connection with terms applying to charity in its more

restricted signification. It is, however, of some consequence as indicating to some extent the scope of the legislative intention in connection with the other statute this is to be construed with this. This section being for the purpose of securing equality of all persons in the use of railroads or conducing thereto is shown by the particular exception under discussion not to be framed on such narrow lines as to be unmindful of other public interests and aims.

Section 7974, if affected at all by the enactment of section 516, is not entirely repealed; passengers only are included, and the permission to carry equipment and exhibits is left unrevoked, leaving only the question whether the provision for carrying such passengers is repealed by implication. As indicated above, it seems not to be so repealed.

Many pertinent statements in reference to the subject of repeal by implication and the giving of force and effect to different statutes upon the same subject are to be found in all the states. We will quote from the syllabus of one of these cases, viz.: City of Birmingham v. Express Company, 164 Ala. 529:

> "7. It is only where two statutes are so repugnant to each other that it must be presumed that the legislature intended that the latter should repeal the former, that a repeal by implication exists, and where there is a reasonable field of operation for both under a just construction, both will be given effect.
>
> "8. Special provisions relating to specific subjects control general provisions relating to general subjects, and things especially treated are considered as exceptions to the general provisions.
>
> "9. Where a specific subject has been explicitly provided for by law, it is not considered repealed by a subsequent law dealing with a general subject in a general way, though the specific subject may be included in the general subject."

The question of interpretation of statutes is simply a question of arriving at the legislative intent. The legislature in the enactment of section 7974 expressed a very strong intent toward furthering this agricultural extension work. There is no reason to suppose that in the subsequent enactment of section 516 they had at all in mind this subject and sought to withdraw the privilege given for its advancement, but, on the contrary, were dealing with railroads exclusively as such. There has been no revulsion of opinion upon the subject of advancement of agriculture. On the contrary, it is something which has had a gradual and steady growth, and continually found more favor in legislation. There is no difficulty in giving effect to both these statutes by leaving section 7954 stand as an additional exception to the general provision of section 516. Since there is no entire repeal by implication, the carrying of accessories not being prohibited, it comes within the letter and also the reason of section 9 of the syllabus in Birmingham v. Express Company, supra.

It is, therefore, unnecessary to advert to the third expedient suggested in your inquiry, and unnecessary that any indirection be resorted to, and you are advised that a railroad company may, if it be willing, transport free, or at such reduced rates as it sees fit, the persons engaged and equipment used in such agricultural extension work.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

119.

TAX LEVIES—UNDER SECTION 7419 G. C. CAN ONLY BE MADE IN EXCESS OF THE LIMITATIONS OF THE SMITH ONE PER CENT. LAW IN CASES OF EMERGENCIES—A REFUNDER OF ILLEGAL TAXES CANNOT BE MADE BY AUDITOR WHEN SAME ARE VOLUNTARILY PAID—MAY BE MADE WHEN A JUDGMENT OR FINAL ORDER HAS BEEN MADE BY A COURT OF COMPETENT JURISDICTION ADJUDGING THE PARTICULAR LEVY ILLEGAL.

Taxes levied by the commissioners of a county under section 7419 *of the General Code for the construction and repair of certain principal highways therein, which taxes are illegal because made in excess of the limitations of the Smith one per cent. law and not made for the emergencies mentioned in said section as the same are defined by the supreme court in the case of State ex rel. Menning v. Zangerle, No.* 15351, *may not be remitted, nor when paid refunded, under the provisions of sections* 2588, 2588-1 *and* 2589 *of the General Code; nor as to such taxes paid voluntarily is there any authority given to refund by the provisions of sections* 12075, 12076 *and* 12077 *of the General Code.*

Under sections 5624-10 *and* 5624-11 *of the General Code the tax commission of Ohio is authorized to remit illegal taxes as have been extended on the duplicate for collection, but not yet paid; but this section does not authorize the tax commission or any other authority to refund such illegal taxes as have been paid.*

Under section 12078-1 *of the General Code a refunder of such illegal taxes may be made when a judgment or final order has been made by a court of competent jurisdiction adjudging the particular levy of such taxes to be illegal when such judgment is made in an action to which appeal or error has not been prosecuted, or, if prosecuted, such proceedings on appeal or error are no longer pending, and such judgment is not made in time to prevent the collection of such illegal taxes.*

HELD: That the judgment of the supreme court in the case of Staley, Auditor, v. State ex rel. Hunt, et al., No. 15327, *adjudging a levy made by the commissioners of Miami county under section* 7419 *of the General Code for the construction and repair of certain principal highways in said county to be illegal because made in excess of the limitations of the Smith one per cent. law and not made for the emergencies mentioned in said section authorizes a refunder of taxes paid under said levy.*

HELD, further, that neither the judgment of the supreme court in the case of State ex rel. Menning v. Zangerle, nor the judgment of the said court in the case of Staley, Auditor, v. State ex rel. Hunt, et al. is a judgment or final order within the meaning of section 12078-1 *authorizing a refunder of taxes paid in other counties under levies made by the county commissioners of said county under section* 7419 *of the General Code even though such levies may be illegal for the reasons noted by the supreme court in the decision of the above cited cases.*

COLUMBUS, OHIO, March 17, 1917.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I have the honor to acknowledge receipt of your favor of January 31, 1917, asking opinion, in which you say:

> "Your attention is respectfully directed to the following cases in the supreme court:

"State ex rel. Joseph Menning v. John A. Zangerle, County Auditor, No. 15,361.

"Mahlon P. Staley, Auditor, v. The State, ex rel., No. 15,327.

"Copy of the first named decision is enclosed for your convenience.

"After the court of appeals of Miami county held the levy for road repairs under section 7419 G. C. to be a legal emergency levy outside of all limitations of the one per cent. law, the auditor of said county, pursuant to a resolution of the board of county commissioners, levied a tax of 1.4 mills for the year 1916 on all the taxable property of said county as an emergency levy under said section, and outside of the limitations of the one per cent. law.

"The December collection of taxes is about finished; most of the tax payers of said county have paid the first half of their taxes, and some, no doubt, have paid both halves thereof, including this illegal rate, and the county auditor asks instructions as to remitting and refunding the illegal taxes so assessed and collected.

"Please give the commission your opinion as to his powers and duties in the matter."

In the supreme court decisions above referred to the court had under immediate consideration the provisions of section 5649-4, General Code, a part of the Smith one per cent. law, and section 7419 General Code, which read as follows:

"Sec. 5649-4. For the emergencies mentioned in sections forty-four hundred and fifty, forty-four hundred and fifty-one, fifty-six hundred and twenty-nine, seventy-four hundred and nineteen and 7630-1 of the General Code, the taxing authorities of any district may levy a tax sufficient to provide therefor irrespective of any of the limitations of this act.

"Sec. 7419. When one or more of the principal highways of a county, or part thereof, have been destroyed or damaged by freshet, landslide, wear of watercourses, or other casualty, or, by reason of the large amount of traffic thereon or from neglect or inattention to the repair thereof, have become unfit for travel or cause difficulty, danger or delay to teams passing thereon, and the commissioners of such county are satisfied that the ordinary levies authorized by law for such purposes will be inadequate to provide money necessary to repair such damages, or to remove obstructions from, or to make the changes or repairs in, such road or roads as are rendered necessary from the causes herein enumerated, they may annually thereafter levy a tax at their June session, not exceeding five mills upon the dollar upon all taxable property of the county, to be expended under their direction or by the employment of labor and the purchase of materials in such manner as may seem to them most advantageous to the interest of the county, for the construction, reconstruction or repair and maintenance of such road or roads or part thereof."

The supreme court in these decisions held that county commissioners were without authority to make a tax levy under sections 7419 General Code, in excess of the limitations prescribed in the Smith one per cent law for the purpose of constructing or repairing principal highways of the county, when the conditions calling for the construction or repair of such highways arose merely from neglect or inattention in the repair thereof or by reason of the large amount of traffic thereon, and did not arise by reason of freshet, landslide or other casualty.

The second, third and fourth syllabi of the opinion of the court in the first case noted by you read as follows:

"2. Section 5649-4, General Code, is not a legislative declaration that all the conditions enumerated in section 7419 General Code, are emergencies for which taxes may be levied in excess of the limitation prescribed.

"3. Exemption from the restriction fixed by such law applies only in favor of levies required to meet extraordinary conditions resulting from some unexpected or unforseen occurrence or circumstances, such as the destruction of or damage to a principal highway by freshet, landslide, wear of watercourses or other casualty.

"4. Neglect or inattention of public officers to repair highways does not constitute an emergency, and a levy of taxes for the purpose of meeting the expense of reconstruction, repair and maintenance of roads which, by reason of such neglect and inattention, or by reason of a large amount of traffic thereon, have become gradually worn out and unfit for travel, even though they cause difficulty, danger or delay, is not exempt as an emergency levy. Writ refused."

Tax levies having been made by the county commissioners in a number of counties of the state as emergency levies under section 7419 General Code, under circumstances considered and held by the supreme court in the above cases not to justify such tax levies as levies in excess of the limitations prescribed by the Smith one per cent. law, the question made by you, I take it, is one of legal ways and means to effect a correction of the tax duplicates and to provide for a refund with respect to such taxes so levied, or portions thereof, which under the decision of the supreme court above referred to are illegal. For it is to be noted that the supreme court in these cases did not hold that the county commissioners of a county could not legally make a levy under section 7419 General Code, to construct or repair highways which were out of repair by reason of neglect, inattention or excessive traffic, but the court did hold that the county commissioners could not make such levies in excess of the limitations prescribed by sections 5649-3a and 5649-2 General Code, which, with respect to the question at hand, provide, respectively, that levies on the taxable property in the county, for county purposes, shall not in any one year exceed three mills, and that the aggregate amount of taxes that may be levied on the taxable property in any county, township, city, village, school district, or other taxing district therein, shall not in any one year exceed ten mills. And only to the extent that the levies here in question are in excess of either or both of the tax limitations prescribed by sections 5649-3a and 5649-2 General Code were they illegal.

To illustrate: If in any particular county the levy made by the county commissioners for highway construction or repair under section 7419 General Code, though declared by them to be in excess of all limitations of the Smith one per cent. law, was together with all other levies for county purposes properly within the purview of section 5649-3a—in fact within the three mill limitation prescribed by that section—such levy would be illegal in any particular taxing district within the county only to the extent that it was in excess of the limitation prescribed by section 5649-2. On the other hand, if in any particular taxing district in the county this levy, together with all other levies within the purview of section 5649-2, was not in excess of the ten mill limitation prescribed by this section, it would be illegal only to the extent that it, together with all other levies for county purposes properly within the compass of section 5649-3a, was in excess of the three mill limitation of that section.

The foregoing discussion is only for the purpose of defining the question presented, for the fact that the levies in question were expressly declared by the county commissioners to be in excess of the limitations of the Smith one per cent law

makes it altogether probable that such levies were in fact in excess at least of the three mill limitation for county purposes prescribed by section 5649-3a, General Code.

In the consideration of the precise question made by you, in which you ask the opinion of this department with respect to the power and authority of the county auditor or other county officers to remit taxes illegally levied by the county commissioners. for the construction and improvement of highways under the presumed authority of section 7419 General Code, and to refund such thereof as has been paid, it seems clear that no such authority can be found in the more or less familiar provisions of sections 2588, 2588-1 and 2589 General Code.

Section 2588-1 General Code which was enacted as a part of the Parrett-Whittemore tax law (106 O. L. 246), in terms provides that the county auditor shall, from time to time, correct any clerical errors which he discovers in the tax list, in the name of the person charged with taxes, the valuation, description or quantity of any tract, lot or parcel of land or improvements thereon, or minerals or mineral rights therein, or in the valuation of any personal property, or when property exempt from taxation has been listed therein, and that he shall enter such corrections upon the tax list and duplicate.

Sections 2588 and 2589 General Code, which were formerly a part of section 1038 Revised Statutes, have by a uniform line of decisions been held to authorize corrections of the tax duplicate and, when paid, a refunder thereof only as to taxes assessed on exempt property or extended on the duplicate by reason of clerical errors, as distinguished from fundamental errors, in the levy and assessment of taxes.

State ex rel. v. Commissioners, 31 O. S. 271, 273;
Insurance Co. v. Capellar, 38 O. S. 560, 574;
Butler v. Commissioners, 39 O. S. 168;
State v. Raine, 47 O. S. 447, 456;
Commissioners v. Rosche, 50 O. S. 103, 112;
Christ v. Commissioners, 13 N. P., n. s., 457.

As observed by the court in the case of State v. Raine, supra, an error does not have to be merely one occurring in copy or in computation to be a "clerical error" within the meaning of these sections, and it was there held that reductions made in the value of real property by a board of equalization, without a corresponding increase made by such board in other property, were errors which the county auditor could correct under the provisions of what is now section 2588 General Code.

On the authority of the decision of the supreme court in the case of State v. Raine, supra, the circuit court of Cuyahoga county, in the case of Brooks v. Lander, 14 C. C. n. s., 481, held that a decision of the supreme court which ousted the board of equalization and assessment in the city of Cleveland authorized the county auditor to thenceforth treat as clerical errors the changes which had been made in the tax duplicate pursuant to the order of said board, and to correct them in accordance with the current duplicate.

I am unable to hold that the decisions just noted support the conclusion that the taxes here in question were assessed and collected by reason of any clerical error on the part of any officer or officers within the meaning of sections 2588 and 2589 General Code. The levy of these taxes in excess of the limitations prescribed by law was erroneous, but the error was one of law and fundamental inuring in the levy itself.

See Commissioners v. Rosche, supra.

The question presented by you further suggests the consideration of sections 12075, 12076 and 12077 of the General Code. Taxes paid on the levies here in ques-

tion, to the extent that such levies exceeded the limitations of sections 5649-3a and 5649-2 General Code, were, I assume, illegal within the meaning of these sections. These sections, however, do not afford any authority to the auditor or other county officers either to correct the duplicate with respect to such illegal levies or to remit taxes on such levies remaining unpaid. Neither do they seem to afford any right by action to recover back against the county, or any officers thereof in their official capacity, taxes that have been paid on such levies. The right of action afforded for the recovery of illegal taxes paid by a tax payer seems to be solely a personal action against the treasurer individually. Even if, however, on any view, these sections could be construed as affording a right of action against the county, or officers thereof in their official capacity, for the recovery back of illegal taxes paid by a tax payer, I apprehend with respect to the situation here presented that practically all the taxes paid on the levies here in question were paid voluntarily, and that such payments do not, therefore, furnish a legal ground of recovery against any one.

May v. Cincinnati, 1 O. S. 268;
Marietta v. Slocumb, 6 O. S. 471;
Wilson v. Pelton, 40 O. S. 306;
Whitbeck v. Minsch, 48 O. S. 210;
Commissioners v. Rosche, supra;
Railway Co. v. Martin, 53 O. S. 386.

As the payment of taxes on these illegal levies does not constitute a legal claim against the county for the repayment thereof, I do not know of any authority following the consideration of these sections by which the officers of the county, or any of them, can refund the taxes so paid. It has been held in this state that county commissioners—and I apprehend the same is true of other officers of the county—represent the county in respect to its financial affairs only so far as authority is given to them by statute, and that they may pass upon and adjudicate only such claims which, under the statutes, may be the subject of a legal claim against the county, and that they are without jurisdiction to entertain or adjudicate claims which are either wholly illegal or of such a nature as not to form the subject of a valid claim for any amount.

Jones, Auditor, v. Commissioners, 57 O. S. 189;
Peter v. Parkinson, 83 O. S. 36;
State v. Lewis, 20 C. C. 319.

Sections 5624-10 and 5624-11 of the General Code, enacted as a part of the Parrett-Whittemore bill, are identical in their provisions with those of sections 5617-4 and 5617-5 of the General Code which were repealed in the enactment of the Warnes tax law. Said sections 5624-10 and 5624-11 of the General Code read as follows:

"Sec. 5624-10. The tax commission of Ohio may remit taxes and penalties thereon, found by it to have been illegally assessed, and such penalties as have accrued or may accrue, in consequence of the negligence or error of an officer required to perform a duty relating to the assessment of property for taxation, or the levy or collection of taxes. It may correct an error in an assessment of property for taxation or in the tax list or duplicate of taxes in a county, but its power under this section shall not extend to taxes levied under the provisions of subdivision 2 of chapter 15 of title 2, part second of the General Code.

"Sec. 5624-11. No such taxes, assessments or penalties in excess of one hundred dollars, shall, in any case, be remitted until after ten days' notice in writing of the application to have same remitted has been served upon the prosecuting attorney and the county auditor of the county where such taxes or assessments were levied and proof of such service has been filed with the commission. When any taxes or penalties have been remitted as provided in this and the next preceding section, the commission shall make a report thereof to the auditor of state."

The provisions of these sections do not call for an extended discussion. It is plain from these provisions that, except as to taxes assessed on the business of trafficking in intoxicating liquors, authority is granted to the tax commission to remit taxes illegally assessed, and in their application to the question at hand, these provisions authorize the tax commission to remit unpaid taxes extended and now standing on the county tax duplicate by reason of illegal levies made by the county commissioners of said county under section 7419 of the General Code.

There is nothing, however, in the provisions of the sections under consideration authorizing a refunder of the taxes paid on such illegal levy. The question presented by you requires a consideration of the provisions of section 12078-1 of the General Code, which reads as follows:

"That if, by judgment or final order of any court of competent jurisdiction in this state, in an action not pending on appeal or error it has been or shall be adjudged and determined that any taxes or assessments or part thereof levied after January 1, 1910, was illegal and such judgment or order has not been made or shall not be made in time to prevent the collection or payment of such tax or assessment, then such tax or assessment or such part thereof as shall at the time of such judgment or order be then unexpended and in the possession of the officer collecting the same, shall be repaid and refunded to the person paying such tax or assessment by the officer having the same in his possession."

The proper construction of the provisions of these sections in their application to the situation of facts presented by your inquiries is a matter of some difficulty. It will be observed, however, from the provisions of these sections that before a tax payer can have a refunder of taxes paid by him, there must be a *judgment* or *final order* of a court of competent jurisdiction in this state in an action not pending on appeal or error adjudging and determining said taxes so paid by him to be illegal, which judgment or final order shall not have been made in time to prevent the collection of such illegal taxes.

In the case of Menning v. Zangerle, above noted, which was an original action in mandamus in the supreme court, the court had before it for consideration only the levy made by the county commissioners of Cuyahoga county under the assumed authority of section 7419 of the General Code, which levy the county commissioners of said county in said action sought to compel the county auditor to extend for collection on the tax duplicate of the county. The court in this case denied the petition for a writ of mandamus on the ground that the said levy was illegal and the same was not, therefore, placed on the tax duplicate. The supreme court in this case did not decide that the board of county commissioners of a county may not in any event make a levy for taxes under section 7419 of the General Code in excess of the limitations of the Smith law, but did decide that such levy could be made in excess of the limitations of the Smith law only when the conditions calling for such levy for the purpose of constructing or repairing principal highways in a

county were caused by some one or more of the things mentioned in said section 7419 of the General Code, which were the occasions of real emergencies.

The decision of the supreme court in this case, therefore, although affording a binding rule as to the construction of the statutes therein involved and considered, was not itself an adjudication with respect to the levy made by the commissioners of the other counties under section 7419 General Code, though made in excess of the limitations of the Smith law. The question with respect to the legality or illegality of such levy in other counties obviously depends in each case upon the facts with respect to the conditions calling for and actuating the county commissioners in making such levy. It follows, therefore, that the judgment of the supreme court in the case of State ex rel. Menning vs. Zangerle, though made by a court of competent jurisdiction in this state in an action not pending on appeal or error is not a judgment or final order which, under the provisions of section 12078-1, affords to the tax payers in other counties of the state a right to a refunder for taxes paid by them under illegal levies made by the county commissioners of such county under section 7419.

The case of Staley, Auditor, v. State ex rel. Hunt et al., referred to by you, was an action wherein the supreme court on petition in error reversed a judgment of the court of appeals of Miami county which affirmed a judgment of the common pleas court of said county, sustaining the petition of the commissioners for a writ of mandamus against Staley, the county auditor, requiring him to extend on the tax duplicate for collection a levy made by said county commissioners under section 7419 in excess of the limitations of the Smith law. Although the condition calling for the levy made by the commissioners of Miami county was not occasioned by a freshet, landslide or other casualty, said levy was held by the common pleas court to be legal, and entertaining the same view with respect to the legality of this levy the court of appeals on April 18, 1916, affirmed the judgment of the common pleas court. On January 30, 1917, the supreme court, on authority of the case of State ex rel. Menning v. Zangerle, reversed the judgment of the court of appeals of Miami county and thereby held the levy made by the county commissioners of said county to be illegal. It, therefore, appears that within the purview of section 12078-1 the judgment of the supreme court in the case of Staley, Auditor, v. State ex rel. Zangerle, was a judgment or final order of a court of competent jurisdiction in this state adjudging and determining the levy made by the commissioners of Miami county to be illegal, which judgment and final order was not in time to prevent the collection of such illegal taxes, and the only question with respect to the right of tax payers in Miami county to a refunder of such illegal taxes paid by them depends upon the question of whether or not the judgment and final order of the supreme court was a judgment

> "in an action not pending on appeal or error,"

within the meaning of said language as used in section 12078-1.

This language as used in section 12078-1 seems to be open to two possible interpretations:

1. That the action in which the judgment or final order is made shall not be an action pending on appeal or error in the court rendering such judgment; and

2. That such judgment or final order shall be made by a court in an action to which appeal or error has not been prosecuted; or if prosecuted is no longer pending.

Looking to the purpose of the statute as a whole it seems to me that the intent of the legislature in using the language above quoted was to require a final determination by a court of competent jurisdiction before the right of a tax payer to a refunder of such illegal taxes by him paid has accrued, and consistent with the

purpose of this section, and giving effect to the language used by the court in its enactment, I cannot believe that it was the intent of the legislature to limit such right of refunder on the payment of illegal taxes to judgments or final orders made and entered by a court in the exercise of original jurisdiction only.

Giving effect to the manifest purpose of these provisions, before noted, it seems clear that a judgment of the supreme court in the exercise of its appellate jurisdiction adjudging and determining a tax to be illegal is just as effective when made after such illegal tax is collected to afford a right of refunder to a tax payer paying such illegal tax as would be a judgment or final order of the court of common pleas of a county in the exercise of its original jurisdiction.

I am, therefore, of the opinion that the judgment of the supreme court in the case of Staley, Auditor, v. State ex rel. Hunt et al., above noted, is a judgment or final order which, under the provisions of section 12078-1 affords to a tax payer of Miami county paying illegal taxes on said levy made by the commissioners of the county under the provisions of section 7419 a right to a refund of such illegal taxes paid by him if such illegal taxes so paid have not been expended. These taxes were collected for county purposes only, and though they have probably been distributed to the proper funds they may be refunded if they have not been expended and are in the possession of the county treasurer.

I hardly need to say that as in the case of State ex rel Menning v. Zangerle, before discussed, the court in the case of Staley, Auditor, v. State ex rel. Hunt et al., had before it for consideration only the particular levy there involved, and the judgment of the court affords no right to a refunder of illegal taxes of the same kind in other counties.

In conclusion I note that section 301 of the Cass road law, one of the curative sections of the said act, has been carried into the Page and Adams supplement to the General Code as section 12078-1. This section, among other things, provides for a right of refunder for taxes or assessments paid for particular roads theretofore constructed or improved or ordered to be constructed or improved. Without discussing the provisions of this section of the Cass road law it is sufficient to note that it was not intended to cover a case of the kind presented by your inquiry.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

120.

BOARD OF EDUCATION—MAY COMPROMISE CLAIM DUE IT.

A board of education may compromise a claim justly and legally due it.

COLUMBUS, OHIO, March 17, 1917.

HON. CHARLES G. WHITE, *Prosecuting Attorney, Batavia, Ohio.*

DEAR SIR:—In your letter of March 14, 1917, you ask my opinion on the following proposition:

> "The bank at New Richmond, Ohio, through its cashier, was forced to go in the hands of a receiver and at the time it was the depository of New Richmond school district. The bank gave a bond as is required by law, but gave personal security with seven men on the bond, all but two of whom were considered to be worth the full amount of the same, but since the

crash came three of the signers have gone into bankruptcy, the cashier has died without a cent, one of the others has been entirely broken up and the other two could not, if pushed, pay very much. By arranging a compromise with their creditors, two of the securities can and will pay more than could be collected from them by a suit, and the board of education are more than willing to accept this settlement if they have the legal right so to do. Therefore, my specific question is, can the board of education under the powers conferred upon them by section 4749 of the General Code, or otherwise, compromise this matter with these two men without bringing a suit, which at this time would jeopardize their chances of recovering anything like they will get under this settlement?"

General Code section 4749 provides in part as follows:

"The board of education of each school district * * * shall be a body politic and corporate, and, as such, capable of suing and being sued, contracting and being contracted with, inquiring, holding, possessing and disposing of real and personal property. * * *"

A board of education is made by law the governing power of a school district and all the financial transactions thereof. It is clothed with authority to do whatever is necessary in its corporate capacity to carry out the intention of those in authority in the management and control of the public schools. It is permitted to make all necessary and proper arrangements for conducting the schools and for the raising of money with which to conduct the same, to build buildings, furnish and equip same and in fact to do generally those things necessary that the public schools might be the necessary and useful institutions which they are claimed to be. The power to sue and be sued ordinarily carries with it the power to compromise and be compromised with, but it might be well to determine just what the word "compromise" means, implies or includes.

Bouvier says:

"A compromise is an agreement made between two or more parties as a settlement of a matter in dispute."

Cyc., page 505 (Vol. 8), says:

"A valid compromise may be made by any parties between whom a controversy as to their respective rights exist and who are not under any disability to contract."

The American and English Encyclopedia of Law, Vol. 6, page 418, perhaps uses language a little more applicable here than either of the above definitions, to wit:

"Compromise has been defined as an agreement between two or more persons, who, to avoid a law suit, amicably settle their differences on such terms as they can agree upon."

In all the above definitions the principle of entering into a contract or an agreement is manifest, and in section 4749 G. C. the especial power to contract and be contracted with is given to a board of education. There is some law, however, in Ohio which tends toward a solution of this matter.

In Board of Education v. Milligan, 51 O. S. 115, the treasurer of a school district defaulted and instead of the board of education bringing suit upon the bond, the board brought suit directly against the treasurer on account. On page 116 the court uses the following language:

> "The board of education is by statute made a legal entity, empowered to sue and be sued. The money detained belonged to it and it had the right to recover same. The remedy is *not limited* to an action on the bond. It may sue a defaulting treasurer for money had and received, as was done in this case."

In Ohio ex rel., etc., v. Treasurer, etc., 22 O. S. 144, the court, on page 147, uses the following language:

> "The township board of education is by statute constituted a body politic and corporate, and as such is authorized *to contract and be contracted with,* to sue and be sued, plead and be impleaded with, in any of the courts of the state. They are invested, in their corporate capacity, with the title, care, and custody of all school houses, school house sites, school libraries, apparatus, or *other property* belonging to the school district within the limits of their jurisdiction, *with full power to control the same in such manner as they may think will best subserve the interests of common schools and the cause of education."*

There is some similarity between the language of the General Code, which confers powers upon boards of education, and the language of the General Code which confers powers upon boards of county commissioners. By General Code section 2408 a board of county commissioners may sue and be sued, plead and be impleaded, maintain and defend all suits in law and in equity, and do generally those things which are necessary to preserve and protect the property of the county.

In construing the language of said section the court held in Shanklin, et al. v. Commissioners, 21 O. S. 583:

> "It may be laid down as a general rule that the board of county commissioners is clothed with authority to do whatever the corporate or political entity, the county, might, if capable of rational action, except in respect to matters the cognizance of which is exclusively vested in some other officer or person. Only what the county might not do, it may not, except as aforesaid. It is, in an enlarged sense, the representative and guardian of the county, having the management and control of its financial interests.
>
> *"It cannot be contended that the county, if capable to act, might not, in any lawful way, adjust and accept satisfaction of a liability justly and legally due to it."*

With same force, then, it seems to me it should be argued that the board of education can, under the powers granted it, adjust and accept satisfaction of a liability justly and legally due it—and why should this not be so? The property from which recovery is to be had might be of such a nature that without prompt acting, serious loss and injury would result. If such were the case, is it to be presumed that the legislature, using language of the strength of that used, in that part of section 4749 above quoted, intended to limit the authority of the board to certain classes of contracts and simply because power was not specifically granted to compromise that the board would be seriously injured financially? We think not.

I prefer to believe that the legislature intended, when it used the language "to sue and be sued" and "to contract and be contracted with," to convey upon the board of education full and complete power to do whatever was necessary to be done to best subserve the interests of the common schools, and as you state in your letter that money can be saved by compromising, I can see no reason why the board of education, even though it is a body of limited powers, cannot compromise said claim and thus save money for the tax payers of the district.

Holding the above views, then, I advise you that the board of education can, under the powers conferred upon it by section 4749 G. C., compromise a claim which, but for such compromise, jeopardizes its chance of recovering thereon.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

121.

COLUMBUS DAY—HOLIDAY ONLY FOR PURPOSE OF COMPUTING TIME IN REFERENCE TO PAYMENT AND PROTESTING COMMERCIAL PAPER.

Held: Columbus day is not a holiday for all purposes, but is only a holiday for the purpose of computing time in reference to payment and protesting of commercial paper.

COLUMBUS, OHIO, March 19, 1917.

HON. SAMUEL DOERFLER, *Prosecuting Attorney, Cleveland, Ohio.*

DEAR SIR:—I am in receipt of your communication February 26, 1917, as follows:

> "I have been asked as to whether or not October 12, popularly known as Columbus day, is a legal holiday.
>
> "An investigation of the statutes in referance to legal holidays indicates that section 8301 is the principal section on that subject. That section provides that New Year's day, Washington's birthday, Memorial day, Independence day, Labor day, Columbus day, Christmas day and Thanksgiving day are holidays 'for the purpose of this division.' The division referred to is the one dealing with negotiable instruments.
>
> "This would seem to indicate that these days were made holidays merely for the purpose of computing time in reference to payment and protesting of commercial paper.
>
> "The only other sections creating legal holidays are sections 5976, 5977 and 5978 which makes election day a part holiday, Labor day a full holiday and Saturday afternoons a holiday.
>
> "It is generally believed that New Year's day, Christmas day, Memorial day and the other days are by statute made full and complete holidays, but unless there are other provisions of the statute which make them so, it would seem that this is an erroneous notion.
>
> "Since this is a matter of state-wide interest, I call it to your attention so that I may have the benefit of your opinion."

Section 8301 provides as follows:

"Section 8301. The following days, viz.:
"1. The first day of January, known as New Year's day;
"2. The twenty-second day of February, known as Washington's birthday;
"3. The thirtieth day of May, known as Decoration or Memorial day;
"4. The fourth day of July, known as Independence day;
"5. The first Monday of September known as Labor day;
"6. The twelfth day of October, known as Columbus Discovery day;
"7. The twenty-fifth day of December, known as Christmas day;
"8. Any day appointed and recommended by the governor of this state or the president of the United States as a day of fast or thanksgiving and
"9. Any day which may hereafter be made a legal holiday, shall for the purpose of this division, be holidays. But if the first day of January, the twenty-second day of February, the thirtieth day of May, the fourth day of July, or the twenty-fifth day of December be the first day of the week, known as Sunday the next succeeding secular or business day shall be a holiday."

The above quoted section provides that the days enumerated therein "shall for the purposes of this division, be holidays." The only thing to determine then in answering your question is, what is meant by the phrase "for the purpose of this division."

This section of the statute, since its enactment, has always been connected with the act dealing with negotiable instruments. It might be well in this connection to trace the history of the act creating negotiable instruments. The first act on this subject was passed Nov. 15, 1799, found in volume 2, Laws of the North Western Territory and entitled an act, making promissory notes and inland bills of exchange negotiable. After this original act had been amended several times an act was passed March 26, 1861, 58 O. L. 41 entitled an act supplementary to "an act making certain instruments of writing negotiable, passed February 25, 1820."

This act after setting forth a certain number of days therein, provided they shall, for all purposes whatsoever as regards the presentment for payment or acceptance and the protesting or giving notice of nonacceptance, etc., of negotiable paper, be holidays. This act was later amended by the passage of the so-called uniform negotiable instruments act, passed April 17, 1902, 95 O. L. 197. The section providing for holidays was carried into said act as subdivision 5.

The history of the law showing, as it does, the connection of the provision relative to holidays and the act making certain instruments negotiable, I think it was the intention of the framers of this law that the holiday provision should be read only in connection with the act relating to negotiable instrument, and that the only construction that can be placed upon the phrase "for the purpose of this division" is, that the holidays enumerated in section 8301 are holidays merely for the purpose of computing time in reference to payment and protesting of commercial paper.

Section 5977 G. C. provides as follows:

"Section 5977. The first Monday in September of each year shall be known as 'Labor day,' and for all purposes, shall be considered as the first day of the week."

You will note that in section 8301 the first Monday in September, commonly known as Labor day, is mentioned with the other days as a holiday for the purpose of that division and it is specifically provided in section 5977 as a holiday "for

all purposes." It is my opinion, therefore, had it been the intention of the legislature that Columbus day and the other days mentioned in section 8301 should be holidays for all purposes they would have been specifically provided for in the same manner as Labor day.

Therefore, I advise you that Columbus day is not a holiday for all purposes, but is only a holiday for the purpose of computing time in reference to payment and protesting of commercial paper.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

122.

THE QUESTION OF WHETHER OR NOT A COUNTY WILL BE ABLE TO PAY ITS SHARE FOR A PROPOSED ROAD IMPROVEMENT DEPENDS ON WHETHER THE LEVY FOR SAID IMPROVEMENT, TOGETHER WITH THE OTHER LEVIES, CAN BE KEPT WITHIN FIFTEEN MILLS LIMITATION.

Whether a county will be in position to assume its portion of the cost and expense of improving a highway, depends upon the question whether the levy necessary to be made to provide the portion of the cost and expense of the townships through which the highway passes and the county, together with other levies provided by law, can be kept within the statutory limitation of 15 *mills, not considering emergency levies.*

COLUMBUS, OHIO, March 19, 1917.

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

DEAR SIR:—I have your letter of March 9, 1917, in which you ask my opinion in reference to a certain matter set out therein. Your communication reads as follows:

> "I am attaching hereto copy of a resolution dated February 8, 1917, signed by two of the members of the board of commissioners of Muskingum county, making application for state aid and federal aid in the improvement of main market road No. IV, intercounty highway No. 1, in Muskingum county, and agreeing on behalf of the county that if the sum of $140,000.00 be secured from the state or federal government for the above improvement 'to meet the above amount of $140,000.00 or as much more as will be necessary for the improvement and construction of the above mentioned road between the corporation line of Zanesville and the west corporation line of New Concord.'
>
> "It has been and is my intention to expend a sum not to exceed $10,000 per mile in the improvement of the road requested by the commissioners, which improvement would approximate 14 miles, and I have contemplated that the funds to be expended on this improvement shall be the funds secured from the federal government under the federal aid road act and appropriated to the state of Ohio for the fiscal year 1917.
>
> "At a conference in my office at a recent date with two of the members of the board of commissioners of Muskingum county and the prosecuting attorney of that county, the question arose as to the ability of Muskingum county to take care or provide the necessary means of financing their share

of the cost of this improvement. The state director of the Ohio good roads federation was called into the conference and stated to the commissioners, the prosecutor and myself that after a thorough investigation of the situation in Muskingum county and Washington, Perry and Union townships, through which the above improvement lies, the county would be unable this year to live up to any such agreement as is contained in the attached resolution.

"Before we proceed further with the preliminary steps necessary or leading up to final agreement with the commissioners of Muskingum county, and the assurance to the federal government that the necessary funds have been arranged for, and will be available to pay obligations, if incurred, it is necessary to know positively whether or not Muskingum county is in position and is able to place a levy that will come within the fifteen mill limitation to create a fund sufficiently large to meet its share of the obligation for the above mentioned improvement, which may be considered as anywhere from $140,000.00 to $200,000.00.

"Inasmuch as the matter is urgent and in doubt, I, therefore, request you to investigate the situation in Muskingum county and advise me accordingly."

To your communication is attached a resolution upon which the opinion asked in your communication is based. I will not set out in full the resolution, but simply note the parts of it that are vital in the consideration of the question proposed.

In the beginning I desire to say that the information you seek is based more upon fact than upon law, but I may be able to so quote the law in connection with the facts that it will assist you in arriving at a conclusion as to what you had best do under all of the circumstances.

Your question is as to whether Muskingum county is able to carry out the agreement set forth in the copy of the resolution attached to your communication. One clause of said resolution reads as follows:

"BE IT FURTHER RESOLVED, That upon the receipt of the letter or communication from the state highway commissioner of January 18, 1917, stating the state and federal government will furnish the sum of one hundred forty thousand ($140,000) dollars that the board of county commissioners for and upon behalf of Muskingum county hereby agrees for and upon behalf of said county to meet the above amount of $140,000.00 or as much more as will be necessary for the improvement and construction of the above mentioned road between the corporation line of Zanesville and the west corporation line of New Concord, Ohio, upon the following conditions:"

In this section the county commissioners of Muskingum county agree, for and on behalf of said county, to meet the above amount of $140,000.00, or as much more as will be necessary for the improvement and construction of the road mentioned therein, and in your letter you state that the amount to be borne by Muskingum county, if said road is constructed, would be somewhere between $140,000.00 and $200,000.00. Now, your question is as to whether, when we take into consideration the condition of the tax duplicates of the different taxing subdivisions, Muskingum county is in position to carry out its part of its agreement.

First, I will give you some information as to the facts in this matter. You state that this improvement passes through Perry township, Washington township and Union township of Muskingum county. This is an important fact inasmuch as the

township through which the improvement passes will have the greater burden to bear for they will have to bear their share of the county's portion as well as their own portion of the cost and expense of the improvement.

The records for the year 1916 show that the tax rate in Union township proper is 14.8 mills; in New Concord village, which is within Union township, the tax rate for 1916 was 16.2 mills; in Norwich village the tax rate for 1916 was 13.2 mills; in Perry township in 1916 the tax rate was only 10.2 mills and in Washington township for the same year the tax rate was 10 mills, while Pleasant Grove school district, located within Washington township, had a rate of 11.04 mills for 1916. So that Washington township and Perry township could undoubtedly bear the extra burden incident to the construction of said proposed highway. But how Union township and its villages could assume the extra burden incident to said improvement I do not know. The records show that the tax rate of New Concord village has been uniformly high—in 1913, 15.6 mills; in 1914, 14 mills; in 1915, 14.4 mills, and in 1916, as stated above, 16.2 mills. Now this is the condition of the tax levies in the townships through which the improvement would pass.

It is important also to note the condition of the tax levies in other taxing subdivisions of the county because all of the property of the county will have to share in the county's portion of the expense and cost incident to said improvement. In 1916 Taylorsville village had a tax rate of 16.6 mills; Duncan Falls school district, 16.4 mills; Frazeysburg village, 15.2 mills; Zanesville city, 16 mills. It is true the subdivisions given have the highest rate of any taxing subdivisions in the county, but as we often say a chain is no stronger than its weakest link, so the county in this case is no stronger financially than its weakest subdivision.

To be sure I do not know what the financial situation of the different taxing subdivisions of Muskingum county will be for the year 1917, but their tax levies for the year 1916 would indicate that it would be almost impossible for the county and the different taxing subdivisions of the county to bear their share of the cost and expense incident to said improvement.

With the facts as set out above, and you can judge of the facts as well as I can and possibly better, let us note briefly the law that would apply in this case, in the event that you go ahead with said proposed improvement.

Section 5649-3a of the General Code provides that:

> "On or before the first Monday in June, each year, the county commissioners of each county, the council of each municipal corporation, the trustees of each township, each board of education * * * shall submit or cause to be submitted to the county auditor an annual budget, setting forth in itemized form an estimate stating the amount of money needed for their wants for the incoming year."

Section 5649-3c G. C. provides that:

> "The budget commissioners shall examine such budgets and estimates prepared by the county auditor, and ascertain the total amount proposed to be raised in each taxing district for state, county, township, city, village, school district, or other taxing district purposes. If the budget commissioners find that the total amount of taxes to be raised therein does not exceed the amount authorized to be raised in any township, city, village, school district, or other taxing district in the county, the fact shall be certified to the county auditor. If such total is found to exceed such authorized amount in any township, city, village, school district, or other taxing district in the county, the budget commissioners shall adjust the various

amounts to be raised so that the total amount thereof shall not exceed in any taxing district the sum authorized to be levied therein. In making such adjustment the budget commissioners may revise and change the annual estimates contained in such budgets, and *may reduce* any or all the items in any such budget, but shall not increase the total of any such budget, or any item therein. The budget commissioners shall reduce the estimates contained in any or all such budgets by such amount or amounts as will bring the total for each township, city, village, school district, or other taxing district, within the limits provided by law."

Now let us note in connection with the above two sections, the provisions that would have to be made by the county commissioners and township trustees to meet their respective portions of the cost and expense of the improvement.

Section 1222 of the General Code provides that the county commissioners, for the purpose of providing a fund for the payment of the county's proportion of the cost and expense of the construction, improvement, maintenance and repair of highways under the provisions of this chapter, are authorized to levy a tax, not exceeding one mill, *upon all taxable property of the county.*

In the same section it is provided that the township trustees are authorized to levy a tax, not exceeding two mills, upon all taxable property of the township in which such road improvement or some part thereof is situated, this for the purpose of providing a fund for the payment of the proportion of the cost and expense to be paid by the township trustees.

Now it will be readily seen that the levies made by the different townships upon the property of the townships and the levy made by the county commissioners upon all of the property of the county, will come before the budget commissioners for an adjustment and that adjustment will have to bring the total levy within the 15 mill limitation, other than a few emergency levies, and from section 5649-3c G. C. the budget commission is given authority to reduce in amount any levy or levies so made by the trustees or commissioners or school board as to them may seem best. There seems to be no preference in law given to any particular levy.

Now you can see the difficulties with which the budget commissioners of Muskingum county will be confronted when we note that many of their subdivisions are already above the maximum limit, at least they were in 1916. Of course, as I said before, what their condition will be in 1917 I have no means of knowing.

But let us go one step further. Suppose that the county commissioners, under section 1223 of the General Code in anticipation of the collection of such taxes or the assessments to be made against the property owners, should decide to issue bonds. If this is done the county commissioners must, prior to the issuance of such bonds, provide for levying and collecting annually a tax upon all taxable property of the county to provide a sum sufficient to pay the interest on such bonds and to create a sinking fund for their retirement at maturity. Now suppose any one of the townships interested in this matter should fail to meet the levy necessary to meet their proportion of the cost and expense. Then, under the provision for levying and collecting annually a tax upon all taxable property of the county, the county commissioners would be compelled to raise a sum sufficient to take care of the interest on such bonds and to create a sinking fund for their retirement at maturity. In such a case the levy for the taking care of the bonds would necessarily take precedence over the levies for other purposes. So that the budget commissioners in making reductions of the different items submitted to them by any taxing subdivision would virtually be compelled to give precedence to the levy made for road purposes because if this is not taken care of under the regular levies made

it will have to be taken care of under the agreement made by the county commissioners that they would levy a tax sufficient to take care of the bonds.

Now the above is about all the information I can give you both as to the facts and as to the law and you will have to be the judge in view of the condition of the tax duplicate of said county for 1916 and in view of the law as applied to said facts, as to whether the budget commissioners of Muskingum county could so reduce the different items as to bring the total tax levy for the different subdivisions of the county within the 15 mill limitation, this limitation not including of course a few levies for emergency purposes which may be outside of the 15 mill limitation.

While this opinion is not as definite as I should like to make it, yet it is as definite as I can make it due to the fact that your question embodies not only law, but facts as well.

Let me suggest also that the county auditor, before the final agreement is entered into between your department and the county, must certify that the moneys necessary for said improvement are in the treasury or are in process of collection.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

123.

BOARD OF EDUCATION—BY ACQUIRING PRIVATE RIGHT OF WAY MAKING DISTANCE FOR PUPILS TO TRAVEL LESS THAN TWO MILES—DOES NOT RELIEVE ITSELF FROM LIABILITY FOR TRANSPORTATION.

A board of education cannot exempt itself from liability for transportation of pupils by obtaining a right of way across private property which, if traveled by the pupils, would be less than two miles.

COLUMBUS, OHIO, March 19, 1917.

HON. E. E. LINDSAY, *Prosecuting Attorney, New Philadelphia, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of March 5, 1917, in which you ask my opinion on the following:

> "Section 7731 of the General Code and the opinions of your office relating thereto are to the effect that boards of education must provide transportation for pupils who reside more than two miles from the school house to which they are assigned, measured along the most direct public highway.
>
> "We have several instances in our county, where, by reason thereof, boards of education are required to transport pupils, yet such pupils live much less than two miles from such schools by crossing private premises.
>
> "Has a board of education the power to obtain a private right of way across private premises for such pupils where it can be done at a cost less than the costs of transportation, and thus avoid the costs of transportation or save money by so doing?"

In your inquiry you refer to section 7731 G. C., which reads in part as follows:

> "In all rural and village school districts where pupils live more than two miles from the nearest school, the board of education shall provide

transportation for such pupils to and from such school. The transportation for pupils living less than two miles from the school house, *by the most direct public highway* shall be optional with the board of education. * * *"

The language used in that portion of the above section quoted, and particularly that part "by the most direct public highway" seems to eliminate any other route or course than by following the public highway and the construction placed upon the above section, and the other sections of the General Code which relate to the subject, convinces me that our courts take only this view of the matter.

In Board of Education v. Board of Education, 58 O. S. 390, the Coblentz children resided more than one and one-half miles (the distance mentioned by the statute then) from the school in the district of their residence, but said children lived less than that distance if measured in a direct line, and it was averred that the land owners along such direct line always permitted the children to follow it in attending school and that it was a convenient and practical route for them to travel. The court held:

> "Counsel for the plaintiff in error contend that the distance from residence to school is to be taken 'as the crow flies.' The courts below properly rejected this aerial view of the subject. The legislation provides for the convenience of children in attending school, and the distance is to be taken as they travel along the most direct public highway from the schoolhouse to the nearest portion of the curtilage of their residence."

In Board of Education v. Board of Education, 23 O. B. Rep. 698, the plaintiff seeks to recover from the defendant tuition for three pupils who resided less than one and one-half miles "as the crow flies," but the court held that whether the children go by public or private conveyance, or whether they walk to and from school, they are expected to go by the most direct and convenient highway, and the length of that course determines the distance from home to school; and following the ruling of the court, the distance from the home to the school was measured from the exit of the curtilage, along the most direct established route by lane or path to the nearest highway and then following the center line of the highway to the door of the schoolhouse.

The same view as above was taken by the court in Board of Education v. Board of Education, 15 O. N. P. (n. s.) 521, which last mentioned case was affirmed without opinion in 88 O. S.

I must therefore hold that the distance being measured by the most direct public highway route, the board of education has no power to deprive pupils of the means of conveyance if a private way could be obtained across private premises.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

124.

MEASUREMENT—OF DISTANCE FROM PUPIL'S HOME TO SCHOOL—MUST BE MADE ALONG HIGHWAY OPENED TO PUBLIC AND NOT SIMPLY DEDICATED AND PLATTED.

A public highway along which the measurement is made to calculate the distance from a pupil's home to school must be one opened to the public and not simply dedicated and platted.

COLUMBUS, OHIO, March 19, 1917.

HON. FRANK B. PEARSON, *Superintendent of Public Instruction, Columbus, Ohio.*

DEAR SIR:—In your inquiry of recent date you ask my opinion on the following statement of facts:

> "We should like to have your definition of a public highway which must be used in the interpretation of sections 7731 and 7735 G. C. The following facts have been certified to us by Henry C. Moffitt, of Cincinnati:
>
> "'There are a number of children living on Rhode Island Ave. and Ross Ave., East Bond Hill, who have been attending the Bond Hill school while bus transportation was provided for them by the board of education, but now that the bus line has been discontinued because of the advent of the street car, these children are left without transportation facilities. They want to go to the Norwood school which is much nearer for them and can be reached by made sidewalks, but according to the measurement of the distance from the Bond Hill school to the farthest point on the platted streets in the office of the county auditor, all of these children live within a mile and a half of the Bond Hill school. By a cut across the fields they are within possibly less than a mile from the school.'
>
> "Apparently the children mentioned above are within a mile and a half of the Bond Hill school by the public highway if by public highway is meant streets that are platted, but if by public highway is meant a passable road authorized for the use of the public, these children are not within a mile and a half of the Bond Hill school."

From my conservation with the assistant city solicitor of Cincinnati I learn that these platted streets are not "opened" to the public or improved and are impassable for public travel.

Several sections of the General Code pertinent to the above should be noted:

Section 7731 G. C. provides:

> "In all rural and village school districts where pupils live more than two miles from the nearest school the board of education shall provide transportation for such pupils to and from such school. The transportation for pupils living less than two miles from the school house, by the most direct public highway shall be optional with the board of education. When transportation of pupils is provided, the conveyance must pass within one-half mile of the respective residences of all pupils, except when such residences are situated more than one-half mile from the public road. When local boards of education neglect or refuse to provide transportation for pupils the county board of education shall provide such transportation and the cost thereof shall be charged against the local school district."

Section 7733 G. C. provides:

> "At its option, the board of education in any village school district may provide for the conveyance of the pupils of the district or any adjoining district, to the school or schools of the district, the expense of conveyance to be paid from the school funds of the district in which such pupils reside. But such boards as so provide transportation, shall not be required to transport pupils living less than one mile from the school house or houses."

Section 7735 G. C. reads:

> "When pupils live more than one and one-half miles from the school to which they are assigned in the district where they reside, they may attend a nearer school in the same district, or if there be none nearer therein, then the nearest school in another school district, in all grades below the high school. In such cases the board of education of the district in which they reside must pay the tuition of such pupils without an agreement to that effect. But a board of education shall not collect tuition for such attendance until after notice thereof has been given to the board of education of the district where the pupils reside. Nothing herein shall require the consent of the board of education of the district where the pupils reside, to such attendance."

Your inquiry seeks a definition of a public highway as used in the interpretation of the above quoted sections of the General Code.

A public highway is defined by Webster's dictionary as follows:

> "A public road; a way open to all passengers."

and is defined in Sullivan v. Columbus, 12 Dec. Rep. 652;

> "The term highway is the generic term for all kinds of public ways, streets, alleys, etc."

A public highway, as referred to in the last mentioned case, is a public way which has been dedicated to public use, but a highway may be dedicated to public use and yet not be "opened" to the public and improved for public travel.

Section 7735 G. C. was formerly section 4022-a Revised Statutes and construction of the language thereof, and applicable to your question, was made by the court in Board of Education v. Board of Education, 58 O. S. 390. On page 394 of said decision the following language is used:

> "Counsel for the plaintiff in error contend that the distance from residence to school is to be taken 'as the crow flies.' The court below properly rejected this aerial view of the subject. The legislation provides for the convenience of children in attending school, and the distance is to be taken *as they travel* along the most direct public highway from the schoolhouse to the nearest portion of the curtilage of their residence."

It cannot be said that the children could conveniently travel along streets and alleys which are not opened and in public use. That would be exactly the same as traveling across fields and it is held in Board of Education v. Board of Education,

34 Cir. Ct. Rep. 698, that:

> "It would not be proper to measure the distance on a straight line 'as the crow flies,' *across the fields,* as the children, without the consent of the owners of the fields would thereby become trespassers, besides, under the provisions of the statutes of Ohio, children who reside in school districts in the country, living more than one and a half miles from school (now two miles) and residing at not a greater distance than one-half mile from a public highway, are entitled to be carried to school in a public conveyance at the expense of the school fund in the district. Necessarily, they would be carried thus along the highway. And, whether the children go by public or private conveyance or whether they walk to and from school, they are expected to go by the most direct and *convenient* highway, and the length of that course determines the distance from home to school."

It is noted from both of the above cited cases that the convenience of the children is the paramount consideration. In the first case, their convenience is looked to "as they travel" along the public highway and in the second case their convenience is looked to in the measurement of the route from their home to the school, along the most direct and "convenient" highway.

It is only proper, then, it seems to me, to hold, that a platted highway which has not been opened to public travel cannot be taken as the highway mentioned in the above quoted sections over which measurements are taken to ascertain the distance from which pupils reside from schools. It might even be noted that a public highway, in General Code section 1226, as used in the chapter of which said section is a part, includes any causeway, bridge, drain or watercourse which forms a part of a road authorized by law, but it cannot surely be urged that the right of road officials to open and improve a dedicated highway across watercourses and unimproved territory, would mean the same as the convenient use of such highway by pupils, after the same has been opened and placed in condition for such convenient use.

I am led to the conclusion, then, that the streets which are simply platted, but not opened to the public, are not to be considered as public highways along which the distance from a pupil's home to his school is measured, within the meaning of General Code section 7735.

Yours very truly,
JOSEPH MCGHEE,
Attorney-General.

125.

SKUNK—GREEN PELT MEANS ONE NOT CURED—THAT SKUNKS WERE KILLED DURING LAWFUL PERIOD IS DEFENSE AGAINST CHARGE OF HAVING IN POSSESSION BETWEEN FEBRUARY 1ST AND NOVEMBER 15TH.

The term "green pelt of a skunk" in section 13413 *G. C. means one that has not been dried or treated, and where a bona fide dealer is charged with having same in his possession, between the first day of February and the* 15*th day of november, the fact that the skunks were killed within the lawful period is a matter of defense.*

COLUMBUS, OHIO, March 19, 1917.

HON. CLARE CALDWELL, *Prosecuting Attorney, Warren, Ohio.*

DEAR SIR:—I have your letter of February 17, 1917, which reads as follows:

"I wish to submit for your opinion a question involving the interpretation of section 13413 of the General Code of Ohio:

"In your opinion, is it possible that a person who purchases, within the state, a green skunk pelt on January 31st is a violator of section 13413 of the General Code of Ohio, if he retains in his possession this same pelt on February 2nd of the same year?

"Kindly define what is meant by a 'green pelt' under this section. A literal interpretation of this section would, to my notion, make every dealer in Ohio a violator of the same unless he had disposed of any pelts that he might have purchased prior to the 1st day of February immediately upon or after the 1st day of February."

Section 13413 G. C. reads:

"Whosoever shall catch, kill or injure a skunk, or pursue it with such intent, except from the 15th day of November to the first day of February both inclusive, or whoever shall at any time or place dig out, or smoke out with fumes or gases, any skunk or in any manner destroy the den or burrow of any skunk, or whoever during the period when it shall be unlawful to kill such animal shall have in his possession the green pelt of a skunk unless such person can show by the original invoice signed by the shipper that such pelts were shipped from without the state shall be fined not less than ten dollars nor more than twenty-five dollars.

"This section shall not prevent the owner of a farm or anyone authorized by him in writing from killing a skunk when doing an injury upon his premises. The provisions of this section shall be enforced by the commissioners of fish and game."

I am informed by the fish and game department that a "green pelt of a skunk" is one that has not been dried or treated.

It is true that a literal interpretation of this section would seem to make it unlawful for a dealer to have the "green pelt of a skunk" in his possession from the first day of February to the 15th day of November, inclusive. It seems clear to me, however, that the section above quoted was not aimed at such dealers, but was enacted to prevent the unlawful killing by making the mere possession unlawful.

When it is taken into consideration that a "green pelt of a skunk" is one that has not been dried or treated, it is clear that very few dealers would long have them on hand, and while a literal interpretation might cause the legitimate dealer some embarrassment immediately after February 1st, yet this situation is taken care of by a ruling of the fish and game department that they will not prosecute cases against such bona fide dealers.

The circumstances to which you refer are all matters of defense and though under the wording of the statute an affidavit might be filed against a dealer for having "the green pelt of a skunk in his possession" between February 1st and November 15th, yet I am sure when the circumstances were disclosed no conviction could be had.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

126.

CEMETERY TRUSTEES—CREATED UNDER SECTIONS 4183 TO 4201 G. C. INCLUSIVE—SECTIONS 4183 AND 4193-1 G. C. NOT INCONSISTENT—TRUSTEES APPOINTED UNDER SECTION 4193-1 G. C. RECEIVE NO COMPENSATION.

1. *Sections* 4183 *to* 4201 *inclusive G. C. apply to procedure in creating a board of joint township cemetery trustees, subject to provisions of section* 4193-1 *G. C. when advantage is taken thereof.*

2. *Sections* 4183 *and* 4193-1 *G. C. are not inconsistent. The former is the general law, subject to the later optional provisions of the latter.*

3. *The board of cemetery trustees appointed under provisions of section* 4193-1 *G. C. cannot receive any compensation for their services as such.*

COLUMBUS, OHIO, March 19, 1917.

HON. EARL K. SOLETHER, *Prosecuting Attorney, Bowling Green, Ohio.*

DEAR SIR:—I have your communication of February 26, 1917, in which you state:

> "A number of years ago the trustees of Perrysburg and Middleton townships, Wood county, Ohio, secured land near the township line of these townships for cemetery purposes, as provided in section 3456 G. C. The control of the cemetery has been in the hands of cemetery trustees elected by the electors residing within the limits of the territory, comprising the joint cemetery district, as provided in section 4184 G. C., and the cemetery maintained, etc., as provided in section 4185 et seq. G. C.
>
> "Just recently I have been consulted by the board of trustees of this Joint Cemetery Association, and I find upon investigation that sections 4184, 4185 and 4189 of the General Code were repealed by the legislature on the 18th day of April, 1913. The legislature by repealing section 4184 has done away with the election of cemetery trustees, and provided in section 4189, 103 O. L. 272, 'the cemetery so owned in common shall be under the control and management of the trustees of the township or townships and the council of the municipal corporation or corporations,

and their authority over it and their duties in relation thereto, shall be the same as where the cemetery is the exclusive property of a single corporation.'

"It appears that the trustees of this joint cemetery association were unaware of the fact that these sections had been repealed, and I have, therefore, advised them that they have no longer any authority to act as joint cemetery trustees.

"Section 3456 provides: 'Two or more townships may join in establishing and maintaining a cemetery, and for such purpose, the trustees shall have the same powers, be governed by the same rules, and proceed in the same manner, as provided for municipal corporations and townships uniting for that purpose.'

"The latter part of this section, I take it, refers to sections 4183 et seq. of the General Code. As above quoted, sections 4184, 4185 and 4189 were repealed by the legislature, and section 4189 was amended, which is found in 103 O. L. 172, and later, the legislature enacted a supplemental section in 105 O. L. at page 345 known as section 4193-1.

"According to section 4193-1, a board of cemetery trustees, consisting of three members, shall be elected by a joint meeting of the trustees of the townships uniting for the purpose of maintaining a joint cemetery, and such board of cemetery trustees shall have all the powers, perform all the duties, exercised and performed by directors of public service in municipalities under section 4161 to 4168 inclusive of the General Code.

"I wish you would inform me if sections 4183 to 4201 inclusive of the General Code will apply to the procedure in creating a joint board of trustees to maintain this cemetery. After having created the board of trustees of the cemetery, who shall be the president, clerk and treasurer of such board?

"Sections 4189 and 4193-1 seem to be inconsistent, and I wish you would inform me as to the exact sections which would apply and the procedure to be followed after the board of trustees has been created. I wish you would also inform me if the board of trustees provided under section 4193-1 are entitled to compensation."

As stated in your question, section 3456 G. C. is the authority for township trustees establishing a joint cemetery.

Section 3456 G. C. provides:

"When a public burial ground located on or near a township line, is used by the people of two or more townships for burying purposes, the trustees of such townships shall jointly take possession thereof, and take care of and keep it in repair, as in case of burial grounds belonging to a township. The trustees of each township shall levy needful taxes therefor, not to exceed in any year more than one-fourth of one per cent. Two or more townships may join in establishing and maintaining a cemetery, and for such purpose the trustees shall have the same powers, be governed by the same rules, and proceed in the same manner, as provided for municipal corporations and townships uniting for that purpose."

The powers, procedure and governing rules for the joint cemetery are to be found in sections 4183 et seq. G. C.

In an opinion of my predecessor, found in Report of Attorney-General for 1915, Vol. II, page 1507, prior to the enactment of the supplemental section 4193-1

G. C. (103 O. L. 345), and which showed the situation of such a union cemetery prior to said enactment, is the following language:

"The ownership, management and control of cemeteries owned in common by two or more municipal corporations, by two or more townships, or by a municipal corporation or corporations and a township or townships are governed by the provisions of sections 4183 to 4201 G. C. inclusive, as amended and repealed by the act of April 18, 1913, 103 O. L. 272.

"Prior to said last mentioned act the management and control of cemeteries so owned in common was under the provisions of sections 4184, 4185 and 4189 G. C., imposed upon a board of cemetery trustees therein authorized to be elected.

"Upon the repeal of sections 4184 and 4185 G. C., 103 O. L. 272-3 supra, section 4189 G. C. was amended to read as follows:

" 'The cemetery so owned in common, shall be under the control and management of the trustees of the township or townships and the council of the municipal corporation or corporations and their authority over it and their duties in relation thereto shall be the same as where the cemetery is the exclusive property of a single corporation.'

"Thus the control and management of such cemeteries was transferred from the board of trustees above mentioned to the trustees of the township or townships and the council of the municipal corporation or corporations jointly, provision for their joint action in relation thereto being found in sections 4192, 4193 and 4194 G. C.

"It will be further observed that under section 4189 as amended, the trustees and council so acting jointly have conferred upon them all the authority and duties in relation to such cemetery as are conferred and imposed upon a municipal corporation relative to a cemetery of which it is sole owner.

"Thus by reference the authority of the director of public service, as found in section 4162 G. C. is conferred upon the trustees and council in respect to cemeteries owned by them in common. Said section is as follows:

" 'The director shall direct all the improvements and embellishments of the grounds and lots, protect and preserve them, and, subject to the approval of the council, appoint necessary superintendents, employes, and agents, determine their term of office and the amount of their compensation.' "

Section 4189 G. C. still reads as above quoted in Mr. Turner's opinion and is the general section providing for the control and management of a cemetery such as you speak of in your request, subject, however, to the optional provisions of the section enacted in 106 O. L. 345, to wit, section 4193-1 G. C., which reads as follows:

"At any such joint meeting or at the joint meeting provided for by section 4192 of the General Code, by a majority vote of all present counting council members and trustees, such meeting *may* elect a board of cemetery trustees consisting of three members, of which one or more must be a member of each of the separate boards of township trustees and municipal councils comprised in the union cemetery association represented by such joint meeting. Such board of cemetery trustees so elected, shall

have all the powers and perform all the duties exercised and performed by directors of public service of municipalities under sections 4161 and 4168 inclusive of the General Code. At the first election of such board of cemetery trustees, one shall be chosen for one year, one for two years and one for three years, together with such part of a year as may intervene between the time of such election and the first day of January next thereafter. Yearly thereafter at the joint meeting held in May one trustee shall be chosen for three years commencing on the first day of January next thereafter. Any regular or regularly called joint meeting of the township trustees and municipal council may fill vacancies occurring on the board of cemetery trustees by a majority vote of the members present, such election to be for the unexpired term.

"Any member of such board of county trustees may be removed by such joint meeting on a two-thirds vote of all members entitled to sit in such joint meeting, for misfeasance or malfeasance in office, any gross neglect of duty or gross immorality, but no member shall be so removed until he shall have had at least ten days' notice in writing, together with a copy of the charges against him and shall have had opportunity to appear and defend himself either in person or by counsel."

There is no inconsistency in these sections. Under well known principles of law our supreme court has time after time iterated the proposition that two statutes on the same subject, which are not directly inconsistent, should be read together. A reading of section 4193-1 G. C. shows that if the trustees of the townships do not desire personal control and management of the cemetery under the provisions of section 4189 G. C., then they "may elect a board of cemetery trustees, etc.," as provided in section 4193-1 G. C.

So answering your specific questions, the first of which is:

"I wish you would inform me if sections 4183 to 4201 inclusive of the General Code will apply to the procedure in creating a joint board of trustees to maintain this cemetery,"

I would say that these sections inclusive, as amended and repealed by the act of April 18, 1913 (103 O. L. 272), do apply, and that is evidenced by the reading of section 4189 G. C. The union cemetery is under the control and management of the trustees of the townships, and their authority over it and their duties and relation thereto are the same as where the cemetery is the exclusive property of a single corporation. Of course when this joint board desires to take advantage of the option given under section 4193-1 G. C. and select a board of trustees in the manner therein provided, the powers and duties of the new board under that section are as prescribed in said section.

In what might be termed your second question you desire to be informed as to the exact sections which would apply—that is, whether section 4189 or section 4193-1 does, which you say seem to be inconsistent.

As I have pointed out, there is no inconsistency, as section 4189 G. C. is the general statute which gives the trustees the control and management of the cemetery, while section 4193-1 G. C. gives them the opportunity, if they so desire, to appoint a sort of sub-board. So in certain union cemeteries the trustees may proceed under section 4189 G. C., while in others they would proceed under the optional statute, section 4193-1 G. C. In the event the trustees in the instant case proceed under said sections 4189 et seq., these statutes point out the procedure to be followed.

As to the election of a president, clerk and treasury of such board, the statute being silent on the subject, the board would proceed to organize as any other board might do, being a body to themselves and subject to organize under such rules and regulations as they themselves adopt.

What might be termed your third question is as to whether or not the board of trustees provided under said section 4193-1 are entitled to compensation.

Without citation of authorities, suffice it to say that it has been repeatedly held by our supreme court that no public officer can receive any fees or compensation unless by express provision of law. The duties imposed upon the subboard are practically the same duties that would have been performed by the entire membership of the united boards of trustees. When a statute imposes added duties in the manner that this statute does, the officer is considered as performing them gratuitously, or that his compensation before provided for included pay for whatever additional services were imposed upon him.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

127.

SCHOOLS—CENTRALIZATION UNDER SECTION 4726 G. C. APPLIES TO ENTIRE DISTRICT—ALL ELECTORS THEREIN PERMITTED TO VOTE—TWO OR MORE SCHOOLS MAY BE CONSOLIDATED UNDER SECTION 7730 G. C. WITHOUT VOTE BY BOARD OF EDUCATION.

When centralization is had as provided by General Code section 4726, it applies to the entire school district affected and the electors of the entire district shall be permitted to vote.

Two or more schools are consolidated or united under the provisions of section 7730 G. C. by the board of education without vote.

COLUMBUS, OHIO, March 20, 1917.

HON. ROY R. CARPENTER, *Prosecuting Attorney, Steubenville, Ohio.*

DEAR SIR:—In your letter of February 24, 1917, you ask my opinion upon the following statement of facts:

> "Smithfield rural school district, situated in Smithfield township, Jefferson county, contains nineteen schools, among which are three known as 'Pine Grove,' or 'No. 5;' 'Jackson,' or 'No. 7,' and 'Piney Fork,' or 'No. 13.' Pine Grove is a country school of one room; Jackson is a country school of one room; and Piney Fork is in a mining settlement and consists of two buildings, one of one room and one of two rooms.
>
> "An inspection has been made of the various schools in this rural district and recommendations made that certain improvements be made on one of the Piney Fork school buildings, with a further recommendation, though, that the three districts above mentioned, Nos. 13, 5 and 7, be consolidated, centralized or whatever term you may wish to use. It is true that section 4726 provides that a rural board of education may submit the question of centralization, etc. Does this statute require that centralization must be applied to the entire district, or can vote be had for centralization of two or more, as for instance, three schools in a district? Or

what law provides that two or more schools in a rural district can be united, consolidated or centralized?

"This is a very hilly community, with poor roads. The question of centralization of the township, as a whole, is impractiable. These three schools are in the same valley, which makes it possible for them to be consolidated so far as making one building readily accessible to the pupils of the three districts, Nos. 5, 7 and 13.

"If there is a provision whereby such consolidation or centralization may be had, can the voters of the rural district, as a whole, vote for it, or must the vote be confined to the electors in the particular subdistricts concerned in the consolidation?"

Pertinent to the above request I desire to quote first from General Code section 7730, which provides in part as follows:

"The board of education of any rural * * * school district may suspend any or all schools in such * * * rural school district. Upon such suspension the board * * * in such rural school district shall provide for the conveyance of pupils attending such schools in the rural * * * district, or to the public school in another district. When the average daily attendance of any school for any preceding year has been below ten, such school shall be suspended and the pupils transferred to another school or schools when directed to do so by the county board of education. No school of any rural district shall be suspended until ten days' notice has been given by the board of education of such district. Such notice shall be posted in five conspicuous places within such village or rural school district; provided, however, that any suspended school as herein provided may be re-established by the suspending authority upon its own initiative or upon a petition asking for re-establishment, signed by a majority of the voters of the suspended district, at any time the school enrollment of the said suspended district shows twelve or more pupils of lawful age."

The above provision of the General Code suggests a plan of centralization of schools in addition to General Code section 4726, which last mentioned section provides for the submission of the question of centralization to the qualified electors of a rural school district, and it may or may not be as complete and effective as though centralization were had under section 4726. When centralization is had under section 7730, a majority of the voters in such suspended district may cause the schools to be re-established, in which case the plan suggested by said last mentioned section would not be as complete and as effective as under the said section 4726. When the board of education of a rural district determines to suspend a school or schools in any such district and posts notices of such suspension, it is then their duty to assign the youth of such suspended district or districts to schools in another district, as provided by section 7684 G. C., which reads as follows:

"Boards of education may make such an assignment of the youth of their respective districts to the schools established by them as in their opinion will best promote the interests of education in their districts."

When such assignment is made, as above pointed out, the pupils so assigned shall attend the schools in said districts to which they have been assigned. If, however, a pupil lives more than one and a half miles from the schools to which

he has been assigned, he may attend a nearer school in the same district or, if there is none nearer in the same district, he may attend the nearest school in another school district in all grades below the high school, and in such case the board of education of the district in which they reside must pay the tuition of such pupils to the school board of the district where such pupils attend. The above provision shall not apply, however, if the schools are centralized or if transportation is furnished.

If, however, it is your desire to make the centralization complete, I do not understand that the same can be done unless the question is submitted to the entire school district, as provided by section 4726, above mentioned, which reads as follows:

> "A rural board of education may submit the question of centralization, and, upon the petition of not less than one-fourth of the qualified electors of such rural district, or upon the order of the county board of education, must submit such question to the vote of the qualified electors of such rural district at a general election or a special election called for that purpose. If more votes are cast in favor of centralization than against it, at such election, such rural board of education shall proceed at once to the centralization of the schools of the rural district, and, if necessary, purchase a site or sites and erect a suitable building or buildings thereon. If, at such election, more votes are cast against the proposition of centralization than for it, the question shall not again be submitted to the electors of such rural district for a period of two years, except upon the petition of at least forty per cent. of the electors of such district."

Under the provisions of the above section the electors of the district are entitled to vote upon said question, and if the vote carries it is the duty of the board of education to proceed to centralize the schools of such entire district.

In your letter you say that the above is impracticable, so that I take it the plan provided for under said section 7730, and other sections thereto relating, is the plan you should advise the school board to follow.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

128.

MUNICIPAL LIGHT PLANT—COUNCIL MAY REQUIRE EXPENSES OF SAID PLANT TO BE PAID FROM REVENUE DERIVED FROM PRIVATE CONSUMERS — DISCRETIONARY WITH COUNCIL WHETHER OR NOT VILLAGE SHALL PAY FOR CURRENT USED FOR MUNICIPAL PURPOSES FROM FUNDS RAISED BY TAXATION.

The council of a village owning, maintaining and operating a municipal lighting plant may require all the expenses of the plant, both for service furnished the municipality itself and private consumers therein, to be paid out of the funds received as electric light rentals from private consumers.

It is discretionary with the council of a village having a municipal light plant to determine whether the village will pay any, all or none of the cost of furnishing electric current to the village itself for municipal purposes out of funds raised by taxation.

COLUMBUS, OHIO, March 20, 1917.

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

GENTLEMEN:—Under date of February 12, 1917, you submitted for my opinion the following proposition:

> "In view of the provisions of section 4362 G. C. should the board of trustees of public affairs of villages, which own and operate a municipal lighting plant, furnish current for street lighting without charge?"

Section 4362, General Code, reads as follows:

> "When waterworks and electric light plants or either of them are owned and operated by a village which receives its street lighting and fire protection therefrom and the proceeds from the operation of such plant or plants is insufficient to pay the expenses of operating such plants or either of them, the council may levy a tax not to exceed five mills on each dollar valuation of the taxable property listed for taxation in such village, real and personal, to pay the running expenses and extensions made thereto after applying the proceeds therefrom, which tax shall be in addition to all other taxes authorized by law."

The following sections and part of section of the General Code refer to the general powers of a municipality with respect to the establishment of an electric light plant:

> "Sec. 3616. All municipal corporations shall have the general powers mentioned in this chapter, and council may provide by ordinance or resolution for the exercise and enforcement of them.
>
> "Sec. 3618. To establish, maintain and operate municipal lighting, power and heating plants, and to furnish the municipality and the inhabitants thereof with light, power and heat, to procure everything necessary therefor, and to acquire by purchase, lease or otherwise, the necessary lands for such purposes, within and without the municipality.
>
> "Sec. 3990. The council of a municipality may, when it is deemed expedient and for the public good, erect gas works or electric works at the expense of the corporation, or purchase any gas or electric works already erected therein, * * *"

Section 3618, supra, seems to be the only section of the General Code that contains any reference to the right of a municipality to establish and maintain a municipal lighting plant for the purpose of furnishing electricity to the municipality itself. In this section is found the general grant of power by the legislature to a municipality to establish, maintain and operate a municipal lighting plant to furnish both the municipality itself and the inhabitants thereof with electricity. An examination of the General Code does not disclose any special limitation on this general grant of power.

Provision for the management, conduct and control of a village electric light plant is contained in section 4361, General Code, as amended 103 O. L. 561, which reads as follows:

> "Sec. 4361. The board of trustees of public affairs shall manage, conduct and control the water works, electric light plants, artificial or natural gas plants, or other similar public utilities, furnish supplies of water, electricity or gas, collect all water, electrical and gas rents, and appoint necessary officers, employes and agents. The board of trustees of public affairs may make such by-laws and regulations as it may deem necessary for the safe, economical and efficient management and protection of such works, plants and public utilities. Such by-laws and regulations when not repugnant to the ordinances, to the constitution or to the laws of the state, shall have the same validity as ordinances. For the purpose of paying the expenses of conducting and managing such waterworks, plants and public utilities, of making necessary additions thereto and extensions thereof, and of making necessary repairs thereon, such trustees may assess a water, light, power, gas or utility rent, of sufficient amount, in such manner as they deem most equitable, upon all tenements and premises supplied with water, light, power, or gas, and, when such rents are not paid, such trustees may certify the same over to the auditor of the county in which such village is located to be placed on the duplicate and collect as other village taxes or may collect the same by actions at law in the name of the village. The board of trustees of public affairs shall have the same powers and perform the same duties as are possessed by, and are incumbent upon, the director of public service as provided in sections 3955, 3959, 3960, 3961, 3964, 3965, 3974, 3981, 4328, 4329, 4330, 4331, 4332, 4333, and 4334 of the General Code, and all powers and duties relating to waterworks in any of these sections shall extend to and include electric light, power and gas plants and such other similar public utilities, and such boards shall have such other duties as may be prescribed by law or ordinance not inconsistent herewith."

The last mentioned section gives ample authority for the assessment of a light rent and vests the board of trustees of public affairs with the power of fixing the rent, of sufficient amount, upon all tenements and premises supplied with light to pay the expense of conducting and managing such electric light plant, of making necessary additions thereto and extensions thereof and of making necessary repairs thereon, and of assessing such light rent in such manner as they deem most equitable.

Section 3960 General Code is incorporated in section 4361, supra, by reference, and the provisions of said first mentioned section concerning water works plants are extended to and include electric light plants of villages as well.

Section 3960 reads as follows:

> "Money collected for waterworks purposes shall be deposited weekly with the treasurer of the corporation. Money so deposited shall be kept

as a separate and distinct fund. When appropriated by council, it shall be subject to the order of the director of public service. Such director shall sign all orders drawn on the treasurer of the corporation against such fund."

The effect of section 3960, supra, taken in connection with section 4361 is to require all moneys collected by the board of trustees of public affairs as electric light rentals to be deposited weekly in the public treasury, to the credit of the electric light plant fund. When placed therein said money cannot be used until council has appropriated it specifically for the use of said board, as is further provided by said sections.

Section 4240, General Code, reads as follows:

"The council shall have the management and control of the finances and property of the corporation, except as may be otherwise provided, and have such other powers and perform such other duties as may be conferred by law."

A consideration of the three last mentioned sections of the General Code makes it apparent that the general supervision of a village electric light plant, as far as the finances of the same are concerned, is placed in the village council. The control of same in this respect by said body consists in the right to exercise discretion, and it would be for the council to determine whether the amount of money appropriated for the use of said plant would be large or small.

An examination of the General Code relative to municipalities does not disclose any provision which places the duty or requirement upon the village council —which represents the village, of course—to make any payment for current used by the village itself. The only section that seems to have any bearing at all is section 4362, supra, which in part provides in effect that when the proceeds from the operation of a village light plant furnishing street lighting to the village are insufficient to pay expenses, the council *may* levy a special tax to take care of the deficiency. However, this section merely amounts to an authorization for a levy of taxes for said purpose, and does not make the levying of said tax mandatory; and while it might be inferred from said section that the reason for said levy was the furnishing of said street lighting, still at no place in the Code do we find a provision that a village light plant may or may not furnish current free to said village for its own use.

The fact that the legislature has vested the general power of handling the finances of a village light plant in the village council, as is noted above, and has failed to place any special limitation on the exercise of same leads me to the conclusion that it is a matter of discretion for the village council to determine whether it will or will not pay any or all of the cost of furnishing electric current to the village itself for municipal purposes out of funds raised by taxation, or whether it will require all of the expenses of said plant, both for service furnished to the municipality and to private consumers, to be paid out of the funds received by way of light rentals from said private consumers.

As will be noted by reference to section 4361, supra, provision is made that the board of trustees of public affairs may make by-laws and regulations for the safe, economical and efficient management and protection of said electric light plant, but they shall not be repugnant to the ordinances of said village.

Sections 3616 and 3618, supra, in effect provide that council may provide by ordinance or resolution for the establishment, maintenance and operation of a

municipal lighting plant to furnish the municipality with light. It would seem that these two sections would grant sufficient power to said council to require the board of trustees of public affairs to furnish current free to said village for its own use, unless there was some limitation upon the right to do so, which is not apparent either expressly or impliedly.

The right of a municipality to receive electric current from its own plant free of charge was considered by Attorney-General U. G. Denman in an opinion to Hon. M. R. Smith, city solicitor, Conneaut, Ohio, under date of September 22, 1910, and found in the Annual Report of the Attorney-General of Ohio, 1910-1911, page 1015, and the following quotation from said opinion bears on the point in question:

> "It matters not, therefore, which, as between council and the director, has technically the rate-making power. Council has the undoubted and exclusive power to determine how much money the city will pay for the support of the electric light plant from its general revenues. Such a payment, of course, can only be made from an appropriation made in accordance with law by council.
>
> "The mayor suggests that it is not fair to private consumers that the city should pay less for the current consumed by it than such consumers are obliged to pay. However, this action is within the powers of council and council may, if it sees fit, refuse to apply any moneys raised by taxation to the support of the municipal plant, and thus require that the rates charged against private consumers shall pay for the light furnished the city."

Ricker v. Lancaster, 7 Pa. Sup. Ct., 149.
Preston v. Water Comrs., 117 Mich., 589.
Gallipolis v. Waterworks Trustees, 2 N. P. 161.

When engaged in furnishing electricity to private consumers the municipality is not acting in its governmental capacity, but is acting in a private or proprietary capacity.

Section 1303, Dillon on Municipal Corporations, 5th Ed.

Electric rates or rents are in no sense taxes, but are nothing more than the price paid for electric current as a commodity by the consumer.

Gallipolis v. Waterworks Trustees, 2 N. P. 161;
Twitchell v. City of Spokane (Wash.), 104 Pac. 150; 44 L. R. A. (n. s.) 290.

The principle seems to be well sustained that a municipality owning a waterworks system may furnish water for municipal purposes free of charge.

Gallipolis v. Waterworks Trustees, 2 N. P. 161;
Twitchell v. City of Spokane, supra;
30 Am. and Eng. Enc. Law, 2d Ed., page 435;
Sweickley, Waterworks Com'r v. Sweickley, 159 Pa. 194.

There would not seem to be any reason why the same rule should not apply to municipal light plants.

In view of the foregoing statutory provisions and of the general principles of law applicable to the furnishing of free service by a municipal utility to the municipality itself, I am of the opinion that the board of trustees of public affairs of villages which own and operate municipal lighting plants should frunish current for street lighting without charge, if the council of said village requires the same to be done, and that the village council in the exercise of its discretion may require all the expenses of the municipal lighting plant, both for service furnished the municipality itself and private consumers therein, to be paid out of funds received as electric light rentals from private consumers.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

129.

APPROVAL—FINAL RESOLUTION FOR IMPROVEMENT OF TWO ROADS IN BUTLER COUNTY.

COLUMBUS, OHIO, March 20, 1917.

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

DEAR SIR:—I have your communication of March 15, 1917, in which you ask my approval of the following final resolutions, a duplicate having been enclosed with each of said final resolutions:

"Butler County—Sec. A, Carthage-Hamilton road, Pet. No. 2129, I. C. H. No. 43.

"Butler County—Sec. C, Hamilton-Scipio road, Pet. No. 2134, I. C. H. No. 467."

I have carefully examined the said final resolutions and find them correct in form and in accordance with law, and, therefore, am returning the same to you with my approval endorsed thereon.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

130.

FUNDS—RAISED UNDER SEC. 6956-1 G. C. CAN BE USED FOR REPAIR OF COUNTY ROADS AND BRIDGES GENERALLY—REGARDLESS OF AMOUNTS CONTRIBUTED BY DIFFERENT TOWNSHIPS—COUNTY COMMISSIONERS CANNOT CO-OPERATE WITH TOWNSHIP TRUSTEES FOR IMPROVEMENT OF A ROAD ENTIRELY WITHIN LIMITS OF MUNICIPALITY.

The fund provided by section 6956-1 G. C. is to be used for the repair and maintenance of bridges and county highways over the county generally irrespective of the amounts contributed by the different townships thereof.

The county commissioners and the council of a municipality are not authorized to co-operate in the improvement of a part of the intercounty highway system of the state, where the part to be improved lies entirely within the limits of the municipality.

COLUMBUS, OHIO, March 21, 1917.

HON. A. B. UNDERWOOD, *Prosecuting Attorney, Medina, Ohio.*

DEAR SIR:—I have your communication dated February 28, 1917, in which you ask my opinion in reference to two different propositions. Your communication in full reads as follows:

> "I am submitting herewith two propositions upon which the county commissioners desire your opinion.
>
> "(1) The distinction between county roads and township roads being somewhat vague, a repair and maintenance levy was made last year under 6956-1 G. C. of $20.00 per mile on all roads in the county other than state roads. Question: Must this money be spent in the township where it was raised or can it be shifted to the place needed and spent anywhere in the county?
>
> "(2) Ashland-Medina I. C. H. 139 and Barberton-Greenwich I. C. H. 97 have been built and constructed up to the corporation line of the village of Lodi, Medina county, Ohio. It is the desire of the village council at Lodi, and of the Medina county board of commissioners to co-operate under sections 6949 to 6954 G. C., inclusive, and extend a stone road from the corporation line into said village to meet the brick pavements. Question: Are the aforesaid sections broad enough to permit such co-operation in view of the fact that the roads outside of the corporation line have all been built? Or is co-operation by the commissioners limited solely to the case where the municipality extension is a part of and made at the same time as the road outside of and leading up to the corporation line?
>
> "I have submitted my own views to the county commissioners, but would like a written opinion from your office."

Your first question has to do with the proposition as to whether the repair and maintenance levy made under section 6956-1 G. C. must be applied to the roads in each township of the county in proportion to the amount of money paid, or can the money be used for the repair and maintenance of the roads in any part of the county without respect to the proportion that is furnished by each township?

You state in said proposition that the distinction between county roads and township roads is somewhat vague. In answering this question intelligently it will be necessary for me to cite and construe a number of statutes which have to

do with the classification of highways and the method by which each class is to be repaired and maintained.

Section 7464 of the General Code classifies the highways of the state as follows:

"The public highways of the state shall be divided into three classes, namely: State roads, county roads and township roads."

Subdivision (a) of said section defines state roads as follows:

"State roads shall include such part or parts of the intercounty highways and main market roads as have been or may hereafter be constructed by the state, or which have been or may hereafter be taken over by the state as provided in this act, and such roads shall be maintained by the state highway department."

Subdivision (b) of said section defines county roads as follows:

"County roads shall include all roads which have been or may be improved by the county by placing brick, stone, gravel or other road building material thereon, or heretofore built by the state and not a part of the intercounty or main market system of roads, together with such roads as have been or may be constructed by the township trustees to conform to the standards for county roads as fixed by the county commissioners, and all such roads shall be maintained by the county commissioners."

Subdivision (c) of said section defines township roads as follows:

"Township roads shall include all public highways of the state other than state or county roads as hereinbefore defined, and the trustees of each township shall maintain all such roads within their respective townships; and provided further, that the county commissioners shall have full power and authority to assist the township trustees in maintaining all such roads, but nothing herein shall prevent the township trustees from improving any road within their respective townships, except as otherwise provided in this act."

Now the next important question is as to how these different classes of roads are to be maintained and repaired.

Section 7467 of the General Code provides as follows:

"The state, county and township shall each maintain their respective roads as designated in the classification hereinabove set forth;" (that is, the classification set forth in section 7464 G. C.)

You will note that this provision of section 7467 does not prevent the county or township from entering into an agreement by which the respective classes of roads may be repaired and maintained in a different method than that set out in the statute.

Now, if the state, the county and the township is each to maintain its respective roads as set out in section 7464, the next question is as to how these different classes of roads are to be maintained.

Section 3298-1 of the General Code provides that:

> "The board of trustees of any township may levy and assess upon the taxable property of such township a tax not exceeding three mills in any one year upon each dollar of taxable property therein for the purpose of *improving, dragging, repairing or maintaining* any public road or roads or *part thereof.*"

Now, it must be remembered that this levy is made to take care of township roads only.

Section 6956-1 G. C., which is the section to which you refer in your communication, provides as follows:

> "The board of county commissioners shall provide annually a fund for the repair and maintenance of bridges and county highways. The repair and maintenance fund so provided shall not be less than twenty dollars for each mile of county highways in said county."

In the first place this levy is based upon the number of miles of county highways as described in section 7464 of the General Code and the fund derived from said levy shall be used for the repair and maintenance of bridges and county highways only. This being a fund for the repair and maintenance of bridges and county highways it may be used for the repair and maintenance of bridges and county highways in general, wheresoever they may need repair and maintenance irrespective of what sum or sums of money each township may furnish for the said fund under said levy. This is the answer, in my opinion, in reference to your first question.

In passing I might say that section 1221 of the General Code provides means of repairing and maintaining the state roads.

Now as to your second question: As I understand the facts to be, the intercounty highway passing through the village of Lodi in your county has been built and constructed up to the corporation line on each side of the village of Lodi, but the part of said intercounty highway that lies within the village of Lodi is not improved and that the county commissioners of your county desire to co-operate with the said village of Lodi in constructing a stone road within the corporation limits of said village, the part to be improved lying entirely within the village. As you suggest, the sections which control in this matter are 6949 to 6954 of the General Code.

Section 6949 provides that:

> "The board of county commissioners may *extend* a proposed road improvement *into or through* a municipality when the consent of the council of said municipality has been first obtained."

Before attempting to construe the said statutes, let us place an interpretation upon "into or through." The Standard Dictionary defines the word "into" as follows:

> "Expressing entrance, or a passing from the outside of a thing to its interior parts, and following verbs expressing motion."

This preposition "into" follows the verb "extend." That is, it follows a verb expressing motion and seems to indicate that the improvement is to pass from a

point outside of the municipality either into the municipality or clear through the municipality. It seems to mean the same as if it read that the board of county commissioners may project a proposed road improvement into or through a municipality. That is, they may literally project something into the municipality, which would necessitate that the point from which the thing was projected is outside of the limits of the municipality.

In placing the above interpretation upon these words used in section 6949, I am aware that this is not an absolutely necessary construction. But let us use in connection with the interpretation of the words so used the construction of the statutes which have to do with this matter. In section 6950 of the General Code we find this provision:

> "*Whenever any portion of a road* to be improved under the provisions of this act lies within the corporation limits of a municipality. * * *"

Section 6954 of the General Code, which provides for the letting of the contract for the improvement of the road, provides as follows:

> "The county commissioners shall thereupon receive bids and let the contract for improving *such portion of said road as lies within the municipality* either in connection with the remainder of said improvement or separately, as such board of commissioners may determine."

Now when we consider together the plain interpretation of the words "extend," "into" and "through" as found in section 6949, together with the plain construction of the sections which have to do with the improvement provided for in said sections, the only conclusion that seems to be warranted is that a road lying entirely within the confines of a municipality, even though it joins with other parts of the highways already improved, cannot be constructed jointly by the board of county commissioners and the village council.

This seems to have been the construction placed upon these statutes by the legislature itself because we find in the new highway bill, which is now on its passage through the general assembly, a clause making provision for just the situation which you present in your communication. So that I answer your second question in the negative and hold that such a road as you suggest cannot be constructed by the co-operation of the county commissioners and the village council.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

131.

CHILDREN'S HOMES—DEFICIENCY IN FUND PROVIDED FOR MAINTAINING SCHOOLS THEREIN—SHOULD BE PAID BY COUNTY COMMISSIONERS.

County commissioners are required to pay any deficiency left in the cost of maintaining schools in children's homes not provided for by the distributive share of the school funds.

COLUMBUS, OHIO, March 21, 1917.

HON. JAMES P. WOOD, *Prosecuting Attorney, Athens, Ohio.*

DEAR SIR:—In your letter of January 15, 1917, you ask my opinion on the following statement of facts, to wit:

> "The Athens county children's home is located in Athens township rural school district. For many years under the provisions of 7676 a separate school has been maintained in the children's home. The board of education of the Athens rural school district now refuses to pay the salary of teachers employed for the school maintained at the children's home except to the extent of the funds received from the school enumeration.
>
> "Section 7677, as amended 103 O. L. 896, provides that such schools 'shall be under the control and management of the respective boards of education of the school district in which such homes and institutions are located, etc.'
>
> "Section 7878, as amended 103 O. L. 896, provides for the expense of maintenance of such schools and enumerates the different items of expenditures which do not include the salary of teachers. The question then, I think, resolves itself into an interpretation of the latter part of section 7676 as amended, which is as follows:
>
> "'If the distributive share of school funds to which the school at such home or asylum is entitled by the enumeration of children in the institution is not sufficient to continue the schools for that length of time, the deficiency shall be paid out of the funds of the institution or by the county commissioners.'
>
> "The funds received for school enumeration are wholly inadequate to pay the salaries of teachers employed at the children's home in this county. No provision was made for the payment of these salaries in the budget for the children's home. Under these circumstances are the county commissioners required to pay the balance of the salaries to the teachers employed at the children's home and is there no obligation on the part of the board of education of the Athens township rural school district to pay any part of these salaries except from those funds received from the school enumeration?"

There seems to be two methods provided by our laws for the establishment and maintenance of schools in a county children's home. By the provisions of the children's home statutes, that is, General Code sections 3085 and 3088, it is provided that schools may be established and maintained by the trustees of such institutions.

General Code section 3085 provides as follows:

"Subject to such rules and regulations as the trustees prescribe, the superintendent shall have entire charge and control of such home and the inmates therein. Upon the recommenation of the superintendent, the trustees may appoint a matron, assistant matron, teacher or teachers whose duties shall be the care of the inmates of the home, and to direct their employment, giving suitable physical, mental and moral training to them. Under the direction of the superintendent, the matron shall have the control, general management and supervision of the household duties of the home, and the matron, assistant matron, teacher or teachers, shall perform such other duties, and receive for their services such compensation as the trustees may by by-laws from time to time direct. They may be removed by the superintendent or at the pleasure of the trustees, or a majority of them. A licensed physician may be employed, who shall at least quarterly make a physical and mental examination of all the inmates of such home, and a record of such examination shall be kept. When necessary, experts may be employed to give the proper treatment, or a child may be sent to a suitable institution for treatment at the expense of the county."

General Code section 3088 provides:

"During the two weeks ending on the fourth Saturday in July, the clerk of the board of trustees shall take and return to the county auditor the names and ages of all youth of school age in such home. The state common school fund, not otherwise appropriated by law, shall be apportioned in proportion to the enumeration of youth, to such home and other districts, subdistricts and joint subdistricts within the county. The amount of money due such home under such apportionment shall be set apart by the auditor of the county, and shall become a part of the children's home fund and used to maintain a common school in such home, and shall be paid out on certificate of the trustees, stating in the certificate, the amount and the purposes thereof. Thereupon the county auditor shall issue his warrant on the treasurer for the amount so certified. This section shall not apply to children's homes in counties where such children attend the public schools. When in their judgment advisable, the trustees may employ a teacher to teach in any such home, as provided by law, but such teacher must have a 'teacher's elementary school certificate' as provided for by section seven thousand eight hundred and twenty-nine of the General Code."

So that from the above two sections it is not only provided that the trustees of the institution may make such rules and regulations as the superintendent shall follow in establishing such means of instruction as is proper, but by the provisions of section 3088 a method is outlined for the raising of funds for the support of such schools in such county children's home. It is quite clear, from the above sections, that if the schools are provided by the above sections the county commissioners must make provision for the entire expense in connection with said schools. But, another class of statutes must be looked to, viz., a portion of the school laws, found in General Code sections 7676 to 7678, inclusive.

Sections 7676, 7677 and 7678 provide:

"*Section* 7676. The board of education in any district in which a children's home or orphans' asylum is established by law, when requested by

the board of trustees of such children's home or orphans' asylum when no public school is situated reasonably near such home or asylum, shall establish a separate school in such home or asylum, so as to afford to the children therein, as far as practicable, the advantages and privileges of a common school education. Such school must be continued in operation for such period as is provided by law for public schools. If the distributive share of school funds to which the school at such home or asylum is entitled by the enumeration of children in the institution is not sufficient to continue the schools for that length of time, the deficiency shall be paid out of the funds of the institution or by the county commissioners.

"*Section* 7677. All schools so established in any such home or asylum shall be under the control and management of the respective boards of education of the school districts in which such homes and institutions are located, and courses of study, length of school term, and all other school matters shall be uniform in the respective school districts. Teachers employed in such homes or institutions must have a teacher's elementary school certificate as provided by section seven thousand eight hundred and twenty-nine of the General Code.

"*Section* 7678. In the establishment of such schools the commissioners of the county in which such children's home or orphans' asylum is established, shall provide the necessary school room or rooms, furniture, fuel, apparatus and books, the cost of which for such schools must be paid out of the funds provided for such institution. The board of education shall incur no expense in supporting such schools."

Thus by the above sections it will be noted that when requested by the trustees of such children's home and when no public school is situated reasonably near such home, the board of education of the district in which the children's home is located *shall* establish a separate school in such home, and a school which is sufficient to afford the children therein the advantages and privileges of a common school education; that the school shall be operated during the full school year and if there are not sufficient funds from the distributive share of the school fund or from the funds of the institution otherwise provided therefor, then the deficiency shall be paid by the county commissioners.

I am convinced that the above quoted sections mean exactly what they say, that is, that it is the purpose of the law to provide schools and the means of education for the children in such homes, and just as a school board can be compelled to levy and collect taxes for the maintenance of schools within their several jurisdictions, I am convinced the board of county commissioners may be compelled to levy and collect taxes to provide for the expense of conducting said schools in said children's homes and to provide for any deficiency which may occur over and above the amount received from the state or from any other source.

Holding this view, then, I advise you that the board of education of Athens township rural school district should provide for the payment of the salaries of teachers employed in the schools maintained at the children's home, and that the expense over and above the amount received from the state common school fund, or from any fund in the children's home which might be used for said purpose, must be paid by the board of county commissioners of the county in which such homes are located.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

132.

COUNTY SURVEYOR—SURVEYING TRACT OF LAND SOLD AT FORFEITED LAND SALE—PAID OUT OF PROCEEDS OF SALE—WHEN LAND SOLD AT FORFEITED LAND SALE DOES NOT EXIST AUDITOR MAY REFUND PURCHASE PRICE AND TAKE SAME OFF TAX DUPLICATE.

1. *A county surveyor is to be paid out of the proceeds of the sale for surveying a tract of land sold at forfeited land sale when required to survey the same by the county auditor under section 5762 G. C.*

2. *When the county auditor has sold lands at forfeited land sales and then it is found that these lands in fact do not exist, the purchase price thereof may be refunded to the purchaser.*

3. *When the auditor's attention is called to the fact that lands sold at forfeited land sale do not in fact exist, it is his duty to take the same off the tax duplicate.*

COLUMBUS, OHIO, March 21, 1917.

HON. C. M. CALDWELL, *Prosecuting Attorney, Waverly, Ohio.*

DEAR SIR:—I have your letter of January 11, 1917, as follows:

"The General Code seems to be silent as to how the county surveyor is to be paid for the work required under the provisions of section 5762, and I would like to know whether the surveyor's bill is to be paid from the county treasury and out of the general county fund, or could it be charged against the land so sold. My investigation leads me to believe that the county surveyor would simply have a claim against the county for which he should present his bill to the county auditor and have it allowed in the regular way, but I had no authority to back up this opinion; and, therefore, ask your direction in the matter.

"Again, I have found a number of instances where the auditor has sold forfeited lands and the land so sold is found not to exist; that is, it has been included in other lands and is actually owned by other parties who are paying the taxes on it, but has never been taken off the duplicate.

"As an illustration, take the following: A tract of land was run on the duplicate here for a number of years as 300 acres. A deed was presented to the auditor for 250 acres. The auditor transferred the 250 acres out of the 300, leaving the extra 50 acres still in the name of the former owner on the tax duplicate. The 50 acres were sold at forfeited land sale, and I was called upon to locate the boundaries of the same. Upon investigation, I found that the original owners had had the 300 acres surveyed, and that it only measured out 250 acres; that they sold the entire tract by metes and bounds, but stating in the deed that it contained 250 acres.

"Hence, you will see how the auditor was led into error thinking that there were 50 acres still left to the original owner when in fact there was none. Now, the auditor wants some way for his records to show that this land does not exist. There are other instances in which land has been sold at forfeited land sale and the purchaser cannot locate same, and I am satisfied that it is included in other lands on which the owners are paying taxes just as mentioned in the aforesaid illustration.

"Now, can the county auditor direct the county surveyor to go out and ascertain the location of such lands, and if he finds that the lands sold at forfeited land sale are included in other lands, can he make such report

to the county auditor and the county auditor correct his duplicates by taking off these tracts of land which are included in the lands of other owners, and refund to the purchasers at the forfeited land sales the amounts paid by them, and how is the county surveyor to be paid for this work?

"These questions have been mooted for a long time, and it seems to me steps should be taken so that they can be adjusted with some certainty."

Section 5762 G. C. reads:

"The county auditor on making a sale of a tract of land to any person, under this chapter, shall give to such purchaser a certificate thereof. If the land so sold is not an entire original tract, and the auditor deems it necessary, such certificate shall be directed to the county surveyor of the county, requiring him to proceed at the request of the purchaser, his heirs, or assigns, to ascertain the boundaries of the tract of land so purchased, unless it is held in common with some other person. On producing or returning to the county auditor the certificate of sale when the tract sold is an entire original tract, or when the tract of land so sold is held in common with another person, or on producing the plat and certificate of the county surveyor attached to a copy of the certificate of sale, the county auditor, on payment to him by the purchaser, his heirs, or assigns, of the sum of one dollar and twenty-five cents shall execute and deliver to such purchaser, his heirs, or assigns, a deed therefor, in due form, which deed shall be prima facie evidence of title in the purchaser, his heirs, or assigns."

Answering your first question as to how the surveyor is to be paid for surveying a tract of land sold at forfeited land sale, I beg to call your attention to the following sections:

"*Sec.* 5756 *G. C.* When a tract or parcel of land is sold, under the provisions of this chapter, at forfeited sale, any person, desiring to do so, may redeem it, at any time within six months from the sale thereof, by depositing with the county treasurer, as provided in the next preceding chapter of this title, the amount of such sale with fifty per cent. penalty thereon, and paying all other expenses incidental to, and arising from the sale.

"*Sec.* 5757 *G. C.* If any of such forfeited lands are sold for a greater sum than the amount of such tax, interest, penalty, and costs, the county auditor shall charge the county treasurer separately in each case, in the name of the supposed owner, with the excess above such amount. The treasurer shall retain such excess in the treasury for the proper owner of the forfeited lands, and upon demand by such owner, within six years from the day of sale, shall pay the excess to him.

"*Sec.* 5758 *G. C.* If the county treasurer, upon such demand, is not fully satisfied as to the right of the person demanding, to receive it, if there are several different claimants, he shall commence a civil action by filing a petition of interpleader, in the court of common pleas of the county where the land was sold, wherein he shall make the person or persons claiming the excess, and the state, defendants, and the action shall proceed as other civil actions. The costs of the proceedings shall be paid by the person or persons claiming the excess, as the court shall order. The prosecuting attorney of the county shall attend to the action, in behalf of the treasurer.

"*Sec.* 2822 *G. C.* When employed by the day, the surveyor shall receive five dollars for each day and his necessary actual expenses. When not

so employed, he shall be entitled to charge and receive the following fees; for each rod run, not exceeding one mile, three-fourths of one cent, and for each rod over one mile, one-half of one cent; for making out or recording a plat not exceeding six lines, seventy-five cents, and for each line in addition, five cents; for each one hundred words or figures therein, six cents; for calculating the contents of a tract not exceeding four sides, six cents, and for each additional line ten cents; for mileage, going and returning, five cents per mile; and for all other services, the same fees as those of other officers for like services. Chain carriers and markers are entitled, each, to two dollars."

It will be noted that section 5757 G. C. provides that if any of such forfeited lands are sold for a greater sum than the amount of such tax, interest, penalty and *costs*, the county auditor shall charge the county treasurer separately in each case, in the name of the supposed owner, with the excess above such amount. Nowhere in the statute is there any definite recital of just what "costs" are to be allowed. Sections 5756, 5757 and 5758 of the General Code, above quoted, were originally sections 102 and 103 of an act passed April 5, 1889, and entitled "An act for the assessment and taxation of all property in this state and for levying taxes thereon according to its true value in money." (56 O. L. 175.)

Section 103 of this act reads:

"Whenever any tract or parcel of land shall be hereafter sold, under the provisions of this act, at forfeited sale, any person desiring to do so, may redeem the same, at any time within six months from the sale thereof, by depositing with the county treasurer, as is provided in section ninety-third (93) of this act, the amount of said sale, together with fifty per centum thereon, and by paying all other expenses incidental to, and arising from said sale: Provided, however, that if any of said forfeited lands shall be sold for a greater sum than the tax, interest, penalty and costs, it shall be the duty of the auditor to charge said treasurer separately in each case, in the name of the supposed owner, with the excess above said tax, interest, penalty and costs; and such treasurer shall retain in the treasury of his county the said excess, for the proper owner of said forfeited lands, and upon demand by such former owner, within six (6) years from the day of such sale, pay such excess to said former owner; and in case said treasurer, upon such demand, shall not be fully satisfied as to the right of the person demanding the same to receive it, or in case of different claimants, it shall be the duty of said treasurer to file his bill of interpleader, in the court of common pleas of the county where such land was sold, wherein he shall make the person or persons claiming such excess, and the state of Ohio, defendants, and such suits shall be proceeded in according to the usages of courts of chancery upon bills of interpleader; and, in all cases, the costs of such proceeding shall be paid by the person or persons claiming said excess, as the court shall order; and it shall be the duty of the prosecuting attorney of the county to attend to the same, in behalf of the treasury."

I think it is clear from a reading of this section that the word "costs," as used in section 5757 G. C., meant and referred to "all other expenses incidental to and arising from the sale." It would seem, therefore, to be the policy of the statute to pay all expenses arising out of the sale from the proceeds of the same.

This view is strengthened by the fact that it is the general policy of the law, as declared in 37 Cyc., 1363, that:

> "The costs and expenses of a tax sale are payable out of the proceeds of the sale and the county or city is not to be held liable for them."

Under section 5762 G. C., when the county auditor "deems it necessary," he directs the county surveyor to "ascertain the boundaries of the tract of land so purchased." Section 2822 of the General Code, above quoted, provides for a fee charged by the county surveyor "for calculating the contents of a tract not exceeding four sides, six cents, and for each additional line ten cents."

From a consideration of these sections, and the authorities above quoted, I am of the opinion, in answer to your first question, that the county surveyor may charge a fee for ascertaining the boundaries of land sold at a forfeited land sale, when requested so to do by the county auditor, under section 2822 G. C., and that this fee should be paid from the amount received for the lands at the sale.

Now the two remaining questions are, may the auditor, if he finds such lands do not exist, refund the money to the purchaser, and may he, in such cases, correct his duplicate "by taking off the tracts of lands which are included in the lands of other owners."

The first of these questions is answered in the affirmative by an opinion of this department rendered by my predecessor, Hon. Edward C. Turner, on May 4, 1916, in which he held such money could be refunded by the auditor under sections 2589-90. I agree with this opinion and am enclosing you a copy of same.

The remaining question, then, is, can the auditor correct his duplicate.

Section 2588 G. C. reads:

> "From time to time the county auditor shall correct all errors which he discovers in the tax list and duplicate, either in the name of the person charged with taxes or assessments, the description of lands or other property or when property exempt from taxation has been charged with tax, or in the amount of such taxes or assessment. If the correction is made after the duplicate is delivered to the treasurer, it shall be made on the margin of such list and duplicate without changing any name, description or figure in the duplicate as delivered, or in the original tax list, which shall always correspond exactly with each other."

In the case of Commissioners of Hamilton County v. Brasgears et al., 9 American Law Record, 626 (6 Dec. Rep. 1027), it is held:

> "Where through a clerical error of the county auditor in transcribing the number of acres of land to be valued by the decennial appraiser, and the appraiser values land that has no existence in fact, by reason of such mistake the auditor is authorized by 1038 R. S. to correct the valuation as well as description, and the commissioners are authorized to instruct the auditor to refund taxes paid upon such erroneous valuation, as provided in said section." (Section 1038 R. S. referred to above is now known as Section 2588 G. C.)

In this case the court say at page 627:

> "In this case by a clerical error of the auditor, the appraiser was led to assess real estate having in fact no existence whatever, giving it a valuation

which would not have occurred but for the error of the auditor. The auditor in discovering his error corrected it, that is, as to the number of acres, but the valuation remains the same. The owner paid on an incorrect valuation. We think the error was not a fundamental error, but an error wholly clerical. An error of the hand, not of judgment and discretion, and the assessor having fixed a valuation of $2,500.00 to something that had no existence, it became the plain duty of the auditor, upon the request of the property holder to certify the fact to the commissioners, and for them to instruct him to draw his warrant for the amount of taxes so overpaid, *and it became the duty of the auditor to correct the error in the valuation as well.*"

In the case of Christ v. Eihrich, 13 N. P. (n. s.) 457:

"One Harms had conveyed certain property in 1875, but in 1883 such property still apparently listed for taxation in the name of Harms, became delinquent and the same was sold at delinquent sale in January, 1883, to one Kelly, who paid the taxes then appearing due thereon as of record in the auditor's office, and received from the auditor the usual certificate of purchase, which certificate Kelly assigned, about a month later, to one Hill. In December, 1883, the auditor discovered that an error had been made, and refunded to Hill the money paid for the certificate of purchase at said tax sale. The auditor, then, as appears by the agreed statement of facts, upon which this case is submitted, made an entry 'on the tax sale records of his office on the same lines where said tax sales are recorded' in the following words: 'Double entry; money refunded December 5, 1883.' The auditor, however, did not take this parcel of land from the tax duplicate, but the same was still carried in and remained listed in the name of said Hill."

Concerning this situation the court said at page 465:

"Evidently the attention of the auditor, however, was called to the mistake in December, 1883, by Hill, who then owned or held the certificate of purchase given Kelly, and the money paid therefor was refunded to Hill. It appears that the auditor at the time, upon the discovery of this mistake, made an entry on the tax records of his office on the same lines where said tax sales are recorded, to the effect that it was a double entry, and the money was refunded December, 1883. *The auditor at this time had knowledge of the mistake, and it was his plain duty to take this parcel of land from the tax duplicate; this he failed to do.*"

In answer, therefore, to your last question, I am of the opinion that the auditor has authority to and should correct his tax duplicate in these cases as soon as the error is apparent from the surveyor's report, noting in the margin thereof his reasons therefor.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

133.

FRANCHISE—WHEN GRANTED BY MUNICIPALITY AND SAME IS SILENT AS TO DURATION—IT IS SIMPLY INDETERMINATE AND NOT PERPETUAL—COUNCIL HAS NO AUTHORITY TO GRANT EXCLUSIVE FRANCHISE TO LIGHTING COMPANY IN PUBLIC HIGHWAYS—MAY GRANT FRANCHISE TO SECOND COMPANY AND FIX MAXIMUM RATE FOR CURRENT AT A LESS RATE THAN FIRST COMPANY.

Where a contract between a municipal corporation and an incorporated company is silent as to the duration of the franchise, such franchise is not perpetual but the duration thereof is simply indeterminate existing only so long as the parties mutually agree thereto.

A city council has no authority, under the powers granted and conferred upon it by the legislature as they now exist, to grant an exclusive franchise to an electric lighting company in the public highways of said city.

Where an electric lighting company has a franchise to use the public highways of a city for the purpose of furnishing electricity to the city and its citizens and the maximum rate to be charged by said company was mutually fixed by the city council and the company for a definite period of time, the city council may grant a franchise to a competing electric company and may fix by mutual agreement with said company the maximum rate to be charged by it for electric current at a less rate than that provided in the agreement in force with the other company.

COLUMBUS, OHIO, March 21, 1917.

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

GENTLEMEN:—Under date of March 9, 1917, you submitted to me for an opinion the following request:

> "The Circleville Light and Power Company, of Circleville, Ohio, has been granted the right by the city council to use the public highways of said city for the purpose of erecting and maintaining poles and wires for the purpose of furnishing electricity for light, heat and power to the city and its citizens, but no provision was made in the ordinance for the duration of the franchise or right to use the public highways, and the maximum rate to be charged by said company was mutually fixed for a period of ten years in a separate ordinance from the franchise ordinance and said period has not yet expired.
>
> "In view of the foregoing statement of facts:
>
> "1. Is said franchise perpetual?
>
> "2. Is said franchise exclusive?
>
> "3. If said franchise is not exclusive may the council of said city grant a franchise to a competing electric company and fix by mutual agreement with said company the maximum rate to be charged by it for electric current at a less rate than that provided in the agreement in force with the other company."

The first question that you present for solution was considered by the supreme court of Ohio in the case of East Ohio Gas Co. v. City of Akron, 81 O. S. 33. The

phraseology of the franchise granted the East Ohio Gas Co. by the council of the city of Akron was practically identical with that of the franchise granted to the Circleville Light and Power Co. except that the first one related to a gas company while the one in question here is an electric company, but the principles of law involved are the same. The fourth syllabus in said case reads as follows:

> "Where the contract between a municipal corporation and an incorporated company is silent as to the duration of the franchise, such franchise is not perpetual but the duration thereof is simply indeterminate, existing only so long as the parties mutually agree thereto. The incorporated company may therefore voluntarily forfeit its right to exercise its privileges within the municipality and wholly withdraw therefrom; but in such case the municipality has no right to prevent the incorporated company from removing its property, nor to take possession of and make use of the same, nor to grant the right to use the same to another company, without due process of law."

It is apparent, therefore, that the doctrine laid down as aforesaid is applicable to the particular case presented by you in that the franchise in question is indeterminate as to the extent in point of time as a general proposition, but inasmuch as the council and the company have mutually agreed upon the furnishing of electricity by said company to the city and its citizens at not exceeding a certain rate for a certain definite period of time, that the franchise is determined as to that period and amounts to a contract that is binding upon both parties and enforcible by either. When the period mutually agreed upon for the exercise of the franchise by the furnishing of current by said company at a certain rate has expired, the franchise then assumes again its character of being indeterminate and may be terminated by either party at will.

Answering your first question specifically, I am of the opinion that the franchise in question is not perpetual, but the duration thereof is simply indeterminate, existing only so long as the parties mutually agree thereto.

Your second question is whether or not the franchise is exclusive in its scope. It is my understanding that the franchise proper contains no provision stating that the rights of the grantee in the public highways of said city are exclusive. The only right given is that, as stated above, to use the public highways for the purposes mentioned; but regardless of that the supreme court of Ohio has held in the leading case of State ex rel. v. Cincinnati Gas, Light and Coke Co., 18 O. S. 262, that in the absence of an express grant by the legislature or an implication from the powers expressly granted so strong as to make its existence free from doubt, that a city council has no authority to grant an exclusive right to use the streets and alleys of a city for public utility purposes. No such express grant of power or implication of such strong character as required was found in the powers given a city council by the legislature and the court held that the franchise right was not exclusive.

This case has been cited time after time by the supreme court and the rule of law as to exclusiveness of a franchise has been sustained by the supreme court repeatedly; and there is no question but what the doctrine as set forth therein is the law of the state today, the theory being that to hold a franchise exclusive in this respect would amount to the creation of a monopoly and it is contrary to public policy and the best interests of the public to grant exclusive privileges. The power of municipalities with respect to granting exclusive franchises has not been changed in substance since the decision was made in the leading case hereinbefore mentioned, and, hence, a city council has no right to grant a monopoly

and thereby place restraint upon the right of competition at a future date when some other city council might feel that it would be better to have competition in the furnishing of some certain public commodity.

Hence, for the reasons given above, I am of the opinion that the franchise granted the electric company in question is not exclusive and that under the powers granted and conferred upon a municipality by the legislature as they now exist no right is given a city council to grant an exclusive franchise to an electric lighting company in the public highways of such city.

Your third question is, if council has fixed a maximum price for one company does that fact prevent council within ten years from fixing a lower maximum price for another company.

Sections 3982 and 3983 of the General Code read as follows:

> "The council of a municipality in which electric lighting companies, natural or artificial gas companies, gas light or coke companies, or companies for supplying water for public or private consumption, are established, or into which their wires, mains or pipes are conducted, may regulate from time to time the price which such companies may charge for electric light, or for gas for lighting or fuel purposes, or for water for public or private consumption, furnished by such companies to the citizens, public grounds, and buildings, streets, lanes, alleys, avenues, wharves and landing places, or for fire protection. Such companies shall in no event charge more for electric light, natural or artificial gas, or water, furnished to such corporation or individuals, than the price specified by ordinance of council. The council may regulate and fix the price which such companies shall charge for the rent of their meters, and such ordinance may provide that such price shall include the use of meters to be furnished by such companies, and in such case meters shall be furnished and kept in repair by such companies and no separate charge shall be made, either directly or indirectly, for the use or repair of them.
>
> "Sec. 3983. If council fixes the price at which it shall require a company to furnish electricity or either natural or artificial gas to the citizens, or public buildings or for the purpose of lighting the streets, alleys, avenues, wharves, landing places, public grounds or other places or for other purposes, for a period not exceeding ten years, and the company or person so to furnish such electricity or gas assents thereto, by written acceptance, filed in the office of the auditor or clerk of the corporation, the council shall not require such company to furnish electricity or either natural or artificial gas, as the case may be, at a less price during the period of time agreed on, not exceeding such ten years."

It is clear from the provisions of the two foregoing sections of the General Code that the right is vested in the city council to determine the maximum rate that may be charged by an electric light company for current furnished to the city and its citizens. If said company agrees to and assents to such rates fixed by council and files its written consent in the office of the city auditor, then the relationship between the city council and the company is a contractual one and is binding for and during the period for which such rates are fixed, not exceeding ten years. (Gas & Fuel Co. v. City of Chillicothe, 65 O. S. 186.) This relationship, however, goes only to the extent that the city council has no right during the time fixed to require the light company to furnish current at a less rate than the maximum amount determined upon and on the part of the light company that it has no right during the same period to demand in excess of that amount.

The contract does not vest in the light company the right to have no competitors who might furnish electricity at a less rate for, as has been considered heretofore, the franchise right that the company acquires is not exclusive in its nature.

The case of Gas & Fuel Co. v. Columbus, 16 O. D., N. P., 359, is in point on the particular question and seems to be the only case in Ohio as far as I have been able to find that has passed on the exact question. The opinion is a well considered one and syllabi 2, 3 and 4 contain the principles of law applicable to this question and are as follows:

> "2. Monopolies are odious, and it is contrary to public policy and the best interests of municipalities to grant exclusive privileges which will in effect create them; hence, if a municipal corporation has fixed the maximum price of natural gas under favor of Rev. Stat. 2478, 2479, and a company has accepted the provisions of the ordinance and engaged in supplying gas thereunder, injunction will not lie to restrain such municipality from fixing a lower maximum price for a competing company.
>
> "3. An ordinance fixing the price which may be charged for natural gas by a competing company does not, as a matter of law, operate as a requirement that the company engaged in selling gas under a prior ordinance fixing a higher maximum rate shall furnish gas at the reduced price fixed by such latter ordinance, and does not, therefore, impair the obligation of the contract of the old company.
>
> "4. A gas company will not be heard to attack an ordinance fixing the price at which gas may be sold by a new competing company on the ground that, being general in its nature, it lacks uniform operation, where it appears that the complaining company is allowed under the terms of a prior ordinance to sell gas at a higher price than its competitor will be, under the new ordinance."

The following excerpt from the opinion of the supreme court in the case of City of Columbus v. The Columbus Gas Co., 76 O. S. 339, also sets forth some general principles that are applicable to the particular situation:

> "The defendant and its assignor, the Columbus Gas Light and Coke Company, under prior ordinances and the one under consideration have occupied and used many of the city streets and grounds for the transaction of its business for over half a century, and when the last ordinance was passed and accepted, both the city and the company were facing the future, not knowing what it might unfold as to new means of furnishing light. The company was content with past profits, and would venture upon the unknown future. If its profits are now behind it, the city should not be tied to the destiny of the company and be obliged to exclude other gas and electric companies, to the great detriment of its inhabitants. What time has developed, the company must be held to have contemplated.
>
> "In respect to the gas company, the contract may now be a hard one to comply with, but there are innumerable instances in business life where contracts of parties have become hard and unprofitable, yet the courts cannot discharge from liability on that ground, for such risks were assumed when the contracts were made."

In view of the foregoing, therefore, I am of the opinion, answering your question specifically, that the council of the said city of Circleville may grant a

franchise to a competing electric company and fix by mutual agreement with said company the maximum rate to be charged by it for electricity at a less rate than that provided in the agreement in force with the other company.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

134.

COUNTY INFIRMARY—SUPERINTENDENT NOT PUBLIC OFFICER—NOT REQUIRED TO HAVE QUALIFICATIONS OF ELECTOR.

The superintendent of a county infirmary is not a public officer and therefore not required to have the qualifications of an elector.

COLUMBUS, OHIO, March 22, 1917.

HON. J. H. FULTZ, *Prosecuting Attorney, Lancaster, Ohio.*

DEAR SIR:—On March 3rd you addressed the following inquiry to this office:

> "In the examination under the civil service laws of our state an elector and citizen of the United States and having a residence in the state of Ohio of six months wishes to take the competitive examination by appointment under the civil service laws of Ohio for superintendent of the county infirmary. Would he be eligible to appointment provided he obtained a passing grade?"

The ultimate question involved is as to whether or not the superintendent of the infirmary is an officer. If he is, then under article XVI, section 4, of the Constitution, he must have the qualifications of an elector. Otherwise this is unnecessary.

His duties are defined by G. C. section 2523.

The supreme court has decided that he is not an officer. (Palmer v. Zeigler, 76 O. S., 210.)

Your inquiry, of course, is answered in the affirmative.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

134½.

TEXT BOOKS—PUBLISHERS SHOULD FILE SAME TOGETHER WITH PRICE LIST WITH SUPERINTENDENT OF PUBLIC INSTRUCTION EACH FIVE YEARS—THE FIVE-YEAR PERIOD IN SECTION 7710 APPLIES ONLY TO THE FILING OF SAID LIST.

Under G. C. 7710 providing a school book commission and for filing text books with the superintendent of public instruction, it is necessary to file a given text book with the published list wholesale price each five years.

The five-year period mentioned in said section applies to such filing, and does not refer to the five-year period provided in section 7713, during which a board of education may not make a change of text books.

COLUMBUS, OHIO, March 22, 1917.

HON. FRANK B. PEARSON, *Superintendent of Public Instruction, Columbus, Ohio.*

DEAR SIR:—Your letter of January 22, 1917, requests my opinion as follows:

"Please give us your construction on these parts of sections 7709, 7710, 7711, 7712 and 7713 G. C., which apply to the following:

"(1) How often should publishers file their books and prices in order to do business continuously in Ohio?

"(2) To what does the five year period of time mentioned in General Code section 7710 apply, the filing period or the furnishing period?"

Your inquiry involves the consideration and construction of the sections of the General Code which provide for the filing of text books and the prices thereon by the publishers, with the superintendent of public instruction of Ohio, the fixing of maximum prices thereon by the commission designated for that purpose and the adoption of such text books by boards of education.

General Code section 7709 provides as follows:

"Any publisher or publishers of school books in the United States desiring to offer school books for use by pupils in the common schools of Ohio as hereinafter provided, before such books may be lawfully adopted and purchased by any school board, must file in the office of the superintendent of public instruction, a copy of each book proposed to be so offered, together with the published list wholesale price thereof. No revised edition of any such book shall be used in common schools until a copy of such edition has been filed in the office of the superintendent together with the published list wholesale price thereof. The superintendent must carefully preserve in his office all such copies of books and the price thereof."

General Code section 7710 provides:

"When and so often as any book and the price thereof is filed in the office of the superintendent of public instruction as provided in section 7709, a commission consisting of the governor, secretary of state and superintendent of public instruction, immediately shall fix the maximum price at which such books may be sold to or purchased by boards of education, as

hereinafter provided, which price must not exceed seventy-five per cent. of the published list wholesale price thereof. The superintendent of public instruction immediately shall notify the publisher of such book so filed, of the maximum price fixed. If the publisher so notified, notifies the superintendent in writing that he accepts the price fixed, and agrees in writing to furnish such book during a period of five years at that price, such written acceptance and agreement shall entitle the publisher to offer the book so filed for sale to such boards of education."

The answer to your first question is found, if not expressly, by absolutely necessary implication, in section 7710 G. C.

If the publisher in the manner therein provided agrees to furnish the book for five years at the price fixed by the commission provided in such section, there is no occasion for filing the book again within that period, as the agreement to furnish it for that time at that price obviates any further necessity for filing again during that period.

To be exact about it, the five-year period would commence at the beginning of the contract period, which in the nature of the case is very shortly after the filing of the book. The compliance with this section, so to speak, fixes a *modus vivendi* for this period and establishes a contract relation between the publisher on one side and the superintendent on behalf of the schools of the state on the other side. There would appear no doubt of this construction if the attention be confined to this section alone, as there is only one five-year period mentioned. Some doubt seems to be cast on it, however, by the provisions of section 7713 forbidding the change of text books for the period of five years after the date of the adoption thereof. Inasmuch as a text book might be adopted at any time during the five years of the contract relation above provided, leaving a period of less than five years at which it could be obtained for that price, it might be argued that the five-year period was variable, and that it meant five years in each case from the adoption of the book by the local board. Such construction, however, does violence to the language of section 7710, and is unnecessary in order to reconcile the two sections. The provision against a change for five years is simply for the prevention of frequent and unreasonable changes. The price might be changed during the five years that a book was adopted and used by a local board, but this could work no injury or injustice to the local board, as the changed price would be fixed by the commission above provided and in contemplation of the trend of events at the time of the enactment of these statutes the expectation would have been that the price would be reduced as during a long period the production of books, as all other articles depending upon constantly improving methods of manufacture was cheapening, but whether the changed price be lower or higher can work no mischief or at least no injustice to the ultimate purchaser of the text book, the period of five years being fixed by the legislature as a reasonable time during which the price might remain unchanged.

This discussion necessarily disposes of the second question along with the first, and your two questions are, therefore, answered. First, the publisher should file his books and list prices thereon every five years; second, the five-year period of time mentioned in section 7710 applies to the filing of the copy in the office of the superintendent of public instruction and the fixing of the price as provided in that section.

Yours very truly,
JOSEPH MCGHEE,
Attorney-General

135.

ASSESSORS AND ASSISTANT ASSESSORS—FORM OF BOND NOT REQUIRED TO BE CHANGED BY AMENDMENT TO SECTION 3350—FORM OF OATH TAKEN BY ASSISTANT ASSESSOR CHANGED.

Amendment of section 3350 of the General Code by senate bill 177 does not require a change in the form of bond to be furnished by assessors and assistant assessors, but necessitates a change in the form of oath taken by the latter.

COLUMBUS, OHIO, March 23, 1917.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I have at hand your letter of March 10, 1917, in which you say:

> "The commission is enclosing herewith blank forms of bond of assessor and bond of assistant assessor, the form for which was prescribed by your predecessor. The form for bond of assessor was used in the case of assessors elected in November, 1915, and the same were executed for a term of two years commencing on the first day of January, 1916.
>
> "The commission presumes that it will not be necessary for assessors who have already executed this bond to execute another bond, unless a change in the form of the bond is necessitated by the passage of the new tax law. There will no doubt be a number of vacancies, however, which will have to be filled by appointment, and such assessors will be required to execute bonds.
>
> "The commission desires to know whether you approve of the form herewith enclosed for use in such cases, and, if you do not, requests that you prescribe a form as required by section 3351 of the General Code as re-enacted in senate bill No. 177. You are also requested to prescribe a form of bond of assistant assessor if any change in the form herewith enclosed is necessary by the passage of senate bill No. 177. While this bill has not yet become a law, the commission is anticipating its passage so that it may be prepared to furnish the bonds promptly."

By way of answer to the inquiry made by you I beg to say that I see nothing in the provisions of senate bill No. 177 which makes necessary any change in the form of the bond of an elected assessor or in the form of the oath of office made by him. Neither do I see anything in the provisions of senate bill 177 which necessitates any change in the form of the bond to be given by an assistant assessor.

Section 3349 of the General Code is neither repealed nor amended by the proposed new law, and hereafter, as before, assessments of property will be made territorially by the cities, wards or districts and by villages and townships.

The various acts and defaults which, under section 3351 as amended in senate bill No. 177, make the assessor and the assistant assessor liable on their respective bonds are the same as those mentioned in section 3351 as amended in the Parrett-Whittemore bill. Neither has there been any change in the amounts named as the penalty in the bond to be given by the assessor and assistant assessor respectively.

Under section 3350 of the General Code, as amended by the new law, the assistant assessor of any ward, district, village or township is appointed by the

elected assessor instead of by the county auditor as now provided in section 3350 of the General Code. However, as to this the recital in the bond of an assistant assessor need only be that:

"he has been duly appointed assistant assessor,"

and therefore no change in the form of such bond in this respect is made necessary by the change in the provisions of section 3350 of the General Code with respect to the manner of appointing such assistant assessor.

Under the provisions of section 3350 of the General Code, as amended, it may be doubted whether the orders, rules and regulations of the county auditor with respect to the assessment of property operate directly on an assistant assessor inasmuch as under the provisions of said section, as amended, such assistant assessor performs his duties under the immediate direction of the assessor.

Section 5367 of the General Code, requiring the county auditor to instruct assessors as to their duties, has not been changed in any manner by the new law, except as to the time of meeting, and in as much as it will clearly be the duty of an assistant assessor appointed under the provisions of section 3350 of the General Code, as amended, to conform in the performance of his duties with all competent and lawful orders and instructions of which he is advised by the assessor, I see no substantial reason for making any change in the conditions prescribed in the form of the bond of an assistant assessor in this respect. The same can be said of the conditions in said bond requiring an assistant assessor to observe the orders, rules and regulations of the tax commission of Ohio. In any event, the conditions in said bond form with respect to the observance of orders, rules and regulations of the county auditor and the tax commission of Ohio can only refer to such orders, rules and regulations as may be completely and lawfully made, and I see no substantial reason why the bond form should be changed in this respect.

The provisions of section 3350, as amended, do not provide for the term or period of time for which the assistant assessor is to be appointed, but neither, for that matter, do the present provisions of section 3350, so this matter can be left in blank the same as is provided for in the form of an assistant assessor's bond prepared by my predecessor.

It is obvious, however, that change must be made in the form of the oath taken by an assistant assessor appointed under the provisions of section 3350 of the General Code, as amended. Such oath, to comply with the provisions of section 3352 should be in the following form:

"OATH OF OFFICE

"State of Ohio, _____ county, ss:

"I, _____do hereby solemnly swear (or affirm) that I will support the Constitution of the United States, the Constitution of the State of Ohio, and that in the capacity of assistant assessor for_____

_____

(Here insert the name of ward or district of the city, or of the village or township for which said assistant assessor has been appointed.)

"_____County, Ohio, to which office I have been appointed, I will faithfully and impartially perform the duties imposed upon me by law.

"_____

"Sworn to before me and subscribed in my presence this_____
day of _____A. D. 191____.

"_____
"_____"

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

136.

WIDOWED MOTHER—WHO HAS RECEIVED COMPENSATION FROM INDUSTRIAL COMMISSION NOT BARRED FROM RECEIVING ALLOWANCE UNDER MOTHER'S PENSION ACT.

The mere fact that a widowed mother has been allowed compensation by the industrial commission of Ohio will not, standing alone, prevent her from receiving an allowance under the mother's pension act.

COLUMBUS, OHIO, March 23, 1917.

HON. HOMER L. BOSTWICK, *Probate Judge, Columbus, Ohio.*

DEAR SIR:—I have your letter of February 27, 1917, as follows:

> "Will you kindly give us an opinion on the following questions which have come up in regard to a mother's pension allowance?
>
> "(a) Would a mother be entitled to a pension whose husband is dead but had not taken out naturalization papers in this country?
>
> "(b) Would a mother be entitled to a pension who has been allowed compensation through the industrial commission of the state?"

Your first question is answered in the affirmative in an opinion of this department rendered March 5, 1917, to Bernard M. Focke, prosecuting attorney, Dayton, Ohio, in which it was held:

> "Under the provisions of the law relating to mothers' pensions, the widow of an unnaturalized person is entitled to a pension under the same conditions as if the widow of a naturalized citizen."

For your information I am enclosing a copy of this opinion.

Answering your second question, section 1683-2 reads in part as follows:

> "For the partial support of women whose husbands are dead, or become permanently disabled by reason of physical or mental infirmity, or whose husbands are prisoners or whose husbands have deserted, and such desertion has continued for a period of three years, when such women are poor, and are the mothers of children not entitled to receive age and schooling certificate, and such mothers and children have a legal residence in any county of the state for two years, the juvenile court may make an allowance to each of such women as follows: * * *"

Section 1683-3 sets out the conditions which must obtain before a mother's pension can be allowed to any mother. They are as follows:

> "First, the child or children for whose benefit the allowance is made, must be living with the mother of such child or children; second, the allowance shall be made only when in the absence of such allowance, the mother would be required to work regularly away from her home and children, and when by means of such allowance she will be able to remain at home with her children, except that she may be absent for work for such time as the court deems advisable; third, the mother must in the judgment of the juvenile court be a proper person, morally, physically and mentally for the bringing up of her children; fourth, such allowance shall in the judgment of the court be necessary to save the child or children from neglect and to avoid the breaking up of the home of such woman; fifth, it must appear to be for the benefit of the child to remain with such mother;"

It will be noted that section 1683-2 G. C. provides that these mothers may be entitled to pensions "when such women are poor," and section 1683-3 provides that "the allowance shall be made only when in the absence of such allowance the mother would be required to work regularly away from her home and children." A mother may be receiving an award from the industrial commission of Ohio and still be "poor" within the meaning of section 1683-2. It may be too that the allowance allowed by the industrial commission is insufficient to allow the mother to refrain from working "regularly away from her home and children." These are questions of fact to be decided by the court, but, in answer to your second question, it is my opinion that the mere fact that a widowed mother has been allowed compensation by the industrial commission of Ohio will not, standing alone, prevent her from receiving an allowance under the mother's pension act.

Yours very truly,

JOSEPH MCGHEE,

Attorney-General.

137.

COUNTY COMMISSIONERS—WHEN NO BIDS ARE RECEIVED WITHIN ESTIMATE UNDER 6946—MAY AMEND ESTIMATE—READVERTISE, AND ACCEPT BID IF WITHIN AMENDED ESTIMATE.

Under section 6946 G. C. the county commissioners may, if they receive no bids within the estimate, amend the estimate and proceed to advertise again under the provisions of section 6945 G. C., and under said second advertisement let the contract, provided there are bids within the amended estimate.

COLUMBUS, OHIO, March 23, 1917.

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

GENTLEMEN:—Your communication of March 19, 1917, in which you ask my opinion in reference to a certain matter set out therein, was received. Your communication reads as follows:

> "In a certain county of the state, the commissioners recently asked for bids for the construction of a road, but received no bids at the engineer's estimate of the cost.
>
> "May the commissioners now order a re-estimate and sell same under the provisions of section 6946 of the General Code, 106 O. L. 607, without readvertising at the original estimate?"

The question you have in mind arises from the fact that the language used in section 6946 G. C. is not altogether consistent. Undoubtedly the language used in this section is not the exact language that the legislature intended to use to express ideas it had in mind, but it remains for us to place a construction upon the language used, in order to arrive at the course which ought to be pursued thereunder, and not to construe the language that might have been used by the legislature in giving expression to its views.

The difficulty arising under the provisions of this section is due to the fact that it provides:

> "Sec. 6946. * * * If no bids are made within the estimate, the county commissioners *may amend the estimate,* and again proceed to advertise *at the original estimate,* for bids. * * *"

That is, the section provides that the county commissioners may amend the estimate, but further provides that if they proceed to advertise further for bids, they shall advertise at the original estimate, thus apparently rendering the amended estimate of no force or effect.

Now, the question is as to whether such a construction can fairly be placed upon this statute, as to render said provisions harmonious. It is my opinion that the phrase "at the original estimate" is mere surplusage, as used in said section, and has no force or effect whatever. To establish this assumption, I desire to call attention to the provisions of several other sections of the same act.

Section 6911 G. C. provides:

> "When the board of commissioners have determined that any road shall be constructed, improved or repaired, as herein provided for, such

board * * * shall order the county surveyor to make such surveys, plats, profiles, cross-sections, estimates, and specifications as may be required for such improvement. * * *"

For what purposes and with what object in view is the county surveyor ordered to make such surveys, plats, profiles, etc., and how are they to be used in reference to the question of advertising for bids and the letting of the contract under such advertising?

Section 6945 G. C. provides for advertising for bids, which section reads in part as follows:

"After the commissioners have decided to proceed with said improvement, they shall advertise for bids. * * * Such notice shall state that plans and specifications for such improvement are on file in the office of the county commissioners, and the time within which bids will be received. * * *"

Now, it will be noticed that under the provisions of this section, in reference to advertising, no part of the above information is used with the exception of the "plans and specifications." The estimate of the cost and expense of such improvement is not required to be set out in the advertisement at all under the provisions of said section. The estimate has nothing to do with the matter of advertising. In fact, it is doubtful whether it is for the best interests of the county that the bidder should be informed as to the estimate of the cost and expense of the proposed improvement.

If one were to build a house and decided that he had five thousand dollars to invest, and no more, in a certain kind of a property, the last thing he would do would be to give this information to those who were about to bid for the construction of the house, he well knowing that if the bidders knew the amount of money he had to invest, no bidders would fall very far below the amount fixed by the one who had the building of the house in mind; and it undoubtedly works out along the same line when persons bid for the construction of a public work. If they know that the estimated cost and expense of said improvement is fixed at a certain amount and that the contract cannot be let at a figure above the estimate, but can be let at any figure within the estimate, the general inclination will be to make the bids at a figure not very much below the estimate.

So that while the law does not forbid the setting out of the estimate in the advertisement for bids, yet it can fairly be stated that the estimate does not form any material part of the advertisement for bids, and that the law possibly does not contemplate that the estimate should be set out in the advertisement for bids.

That the law does not contemplate the setting out of the estimate in the advertisement for bids would seem evident from this provision of section 6946 G. C.:

"No contract for any improvement shall be awarded at a greater sum than the estimated cost thereof. * * *"

To be sure, if the bidders know what the estimated cost of the improvement is, they will make no bid above the estimated cost and hence this provision of the law is rendered almost nugatory.

Now, if the conclusion is correct that the estimate has no place whatever in the advertisement for bids, what is the force and effect of the phrase "at the original estimate," found in section 6946 G. C.? None whatever. And the section as it is

written means nothing more than it would mean if said phrase "at the original estimate" were omitted from the section.

Hence, it is my opinion that said section should be construed as if it read as follows:

> "No contract for any improvement shall be awarded at a greater sum than the estimated cost thereof. The bids received shall be opened at the time stated in the notice. If no bids are made within the estimate, the county commissioners may amend the estimate, and again proceed to advertise for bids, but the county commissioners shall have the right to reject all bids."

Therefore, it is my opinion that the county commissioners in the case suggested by you may, if they so desire, amend the estimate of the cost and expense of the proposed improvement, and again proceed to advertise for bids under the provisions of section 6945 G. C., and let the contract to the lowest and best bidder thereunder, provided the bid is within the amended estimate.

There is another construction which can be placed upon section 6946 G. C., which would lead to exactly the same conclusion and which in my opinion is possibly what the legislature intended to do, and that is to read said section, substituting the word "or" in the place of the word "and," which is always allowable in the construction of statutes. The section would then read:

> "Sec. 6946. No contract for any improvement shall be awarded at a greater sum than the estimated cost thereof. The bids received shall be opened at the time stated in the notice. If no bids are made within the estimate, the county commissioners may amend the estimate, *or* again proceed to advertise at the original estimate, for bids, but the county commissioners shall have the right to reject all bids."

If this construction is placed upon the statute, the county commissioners in the case suggested by you would have one of two courses open for them to follow. The one would be that they might amend the estimate and proceed to advertise under section 6945 G. C. for bids, *or* they might proceed to advertise for bids a second time under section 6945 G. C., and not amend the original estimate. As I said before, I am rather of the opinion that this was the intention of the legislature.

In section 1207 G. C. we find the following provision made in reference to advertising for bids for intercounty highways or main market roads:

> "* * * If no acceptable bid is made within the estimate, the state highway commissioner may either readvertise the work or amend the estimate * * * and * * * again proceed to advertise for bids. * *"

Thus in this section we find that the state highway commissioner has one of two courses open to him, which he may pursue. And when we remember that this statute is one complete scheme for road building, not only as it applies to the state, but to the counties and townships as well, it is my opinion that the same provision was meant to be included in section 6946 G. C. as is found in section 1207 G. C.

But even though we assume the latter construction of this section to be the correct one, yet the county commissioners in the case suggested by you may, if they desire, proceed to amend the estimate and then advertise for bids under section 6945 G. C., and let the contract to the lowest and best bidder, provided any of said bids be within the amended estimate.

Very truly yours,

JOSEPH MCGHEE,
Attorney-General.

138.

OFFICERS COMPATIBLE—COUNTY CORONER AND MAYOR OF VILLAGE.

The offices of county coroner and mayor of a village are not incompatible and may be held by one and the same person.

COLUMBUS, OHIO, March 23, 1917.

HON. C. C. CRABBE, *Prosecuting Attorney, London, Ohio.*

DEAR SIR:—I have your letter of March 20, 1917, as follows:

> "There is a vacancy in the office of county coroner, and the commissioners are about to appoint Dr. A. F. Green, who is mayor of the village of West Jefferson, this county.
>
> "As to many county offices the statute designates who cannot be elected to such office, but is silent as to county coroner.
>
> "In your opinion will the duties of county coroner and mayor of a village be incompatible.
>
> "The commissioners would like to make this appointment on next Monday, and I will be pleased if you can give me your opinion on this matter in the meantime."

The rule of common law incompatibility is stated by the court in the case of State ex rel. v. Gebert, 12 C. C. (n. s.) 274, as follows:

> "Offices are incompatible when one is subordinate to or in any way a check upon the other; or when it is physically impossible for one person to discharge the duties of both."

I have carefully examined the statutes relating to the duties of a county coroner and mayor of a village and have been unable to find anything that prohibits one person from holding both of these offices under the foregoing rule.

I am, therefore, of the opinion, in direct answer to your question, that a village mayor may also serve as coroner of the county.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

139.

IN DETERMINING WHETHER OR NOT FIFTY-ONE PER CENT. OF THE LAND OWNERS HAVE SIGNED PETITION FOR CONSTRUCTION OR REPAIR OF HIGHWAY—ONLY RESIDENT LAND OWNERS ARE TO BE FIGURED AS A BASIS OF COMPUTATION.

In arriving at a conclusion as to whether fifty-one per cent. of the land or lot owners have signed a petition asking for the construction, reconstruction or repair of a public road under Sec. 6907 G. C., none but resident lot or land owners are to be included in the number to be used as a basis of computation.

COLUMBUS, OHIO, March 24, 1917.

HON. CHARLES L. BERMONT, *Prosecuting Attorney, Mt. Vernon, Ohio.*

DEAR SIR:—I have your communication of March 14, 1917, in which you ask my opinion in reference to a certain proposition therein set out. Your communication reads as follows:

> "I desire to submit the following for an opinion:
> "A petition has been filed with the commissioners of this county, asking for the improvement of a road under the provisions of section 6906 and following of the General Code. There are seventy-seven land or lot owners who will be specially taxed for this improvement, seven of whom are non-residents of Knox county, leaving seventy resident land owners, thirty-six of whom have signed the petition.
> "The question now arises, have the petitioners the required 51 per cent. of the land or lot owners.
> "I have advised the commissioners that the required 51 per cent. have not signed the petition and base my opinion on a comment upon sections 6907, 6908 and 6909, given by Judge Wm. M. Rockel, in his work on Ohio Roads and Bridges, in which he gives as his opinion that non-resident land or lot owners are to be counted against the petition.
> "The parties petitioning for this improvement are not content with my ruling on the subject and I, therefore, desire a ruling from your department as to whether non-resident land or lot owners are to be counted against the improvement or not. In other words would it take 51 per cent. of all the lot or land owners or just 51 per cent. of the resident land owners?"

Your question briefly stated is as to whether non-resident property owners, who are to be benefited in the construction, reconstruction or repair of any public road, are to be counted in the total number of property owners so to be benefited by an improvement. This especially when said total number of property owners so benefited is to be used as a basis of computation in arriving at a conclusion as to whether fifty-one per cent. of the property owners who are to be especially taxed or assessed for said improvement have signed the petition.

I note in your communication that you have rendered an opinion to your board of county commissioners to the effect that non-resident property owners are to be included in the total number of property owners in arriving at a conclusion as to whether fifty-one per cent. of the total have so signed the petition asking for the improvement.

You state that there are seventy-seven land or lot owners who will be especially taxed for the particular improvement now under consideration by your county

commissioners. Seven of these land or lot owners are non-residents of Knox county, leaving seventy who are resident land owners, and that thirty-six of these land or lot owners have signed the petition asking for the improvement. Of course it is evident that, if the non-resident lot owners are to be included in the total number, fifty-one per cent. of the total number have not signed the petition, but if the non-resident land or lot owners are not included in the total number, then fifty-one per cent. of said owners have signed the petition asking for the improvement, inasmuch as thirty-six is more than fifty-one per cent. of seventy, but on the other hand it is less than fifty-one per cent. of seventy-seven.

While the construction of sections 6907, 6908 and 6909 of the General Code and the language used by Rockel in his work on Roads and Bridges might warrant the construction you have placed upon these statutes and the conclusion you have drawn therefrom, yet in my opinion your conclusion is not correct.

In the first place I am assuming that the petition filed with the county commissioners sets out the method of paying the compensation, damages, costs and expense thereof under section 6919 of the General Code and whichever one of these different methods has been selected under the petition will control as to the number of lot or land owners who are to be benefited under and by virtue of said improvement. This is evident from the fact that you set out in your communication that there are seventy-seven different land or lot owners included under the terms and conditions set out in the petition.

Section 6907 G. C. reads as follows:

> "When a petition is presented to the board of commissioners of any county asking for the construction, reconstruction or repair of any public road or part theref, as hereinafter provided for, signed by at least fifty-one per cent. of the land or lot owners, *residents of such county,* who are to be specially taxed or assessed for said improvement as hereinafter provided, the county commissioners shall go upon the line of said proposed improvement within sixty days after such petition is presented and, after viewing the proposed improvement, shall determine whether the public convenience and welfare require that such improvement be made."

The question immediately arises under the above section as to the effect the words "residents of such county" have upon the remaining part of the section. In my opinion "residents of such county" modifies "of the land or lot owners." That is, the number of land or lot owners upon which the fifty-one per cent. is based, is land or lot owners residents of such county. The only other construction that could be placed upon these words would be that they modify fifty-one per cent. instead of land or lot owners, which words they immediately follow. But it is my opinion that said words "residents of such county" do not modify fifty-one per cent. but modify "land or lot owners." So that if the construction placed upon this section by me is correct wherever "land or lot owners" is used in the following sections of this statute it always refers to resident land or lot owners.

I am the more firmly convinced that the construction placed upon this section is correct by the provisions of section 6909 G. C. It will be noted in this section that "in determining whether the required number of persons have signed the petition asking for said improvement, necessary to give the county commissioners jurisdiction thereof, the following persons shall not be counted: Resident land owners whose only real estate within the territorial bounds of such road is located in a municipality." There are three other exceptions in said section, viz.: Owners

of life and leasehold estates; minors and tenants in common, unless all the tenants in common unite as one person.

Now let us notice carefully the reading of this section. It says that *"resident* land owners whose real estate is located in a municipality." If it were intended that *non-resident* land owners should be used in connection with *resident* land owners in arriving at the conclusion as to whether fifty-one per cent. of the total number of land owners had signed the petition, there would have been no reason or occasion for using *resident* land owners because the same rule that applies to resident land owners would apply to non-resident land owners, providing they were both to be used together as a basis for determining the question as to whether fifty-one per cent. had signed the petition or not.

There is another provision in this section to which I desire to call your attention and that is the following:

> "All tenants in common of any undivided estate, *resident within the county* shall be counted as a unit, and if all are not united either for or against the improvement, none of such tenants in common shall be counted in determining whether the requisite number of persons have signed such petition."

Now why use the words "resident within the county?" Because it was evidently the intention of the legislature to include none but resident land owners in the matters above set forth, even in the case of tenants in common. If one tenant in common resided out of the county and all the other tenants in common resided within the county, and the tenants in common residing within the county would agree one way or the other, they would count as a single unit either for or against the improvement. Hence, it is my conclusion that it is evident that it was the intention of the legislature not to include non-resident land owners in the matter of arriving at the conclusion as to whether fifty-one per cent. of the land or lot owners to be benefited by the improvement had signed the petition asking for the improvement.

Further, I believe this construction of the statute would be borne out by the practical side of the question. It might be very difficult and inconvenient for those interested in the construction, reconstruction or repair of any public road to get into communication with the land owners who are non-residents of the county. They might not only be non-residents of the county, but they might be non-residents of the state. Further, those land owners who reside outside of the county might not be much interested in having the road constructed, reconstructed or repaired for the reason that they would not possibly be in position to use the same after it would be so improved. Hence, it seems to have been the intention of the legislature, from the construction that can readily be placed upon the said statutes and from looking at the practical and reasonable side of the proposition, that non-resident land owners should not be included as a basis upon which to determine whether fifty-one per cent. of the owners of land to be benefited have signed a petition asking for the improvement.

Answering your question directly it is my opinion that, under the facts set out in your communication, fifty-one per cent. of the land or lot owners have signed the petition.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

140.

ABUTTING PROPERTY OWNERS—CANNOT BE RELIEVED OF THE PAYMENT OF 10 PER CENT. OF COST OF IMPROVEMENT OF INTERCOUNTY HIGHWAYS AND MAIN MARKET ROADS.

There is no provision of law relating to the construction of intercounty highways and main market roads by which the abutting property owners may be relieved of all or any part of the ten per cent. of the cost and expense of the improvement as provided for by statute.

COLUMBUS, OHIO, March 24, 1917.

HON. ROY R. CARPENTER, *Prosecuting Attorney, Steubenville, Ohio.*

DEAR SIR:—I have your communication of March 7, 1917, in which you ask my opinion with reference to a matter therein set out. Your communication reads as follows:

> "The state highway commissioner and the county commissioners of Jefferson county have entered into an arrangement for the improvement of about three miles of an intercounty highway, the improvement to start at the boundary line between Jefferson county and Harrison county, beginning near Hopedale and extending eastwardly towards Steubenville. The improvement is along a free turnpike, the road bed of which is ten feet wide. The improvement will consist of widening this road bed to a width of sixteen feet, and the construction of a ten foot dirt road alongside; the old pike to be scarified; the surface of the road, as improved to sixteen feet in width, to be Tarva bond. Of course you will see that this is not repair work, but it is an improvement amounting to almost reconstruction.
>
> "The property owners on either side are still paying between five and six mills on a bond issue for the payment of this original pike, and will continue to pay probably until about 1925. Referring to section 1217 G. C., that is Sec. 210 of the Cass road law, the latter part thereof reads:
>
> "'In no case shall the property owners abutting upon said improvement be relieved by the state, county or township, from the payment of ten per cent. of the cost and expense of such improvement, excepting therefrom the cost and expense of bridges and culverts, provided the total amount assessed against any abutting property does not exceed thirty-three per cent. of the valuation of such abutting property for the purposes of taxation.'
>
> "The question that confronts our county commissioners is must the said abutting property owners pay ten per cent. of this improvement irrespective of the fact that they are still assessed for the original bond issue for the original pike. Neither the commissioners nor the trustees of the township through which the improvement extends contemplate that the abutting property owners should pay any of this improvement."

Your query briefly stated is as to whether the state highway department, the commissioners of your county and the township through which a certain highway passes could make such arrangements as to relieve the abutting property owners entirely from paying any part of the cost and expense of the improvement. In your communication you make reference to section 1217 of the General Code and rather infer that there is doubt as to whether such a result could be obtained as you suggest.

It seems to be the policy of the statutes having to do with the construction of intercounty highways or main market roads that the abutting property owners shall in all cases pay ten per cent. of the cost and expense of the improvement, less the cost of the construction of bridges and culverts.

In noticing this matter I desire to call your attention to a number of sections of the statutes which seem to indicate the above policy.

First, let us note the provisions of section 1191 of the General Code. In this section provisions are made for the state highway commissioner to construct highways in any county of the state, either by contract or by force account, or in such manner as he may deem for the best interests of the public, wherein neither the county commissioners nor the township trustees of any township in the county make application for state aid. It is to be noted that in this section provision is made that ten per cent. of the cost of said construction or improvement shall be assessed against the land abutting thereon according to the benefits.

Section 1194 G. C. provides that the county commissioners or township trustees may expend any amount available by law for the construction, improvement, maintenance or repair of intercounty highways or main market roads within the county, providing the county commissioners or township trustees by resolution agree to pay the cost and expense of said improvement over and above the amount received from the state, *and the amount assessed against the abutting property owners.*

Section 1214 G. C. provides how the cost and expense of the improvement of intercounty highways and main market roads shall be apportioned among the county, the township or townships, and the abutting property owners, which is as follows: "The county shall pay twenty-five per cent. of all cost and expense of the improvement. Fifteen per cent. of the cost and expense of such improvement, except the cost and expenses of bridges and culverts, shall be apportioned to the township or townships in which such road is located. Ten per cent. of the cost and expense of improvement, excepting therefrom the cost and expense of bridges and culverts *shall be a charge upon the property abutting on the improvement.*"

Section 1217 G. C. to which you make reference in your communication, provides that the county commissioners of any county may agree to relieve the township trustees of any part or all of the apportionment of the cost and expense of the improvement which would under the statutes be assessed against said township or townships, and the county assume that part of which the township or townships is relieved. Or on the other hand, the township trustees may in like manner relieve the county of any part or all of the share which would be assessed against the county under and by virtue of the provisions set out in section 1214. It further provides that if the application for the improvement is made by the township trustees that the state may assume all or any part of the county's proportion of the cost of said improvement. Thus it is seen that provision is made by which the state, county and township may assume a greater or a lesser portion of the cost and expense than is provided for by statute. But there is no provision made whereby the abutting property owners may be relieved of any portion of the cost and expense of the improvement as set out in the statute. On the other hand it is provided, as you suggest, in section 1217 G. C. that *"in no case* shall the property owners abutting upon said improvement be relieved by the state, county or township, from the payment of ten per cent. of the cost and expense of such improvement, excepting therefrom the cost and expense of bridges and culverts." Of course, it is to be noted that this assessment can in no case be greater than thirty-three per cent. of the valuation of such abutting property for the purposes of taxation.

Now, in view of all the above, it is my opinion that there is no provision of law which would warrant or authorize your county and the township through

which the contemplated improvement passes to relieve the abutting property owners of any part or all of said ten per cent. of the cost and expense of the improvement, other than the cost and expense of the construction of bridges and culverts, for which construction it is provided that the county and the state must each pay half, thus relieving the townships and abutting property owners of any part of this cost and expense.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

141.

COUNCIL—MAY ISSUE BONDS TO IMPROVE WATERWORKS SYSTEM THAT HAS BECOME INADEQUATE BECAUSE OF SUDDEN GROWTH OF COMMUNITY—LEGISLATION IMMEDIATELY EFFECTIVE—EMERGENCY WITHIN MEANING OF MUNICIPAL REFERENDUM LAW.

The inadequacy of a village water plant resulting solely from the remarkable and sudden growth of the community and creating a dangerous situation with respect to domestic water supply, sanitation and fire protection, is an "emergency" within the meaning of the municipal referendum law, section 4227-3 G. C., and the council, in issuing bonds to improve and extend the system, may lawfully declare it such and make its legislation immediately effective.

COLUMBUS, OHIO, March 26, 1917.

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

GENTLEMEN:—I am in receipt of a request for opinion from Hon. L. M. Keyes, city solicitor of East Palestine, Ohio, which I deem of sufficient state-wide importance to merit an opinion and am therefore sending an opinion to you thereon. The question involved is as follows:

The present water supply of the village of East Palestine is greatly inadequate for the needs of the village. The residents of certain districts have found themselves without water on repeated occasions, and the situation as regards fire protection is thought to be alarming.

There has been no breakdown in the village plant, nor on the other hand has there been any neglect or inattention to the maintenance of the plant. The situation results solely from the remarkable and sudden growth of the community, which, extending through a period of some months, at first exhausted, then surpassed the capacity of the plant.

May the council issue bonds for the purpose of improving and extending the plant and system, without waiting for the prescribed referendum period to elapse, by declaring that an emergency exists under the above circumstances?

At the outset I may say that there is in my own mind some question as to whether or not an issue of bonds under the Longworth act is subject to a referendum at all, except as therein provided, i. e., when the amount of the bonds to be issued, or that will be outstanding when the issue is made, exceeds certain specified percentages. I assume, of course, that in this case such necessity does not exist; but if it does exist by reason of the fact that the amount of the bonds which it is necessary to issue will cause the limitations of sections 3939 et seq. of the General Code to be exceeded, then I am of the opinion that the popular

vote, required to be taken in the manner provided by sections 3943 to 3947 inclusive G. C., is a complete substitute for the referendum. That is to say, if it is necessary to submit the issue to a popular vote anyhow, by reason of the debt limits, it would seem ridiculous to require an additional vote on the same question, especially since the Longworth law referendum must carry by the votes of two-thirds of the electors voting thereon, while that provided by the general law requires the affirmative concurrence of a majority only.

See on this point the reasoning in Drum v. Cleveland, 13 N. P. (N. S.) 281, which, however, was unfortunately reversed by upper courts without report, and is therefore not a clear authority for the proposition submitted. (See 88 O. S. 619.)

Considerations of the kind just referred to do, as I have said, raise some doubt in my mind as to whether the action of the council of a municipal corporation, in issuing bonds under sections 3939 et seq. G. C., is ever subject to a referendum under sections 4227-1 et seq. G. C., even when the action of council under the former sections would otherwise be final.

This question, however, is involved in so much doubt that I make no holding thereon, but assume that in your case the council desires to proceed, and, so far as the Longworth act limitations are concerned, can proceed, without a vote of the people, to issue bonds, which action it is desired to make effective as quickly as possible, without waiting for the referendum period to elapse; and it will be likewise assumed, without argument, that the referendum provisions of the General Code do apply to the council under such circumstances.

It will not be necessary to quote extensively from the sections last mentioned.

Section 4227-3 G. C. provides, by way of exception to all the remaining provisions of the several sections in the series, that

> "emergency ordinances or measures necessary for the immediate preservation of the public peace, health or safety in such municipal corporation, shall go into immediate effect. Such emergency ordinances or measures must, upon a yea and nay vote, receive the vote of two-thirds of all the members elected to the council or other body corresponding to the council of such municipal corporation, and the reasons for such necessity shall be set forth in one section of the ordinance or other measure. * * *"

A question which immediately arises is as to whether, when council has declared that an ordinance or measure is of an emergency character necessary for the immediate preservation of the public peace, etc., and shall go into immediate effect, and has properly set forth in a section of the measure the reasons for such necessity, the existence of the emergency, or the sufficiency or truth of the reasons set forth therein are open to collateral attack.

Decisions of other states, where the initiative and referendum is in force by constitutional provisions of this same general character, are not in strict accord with respect to this general question.

However, the supreme court of this state in Miami Co. v. Dayton, 92 O. S. 215, seems to have settled this question so far as the constitutional referendum is concerned, by the following paragraph of the syllabus:

> "11. The judgment of the general assembly as to the emergency character of an act, under the constitutional amendment of 1912, is not conclusive, but its judgment in that behalf may be challenged in a proper proceeding at any time within the ninety-day period, either as to the constitutional vote or the emergency character of the act."

The reasoning here would seem to apply as well to the municipal referendum as to that which is a part of the legislative machinery of the state as a whole, especially in view of the reservation in article II, section 1f of the Constitution, to the people of the municipality of "the initiative and referendum powers."

It will therefore be assumed that council cannot, by the fiat of its own legislation, create an emergency, but that the condition, upon which an ordinance or other measure may go into immediate effect, must have actual objective existence, open to ascertainment by the courts in a proper proceeding for that purpose.

That the principles governing the state referendum apply substantially to the municipal referendum is well established by the decision in Shryock v. Zanesville, 92 O. S. 375. The last cited decision presents a state of facts somewhat like that which has been submitted, but the legal questions which are raised are not answered therein.

In my opinion the facts as they are stated do constitute an emergency. The fiscal affairs of a municipal corporation, like those of other taxing districts, are put by the laws upon an annual basis. That is to say, the municipal officers are required to anticipate, far in advance, the needs of a given fiscal year. While they may, and in the exercise of reasonable discretion are required to set aside a proper amount for unforeseen contingencies in the several funds, yet they can not be expected, even in this way, to anticipate the excessively abnormal. The taxing authorities of a growing community should of course foresee a normal growth. But if, as stated, there has been an immense and unprecedented growth, entirely unforeseen at the time the annual estimates were made, such growth, though in the nature of the case not instantaneous, must be regarded as an emergency.

In other words, an emergency implies the idea of an unexpected event or series of events occurring with suddenness and which could not reasonably be foreseen. What amounts to a sudden occurrence may be influenced, I think, by the rapidity of action which may be possible under the law to meet its consequences. The springing up of a large addition to a municipal corporation through a course of several months is a sudden occurrence, as compared with the promptitude with which the taxing authorities may in the usual mode acquire additional revenue to care for the newly created need.

It might be answered that while all these considerations are true, yet if the council of the village had undertaken the initial legislation now contemplated, several months ago, while the remarkable growth of the community was in progress, the referendum period could have been awaited and the municipality would have been in no worse situation than it now is. The conclusiveness of such an answer, however, depends upon the reasonableness of official action or non-action; that is to say, where there has been no actual neglect of existing facilities and no actual failure to appreciate the reasonably anticipated future needs of a community, the mere fact that the council did not awake to the rapidly changing situation at an earlier date will not of itself defeat the existence of the emergency.

Weighing all the considerations in the light of such incomplete facts as I have before me, I conclude that if there has been a sudden and abnormal acceleration in the growth of the population of the community, which could not, in the exercise of reasonable official discretion, be foreseen, and if, the officials of the village being reasonably diligent, they have nevertheless failed to appreciate the significance and ultimate effect of such abnormal growth until it has progressed to the point where the public health and safety is immediately in danger, an emergency exists.

Of course, under the section above quoted, two things must unite in order to enable the council to put its measure into immediate effect, viz., the occurrence of an emergency, and, as a result thereof, a necessity for the immediate preser-

vation of the public peace, health or safety. I have no difficulty on the second of these two requisites. It is so clear as not to require argument, that a condition of inadequacy of water supply, such as that which you describe, does greatly and immediately endanger both the public health and public safety.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

142.

TOWNSHIP TRUSTEES—NO AUTHORITY TO ISSUE BONDS FOR ROAD IMPROVEMENT UNDER SECTIONS 7033 TO 7052 G. C. INCLUSIVE—REPEALED BY CASS HIGHWAY LAW.

The township trustees have no authority or power to proceed to improve highways and issue bonds to take care of the expense and cost of the same under sections 7033 to 7052 inclusive G. C., for the reason that said statute was repealed by the Cass highway act and a different plan of road building adopted therein.

Opinion No. 978 of my predecessor distinguished.

COLUMBUS, OHIO, March 26, 1917.

HON. SUMNER E. WALTERS, *Prosecuting Attorney, Van Wert, Ohio.*

DEAR SIR:—I have your communication of March 6, 1917, in which you ask my opinion in reference to the matter set out therein. Your communication reads as follows:

> "Under and by virtue of an act of the general assembly of Ohio, passed April 12, 1900, entitled 'An act to authorize township trustees to create road districts and improve the roads therein,' the township trustees of Harrison township, Van Wert county, Ohio, created the whole of said township into a road district by resolution passed March 17, 1903; and by resolution on the same date declared the necessity for borrowing $100,000 to improve the roads therein, and also by resolution on the same date, provided for submitting the question of improvement and issuing of $100,000 worth of bonds to a vote of the electors at an election to be held April 6, 1903.
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> "The vote at said election was 174 for improvement and bond issue and 86 against it.
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> "All of this $100,000 authorized to be issued was issued and sold and again, on May 5, 1911, the trustees determined by resolution to submit to the electors the question of further improving the roads and issuing the further sum of $100,000 to be submitted at an election held on May 31, 1911. The vote at said election was 115 for further improvement and issue of $100,000 and 93 against.
>
> "Of this authorization $25,000 of the bonds were issued June 5, 1911, and sold June 12, 1911; $10,000 of the bonds were issued April 30, 1913, and sold June 7, 1913, and $10,000 of the bonds were issued April 17, 1915, and sold May 29, 1915, and there now remains unsold of the last $100,000 authorization $55,000.
>
> "They would like to make further sale of bonds up to the limit of this last authorization but hesitate on account of the provisions of the Cass

road law which repealed the law under which these bonds were authorized. It seems to me that under the provisions of section 303 of the Cass road law, these trustees have proceeded far enough under the act of April 12, 1900, so that they now ought to be able to complete the sale of bonds authorized, especially as fast as they would be permitted under the $100,000 outstanding limitation of the law of April 12, 1900.

"I am familiar with the opinion numbered 978 of the former attorney-general, given October 27, 1915, under which he held the trustees of Washington township, Belmont county, Ohio, could issue bonds authorized under this repealed law if they did so within a reasonable time, provided, of course, that the proceedings under the law of April 12, 1900, had been regular and in conformity to said law.

"I would like to have your opinion as to whether or not these trustees can proceed to issue and sell the remaining authorization of bonds at times and in amounts so as not to have outstanding and unpaid more than $100,000 as provided in the law under which the authority to issue was granted. There are three or four townships in this county in the same position that Harrison township is now, and they are awaiting with interest your opinion in this matter, which I hope you will not delay."

The answer to the question set out in your communication is to be found in sections 7033 to 7052 inclusive G. C. Let us note briefly the provisions of said statutes, first leaving out of consideration the question of election provided for therein.

Section 7033 G. C. provides that:

"The board of trustees of a township, when in their opinion, it is expedient and necessary, and for the public convenience and welfare, to improve the public ways of the township, * * * may create the township into a road district for the purpose of improving the public ways therein, or any number of them. * * *"

Section 7035 G. C. provides:

"In order to provide means for improving public ways in such road district, the trustees, if in their judgment it is expedient and necessary to do so, may borrow money and issue bonds of the road district for the payment thereof. * * *"

Let us now consider the question of the election provided for in said statutes. It is provided that before the improvement of any of the public ways shall be undertaken and

"before bonds shall be issued to pay for such improvements, the question of improving the public ways and of issuing bonds shall be submitted to the qualified electors of the road district, at a general or special election."

This provision is found in section 7037 G. C.
Then in section 7042 G. C. we have the following:

"* * * If a majority of the votes cast upon such question, at such election, are in favor of the proposition, the trustees shall improve the

public ways of such road district and issue bonds to provide means therefor."

Now, let us notice what provisions are made in said statutes for proceeding after the result of the election is shown to be in favor of the improvement and of issuing bonds.

Section 7045 G. C. provides that:

"Thereupon the trustees shall determine the order and manner in which the public ways shall be improved, beginning, so far as practicable, with the main roads. * * *"

Section 7049 G. C. provides as follows:

"The bonds so provided to be issued shall be sold at not less than par and accrued interest, *in such quantities as is deemed expedient by the* trustees, * * *."

Section 7036 G. C. provides as follows:

"The trustees shall not cause to be outstanding more than one hundred thousand dollars par value of such bonds of such road district, at any one time; nor issue, under any single vote, more than the aggregate amount stated in the notice of the election therefor."

Section 7035 G. C. also provides that:

"The bonds may be issued at such times, and in such amounts, as the work progresses, as, in their judgment, may be necessary."

It is plainly evident from the foregoing that everything in connection with the question of improving the roads of the said road district is placed within the discretion of the trustees of the township. They decide as to the roads to be improved, the order in which they are to be improved, the times at which bonds are to be issued and the amount of bonds to be issued up to the amount authorized by the election. It will be noticed that the statute does not provide that the full amount of bonds authorized shall be sold, but merely that the trustees shall not exceed the amount provided for.

The election settles nothing other than to get the consent of the voters of the road district to proceed with the improvement and to issue bonds for the improvement. After the consent is given, the whole matter of proceeding with the improvement is set out in the statutes and is up to the sound discretion of the trustees.

I know that section 7042 G. C. says that

"if a majority of the votes cast upon such question, at such election, are in favor of the proposition, the trusteees *shall* improve the public ways of such road district and issue bonds to provide means therefor,"

but when read in connection with the other sections of the statute I am of the opinion that this means no more than that the board of township trustees has authority to proceed under the provisions of the statute.

Hence, when the entire statute is repealed, in which are set out the terms and conditions under which the trustees of any road district may proceed, the

trustees no longer have power to act. So far as the election is concerned, the trustees have permission to act, but in so far as the legislature is concerned they have no authority to act. And as the latter body sets forth all the terms and conditions under which the trustees should proceed, the authority to proceed ceases when the statute containing said terms and conditions is repealed.

Supposing the legislature, without the intervention of an election, had conferred upon the board of trustees of any township the same powers and the same authority as set out in the statute under consideration, that is, gave the township trustees the authority to create a road district, and gave them power to borrow money and to issue and sell bonds up to a limit of $100,000; and supposing the trustees had proceeded to issue and sell bonds up to the amount of $45,000 as your trustees have done, during the time that said law was in force and effect; then, as in this case, the law be repealed under which the trustees were acting; what then would have been the powers and authority of the trustees to have issued bonds after the repeal of the statutes?

Their authority would cease with the repeal of the statutes. Their power would have been at an end. We would all agree as to that proposition. We would agree to the above proposition, notwithstanding the fact that the law which repealed the statute under which said trustees had been acting contained a saving clause, saving certain rights which had arisen during the existence of the former statute.

If such a conclusion is warranted where no election intervenes, it is my opinion that the same conclusion must be drawn where an election intervenes, as is provided under said statute. The said board of trustees certainly received no additional powers, no more extended authority, by virtue of the election, than they would have had under the provisions of the statute without the intervention of an election. As was said before, the results of the election simply gave the trustees permission to proceed with the improvement and with the issuing of bonds under and by virtue of the terms and conditions of the statute. And when these terms and conditions were no longer in force and effect because of the repeal of the statute, the power and authority to proceed with road improvements and the issuing of bonds therefor ceased.

Futhermore, the legislature at the same time that it repealed said statute, under which you ask whether your township trustees could proceed, provided another and different plan by which the highways of a township shall be repaired and built and a different method by which the township trustees shall proceed in said matter. This plan is found in sections 3298-1 et seq. G. C., and in many respects differs in terms and conditions from the statute under consideration. So that I am of the opinion that it was not the intention of the legislature that the township trustees should proceed further under the statute repealed, but that they should proceed under the provisions of the new law.

You suggest in your communication that you are of the opinion that the saving clause found in the act known as the Cass highway act would warrant your township trustees in proceeding to further improve the highways of your township and to issue bonds to take care of the cost and expense of the same, up to the limit of $100,000.

Let us note the reading of section 303 of said Cass highway act, which contains the saving provisions referred to by you:

> "This act shall not affect or impair any contract or any act done, * * * prior to the time when this act or any section thereof takes effect, under or by virtue of any law so repealed, but the same may be asserted, completed, enforced, * * * as fully and to the same extent as if such laws had not been repealed. The provisions of this act shall not affect or

impair any act done or right acquired under or in pursuance of any resolution adopted by the board of commissioners of any county, the trustees of any township, or the commissioners of any road district prior to the time of the taking effect of this act, * * *."

There are two parts to this saving clause, first, in reference to contracts and acts done. The statute provides that the provisions of this act shall not affect or impair any contract or any act done. But there is no contract or act done in the case presented to me which would be impaired by holding that the township trustees can proceed no further under the said statute.

The saving clause further provides that this act shall not affect or impair any act done or right acquired under or in pursuance of any resolution adopted by the trustees of any township, but there is no act done or right acquired which would be affected by holding that your township trustees can proceed no further. It is true they had permission to proceed further, under and by virtue of the results of the election, but they performed no act and entered into no contract which would be impaired by holding that their authority under the statutes is at an end.

Further, you suggest that you are familiar with opinion No. 978, rendered by my predecessor in office. I feel that this opinion ought not to be extended beyond the facts as they existed in that case. You will note in that case that the township trustees had proceeded under the old act to advertise the sale of ten thousand dollars worth of bonds, the sale to be made September 8, 1915, just a few days after the Cass highway act took effect. Thus, certain acts had been done and certain rights had been acquired which would be protected under and by virtue of the saving clause of the Cass highway act.

And it is further to be noted that said opinion, in holding that the balance of the fifty thousand dollars' worth of bonds, namely, forty thousand dollars' worth of bonds, might be sold, specifically provided that this must be done in a reasonable time, that is, must be done in such a time that the issuing of the fifty thousand dollars' worth of bonds might be considered almost as one act.

The facts in your case are different. Nothing has been done by your trustees for almost two years. Hence I think your case is readily distinguished from the case in which my predecessor rendered opinion No. 978.

Therefore, answering your question specifically, it is my opinion that the board of trustees of your township has no authority to proceed further to improve the highways of said road district and to issue bonds to take care of the cost and expense of said improvement.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

143.

RURAL BOARD OF EDUCATION—MUST PROVIDE TRANSPORTATION FOR PUPIL MORE THAN TWO MILES DISTANT FROM SCHOOL—FUNDS MAY BE RAISED UNDER SECTION 5656 G. C.

It is the duty of a rural board of education to provide transportation for pupils as provided by General Code section 7731. If sufficient funds are not available for that purpose, relief may be had in General Code section 5656.

COLUMBUS, OHIO, March 27, 1917.

HON. D. F. MILLS, *Prosecuting Attorney, Sidney, Ohio.*

DEAR SIR:—In your letter of March 12, 1917, you ask my opinion upon the following facts:

"The board of education of one of the rural school districts in this county has neglected and refused to provide transportation for certain pupils living in said district, and who reside more than two miles from any school, on the ground that they have not sufficient funds with which to provide for such transportation. The parents of the pupils have taken the matter up with the state superintendent of public instruction and he has written several letters to the county board of education insisting that they provide transportation for such pupils, as provided in section 7731 G. C.

"The county board of education has submitted the matter to me, and in view of the claim of the local board they want to know as to whether or not they are compelled to furnish such transportation.

"I have in my possession a copy of the court's decision in the case of the State of Ohio ex rel. Charles P. Stringer, plaintiff, v. W. A. Zellars et al., defendants, in the court of appeals of Harrison county, Ohio. It seems to me that this case clearly holds that while the statutes specifically say that the county boards of education shall furnish transportation in such cases, and may charge it back to the board of education of the local school district, yet there is no authority or power given the county board of education to compel such payment. As the county board of education has no funds under their control from which to pay for such transportation, in view of the decision of the court above referred to, I have advised them that they are without authority to proceed in the matter.

"I enclose herewith a copy of the decision above referred to for your consideration. I have been unable to find any other authorities or decisions in connection with this matter.

"I would be pleased to have your opinion as to the powers and duties of the county boards of education, in cases such as I have outlined above under the law as it now exists."

General Code section 7731 provides in part:

"In all rural * * * school districts where pupils live more than two miles from the nearest school, the board of education shall provide transportation for such pupils to and from such school. * * * When local boards of education neglect or refuse to provide transportation for pupils, the county board of education shall provide such transportation and the cost thereof shall be charged against the local school district."

I anticipate that you would have little trouble in applying the above quoted section of the General Code as the law governing the facts related in your letter if it were not for the decision in the case of State ex rel. Stringer v. Zellers et al., in the court of appeals of Harrison county, unreported. I have given said case careful consideration and I cannot see how the court, under the circumstances and state of pleadings in that case, could have decided differently, but the state of facts in that case should carefully be distinguished from the facts in your case, and that same may be done I desire first to quote from said opinion.

"It is contended in this case on the part of counsel for relator that there is a duty imposed first upon the local board to furnish transportation to scholars living more than two miles from school and if the local board fails or neglects to furnish transportation, then it is the duty of the county board of education to furnish transportation and to charge the cost of this transportation up to the local school district. It is ordinarily true, as argued by counsel for relator, where there is a clear right on the part of the relator to the remedy asked, then it is the duty of the court to issue the writ. Many authorities are cited, and the rule, as we understand it, is well established that it is ordinarily the duty of the court, where there is no question as to the right of the relator to the remedy, to issue the writ of mandamus. The situation in this case, however, is somewhat different. The only defendants before this court are the members of the board of education of Harrison county. Those representing the Hopedale school district are not before this court.

"The statute provides, first, as I have said, that the members of the board of education of the local school district shall furnish transportation for scholars living more than two miles from the school that in case this board fails or neglects to perform this duty then there is a duty imposed upon the board of education of the county to furnish transportation to such scholars. While this statute provides that the board of education of the county, in case the local board fails, shall furnish transportation for the scholars living more than two miles from the school, yet it makes no provision by which the board of education of the county may pay or provide pay for this transportation. All that it does is to provide that the board of education of the county may charge it back to the board of education of the local school district. Suppose that the board of education of the local school district (refuse to pay), there is no authority given to the members of the board of education of the county to compel payment, and as I said, while there is a duty imposed upon the board of education of the county by this statute, there is no means given to the board of education of the county to carry out the provisions of that statute, and that being true, if this court shall issue the writ, as prayed for in this case, and the board of education should fail to carry out the orders of this court, the members of the board undoubtedly would be in contempt of court. Now, should this court issue an order knowing that the members of the board have no means to comply with that order, which might place the members of that board in contempt of court if they failed to do a vain or impossible thing. * * * We feel that these questions can only be determined by bringing the Hopedale school board before the court and allowing all the questions to be determined; that it would not be fair to that board, nor fair to the Hopedale school district, for this court to undertake to determine many of the questions which have been suggested here, in the absence of the local board.

"In the present condition of this case the writ of mandamus will have to be refused."

In your case, as in the case above quoted, the local board and the county board have both refused to provide transportation and the opinion of the court, above quoted, instead of preventing the enforcing of the provisions of General Code 7731, simply maps out the correct course to follow in the enforcement of said provisions. That is to say, instead of endeavoring to compel a supervisory board, one which has not the power to levy taxes or has not at its disposal funds for other than special limited purposes, and one which cannot establish and maintain schools, to furnish transportation, you would bring your action, if action is necessary, against the board which has the power and is compelled to furnish and maintain the schools for the pupils and is given authority to pay for all things necessary and incidental to the carrying out of those purposes.

It was held by my predecessor in opinion 612, in which he followed his predecessor in an opinion dated November 5, 1914, that rural boards of education may borrow money under the provisions of General Code section 5656 to pay for the transportation of pupils to the public schools, where transportation is required. I concur in the conclusion reached in both of said opinions and advise you that if your rural board of education is without funds to pay for the transportation of said pupils and there is no means of establishing a school within the limits where transportation is not required, it is their duty to furnish said transportation and to borrow money as aforesaid to pay for same.

In case said transportation is furnished and said money is borrowed, it is clearly the duty of the board to levy a tax to raise sufficient funds for the proper redemption of notes or bonds issued on account of said indebtedness. An action in mandamus will lie to compel the board of education to levy such tax if there is not sufficient funds in the treasury otherwise.

7 Ohio State, 327;
6 Ohio State, 280;
27 Ohio State, 102.

I am also of the opinion that an action in mandamus will lie against the board of education of a rural district compelling it to furnish such transportation.

General Code section 12283 provides:

"Mandamus is a writ issued, in the name of the state, to an inferior tribunal, a corporation, board or person commanding the performance of an act which the law specially enjoins from a duty resulting from an office, trust or station."

What could be clearer than the language of General Code section 7731 in relation to the transportation of pupils, when means are provided to carry out the act to be performed.

It was held in State ex rel. Board of Education, 35 O. S., 383, that the relator, a resident taxpayer of the city of Cincinnati, and the father of a child of school age, who was attending the city schools, and for whose use in school he had purchased certain books, had, therefore, a pecuniary and also a parental interest in having the public schools of the district controlled and conducted in the manner prescribed by statute and that these interests are sufficient to enable him to maintain a proceeding in mandamus to compel the board to perform its legal duty toward him and his child.

Also in Board of Education v. State, 45 O. S. 555, it is held that an action in mandamus is a proper procedure to compel the admittance of colored children to the public schools of the state.

It was also held to be the proper remedy to compel a board of education to fix a teacher's salary in State ex rel. Board of Education, 4 O. C. C., 93, and a long list of other cases in this state bearing indirectly upon the above proposition.

Holding these views, then, I advise you that the decision referred to by you in State ex rel., etc., v. Zellers, does not control the course of rural boards of education; that it is the duty of your rural board of education to provide transportation for pupils living more than two miles from school; and that where sufficient funds are not available for that purpose money may be raised therefor under the provisions of section 5656 G. C.

Very truly yours,
JOSEPH McGHEE,
Attorney-General.

144.

APPROVAL—TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE OF CONTINENTAL VILLAGE SCHOOL DISTRICT.

COLUMBUS, OHIO, March 27, 1917.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of the Continental village school district in the sum of $2,300.00, issued for the purpose of improving the school buildings, being one bond of $300.00 and four bonds of $500.00 each.

I have examined the transcript of the proceedings of the board of education and other officers of Continental village school district in reference to the above bond issue, and I find the same regular and in conformity to the provisions of the General Code.

I am of the opinion that said bonds drawn in accordance with the form submitted and executed by the proper officers will, upon delivery, constitute valid and binding obligations of the said district.

Very truly yours,
JOSEPH McGHEE,
Attorney-General.

145.

DISAPPROVAL—TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE OF THE BOARD OF EDUCATION OF HIGGINSPORT VILLAGE SCHOOL DISTRICT—VILLAGE SCHOOL DISTRICT WITH TAX VALUATION OF LESS THAN $500,000 CANNOT EXIST UNLESS CARRIED BY VOTE OF ELECTORS OF PROPOSED DISTRICT.

COLUMBUS, OHIO, March 27, 1917.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of Higginsport village school district, Brown county, Ohio, $1,200.00 being six bonds of two hundred dollars each."

The transcript of proceedings of the board of education and other officers of Higginsport village school district submitted to me for examination discloses that said district has total tax valuation of only $300,090.

Section 4681 of the General Code provides that:

"Each village, together with the territory attached to it for school purposes, and excluding territory within its corporate limits detached for school purposes, and having in the district thus formed, a total tax valuation of not less than $500,000 shall constitute a village school district."

Section 4682 of the General Code provides that:

"A village, together with the territory attached to it for school purposes, and excluding the territory within its corporate limits detached for school purposes, with a tax valuation of less than $500,000 shall not constitute a village school district, but the proposition of organizing the territory so formed into a village school district may be submitted by the board of education, and shall be submitted by the board of education, upon the presentation to it of a written petition for such purpose signed by 25 per cent of the electors of the territory thus formed, to a vote of the electors of the territory thus formed, at any general or special election called for that purpose and be so determined by a majority vote of such electors."

The transcript fails to show that the proposition to organize the village of Higginsport into a village school district has been submitted to and carried by a vote of the electors of said territory, and I am informed by Hon. John M. Markley, prosecuting attorney of Brown county, that no such vote was in fact ever taken.

Under the provisions of the General Code above quoted it is clear that a village school district cannot exist in Ohio unless the question of organizing the territory of the village into a school district has been submitted to and carried by a vote of the electors of the proposed district. There being then no village school district, it follows that the issuance of the bonds under consideration was unauthorized and the bonds themselves invalid.

Section 4682-1, General Code, as originally enacted in 103 Ohio Laws, at page 546, provided as follows:

"A village school district organized as a village school district at the time of the passage of this act, or that may be hereafter organized, which has a total tax valuation of less than $500,000 shall continue as a village school district, but the proposition to dissolve such village school district may be submitted by the board of education, and shall be submitted by the board of education upon the presentation to it of a written petition for such purpose signed by 25 per cent. of such village school district, to a vote of the electors of such village school district at any general or special election called for that purpose, and be so determined by a majority vote of such electors."

By virtue of this section a village school district organized as a village school district at the time of the passage of the act which had a total tax duplicate of less than $500,000 continued as a village school district until dissolved by a vote of the electors. This provision was, however, stricken out of the law by amendment of the section as it appears in 104 Ohio Laws, at page 546. It is clearly the legislative intent, therefore, that a village school district having a total tax valuation of less than $500,000 can no longer exist in Ohio unless its organization into such a village school district is submitted to and carried by the electors of such district. This conclusion is in accord with opinion No. 1847 rendered by my predecessor, Hon. Edward C. Turner, to Hon. S. W. Ennis, prosecuting attorney of Paulding county, August 12, 1916.

I therefore advise you that the bonds in question are invalid and that you should not purchase the same.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

146.

INDEBTEDNESS—OF A SCHOOL DISTRICT THAT HAS BEEN TRANSFERRED UNDER SECTION 4692 G. C. TO ANOTHER DISTRICT—BECOMES CHARGE AGAINST NEW DISTRICT—MUST BE PAID BY TAX LEVY ON PROPERTY OF NEW DISTRICT—DIVISION OF FUNDS AND INDEBTEDNESS NOT JURISDICTIONAL TO POWER OF COUNTY BOARD OF EDUCATION TO MAKE TRANSFER—MAY BE MADE AT A LATER MEETING THAN ONE AT WHICH TRANSFER IS MADE—NO RIGHT OF APPEAL FROM ORDER OF COUNTY BOARD MAKING DIVISION—ORDER MAY BE REVIEWED BY ORIGINAL ACTION IN COMMON PLEAS COURT.

When a county board of education, acting under the provisions of Sec. 4692 G. C., abolishes a village school district by transferring the same to another village school district bonded or other indebtedness of such abolished school district become a charge on the school district to which it is transferred and may be paid by a levy of taxes on all the taxable property of the latter district as enlarged by the transfer.

The equitable division of the school funds and of the indebtedness which the county board of education under section 4692 G. C. is authorized to make on the transfer of the territory from one school district to another is not a matter jurisdictional to the power of the county board of education to make such transfer of territory; and such equitable division of the fund and the indebtedness may be made at a meeting later than the one at which the transfer of the territory is made.

There is no right of appeal from an order of the county board of education making such division of school funds and of the indebtedness, but such order may be reviewed by original action in the court of common pleas on the petition of the board of education of either school district affected by such order if the county board of education has been guilty of fraud or gross and intentional abuse of discretion in making such order.

COLUMBUS, OHIO, March 27, 1917.

HON. F. B. PEARSON, *Superintendent of Public Instruction, Columbus, Ohio.*

DEAR SIR:—I have the honor to acknowledge receipt of your letter of March 5, 1917, asking for my opinion on the facts stated and questions raised by you as follows:

> "Malta and McConnelsville are adjoining villages situated in Morgan county, and under the jurisdiction of the county board of education of that county. The county board attached the entire territory embraced in the Malta school district to the McConnelsville village district and named the same, 'The McConnelsville-Malta school district.' At the time of the joining of the districts, Malta had certain *bonded indebtedness* and also something over $2,000.00 indebtedness under section 5656 of the General Code. It was borrowed without a vote and was secured by notes of the board and was incurred for the purpose of paying teachers and the janitor, the ordinary revenue not being sufficient.
>
> "There is no board of commissioners of the sinking fund or board of any kind for the purpose of providing for the payment of the debts above mentioned.
>
> "1. Is the board of education of the district as now constituted authorized to pay any or all of the indebtedness above mentioned?
>
> "2. In case the first question is answered affirmatively, must the levy

for the payment of this debt be made on the appropriation of the entire enlarged school district or must a special levy be made upon that part of the newly created district which formerly constituted the Malta school district?

"3. As no adjustment was made of funds at the time of this transfer, will the county board have power to make an adjustment of the debt at a future meeting?

"4. Is there no appeal from the adjustment of debt or equitable division of funds made by county boards of education in such transfers of territory?"

I am further informed by your department that the action of the county board of education referred to in your communication was taken pursuant to the provisions of section 4692 of the General Code. By such action the whole of Malta village school district was transferred and attached to McConnelsville village school district. Section 4692 of the General Code is as follows:

"The county board of education may transfer a part or all of a school district of the county school district to an adjoining district or districts of the county school district. Such transfer shall not take effect until a map is filed with the auditor of the county in which the transferred territory is situated, showing the boundaries of the territory transferred, and a notice of such proposed transfer has been posted in three conspicuous places in the district or districts proposed to be transferred, or printed in a paper of general circulation in said county, for ten days; nor shall such transfer take effect if a majority of the qualified electors residing in the territory to be transferred, shall, within thirty days after the filing of such map, file with the county board of education a written remonstrance against such proposed transfer. If an entire district be transferred the board of education of such district is thereby abolished or if a member of the board of education lives in a part of a school district transferred the member becomes a non-resident of the school district from which he was transferred and ceases to be a member of such board of education. The legal title of the property of the board of education shall become vested in the board of education of the school district to which such territory is transferred. The county board of education is authorized to make an equitable division of the school funds of the transferred territory either in the treasury or in the course of collection. And also an equitable division of the indebtedness of the transferred territory."

School districts, as other like subdivisions, are mere agencies of the state for governmental purposes and subject only to the restraint of constitutional provisions; the legislature has plenary power which provides for the change, transfer or dissolution as it sees fit.

Cooley on Constitutional Limitations, pages 266, 267 and 268;
State v. Powers, 38 O. S. 54, 61;
Maumee School Township v. School Town of Shirley City, 159 Ind. 423, 426;
Merriweather v. Garrett, 102 U. S. 472, 511.

A constitutional provision having obvious application to state legislation providing for the change, transfer or abolishment of state subdivisions is that one of

the federal constitution inhibiting to states the power to enact laws impairing the obligation of contracts.

Mt. Pleasant v. Beckwith, 100 U. S. 514, 533.
Graham, etc., v. Folsom, 200 U. S. 248.

Consistent with the above noted principles it may be said that in the absence of statutory provision to the contrary, when one school district or other political subdivision is abolished by its transfer to another, the latter as the new or enlarged subdivision becomes entitled to all the property of the transferred or abolished subdivision and liable for all the existing legal debts and liabilities of such abolished district whether such indebtedness be bonded or otherwise.

Dillon on Municipal Corporations (5th Ed.), Vol. 1, page 624.
Mt. Pleasant v. Beckwith, supra.

As often as the question has been made it has been held that when contiguous territory, whether incorporated as a municipality or otherwise, is annexed to a municipal corporation pursuant to statutory authority such annexed territory and the residents thereof may be taxed to pay pre-existing indebtedness of the municipal corporation to which such territory is annexed.

Powers v. County Commissioners, 8 O. S. 285.
Blanchard v. Bissell, 11 O. S. 96.

In the case of State ex rel. v. Cincinnati, 52 O. S. 419, it was held that an act of the legislature authorizing the city of Cincinnati as a city of the first grade of the first class to annex contiguous municipalities of other grades and classes was a subsisting and constitutional law and that it was not a valid objection to the statute or to the annexation under it that a municipal corporation might be so annexed without the consent of its constitutional authority or of its inhabitants. It was further held that it was no valid objection to the statute or to the annexation proceedings under it that the taxable property within such annexed municipality would become subject to taxation for the payment of previously incurred indebtedness of the city to which the annexation was made.

As a corollary to the proposition just noted it follows that taxable property in annexing municipalities may be taxed to pay existing indebtedness of the corporation annexed. Speaking to this point the court in the case of State ex rel. vs. Cincinnati, supra, at page 455, said:

> "Persons thus brought into the annexing corporation, and their property, like all its other inhabitants, and their property, receive and enjoy the benefits of all local improvements, and should share the burdens existing when the enjoyment commences; and, in like manner the inhabitants of the annexing corporation enjoy the benefits and share the burdens arising from the local improvements of the municipalities annexed. * * *"

In the case of Mt. Pleasant v. Beckwith, supra, it appears that the town of Racine in the state of Wisconsin issued bonds in the sum of $50,000.00 in payment of stock of a railroad company subscribed by it under legislative authority. Afterward the town of Racine was vacated or abolished by legislative enactment and its territory attached to the towns of Caledonia and Mt. Pleasant. Subsequently a part of the territory of the town of Racine attached to the town of Mt. Pleasant

was detached by legislative enactment from the last named town and annexed to the city of Racine, a separate and distinct corporation from the town of the same name. An action was instituted by Beckwith, as the owner and holder of a number of said bonds, in the circuit court of the United States for the eastern district of Wisconsin against said towns of Caledonia and Mt. Pleasant and the city of Racine. The case was referred to a master. The circuit court confirmed the report of the master and entered judgment against the defendants in the full amount of the bonds owned and held by plaintiff, with interest, and ordered that the defendants severally pay the same in proportion that the amount of taxable property of the town of Racine annexed to them respectively bore to the total value of the taxable property of said town. In reaching its judgment or decree said circuit court held that the property of individuals within the jurisdiction of the town of Racine constituted the primary fund to which the complainant had the right to look for the payment of his debts and that the transfer of the property to the jurisdiction of the towns of Caledonia and Mt. Pleasant and the city of Racine rendered them liable to pay the debt due to the creditors of the town whose powers and jurisdiction terminated by the transfer. The circuit court further held that the power of taxation previously vested in the town of Racine, which issued the bonds in question, was by the act annexing its territory to the defendant municipalities transferred to them to be severally exercised by them upon all the taxable property within their respective jurisdictions. These findings and conclusions of law made by the circuit court were assigned for error in the supreme court of the United States. That court, affirming the decree of the circuit court, in its opinion says:

> "Neither argument nor authority is necessary to prove that a state legislature cannot pass a valid law impairing the obligations of a contract, as that general proposition is universally admitted. Contracts under the constitution are as sacred as the constitution that protects them from infraction, and yet the defence in this case, if sustained, will establish the proposition that the effect of state legislation may be such as to deprive a party of all means of sustaining an action of any kind for their enforcement. Cases, doubtless, may arise when the party cannot collect what is due under the contract; but he ought always to be able by some proper action to reduce his contract to judgment.
>
> "Suppose it be admitted that the act of the state legislature annulling the charter of the municipality indebted to the complainant, without making any provision for the payment of outstanding indebtedness, was unconstitutional and void, still it must be admitted that the very act which annulled that charter annexed all the territory and property of the municipality to the two appellant towns, and that they acquired with that the same power of taxation over the residents and their estates that they previously possessed over the estates of the inhabitants resident within their limits before their boundaries were enlarged.
>
> "Extinguished municipal corporations neither own property, nor have they any power to levy taxes to pay debts. Whatever power the extinguished municipality had to levy taxes when the act passed annulling her charter terminated, and from the moment the annexation of her territory was made to the appellant towns, the power to tax the property transferred, and the inhabitants residing on it, became vested in the proper authorities of the towns to which the territory and jurisdistion were by that act transferred; from which it follows that for all practical purposes the complainant was left without judicial remedy to enforce the collection of the bonds or to recover judgment for the amounts they represent.

"When the appellant towns accepted the annexation, their authorities knew, or ought to have known, that the extinguished municipality owed debts, and that the act effecting the annexation made no provision for their payment. They had no right to assume that the annulment of the charter of the old town would have the effect to discharge its indebtedness, or to impair the obligation of the contract held by its creditors to enforce the same against those holding the territory and jurisdiction by the authority from the legislature and the public property and the power of taxation previously held and enjoyed by the extinguished municipality."

In the case of Clother v. Maher 15 Neb. 1, it was held that where one of several school districts consolidated under legislative authority was indebted on bonds previously issued for school purposes, upon such consolidation being effected the new district not only became invested with all property rights of the former, but also became answerable for its debts, and that a tax for their payment was properly levied on all the taxable property within the new district. The court in its opinion in this case says:

"It is not questioned by counsel for the plaintiff, nor could it be successfully, that the legislature had the power to make this consolidation and invest the new district with the property of the other two. Nor does it seem to be doubted that, in such case, in the absence of some different direction by the legislature, consistent with the rights of creditors, the new district is legally and equitably liable for the debts of the other two; that, succeeding as to their property, they succeed to their liabilities also. Such is the rule."

In the case of Thompson v. Abbott, 61 Mo. 176, it was held that where under statutory authority a township subdistrict became merged in an adjoining town or city for school purposes and the board of education of the municipality takes possession and control of the school property of the annexed subdistrict the municipal board will thereby assume an obligation previously incurred by the subdistrict and that to have that effect no direct promise or agreement of the municipal board was necessary. The court in its opinion in this case says:

"By the statute * * * it is provided that adjoining territory may be annexed to any city, town or village for school purposes, by the mutual agreement of the respective boards of education of such city, town or village, and of the township interested. Under the provisions of this law it seems that the annexation was made, and thereafter the subdistrict had no distinct organization. It was merged in the city corporation under the direction and control of its board of education. This latter body succeeded to all the rights and immunities previously enjoyed by the district board and was the only body in existence that possessed the power to adjust, settle and pay off its liabilities. Now, where one corporation goes entirely out of existence by being annexed to or merged in another corporation, if no arrangements are made respecting the property and liabilities of the corporation that ceases to exist, the subsisting corporation will be entitled to all the property, and be answerable for all the liabilities. After subdistrict No. 3 had ceased to exist, there was then no power remaining as an independent organization in its behalf to control its funds or pay off its indebtedness. Its property passed into the hands of the defendant, and when the benefits were taken, the burdens were assumed. The pleadings

admit that plaintiff's claim is a just and honest debt, and that the annexation took place, and that defendant obtained possession of and control over the property of the subdistrict which owed the debt. Then, manifestly, it became liable for its obligations."

Other cases supporting the proposition above discussed are:

McDonald v. School District No. 1, 10 Iowa 469.
Hoffield v. Board of Education, 33 Kan. 644.
Goulding et al. v. Inhabitants of Peabody et al., 170 Mass. 483.

On the considerations above noted it follows that unless statutory provision can be found affecting the first and second questions made by you the answer to the same is that the board of education of the school district as now constituted should pay the indebtedness of the Malta school district referred to in your communication, and that to pay the same it is the duty of the board to make a levy for such purpose on all the taxable property of McConnelsville-Malta village school district and not to make such levy only upon the taxable property in the territory which formerly constituted the Malta village school district. If the statutory provision so directs, it is probable that the board of education of the McConnelsville-Malta village school district may levy such tax only on the taxable property in the territory formerly composing the Malta village school district without a violation of section 2 of article 12 of the state constitution, which requires taxes to be levied by a uniform rule upon all taxable property.

City of Cleveland v. Heisley, 41 O. S. 670.

It remains to be determined, therefore, whether or not there is any statutory provision which expressly, or by necessary inference, authorizes the board of education of the school district as now constituted to make a levy only upon the taxable property within the former limits of Malta village school district or whether there be any statutory provision requiring the integrity of Malta village school district or the board of education thereof to be preserved for the purpose of making the necessary levy on the taxable property of such school district for the purpose of paying its indebtedness.

In this connection I note that section 4692 of the General Code under which, as above noted, the action of the county board of education, referred to in your communication, was taken provides inter alia as follows:

"The county board of education is authorized to make an equitable division of the school funds of the transferred territory either in the treasury or in the course of collection. And also an equitable division of the indebtedness of the transferred territory."

In the nature of things this provision of section 4692, just quoted, can have application only to a case where territory less than the whole of a school district is transferred to another school district leaving the corporate identity of the school district from which said territory is transferred unaffected. In such a case by reason of the transfer of the territory and the equities between the two school districts arising by reason thereof, it is appropriate and proper that the county board of education as authorized by this provision should, as between said school districts on the one hand, make an equitable division of the school funds attributable to the territory transferred, and also on the other hand to make an equitable di-

vision as between the school districts of the indebtedness which may be attributed to such transferred territory.

The adjustment of the funds and indebtedness with respect to such transferred territory is made as between the school districts affected by and interested in such transfer and can have no application where an entire district is abrogated and the board of education thereof is abolished.

Section 4689 of the General Code provides as follows:

> "The provisions of law relating to the power to settle claims, dispose of property or levy and collect taxes to pay existing obligations of a village that has surrendered its corporate powers, shall also apply to such village school district and the board of education thereof."

The provision of law relating to the power of a village that has surrendered its corporate powers to settle claims, dispose of property or levy and collect taxes are those of section 3514 of the General Code, which reads as follows:

> "Such surrender of corporate powers shall not affect vested rights or accrued liabilities of such village, or the power to settle claims, dispose of property, or levy and collect taxes to pay existing obligations, but after the presentation of such petition, council shall not create any new liability until the result of the election is declared, nor thereafter, if such result is in favor of the surrender of corporate powers. Due and unpaid taxes may thereafter be collected, and all moneys or property remaining after such surrender shall belong to the school district embracing such village."

The language of section 4689 of the General Code, above quoted, is identically the same as found in the provisions of this section as carried into the General Code on the adoption of the same by legislative enactment in 1910. In order to ascertain the meaning and application of section 4689 it should be read in connection with the provisions of sections 4682 and 4688 as they stood when carried into the General Code in 1910. Said sections 4682 and 4688 then read as follows:

> "Sec. 4682. A village, together with the territory attached to it for school purposes, and excluding the territory within its corporate limits detached for school purposes, with a tax valuation of less than one hundred thousand dollars, shall not constitute a village school district, but the proposition to dissolve or organize such village school district shall be submitted by the board of education to the electors of such village at any general or special election called for that purpose, and be so determined by a majority vote of such electors.
>
> "Sec. 4688. When a village surrenders its corporate powers or dissolves a village school district, as herein provided, the village school district shall be thereby abolished and the territory formerly constituting such village district shall become a part of the township school district or districts of the civil township or townships in which it is situated, and all school property shall pass to and become vested in the township board of education of the civil township in which it is situated."

In 1913 (103 O. L. 545 and 103 O. L. 257), sections 4682 and 4688 of the General Code were amended, and section 4682 was supplemented by the provisions of section 4682-1, which is as follows:

"A village school district containing a population of less than fifteen hundred may vote at any general or special election to dissolve and join any contiguous rural district. After approval by the county board such proposition shall be submitted to the electors by the village board of education on the petition of one-fourth of the electors of such village school district or the village board may submit the proposition on its own motion and the result shall be determined by a majority vote of such electors."

In Opinion No. 287, under date of April 26, 1915, addressed to Hon. F. C. Goodrich, prosecuting attorney of Miami county, my predecessor, Hon. Edward C. Turner, held that where a village school district coming within the qualifications of section 4682-1 voted to dissolve and attach itself to a contiguous rural school district under the authority of said section, said village school district as a separate taxing district and its board of education as its taxing authority were continued in existence for the purpose of paying existing bonded indebtedness of such school district. This conclusion was reached by reason of the provisions of said sections 4689 and those of 3514 of the General Code therein referred to.

In consideration of the immediate questions here presented I note further that in 1914, section 4735-1 and 4735-2 were enacted providing authority in a rural school district to dissolve and to annex itself to a contiguous rural or village school district on a majority vote of the electors of such rural school district in favor of such proposition.

With respect to the action thus taken by a rural school district on a majority vote of its electors said section 4735-2 provided that the legal title of the property of the rural school district, in case such rural school district dissolves and joins to a rural school or village school district, shall become vested in the board of education of the rural or village school district to which such district is joined. This section further provides that the school funds of such dissolved rural school district shall become a part of the funds of the rural or village school district which it votes to join, and further provides as follows:

"The dissolution of such district shall not be complete until the board of education of the district has provided for the payment of any indebtedness that may exist."

Construing the provisions of sections 4735-1 and 4735-2 of the General Code, my predecessor, Mr. Turner, in Opinion No. 53, under date of February 2, 1915, directed to Hon. Frank W. Miller, superintendent of public instruction, held that prior existing indebtedness of a rural school district voting to dissolve and annex itself to another rural school district was a charge only upon the property of the school district creating such indebtedness, and that such indebtedness was not a charge on the taxable property of the school district formed by union of the two school districts under the provisions of sections 4735-1 and 4735-2 of the general Code.

It is thus seen that in both instances where the legislature has provided for voluntary dissolution of a school district it has provided that existing indebtedness of such school district whether bonded or otherwise should remain a charge only upon the taxable property in the district creating such indebtedness, and that the same does not become a charge upon the taxable property of the school district to which such dissolving district is annexed.

Looking to the provisions of section 4692 of the General Code authorizing the county board of education to abolish a school district by its transfer to another school district it will be noted that no statutory provision is made making existing

indebtedness of such abolished district a charge only upon the taxable property of such district, and it is plain that to read any such provision into section 4692 of the General Code would be legislation by construction, which is not permitted on any view.

In the absence of statutory provision touching this matter we are remitted to the general principles of law applying in such cases, which principles of law, as before noted, compel the conclusion that the debt of a school district abolished by the action of the county board transferring it to another school district becomes a charge upon all the taxable property of the subsisting and enlarged school district, and that to pay such indebtedness the board of education of such district should levy taxes on all such taxable property.

The conclusion here reached with respect to your first and second questions makes it clear that your third and fourth questions have no application to the facts presented in your communication.

By way of answer to your third question, however, it may be observed that the adjustment of school funds and indebtedness by a county board of education is not jurisdictional to the power of such county board of education to transfer territory from the one school district to another, and such adjustment may be made at a meeting later than the one at which the transfer of territory is made.

As to your fourth question it may be said that the right of appeal from the action of an administrative board or other tribunal does not exist unless such appeal is provided by statute, and inasmuch as there is no statutory provision providing for an appeal from the action of the county board making an adjustment of the funds and indebtedness on a transfer of territory from one school district to another, it must be answered that there is no such right of appeal.

The order of the county board making such adjustment or division of school funds and of the indebtedness on a transfer of territory from one school district to another may be reviewed by original action in the court of common pleas on the petition of the board of education of said school district affected by such order if the county board of education has been guilty of fraud or gross and intentional abuse of discretion in making such order.

Yours very truly,

JOSEPH MCGHEE,
Attorney-General.

147.

COUNTY COMMISSIONERS—CONTROL OVER COUNTY ROADS NOT ABROGATED BY CASS HIGHWAY LAW—IS LIMITED—STATE HIGHWAY COMMISSIONER HAS SUPERVISION—CONTRACTS WITH REFERENCE TO CHANGE OF GRADE OF ROAD SHOULD HAVE APPROVAL OF STATE HIGHWAY COMMISSIONER.

1. *The authority of the county commissioners over intercounty and main market roads is not taken away by the Cass highway law, but is limited to the extent that supervision over such roads is given to the state highway commissioner.*

2. *Contracts between the county commissioners and the conservancy directors with reference to changes in the grade of such roads should have the approval of the state highway commissioner to the extent that the supervision thereof is committed to him.*

COLUMBUS, OHIO, March 27, 1917.

HON. DEAN M. STANLEY, *Prosecuting Attorney Warren County, Lebanon, Ohio.*

DEAR SIR:—Referring to the answer of your inquiry of February 15th, asking the opinion of this department in reference to the contract with the directors of

the Miami conservancy district, a further supplemental question is asked on your behalf by the attorney of the said conservancy district, which inquiry is as follows:

> "In regard to the opinion asked for by Mr. Stanley, prosecuting attorney of Warren county, would say, that the only question that is worrying him is, whether county commissioners have power and authority to grant rights over and upon those parts of highways, which are under the control of the state highway commissioner. We did not know what his question was until today. We have already submitted our plans to the state highway commissioner, and he has approved them up to date. We will submit all contracts with the county commissioners, who without doubt hold the ownership and have control of county roads, the same as they had before, subject to the supervision as to construction and maintenance of the state highway commissioner, to him. It will, therefore, be unnecessary for you to advise Mr. Stanley any more than that this be complied with under the law, which may shorten your labors in regard to the opinion. I hope this will be of assistance to you."

This inquiry involves the distribution of power as between the state highway commissioner and the county commissioners with reference to those roads which are improved by state aid. The office of the state highway commissioner is created by section 1178 G. C., which is as follows:

> "There shall be a state highway department for the purpose of affording instruction, assistance and co-operation in the construction, improvement, maintenance and repair of the public roads and bridges of the state, under the provisions of this chapter. The governor, with the advice and consent of the senate, shall appoint a state highway commissioner who shall serve for the term of four years, unless sooner removed by the governor. He shall give his whole time and attention to the duties of his office."

His powers and duties are prescribed by section 1184 G. C., which is as follows:

> "The state highway commissioner shall have general supervision of the construction, improvement, maintenance and repair of all intercounty highways, and main market roads, and the bridges and culverts thereon. He shall aid the county commissioners in establishing, creating and preparing suitable systems of drainage for highways, and advise with them as to the construction, improvement, maintenance and repair of highways; and he shall approve the design, construction, maintenance and repair of all bridges, including superstructure and substructure, and culverts or other improvements on intercounty or main market roads; and in the case of bridges and culverts on other roads, when the estimated cost thereof exceeds ten thousand dollars, the plans therefor shall be submitted to and approved by him, before contracts are let therefor. He shall cause plans, specifications and estimates to be prepared for the construction, maintenance or repair of bridges and culverts when so requested by the authorities having charge thereof, and he shall cause to be made surveys, plats, profiles, specifications and estimates for improvements whether upon state, county or township roads. He shall make inquiry in regard to systems of road and bridge construction and maintenance wherever he may deem it advisable and conduct investigations and experiments with reference thereto, and

make all examinations, in his opinion, advisable, as to materials for road construction or improvement. * * *"

The nature of the authority given him by this section is largely, though not entirely, advisory. The department is said to be "for the purpose of affording instruction, assistance and co-operation in the construction, improvement, maintenance and repair of public roads," and he has, under the provisions of section 1184 G. C., "general supervision of the construction, improvement, maintenance and repair of all intercounty highways and main market roads."

This in nowise excludes the authority of the county commissioners over the roads, who represent the county in its proprietary character, and though not owning the fee simple of the land within the boundary of such roads, nevertheless they do own the easement therein for highway purposes. Their control over the same is not abrogated by the Cass highway law, although the authority of the commissioners is restricted to the extent that the state highway commissioner takes precedence over them. Therefore, any contract made by them would not abridge this supervisory power of the state highway commissioner, and as suggested in your inquiry, it would be necessary, or at least highly desirable, to have his approval of contracts with reference to the extent, dimensions, slope, construction and surfacing of approaches to crossings of the proposed levees constructed by the conservancy district.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

148.

MONEY RAISED UNDER SECTION 9887 G. C. MUST BE USED FOR IMPROVING AN EXISTING FAIR GROUND SITE AND NOT FOR THE PURCHASE OF A NEW SITE—THE FACT THAT THE AGRICULTURAL SOCIETY HAS RECEIVED ASSISTANCE UNDER SECTION 9887 G. C. DOES NOT PRECLUDE FURTHER AID UNDER SECTION 9894 G. C.

Money raised by taxation under favor of section 9887 G. C. must be applied to the purchase and improvement of the original fair ground site and cannot be applied to the purchase of a new site.

The tax levy under section 9887 G. C. by the commissioners to assist the agricultural society in the purchase and improvement of a fair ground site does not preclude further aid to the agricultural society under section 9894.

COLUMBUS, OHIO, March 29, 1917.

HON. CHESTER PENDLETON, *Prosecuting Attorney, Findlay, Ohio.*

DEAR SIR:—I have your letter of February 2, 1917, as follows:

"For a number of years Hancock county has been divided against itself upon the question of whether or not its county fair grounds shall be moved to a new location. For about twenty-five years the Hancock county agricultural society has owned the fair grounds located two and one-half miles south of Findlay and in approximately the geographical center of the county. Because of lack of transportation facilities and difficulty of ac-

cess, dissatisfaction arose over the location of the grounds, and in about the year 1908 an independent organization was formed, and established what is known as the Driving Club, which immediately adjoins the city on the northeast and is readily accessible, both by street cars and boats, from the center of the city. This venture did not prove to be as profitable as its promoters had hoped, and for seven or eight years they have been making a continuous effort to induce the agricultural society to relinquish the old fair grounds and buy the new site from the Driving Club.

"In its present location the Hancock county fair has never been a success, and the county commissioners have frequently had to extend financial aid to the society. Meanwhile the buildings and grounds have fallen into a state of decay and dilapidation, so that the agricultural society has declared that necessary repairs will have to be made before the grounds will be in shape for the fair in September. They estimate that it will take $15,000 for this purpose.

"It is the judgment of the three county commissioners and of five out of the eight members of the agricultural board that it is not good business to spend so much money upon the old grounds and so perpetuate a source of expense upon the county. Three members of the agricultural board live in the south part of the county, which is almost solidly opposed to the change of location, and so oppose the move.

"In the recent November election the proposition was submitted to the people of Hancock county as to whether or not $25,000 in bonds should be issued by the county to purchase the Driving Club grounds. The bond issue was defeated by a narrow margin, largely because of organized opposition, and partly because of other local political conditions.

"Since this election the officials of the Driving Club, the county commissioners and the agricultural board have held a number of conferences. The Driving Club has reduced its price on the new grounds, and the commissioners and agricultural board have decided that it is better business for the county to buy the new grounds, rather than to repair the old.

"The question now arises as to their power to do this without another vote of the people on the matter of bond issue. If this can be done without a vote of the people, the officials of the Driving Club are willing to take the purchase price in payments as same can be made by the county.

"The agricultural board is considering a purchase of the new grounds if possible, or, failing in that, a short term lease of the new grounds until such a time as a purchase can be made. In the light of the above facts, I would like to secure your opinion on the following questions:

"First. Can money raised by taxation, under favor of 9887-1 of the General Code, or any part of it, be used for the purchase price of a new site, or must it be used only for the purpose of improving an existing ground?

"Second. Can this money realized from the sale of the old grounds and applied on the purchase price of a new site according to 9902 G. C. be considered as money furnished by the society for that purpose, so as to empower the county commissioners to pay out of the county treasury the money as provided for in 9887 G. C.? The legal title to the old grounds is vested in the Hancock county agricultural society.

"Third. Is the tax levy authorized in 9894 G. C. to be considered as an addition to other county aid furnished by the commissioners or would the tax levy under 9887-1, for instance, preclude further aid under section 9894 G. C.?"

Answering your first question. Section 9887-1 G. C. reads:

"In counties wherein there is a county agricultural society which has purchased a site whereon to hold fairs and the title to such grounds is vested in fee in the county, but the society has the control and management of the lands and buildings, if they think it for the interest of the county and society, the county commissioners may levy a tax upon all the taxable property of the county for the purpose of improving such grounds not to exceed one-twentieth of one mill in any one year and not for a period of more than five years; and in anticipation of the collection of this tax the commissioners may issue and sell the bonds of the county, bearing interest not to exceed six per cent. per annum payable annually."

It is my opinion that money raised under this section must be used for improving an existing fair ground site and not for purchasing a new one. However, this is not important here, for the reason that section 9887-1 G. C. refers only to sites, the titles of which are vested in fee in the county, and can have no application to your situation, since you advise "the legal title to the old grounds is vested in the Hancock county agricultural society."

In reply to your second question, section 9887 G. C. reads:

"When a county society has purchased, or leased real estate whereon to hold fairs for a term of not less than twenty years, or the title to the grounds is vested in fee in the county, but the society has the control and management of the lands and buildings; if they think it for the interests of the county, and society, the county commissioners may pay out of the county treasury the same amount of money for the purchase or lease and improvement of such site as is paid by such society or individuals for that purpose, and may levy a tax upon all the taxable property of the county sufficient to meet such payment."

Section 9902 G. C. reads:

"Payment for the purchase or lease of the land included in such site, and the improvements thereon, may be made by the county commissioners from any unappropriated funds in the county treasury at the time it is to be made. If no such funds are then in the treasury the commissioners may issue the bonds of the county for such amounts as are necessary for the purchase or lease of the land and the improvements thereon. But if such old site is sold or leased before the new site is purchased or leased, in making the payment such society first shall apply the moneys realized from the sale or lease to the purchase or lease of the new site. If the old site is sold or leased after the purchase or lease of the new site, the amounts realized from such sale or lease shall be placed to the credit of the sinking fund for the redemption of bonds issued as hereinafter provided. Such bonds shall bear not more than five per cent. interest per annum, payable semi-annually, not to be sold at less than their par value, and shall be payable at such place, times, and in such denominations as the commissioners determine."

It will be noted that section 9902, above quoted, provides:

"If such old site is sold or leased before the new site is purchased or leased, in making the payment such society first shall apply the moneys realized from the sale or lease to the purchase or lease of the new site."

I take it what you desire to know is whether or not, after money arising from the sale of the old site has been applied to the purchase of a new one, as provided in this section, the county commissioners may step in and, under the provisions of section 9887 G. C., pay out of the county treasury a like sum of money, to be applied upon the purchase of this new site.

The legislature has, in sections 9900 to 9905 G. C., both inclusive, provided a complete scheme for meeting a situation such as yours "when a county desires to sell its site in order to purchase another, or if for any reason such site is unfit or insufficient for the purposes for which it is used."

In view of this fact I am of the opinion that section 9887 G. C. authorizes the county commissioners to assist the agricultural society in *purchasing and improving the original site only,* and that money raised by taxation under this section must be applied to the purchase and improvement of the original site and cannot be applied to the purchase of a new site.

In answer to your third question it will be noted that section 9887 G. C. provides for the payment of one-half the purchase price or cost of improvement "for the purchase or lease and improvement of such site." This money is not paid over to the agricultural society to be used as they think best, but is paid out for the purchase or improvement referred to. Money under section 9894, referred to, is raised for "the purpose of encouraging agricultural fairs" and is paid to the treasurer of the agricultural society. Levies provided for in these two sections are for two separate and distinct purposes and it is my opinion that the tax levy under section 9887 would not preclude further aid under section 9894, though in view of my answer to your first two questions I doubt whether the answer to the third one is material.

Yours very truly,
JOSEPH MCGHEE,
Attorney-General.

149.

SPENCERVILLE ARMORY CONTRACT—BALANCE DUE ON SAME SHOULD BE PAID TO RECEIVER OF CONTRACTORS.

Proper method of paying balance due on Spencerville armory contract, contractor being in the hands of a receiver.

COLUMBUS, OHIO, March 29, 1917.

HON. B. L. BARGER, *Secretary Ohio State Armory Board, Columbus, Ohio.*

DEAR SIR:—Under date of March 9, 1917, you wrote me as follows:

"At armory board meeting of March 6, 1917, the following resolution was passed:

"SPENCERVILLE ARMORY. RESOLVED, That WHEREAS: After completion of Spencerville armory according to drawings and specifications made part of original contract with Sereff Bros., and after paying the secondary contractor, who completed the contract of said Sereff Bros., there remains the sum of $3,188.25, due the estate of Sereff Bros., now in hands of receiver in cause of Carl F. Steck et al. v. John Sereff & Peter Sereff, being of the court of common pleas of Allen county, Ohio, it is therefore

"RESOLVED, That the board request the attorney-general to cause such entry to be made in such case as will best protect the interest of the

state and authorize the adjutant general to approve a voucher for said sum of $3,188.25 payable to said receivers in said cause to be distributed as approved by attorney-general and as ordered by the court.

"Pursuant to said resolution I herewith transmit a copy of petition and one journal entry in said action, which seem to be all of the court papers in our possession relative to said case. (This is same case in which you rendered opinion dated February 5, 1916.)"

The petition enclosed with your letter is a petition filed in the court of common pleas of Allen county wherein Carl F. Steck and P. P. Baker are plaintiffs, and John Sereff and Peter Sereff are defendants. The petition discloses that the defendants were partners engaged in the general contracting business and as such obtained a contract for the construction of an armory building at Spencerville, Ohio, and proceeded with the construction thereof; that in the month of January, 1916, defendants ceased to work on the building, leaving the armory uncompleted. Plaintiffs bring the suit on behalf of themselves and others engaged as laborers in the construction of said building, who had not received pay for their labor, and pray for the appointment of a receiver "to take charge of said business and to have full jurisdiction over said contract; for the construction thereof, for an accounting of the amounts due to the plaintiffs and said other laborers, the winding up of the business of said partnership so far as it related to said building and said contract and the distribution of the funds arising therefrom, and for all other and further relief in equity just and proper."

The journal entry which you submitted in the same case shows the appointment of C. J. McCune as receiver and he is ordered to give bond, and it is further ordered that "he shall proceed to take possession of the property described in this petition, first, all choses in action, moneys due and rights accruing to said defendant under and by virtue of their contract for the construction of the armory building in Spencerville, Ohio, and the said defendant, and all other parties having any of such property in their possession or under their control, are ordered to deliver the same to said receiver on his demand."

Upon examination of the files in the office of the auditor of state I find that on the 14th day of April, 1915, the state armory board entered into a contract with J. W. Sereff and P. H. Sereff, of Lima, Ohio, for the construction of the armory at Spencerville, Ohio, for the sum of $16,950.00. Article V of said contract provides as follows:

"Should the contractors at any time refuse or neglect to supply a sufficiency of properly skilled workmen, of materials of the proper quality, or fail in any respect to prosecute the work with promptness and diligence, or fail in the performance of any agreement herein contained, such refusal, neglect or failure being certified by the architect, the owner shall be at liberty, after three days' written notice to the contractors to provide any such labor or materials, and to deduct the cost thereof from any moneys then due or thereafter to become due to the contractors under this contract and if the architect shall certify that such refusal, neglect or failure is sufficient ground for such action, the owner shall also be at liberty to terminate the employment of the contractors for the said work and to enter upon the premises and take possession, for the purpose of completing the work included under this contract, of all materials, tools and appliances thereon, and to employ any other person, or persons, to finish the work, and to provide the material therefor; and in case of such discontinuance of employment of the contractors he shall not be entitled to receive any further payment under this contract until the said work shall be wholly

finished, at which time, if the unpaid balance of the amount to be paid under this contract shall exceed the expenses incurred by the owner in finishing the work, such excess shall be paid by the owner to the contractors, but if such expense shall exceed such unpaid balance, the contractors shall pay the difference to the owner. The expense incurred by the owner, herein provided, either for furnishing materials or for finishing the work, and any damage incurred through such default shall be audited and certified by the architect, whose certificate thereof shall be conclusive upon the parties."

It appears that subsequent to the entering in of such contract the said Sereff Bros. failed to carry out the provisions thereof and upon certification of the architect the armory board proceeded to let a contract for the completion of said building. It now appears that after the second contractor has fully completed the building there remains the sum of $3,188.25 due on the contract made with Sereff Bros.

You request me to cause an entry to be made in the case in question as will best protect the interests of the state and authorize the adjutant general to approve a voucher in the sum of $3,188.25, payable to the receiver.

In accordance with your request I have prepared an application on behalf of the state of Ohio in the case referred to reciting the fact that a contract was entered into between the state, through the Ohio State armory board, and the defendants in said action for the construction and completion of an armory at Spencerville, Ohio, for $16,950.00; that after entering into the contract there were additions made thereto in the sum of $542.75 and a deduction in the sum of $135.00, making the complete contract price $17,357.75 upon which was paid $9,424.00; that the subsequent contract entered into upon default of the defendants in the performance of the contract, was for $4,705.50 to which there was an addition of $40.00, making the sum total $4,745.50 paid out to the second contractor, leaving a balance of $3,188.25 still due to the defendants and have prayed for instructions of the court as to the disposition to be made of said sum of $3,188.25. I have also prepared an entry as follows:

"This day this cause came on to be heard upon the application of the state of Ohio for instructions as to the payment of $3,188.25, being the balance due on contract entered into with the defendants herein for the construction and completion of an armory at Spencerville, Ohio, and was submitted to the court.

"The court upon careful consideration thereof directs that the said money be paid to C. J. McCune, the receiver heretofore appointed herein, in accordance with an order of court heretofore entered herein on the ----------day of ----------, 191---, wherein he was ordered to take possession of all choses in action, moneys due and rights accruing to said defendants in and by virtue of their contract for the construction of the armory building at Spencerville, Ohio, and upon receipt of the said sum of $3,188.25, the receiver herein is hereby authorized and directed to receipt to the state of Ohio in full for all moneys due to the defendants under said contract."

Upon receipt of a certified copy of the entry herein referred to the same should be attached to the certified account and voucher drawn on the auditor of state, whereupon the auditor of state would be authorized to draw his warrant for the said amount in favor of the receiver.

After the warrant has been sent to you by the auditor of state it would also be well to obtain from the receiver a receipt in full for the amount due under the contract before turning over the warrant to the receiver. This receipt in full should be filed with the other papers attached to the voucher in the office of the auditor of state.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

150.

FLAVORING EXTRACTS—FOR WHICH NO STANDARD EXISTS—MUST BE LABELED AS PROVIDED FOR IN SECTION 5785 G. C.—WHEN SOLD DIRECTLY TO BAKERIES, ETC.

A manufacturer selling directly to bakeries, confectioners, etc., flavoring extracts for which no standard exists, must comply with the provisions of section 5785 G. C.

COLUMBUS, OHIO, March 29, 1917.

The Board of Agriculture, Columbus, Ohio.

GENTLEMEN:—I have your communication of February 13, 1917, in which you state:

> "Section 5785, subdivision 4, provides that flavoring extracts shall be misbranded for which no standard exists if they are not labeled as imitation, or artificial and the formula printed in the manner hereinafter provided for the labeling of compounds.
>
> "It seems to be the impression of some wholesale dealers where they are selling to bakeries, confectioners, etc., that it is not required for them to label their packages as provided under this section.
>
> "I would be very glad to have you give me your interpretation of this section relative to the requirements of goods sold by wholesale as to whether they should be so labeled."

Section 5774 G. C. provides:

> "No person, within this state, shall manufacture for sale, offer for sale, sell or deliver, or have in his possession with intent to sell or deliver, a drug or article of food which is adulterated within the meaning of this chapter, or offer for sale, sell or deliver, or have in his possession with intent to sell or deliver, a drug or article of food which is misbranded within the meaning of this chapter."

Section 5785 G. C. provides in part:

> "Food, drink, flavoring extracts, confectionery or condiment shall be misbranded within the meaning of this chapter:
>
> "* * * * * * * *
>
> "4. In case of a flavoring extract, for which no standard exists, if it is not labeled 'artificial' or 'imitation' and the formula printed in the manner hereinafter provided for the labeling of 'compounds' or 'mixtures' and their formulae;

"5. If the package containing it or a label thereon bears a statement, design or device regarding it or the ingredients or substances contained therein, which is false or misleading in any particular; provided, that this section shall not apply to mixtures or compounds recognized as ordinary articles or ingredients of articles of food or drink, if each package sold or offered for sale is distinctly labeled in words of the English language as mixtures or compounds, with the name and percentage, in terms of one hundred per cent. of each ingredient therein. The word 'compound' or 'mixture' shall be printed in letters and figures not smaller in height or width than one-half the largest letter upon which any label on the package and the formula shall be printed in letters and figures not smaller in height or width than one-fourth the largest upon any label on the package, and such compound or mixture must not contain an ingredient that is poisonous or injurious to health."

Section 12758 G. C. provides:

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

Section 12371 G. C. reads as follows:

"In the interpretation of part fourth the word 'whoever' includes all persons, natural and artificial, partners, principals, agents, employes, and all officials, public or private."

An examination of the different sections of the statutes relating to the subject matter inquired of does not disclose that there is any exception to wholesale dealers.

Perhaps these gentlemen have confused the state with the federal law. I understand there are some exceptions in the federal law and they may have given grounds for the impression you say the wholesalers have. But so far as the Ohio statutes on the subject are concerned, I find no exception in favor of the manufacturer selling such extracts, etc., in the manner you state. Under penalty they are obliged to conform to the provisions of the law as above set forth.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

151.

COUNTY SCHOOL SUPERINTENDENT—QUALIFIED TO ACT AS JUROR —ENTITLED TO JURY FEES IN ADDITION TO REGULAR COMPENSATION.

A county superintendent of schools may sit as a juryman in the common pleas court and is entitled to his jury fees in addition to his compensation as such county superintendent.

COLUMBUS, OHIO, March 29, 1917.

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

GENTLEMEN:—In your letter of January 26, 1917, you submit for my opinion the following proposition:

> "May the county superintendent of schools sit as a juryman in the common pleas court, he having been drawn in the regular panel. If so, is he legally entitled to compensation as a juror?"

General Code section 11423, in providing who shall be selected as jurors and how they shall be selected, provides in part as follows:

> "* * * the jury commissioners shall * * * select such number of *judicious* and *discreet* persons, having the qualifications of *electors* of such county, as the court may direct, to be selected as nearly as may be from the several wards and townships in proportion to their respective population. No person shall be so selected who shall not, in the judgment of such commissioners, be competent in every respect to serve as a juror. * * *"

Section 11444 G. C. provides who may be exempt from jury service as follows:

> "Public officers, clergymen, priests, physicians, attorneys-at-law, members of a police force, firemen employed by a municipal authority, acting volunteer members of companies to extinguish fires, organized in and under the control of a municipality, and all persons serving as active members thereof for five consecutive years, officers, enlisted men and contributing members of the national guard whose names are contained in certified lists filed in the office of the clerk of the common pleas court in accordance with law, the latter only during the period specified by law, and every person over seventy years old, are exempt from jury service."

But the fact that a person may be exempt from jury service does not mean that the person may not be qualified for jury service. It is held in In Re Heekin, 14 O. C. C. (n. s.) 329, that the legislature may exempt any class of persons it deems proper from jury service and it is held in Glassinger v. State, 24 O. S. 206, that the provisions of law exempting public officers and others from jury service does not have the effect of disqualifying such persons so exempted, but merely extends to him a privilege which he may exercise or which he may waive, and in Roth v. State, 3 O. C. C. 59, it is held that a person who by law is exempted from jury service is not one subject to be challenged for that purpose; that is to say, exemption from jury service is not a ground for challenge. So that a person may be perfectly qualified to sit as a juror and may do so and yet come within

those classes of persons who are exempt under our laws. I find nothing in the statute which bars a county superintendent of schools from sitting as a juror. Of course he would be subject to the same grounds for challenge as any other person, but the fact that he is county superintendent of schools is no bar to his so acting as a juror.

If, then, such superintendent of schools acts as a juror, is he entitled to compensation as such juror?

General Code section 4744-1 provides that the salary of the county superintendent shall be fixed by the county board of education at not less than twelve hundred dollars per year, one-half of the same, not to exceed the sum of one thousand dollars, to be paid by the state and the other half by the districts over which such superintendent has jurisdiction. Other sections in said chapter prescribe his duties, all of them, however, along educational lines, and section 7837 G. C. provides:

> "The county superintendent shall receive no additional compensation for his services as clerk of the county board of school examiners."

Section 7834 provides the compensation for such school examiners but makes an exception of the clerk of said board.

The compensation for jurors is provided for in General Code section 3008, as follows:

> "Each grand or petit juror drawn from the jury box pursuant to law, each juror selected by the court as talesman as provided by law, and each talesman shall receive two dollars for each day of service, and if not a talesman, five cents each mile from his place of residence to the county seat. Such compensation shall be certified by the clerk of the court and paid by the county treasurer on the warrant of the county auditor."

No exception is made of any person or classes of persons in the above section. Each juror drawn, whether accepted as a juror or not, shall receive said pay.

Your inquiry, I am advised, was prompted by an opinion of my predecessor, which held that witness fees in criminal cases could not be received by assistant state fire marshals. The facts upon which that opinion was rendered and the facts stated in your request should be distinguished. In that case it was held that assistant state fire marshals, being representatives of the state in the gathering and giving of evidence, where matters were being investigated and prosecutions were being made, were performing their official duties for which duties they were receiving their salary and expenses; that the testimony they were giving as witnesses was a part of their official duties and they were being paid as such officers. Should they be also paid as witnesses, it would amount to double pay for the same service. In this case, however, the superintendent of schools, sitting as a juror, is not performing official duties. Jury service is not along the line of his school work and I find nothing in the law requiring him to give his entire time and attention to his work. I do not mean by this that a county superintendent of schools should accept other employment outside of his employment as such superintendent, and thus neglect his duties as such superintendent, but the duty of every person drawn on a jury to serve as such juror is so essential to good government that it would seem to me a county superintendent of schools might easily serve as such juror and also perform all the duties as such county superintendent.

My attention is also called to General Code section 11445, which provides as follows:

"No officer shall be allowed compensation for services under this chapter other than were allowed by law."

The chapter referred to is chapter 2, division 3, title 4 of the General Code, and refers to "conduct of the trial," but the following section which, until divided by our codifying commission, was formerly a portion of said last quoted section, reads as follows:

"Sec. 11446. Any officer named in this chapter, who refuses or neglects to perform any duty therein required, shall forfeit and pay not exceeding one hundred dollars."

I am convinced that the term "officer" used in said section 11445 refers to the same officer mentioned in section 11446 G. C., which refers only to the officers named in the chapter and not to any other officer or employe.

Holding the above views, then, I advise you that the county superintendent of schools may sit as a juror in the common pleas court and that he is entitled to his jury fees in addition to whatever salary he may receive as county superintendent of schools.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

152.

EIGHT-HOUR LAW—DOES NOT APPLY TO EMPLOYES OF STATE HOSPITAL—WORKMEN WORKING FOR THE PUBLIC AND WORKMEN ENGAGED ON A PUBLIC WORK DISTINGUISHED.

The constitutional provision and the law providing for an eight-hour day on public works does not apply to employes in the state hospital. Said employes are workmen working for the public but not workmen engaged on a public work.

COLUMBUS, OHIO, March 29, 1917.

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

GENTLEMEN:—I am in receipt of a request from the state hospital employes' union, in which they request an opinion as to the construction that ought to be placed upon sections 17-1 and 17-2 G. C. I deem this question submitted to me to be of sufficient general interest that I am taking the liberty of addressing an opinion thereon to you.

The communication addressed to me by said employes' union reads as follows:

"Will you kindly render an opinion on a statute enacted May 23, 1913, 103 O. L. 854, which provides in part as follows:

"Section 17-1 G. C.: 'Except in cases of extraordinary emergency, not to exceed eight hours shall constitute a day's work * * * for workmen engaged on any public work carried on or aided by the state * * *.'

"Former Attorney-General Turner rendered an opinion on this statute and reached the conclusion that the term 'public work' as used therein applied to the maintenance of public institutions operated by the state, and not simply to construction work.

"This law contains a clause which specifies that it shall not be so construed as to include policemen or firemen, which would seem to indi-

cate that other employes of the state are not excluded in its provisions or such exceptions would have been expressly mentioned.

"We are very anxious to learn whether this law can be interpreted so as to include state hospital employes, and if so the proper course to pursue to gain its enforcement.

"At present we are serving from fourteen to sixteen hours per day, and consequently are trying to find relief, in some way, from these long, tedious hours of employment that are beyond all reason, in view of the insignificant wages we are receiving."

The question has to do with the matter as to whether the employes in the state hospital would come under the eight-hour provision found in section 17-1 G. C. This section of the statute, together with the constitutional provision found in section 37 of article II of the Constitution, has been construed a number of times by former attorneys-general, in applying said statutes to the question of different kinds of employes.

These statutes and said constitutional provision have been discussed so fully and so ably by my predecessors in office that I feel I can do no better than to review a number of these opinions and then apply the law to the facts set out in the communication received by me.

First, let me suggest that section 37 of article II of the Constitution reads as follows:

"Except in cases of extraordinary emergencies, not to exceed eight hours shall constitute a day's work, and not to exceed forty-eight hours a week's work, for workmen engaged on any public work carried on or aided by the state, or any political subdivision thereof, whether done by contract, or otherwise."

and that said section 17-1 G. C. was enacted to enforce the provisions of said section 37, by providing for a penalty to be imposed upon those employers who violated the constitutional provision.

Said section 17-1 G. C. reads as follows:

"Except in cases of extraordinary emergency, not to exceed eight hours shall constitute a day's work and not to exceed forty-eight hours a week's work, for workmen engaged on any public work carried on or aided by the state, or any political subdivision thereof, whether done by contract or otherwise; and it shall be unlawful for any person, corporation or association, whose duty it shall be to employ or to direct and control the services of such workmen to require or permit any of them to labor more than eight hours in any calendar day or more than forty-eight hours in any week, except in cases of extraordinary emergency. This section shall not be construed to include policemen or firemen."

Hence, when we interpret section 17-1 G. C., we are practically interpreting said constitutional provision.

Hon. Timothy S. Hogan, former attorney-general, rendered an opinion on February 13, 1914, found in Vol. 1 of Annual Report of the Attorney-General for 1914, page 283, upon the following statement of facts:

"I have been interested to learn whether or not the law calling for an eight-hour day on public works would apply to Miami university at Oxford, Ohio.

"We employ engineers, janitors and laborers in addition to those who have charge of the domestic work in the boarding department."

Upon this request Mr. Hogan rendered the following opinion:

"The law calling for an eight-hour day on public works does not apply to educational institutions such as Miami university. Such an institution is not a public work in the sense intended by the statute."

In this opinion Mr. Hogan calls particular attention to the clause which is suggested in the communication addressed to me, and that is the fact that—

"This section shall not be construed to include policemen or firemen."

He says:

"Whatever of strength might be added by the last sentence of this statute, in construing the statute as if it stood alone, it is of no avail to vary or change the plain import of the language used in the amendment, and we are relegated to a determination of what is included in the language 'workmen engaged on any public work carried on or aided by the state.'"

That is, Mr. Hogan held that the exemption of firemen and policemen from the provisions of the statute could have no effect upon the interpretation to be placed upon "workmen engaged on any public work carried on or aided by the state," for the reason that this statute was enacted to provide a penalty for the violation of the constitutional provision, and hence it is the constitutional provision that must be construed, rather than the said section of the statute, and it will be noted that the constitutional provision does not contain the clause in reference to policemen or firemen.

In this conclusion of Mr. Hogan I concur, and hence the only question we have to consider is as to whether employes of the state hospital could come under the terms "workmen engaged on any public work carried on or aided by the state." In reference to this matter Mr. Hogan held:

"As the state and various political subdivisions thereof are engaged nearly and probably all of the time in erecting public buildings, bridges and roads, and the state is aiding the divisions in many respects in construction and maintaining roads and highways and maintaining and operating the same such language finds plain and easy application, and it is only necessary to give it its plain and every-day meaning and apply it to workmen engaged on public work as distinguished from workmen for the public, and thereby confining it to constructive work, betterment, building and improvement carried on and aided by the state."

In this it will be noted that he draws a distinction between men who are working for the public and men who are engaged upon public works.

In another opinion Mr. Hogan rendered on April 29, 1914, found in Vol. I of the Annual Report of the Attorney-General for 1914, page 595, he passed upon the following question, as to whether said section 17-1 G. C. would pertain to engineers, firemen and other employes of the waterworks department of a city. Upon this question he rendered the following opinion:

"The words 'public work carried on or aided by the state, etc.,' refer solely to construction work, making a distinction between workmen engaged in *public work* and workmen *working for the public.*"

In the body of the opinion we find the following statement (p. 596):

"To my mind there is a broad distinction between 'workmen engaged on public work' and 'workmen working for the public,' and this distinction must be kept in view all of the time.

"The state house and buildings occupied by the various state departments are full of workmen 'working for the public,' yet very few, if any of them, are engaged on a public work carried on by the state, as I construe the term."

I also desire to note an opinion rendered by my predecessor, Hon. Edward C. Turner, on April 30, 1915, found in Vol. I of the Opinions of the Attorney-General for 1915, page 598, which opinion was based upon the request made by Hon. Charles E. Thorne, director of Ohio agricultural experiment station at Wooster, Ohio. In the request of Mr. Thorne he asks whether experiment work on the farm would be considered as "public work" under the said statute, and whether said section would apply to that portion of the station's work which has to do with live stock and field operations and with the dairy feeding and care of live stock, including the milking of dairy cows, etc.

Mr. Turner rendered the following opinion upon said facts:

"General experiment station work is not public work within the meaning of sections 17-1 and 17-2 G. C., 103 O. L. 854, or of sections 37 of article II of the Ohio Constitution."

In his opinion we find the following statement (p. 599):

"Without going into or repeating the process of reasoning and argument contained in these two opinions, suffice it to say that I agree with the conclusions reached by Attorney-General Hogan, and I am of the opinion that the language referred to in section 37 of article II of the Constitution, and in section 17-1 of the General Code, applies only to public work of a constructive, improvement or betterment character, and not to the general routine work performed under or in various departments of the state. As stated in the opinion of April 29, 1914, above referred to, there is a wide distinction between 'workmen engaged in public work' and 'workmen working for the public.'"

Thus we find that Mr. Turner agrees with the former opinions rendered by Mr. Hogan, and so far as I am able to construe said statute and said constitutional provision, I am convinced that the finding of my predecessors, upon the facts presented to them, is correct.

Now, let us apply the law as laid down in said former opinions to the facts as presented to me in said communication. In the first place we must eliminate the language found in section 17-1 G. C., namely,

"This section shall not be construed to include policemen or firemen."

As said above, we must exclude this because it is not found in the constitutional provision, and hence can have no effect in construing the said section of the statute or of the constitutional provision.

Let us further consider the distinction made between "workmen engaged in public work" and "workmen working for the public."

With these things in mind, in what class would the employes of the state hospital fall? I believe there can be but one answer to this, and that is that they are among those "workmen working for the public" and not among the "workmen engaged in public work." This being the case, the provisions of the statute and the constitutional provision in reference to an eight-hour day would not apply to said employes.

The communication states that Hon. Edward C. Turner rendered an opinion that the term "public work," as used in said section, applied to the maintenance of public institutions operated by the state and not simply to construction work. This language is found in opinion rendered by Hon. Edward C. Turner on September 10, 1915, Vol. II of the Opinions of the Attorney-General for 1915, page 1713. In the body of the opinion the following language is used (p. 1717):

> "It then having been determined that the term 'public work' as used in the constitutional provision and statute under consideration comprehends the maintenance, repair, construction, alteration and operation of all public undertakings of a structural nature of substantial permanence and of general public utility, whether fixed or otherwise, it follows that all persons employed in the work of such construction, maintenance, alteration, repair and operation are engaged on a public work and if the same is aided or carried on by the state or any political subdivision thereof, such persons and their employers are subject to the penalties, possess the rights and are entitled to the remedies therein set forth."

But in noting said language it will readily be observed that it would not in any way bring under the provisions of said section of the General Code and the constitutional provision the employes of state hospitals.

Hence, in answering the question directly, I find that the employes of the state hospital would not come within the provisions of section 17-1 G. C., and I affirm the opinions rendered by my predecessors in office.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

153.

WOMAN'S SUFFRAGE LAW—SUBJECT TO REFERENDUM—LEGISLATURE AS USED IN ARTICLE II, SECTION 1 OF UNITED STATES CONSTITUTION DEFINED.

The act of the general assembly extending suffrage to women in the election of presidential electors is subject to the referendum.

COLUMBUS, OHIO, March 31, 1917.

HON. JAMES A. REYNOLDS, *Member of the House of Representatives, Columbus, Ohio.*

DEAR SIR:—I acknowledge receipt of your letter of March 17, wherein you request my opinion on the following question:

> "The senate and the house of representatives of the general assembly of Ohio have passed a bill conferring upon adult women the privilege of voting for presidential electors. The bill has been treated thus far as an ordinary act of legislation, all the constitutional formalities respecting its passage and authentication in the respective houses having been complied with and it having been presented to the governor for his approval. The governor has approved the bill and it has become a law.
>
> "It is understood that there is on foot a movement to circulate referendum petitions against the above described law.
>
> "Is the law subject to the referendum?"

I shall not quote the operative provisions of the state constitution, requiring in effect that every "law" (with certain express exceptions which do not include a law of this character), shall not go into effect until ninety days after it is filed by the governor in the office of the secretary of state, within which period referendum petitions signed by a certain proportion of the electors of the state may be filed with the secretary of state, in which event the effectiveness of the law is further postponed until the question of its approval or rejection shall be submitted at the succeeding general election to the electors of the state.

Insofar as the effect of such provisions upon an act of the assembly, of this general character, is concerned, and insofar as the same may be regarded as a state question, the recent decision of the supreme court of this state in the case State ex rel. Davis v. Hildebrant, 94 O. S. —, reported in O. L. Rep. Supp., Vol. XIV, No. 32, November 6, 1916, page 118, is conclusive—that is to say, that case is authority for the proposition that with respect to such actions as the legislature of the state may be authorized or required to take as a part of the framework or machinery of the federal government, the referendum provisions of the state constitution are applicable to such actions in the form of legislation, if their application is permitted by the federal constitution. In short, if the subject matter is one within the jurisdiction of the state to control by its constitution, the referendum provisions of the Ohio constitution go to the full extent of that jurisdiction.

I pass, therefore, from any consideration of the question of the interpretation of the state constitution to what I regard as the controlling phase of the general question, viz.: whether or not under the federal constitution it is competent for a state to limit or qualify the action of its representative legislative body in directing the manner of the "appointment" of presidential electors.

Before stating the conditions of this problem, I may be permitted to point out that the question which has been raised undoubtedly goes to the exercise of the governor s veto power as well as to the subjection of the measure to a popular referendum.

The latter may be looked upon, I think, as but an extension of the former—a popular veto superimposed upon an executive veto. So that to hold that the measure under consideration is not subject to the referendum would be equivalent to holding that it was improperly presented to the governor for his approval. Inasmuch as the governor has approved the bill, however, this point is doubtless academic.

The question which now arises exists under article II, section 1 of the Constitution of the United States, which provides as follows:

> "* * * Each state shall appoint, in such manner as the *legislature* thereof may direct, a number of electors, equal to the whole number of senators and representatives to which the state may be entitled in the congress * * *."

The initial approach to the solution of the question which you submit lies, I think, through the ascertainment of the meaning of "legislature" as used in the clause last above quoted.

In many instances in which this term is used in the federal Constitution, with reference to the states, it means a representative body, and of course does not include the whole body of the electors of the state.

See article I, section 2.
See article I, section 3 (as originally adopted).
See article IV, section 3.
See article IV, section 4.
See article V.
See article VI.
Fourteenth amendment, section 2.
Fourteenth amendemnt, section 3.
Seventeenth amendment.

I think a careful examination of the above cited provisions of the federal constitution will show that in the great majority of these instances it is very clear that the word "legislature" means a representative body. This is true in the case of article I, section 2; original article I, section 3; article IV, section 4; article V; article VI; the fourteenth amendment, sections 2 and 3; and the first paragraph of the seventeenth amendment.

In spite of this fact, it does not necessarily follow that the word or phrase in question is used throughout the federal Constitution in this ascertained sense. There are instances of its use, with respect to which the intent to employ it as meaning the law-making body, or the repository of legislative power, may fairly be inferred. Repeatedly, in the same instrument, "the Congress" is referred to and granted powers, but by force of article I, section 7, no concurrent action of the two houses can be taken without executive approval, or by passing the measure over the president's veto.

It is reasonable to assume, therefore, that the framers of the Constitution may have used the term "legislature" as referring to a state agency, in the same sense in which the word "Congress" is used as descriptive of the body to which federal legislative powers are committed, and with the same latent idea respecting the possibility of limitations on the law-making authority.

This thought suggests a principle which, it is believed, will serve as a guide in the interpretation of the word "legislature" wherever it may be found in the federal Constitution, viz.: wherever a power, which in its essential character is or may be *legislative*, is committed to a "state legislature" by the federal Constitution, the state agency which is the recipient of such a power so granted is that agency which is competent to receive and to exercise legislative power. But wherever a "state legislature" is

referred to in the federal Constitution merely as descriptive of a body of public officers, or wherever powers or privileges not essentially *legislative* are conferred in terms upon a "state legislature," the presumption does not apply.

Let this principle be applied to Article I, section 4 of the federal Constitution, which was the provision the effect of which was called in question in State ex rel. Davis v. Hildebrant, supra. It provides as follows:

> "The times, places and manners of holding elections for senators and representatives, shall be prescribed in each state by the legislature thereof; but the congress may at any time by law make or alter such regulations, except as to the places of choosing senators."

Here two legislative bodies are referred to, the state legislature and the congress. No one would argue that congress, in "making or altering such regulations," could act without the interposition of the executive approval, which clearly applies to such action by virtue of article I, section 7 of the feredal Constitution. But the nature of the power conferred upon the state legislatures by this section is the same as that vested in congress; both relate to the same subject matter and the power in both instances is essentially *legislative*. It seems reasonably certain that in this instance, at least, the framers of the Constitution did not intend to confer the power upon the state legislature as a selected body of officers, without such further checks as might be imposed upon the action of the legislative assembly in the enactment of legislation by the state constitutions, any more than they intended to confer the similar power to make or alter the regulations in question upon the congress without the approval of the president.

Indeed, there is direct authority for the conclusion that the word "legislature" in article I, section 4, means the law-making power of the state, and therefore includes the notion of the approval of the executive and that of the electors under a referendum provision of the state constitution.

> State ex rel. v. Polley, 26 S. D. 5.
> State ex rel. v. Hildebrant, supra.

The weight of these decisions is somewhat minimized by the fact that they are decisions of state courts merely. Nevertheless, the first of them is strictly in point on the proposition on which it is cited, and the second of them lays down the proposition, citing the South Dakota case with approval, although, as will be pointed out, the decision itself might have been exclusively rested upon another ground.

In the opinion in State ex rel. v. Polley, supra, the following language is found:

> "We are also of the opinion that the word 'legislature,' as used in section 4, article I, of the federal Constitution, does not mean simply the members who compose the legislature, acting in some ministerial capacity, but refers to and means the lawmaking body or power of the state, as established by the state constitution, and which includes the whole constitutional lawmaking machinery of the state. State governments are divided into executive, legislative, and judicial departments, and the federal Constitution refers to the 'legislature' in the sense of its being the legislative department of the state, whether it is denominated a legislature, general assembly, or by some other name. Under section I, article 3, of the state constitution, it will be observed, the people of this state have reserved to themselves, as a part of the lawmaking power, the right to vote by referendum, upon any law passed by the legislature, with certain specified exceptions, prior to the going into effect of such law. That the exceptions mentioned are 'such laws as may be necessary for the immedi-

ate preservation of the public peace, health or safety, support of the state government or its existing state institutions.' It is clear that said chapter 223 is not within any of these exceptions. Under the constitution of this state, the people, by means of the initiative and referendum, are a part and parcel of the lawmaking power of this state, and the legislature is only empowered to act, in accordance with the will of the people as expressed by the vote, when the referendum is properly put in operation. The term 'legislature' has a restricted meaning which only applies to the membership thereof, and it also has a general meaning which applies to that body of persons within a state clothed with authority to make the laws (Bouvier's Law Dic.; Webster's Dic.; Am. and Eng. Ency. 822; 25 Cyc. 182), and which in this state, under section 1, article 3, Const. S. D., includes the people. Therefore we are of the opinion that in the passage of this act dividing the state into two congressional districts, by the lawmaking power of this state, it was necessary that such law be passed according to the constitutional provisions of this state, and that the referendum was applicable thereto."

It is true that the authority of this decision is somewhat weakened by the inclusion in the opinion of certain dicta respecting the "reserved powers" of the state, found at page 8 et seq. of the report. However, these remarks, which are obviously ill-considered, have no relation to the above quoted portion of the opinion.

Judge Jones, of our own supreme court, employs the following language in his opinion in State ex rel. v. Hildebrant, supra:

"Does the term 'legislature,' as used in article I, section 4 of the federal Constitution, comprehend simply the representative agencies of the state, composed of the members of the bicameral body, or does it comprehend the various agencies in which is lodged the legislative power to make, amend and repeal the laws of the state, including the power reserved to the people empowering them to 'adopt or reject any law' passed by the general assembly under the provisions of section 1, article II of the constitution of Ohio.

* * * * * * * * * * *

"While article I, section 4, of the United States Constitution is controlling upon the states in so far as it grants the legislature of the state authority to prescribe times, places and manner of holding elections, this is the *quantum* of the federal grant. The character of the legislature, its composition and its potency as a legislative body are among the powers which are, by article X of said Constitution, 'expressly reserved to the states respectively, or to the people.'

"Webster's New International Dictionary defines 'legislature' as follows:

" 'The body of persons in a state, or politically organized body of people, invested with power to make, alter and repeal laws.'

"The Century dictionary defines the same term as follows:

" 'Any body of persons authorized to make laws or rules for the community represented by them.'

"Under the reserved power committed to the people of the states by the federal constitution, the people, by their state organic law, unhindered by federal check of requirement, may create any agency as its lawmaking body, or impose on such agency any checks or conditions under which a law may be enacted and become operative. Acting under this recognized authority, the Ohio Constitution, prior to the adoption of the amendment of 1912, provided that the 'legislative power' of the state should be vested in the general assembly, consisting of a senate and house of representatives. The

same provision now exists, but by the adoption of the amendment of 1912 the people expressly limited this legislative power by reserving to themselves the power to reject any law by means of a popular referendum. * *

"The constitutional provision relating to the election of congressmen, conferring the power therein defined upon the various state legislatures, should be construed as conferring it upon such bodies as may from time to time assume to exercise legislative power, whether that power is lodged in a single or two-chambered body, or whether the functions of the latter be curbed by a popular vote or its enactments approved by a referendum vote. This view was sustained in *State ex rel. Schrader v. Polley,* 26 S. Dak. 5, a case similar to this."

The last quoted case was taken on error to the supreme court of the United States and there affirmed (241 U. S. 565). In the opinion of that court (by Mr. Chief Justice White), however, there is nothing as to the meaning of the word "legislature," as used in Art. I, Sec. 4 of the federal constitution, but the decision is expressly put upon the ground also asserted in the opinion of Jones, J., of the state court, but absent from the facts of the South Dakota case, that congress, in the exercise of its express power to "make * * * such regulations," had, in 1911, so amended its acts providing for redistricting a state for the purpose of electing members of the federal house of representatives as to provide that such redistricting should be made "in the manner provided by the *laws* thereof," thus shifting the inquiry from one as to whether or not the particular measure of this character was an act of the "legislature," in the strict sense, to that as to whether or not it was a "law of the state."

The South Dakota case is thus seen to be the only one strictly in point as to the interpretation of the word 'legislature,' in Art. I, Sec. 4.

Coming now to article II, section 1, and considering the meaning of the word "legislature" as therein used, I find certain intimations in McPherson v. Blacker, 146 U. S. 1, which require examination in this connection. The case itself is not in point on the facts, as it concerned merely the validity of an act of the Michigan legislature, providing that presidential electors should be chosen by popular vote in congressional districts. The opinion, however, contains the following statements (quoted with approval by Mr. Chief Justice Fuller from a report made by Senator Morton as Chairman of the senate committee on privileges and elections, recommending a constitutional amendment (1874) Senate Rep. 1st session 43d congress. No. 395):

"The appointment of these electors is thus placed absolutely and wholly with the legislatures of the several states. They may be chosen by the legislature, or the legislature may provide that they shall be elected by the people of the state at large, or in districts, as are members of congress, which was the case formerly in many states; and it is no doubt competent for the legislature to authorize the governor, or the supreme court of the state, or any other agent of its will, to appoint these electors. This power is conferred upon the legislatures of the states by the constitution of the United States, and can not be taken from them or modified by their state constitutions any more than can their power to elect senators of the United States. Whatever provisions may be made by statute, or by the state constitution, to choose electors by the people, there is no doubt of the right of the legislature to resume the power at any time, for it can neither be taken away nor abdicated."

In the same context Mr. Chief Justice Fuller summarizing an elaborate historical review of the practical operation and contemporaneous construction of the section of the constitution now under consideration, states the following conclusion:

"From this review * * * it is seen that from the formation of the government until now the practical construction of the clause has conceded plenary power to the state legislatures in the matter of the appointment of electors."

Again, earlier in the opinion, the Chief Justice had said:

"The state does not act by its people in their collective capacity, but through such political agencies as are duly constituted and established. *The legislative power is the supreme authority except as limited by the constitution of the state, and the sovereignty of the people is exercised through their representatives in the legislature, unless by the fundamental law power is elsewhere reposed.* The constitution of the United States frequently refers to the state as a political community, and also in terms to the people of the several states and the citizens of each state. What is forbidden or required to be done by a state is forbidden or required of the legislative power under state constitutions as they exist. The clause under consideration does not read that the people or the citizens shall appoint, but that 'each state shall;' and if the words 'in such manner as the legislature thereof may direct' had been omitted, it would seem that the legislative power of appointment could not have been successfully questioned in the absence of any provision in the state constitution in that regard. Hence the insertion of those words, while operating as a limitation upon the state in respect of any attempt to circumscribe the legislative power, cannot be held to operate as a limitation on that power itself.

* * * * * * * * * * *

"The constitution does not provide that the appointment of electors shall be by popular vote, nor that the electors shall be voted for upon a general ticket, nor that the majority of those who exercise the elective franchise can alone choose the electors. It recognizes that the people act through their representatives in the legislature, and leaves it to the legislature exclusively to define the method of effecting the object."

It is true that the above quoted excerpts fron the opinion in McPherson v. Blacker, supra, would seem to contain intimations in both directions on the question now under consideration. Yet when they are critically analyzed, they will, it is believed, be found to point in but one direction, on the exact question before me. Thus when Senator Morton said, of the power of the state legislature in the passage above quoted, that

"This power is conferred upon the legislatures of the states by the constitution of the United States, and can not be taken from them or modified by their state constitutions any more than can their power to elect senators of the United States."

the context shows that he was thinking about a possible attempt of a state constitution to limit the subject matter of the provision which might be made by a state legislature in directing the manner of the appointment of the electors, rather than the effect of framework provisions of a state constitution in the delegation of legislative powers. That is to say, he was thinking about what the state might attempt to forbid or compel its "legislature" to do in the exercise of this plenary power, rather than about what a state might do in defining what should be its "legislature" for general purposes.

It must be admitted that the reference to the election of senators by the state legislatures does not tend to support this interpretation of the passage; for it would hardly be contended that under article I, section 3 of the constitution the "legislature" of a state, for the purpose of the election of United States senators, could be otherwise than the representative body, even where the state constitution might provide for the initiative or the referendum, or both.

If a certain discrimination is made, however, the difficulty, which seems to arise by reason of the supreme court's approving quotation of Senator Morton's report, will, it is believed diappear.

A perusal of the entire opinion in McPherson v. Blacker and a regard to the historical facts therein recited will show that the practical and contemporaneous construction of article II, section 1 of the constitution is such as not to limit the power of the state legislature thereunder to the mere directing of the manner in which the state shall appoint its electors, but to extend it also to the appointment of the electors itself. That is to say, for a considerable period of time and in many states of the Union it was custompary in the early days of the Republic for the presidential electors to be appointed by the state legislatures.

The act of appointment is clearly not legislative; neither does it in and of itself amount to a direction as to the manner in which the state shall appoint—rather, it is an appointment without any direction as to manner. In short, it is the exercise of a quasi-corporate function, in which the legislature appears as a body corporate. Such action by the state legislatures is of the same kind and character as the action which they were authorized and required to take in the election of senators under the original constitution.

But when a state legislature, instead of appointing the electors itself, might choose to direct the manner in which the state should appoint them, it is submitted that such direction partakes of the character of legislation. Indeed, the proper meaning of the clause, were we able to shut our eyes to the contemporaneous construction of it, would seem to require some legislative action on the part of the state as underlying the particular form of "appointment" which might be decided upon. That is to say, granted that it is competent for the legislative power of the state to authorize the appointment of presidential electors in any manner which it may see fit, without any limitation in that respect, and granted that it may be deemed expedient by the legislative power of the state to provide that such electors shall be appointed by the general assembly or other representtive body, yet, strictly speaking, it would not be technically proper for the respresentative body to exercise the power of appointment until it had authorized itself to do so by first exercising the legislative power.

This may seem like a quibble, and yet it is believed that there is discernible in this section two distinct ideas, viz., the appointment and the legislative direction as to the manner of appointment. The one is executive or quasi-ccorporate in character. The other is distinctly legislative. The one is imposed upon the "state"; the other upon its legislature.

Some such idea must have been in Mr. Chief Justice Fuller's mind when he spoke, in another one of the passages above quoted, of the "legislative power" of the state, and referred to it as being exercised on behalf of the people of the state "through their representatives in the legislature, unless by the fundamental law power is elsewhere reposed."

At any rate, the decision in McPherson v. Blacker, supra, can not be taken as conclusive of the question either way, first, because its facts did not call for the determination of the precise question now under discussion, and second, because the reasoning which has been quoted, besides being applicable to the question then before the court, is after all reconcilable in a way with either view of the question now under consideration.

I know of no other decision which might be regarded as even remotely in point. In the absence of such decision, your question requires me to answer the question upon what appear to me to be the sounder reasons.

It is well known that the electoral college, as incorporated in the constitution of the United States, was a compromise between the ideas of those in the constitutional convention who favored direct or indirect election of the chief executive by the people, and the ideas of those who favored election by the state legislatures in the manner in which senators were formerly elected. This conflict of ideas is well summed up in the opinion of McPherson v. Blacker, pp. 28 et seq. of the official report. The underlying thought embodied in the compromise was that each state should be allowed to determine for itself the precise manner in which its presidential electors should be chosen, being at liberty to employ the method of election by the members of the representative legislative body or the method of election by the people either in districts or in the state at large, the decision being left to the legislature of the state as a legislative body.

Indeed, the nature of the compromise was so well understood that some legislatures, without thought of taking formal action "directing the manner" of appointment, merely chose the presidential electors to which the state was entitled, at the appropriate times, knowing that it was the intention of the constitution to give them that option if they desired to exercise it. This explains, of course, the contemporaneous construction of the section to which reference has been made.

But while the state legislatures, under actual or implied self-direction, might exercise the appointing power in an executive capacity as a representative body acting like a quasi corporation, yet that was done after all only in pursuance of an actual or implied expression of will respecting the manner of election, which was in its nature legislative.

In short, having regard to the history of the section under consideration and to its language, in which the idea of appointment and the idea of prescribing the manner of appointment are so clearly distinguished, I am of the opinion that article I, section 4 of the federal constitution authorizes and requires an expression of the will of the *legislative power* of the state upon the question as to the manner in which the electors, representing the state in the choice of the president, shall be appointed. This is the primary power. The power to appoint, if exercised by the legislature as a representative body, is not a primary power emanating directly from the grant embodied in the federal constitution, but in the strict sense is a derivative authority created by the act of state legislation just referred to.

Putting it in another way, the state legislatures, which for a time exercised the power of appointment, did not get that power directly from the federal constitution. What they got from the federal constitution was the power to determine the manner in which presidential electors should be chosen for the state. Then having determined that that manner should be that the legislatures themselves should appoint the electors, they proceeded in effect to exercise the power of appointment under and by virtue of their own previous legislative determination that they should exercise such power.

No one pretends that any such elaborate proceeding was in point of fact followed in the early history of the country; but at that time it was not necessary that such distinction should be taken, because the legislative assemblies in the early days were identical in personnel with the repositories of legislative power.

At the present time, however, the introduction of the veto power and of the initiative and referendum has made a distinction between the legislative assembly as such and the "legislature" in the sense of the repository of legislative power. This distinction makes the discrimination above suggested necessary. At the present time, in accordance with the reasoning which appeals to me as correct, I do not believe that the state representative body, called the "General Assembly" or "Legislature," in a state where the legislative power is shared or checked by the people acting under

the referendum, could appoint presidential electors, as in the old days, without the authority of a state law subject to such referendum. This is because, to retrace the steps of reasoning by which this conclusion has been reached, the power to appoint is lodged in a given place only by virtue of a "direction" as to "manner" on the part of the state legislature, viz., the law-making power of the state.

While the above reasoning is not based upon the authority of any opinion or decision of the supreme court of the United States, yet it is believed that after all it results from the reasoning of Mr. Chief Justice Fuller in McPherson v. Blacker, supra. He speaks in the opinion in that case repeatedly of a "plenary power" to be exercised by the state legislature; but the "power" which he characterizes as "plenary" is not the power to appoint, but the power to direct the manner of appointment. He says in a passage not yet quoted:

> "If the legislature possesses plenary authority to direct the *manner of appointment* * * * it is difficult to perceive why, if the legislature prescribes as a method of appointment choice by vote, it must necessarily be by general ticket and not by the districts."

Again, in a passage previously quoted, he says that the constitution "leaves it to the legislature exclusively to define the method of effecting the object."

To be fair, another passage also above quoted should be mentioned, in which Mr. Chief Justice Fuller, after reviewing the history of the practical operation of the electoral college, says:

> "From the formation of the government until now the practical construction of the clause has conceded plenary power to the state legislatures in the matter of appointment of electors."

Yet it is believed that on the whole the reasoning of the Chief Justice supports the view that the "plenary power" of the state legislature is not the power to appoint, but the power to direct the manner of appointment. If the plenary and original power is that of direction, which is essentially legislative, then the executive or quasi-corporate power of appointment, which was exercised for so long, must necessarily be secondary or derivative.

This process of reasoning demonstrates the fallacy of an argument which I find incorporated in a memorandum attached to your letter. The author of the memorandum, whose name is not given, starts out correctly when in citing McPherson v. Blacker, supra, he says:

> "It is absolutely established that the power of the state legislature to designate the manner of appointing the presidential electors is unlimited and plenary;"

but from this point he makes a false step in his logic, by assuming that the power which he has himself described is of the same character as the power possessed by the state legislatures, under the original constitution, to elect United States senators. In short, he changes the nature of the plenary power from that to direct the manner of appointment to that of appointment itself. He then argues—correctly enough from the erroneous minor premise which he has adopted—that the act of a state legislature, in directing the manner of appointment, is in effect a delegation of the original plenary power to appoint.

As suggested, the argument is faulty in the second branch of the syllogism therein embodied. The power of the state legislatures to elect United States senators under section 3 of article I is a directly conferred power; whereas the power of a state legis-

lature to "appoint" presidential electors is not directly conferred upon it by the federal constitution, but becomes reposed in the representative legislative body as a distinct appointing authority only by virtue of an actual or hypothetical "direction" as to the "manner" of appointment previously made by the legislative power of the state. In other words, the writer of the memorandum has confused an original power with a derivative power.

To suggest parallels, let me suppose that a state statute should provide that the president and secretary of every private corporation should be elected by the board of directors and that all other officers of the corporation should be appointed in such manner as the board of directors might prescribe. Here the board of directors has plenary power in both instances, but the power to elect the president and secretary is derived originally from the state law; while the power to elect other officers, if assumed by the directors, is conferred upon them not directly by the state law, but indirectly through their own determination that such other officers shall be so elected.

When, then, the directors might choose, instead of appointing the other officers themselves, to provide that certain of them should be elected by the stockholders at the annual meeting, such determination on their part would not be, it is submitted, a delegation of an originally conferred power to appoint, but an exercise of the originally conferred power to direct the manner of appointment, viz., intra-corporate legislation, instead of direct executive action.

To recapitulate, in the view which I take of the question, the power possessed by the state legislature under article II, section 1 of the constitution of the United States, without any actual or assumed state action—that which is plenary in its character and originally conferred—is not the power to appoint, but the power to direct the manner of appointment. Such power is legislative power and upon the principle first above suggested the body upon which it is conferred must be understood to be that body which under the constitution of the state possesses the general legislative power—the power to make laws.

In other words, the word "legislature," as used in the section under consideration, means the repository of legislative power and not the representative body. The act which this body may or must perform is legislation directing the manner of appointing presidential electors. By such legislation, and not otherwise, in the strictly technical view of the case, the legislative assembly itself might acquire the power of appointment, which is secondary, in the manner in which that power was acquired and exercised in the early history of the country.

Of course the more recent history of the country in this respect shows that the view which I have taken has been accepted in practice. Sufficient time has not been available to conduct an exhaustive research into the practices of the several states, but it is believed that in all cases in which the legislatures of the several states have undertaken to provide for the choice of presidential electors otherwise than by themselves, they have acted through the forms of legislation. This was the case with the Michigan law, involved in McPherson v. Blacker, supra. It has always been the practice in Ohio, and I venture to say that it has been the practice everywhere and amounts to a practical interpretation of the meaning of the constitution and entitled to just as much weight as that commented upon in the opinion in McPherson v. Blacker, supra. In short, it has always been understood that the direction as to the manner of appointing presidential electors in the state constitutes a legislative act.

Summarizing my conclusions, I am of the opinion that where the federal constitution delegates to a "state legislature" a power, whether "plenary" or not, which is in its essential character *legislative* as opposed to executive or quasi corporate, the provision of the federal constitution conferring such power must be interpreted as pointing out and delegating the power conferred to that body, which within the state possesses the power to make laws, whether that body be a representative assembly,

or a representative assembly checked by the executive veto or by initiative and referendum, or both. The power granted by article II, section 1, is *legislative* and not executive or quasi corporate. It is the power to direct the manner of appointment and not the power to appoint. Therefore, the word "legislature," as used in the section under consideration, has a meaning which in Ohio signifies the law-making power as including the people acting through the initiative and referendum.

For these reasons I am of the opinion that the law referred to in your letter is subject to the referendum.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

154.

PHYSICIAN—EMPLOYED BY COUNTY COMMISSIONERS FOR INFIRMARY, ETC.—NOT UNDER CIVIL SERVICE—INTERPRETER—FEES—BEFORE MAYOR OR JUSTICE OF THE PEACE NOT SUCH COSTS AS MAY BE PAID BY COUNTY.

1. *A physician employed by the county commissioners under section* 2546 *of the General Code is not under the civil service laws.*

2. *The fees of an interpreter before a justice of the peace or mayor is not such cost as may be lawfully taxed and paid by the county.*

COLUMBUS, OHIO, March 31, 1917.

HON. HECTOR S. YOUNG, *Prosecuting Attorney, Marion, Ohio.*

DEAR SIR:—I am in receipt of your letter of February 22, 1915, wherein you inquire relative to the statue of a physician for children's home and also as to the fees of an interpreter in a hearing before a justice of the peace.

Your first question is as follows:

> "1. (a) Is a physician employed by the county commissioners under section 2546 of the General Code of Ohio, to look after the inmates of the infirmary, such an employment as would come under the civil service? (b) If such employment is under civil service, what is the tenure of office?"

Section 2546 of the General Code, to which you refer, provides in part as follows:

> "County commissioners may contract with one or more competent physicians, to furnish medical relief and medicines necessary for the persons of their respective townships to come under their charge, but no contract shall extend beyond one year. Such contract shall be given to the *lowest competent bidder*, the county commissioners reserving the right to reject any or all bids. * * *"

The above section requires that the contract shall be given "to the lowest competent bidder." The entire scheme of civil service is founded on the employment of persons under competitive examination, unless the civil service commission shall deem it impracticable to determine the merit and fitness of the person by such competitive examination. This seems wholly inconsistent with the provisions of the

section above referred to, for instead of taking the man with the highest grade it provides that the county commissioners shall take the one who is the lowest competent bidder.

Therefore I advise you, in answer to your first question, that the employment of a physician under the provisions of section 2546 of the General Code is not such an employment as would come under the civil service.

Your second question is as follows:

> "Is the fee of an interpreter in a hearing before a justice of the peace or a mayor such costs as may legally be paid by the county?"

There seems to be no statute authorizing the appointment or employment of, or payment to, an interpreter in hearings before justices of the peace or mayors, though certain cities having municipal courts may have such interpreters. The provision for the appointment of an interpreter for the court of common pleas is found in General Code section 1541, which does not seem to permit the selection of different persons casually to interpret testimony in different cases, but the appointment of a regular employe for that purpose. The section is as follows:

> "The judge of the court of common pleas of a county, or the judges of such court in a county in joint session, if they deem it advisable, may appoint either or all of the following:
>
> "First: A court interpreter, who shall take an oath of office, hold his position at the will of such judge or judges, and under the direction of the court, or any judge thereof, shall interpret the testimony of witnesses, translate any writing necessary to be translated in court, or in a cause therein, and perform such other services as are required by the court or a judge thereof. The interpreter shall, without extra compensation render such service also in the court of appeals, superior court, probate court, and court of insolvency, as the judge or judges of those courts may require. He shall receive for his services a compensation fixed by the judge or judges appointing him, not to exceed twelve hundred dollars in any year, or such sum in each particular case, as the court deems just. If a stipulated salary, such compensation shall be paid monthly from the county treasury, upon the warrant of the county auditor, and in other cases, at the conclusion of his services, upon the certificate of the judge or judges of the court in which they are rendered. * * *"

Section 4589 of the General Code provides that in cities where there is more than one police judge the judges of the police court may appoint an interpreter for the term of two years and fixes his salary at $1,500.00 per year.

These two sections include all the power there is for said appointment or employment of an interpreter.

Section 10490 of the General Code makes the provisions of civil courts applicable to proceedings before a justice of the peace so far as in their nature they may be so. This, however, could not extend to the appointment of an officer or employe which by these two sections is fixed and limited to courts named in them and they specify in just what court such interpreter shall appear.

Strictly speaking, such interpreter could not be subpoenaed as a witness before a justice of the peace because such subpoena is for testifying to matters of which he has knowledge, which does not mean knowledge that he has gained during a trial.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

155.

COVINGTON ARMORY CONTRACT—BALANCE DUE ON SAME SHOULD BE PAID TO ASSIGNEES OF CONTRACTORS.

Proper method of paying balance due on Covington Armory Contract, said balance having been assigned to various creditors.

COLUMBUS, OHIO, March 31, 1917.

HON. BYRON L. BARGAR, *Secretary Ohio State Armory Board, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter of March 9, 1917, to the following effect:

"On March 7, 1916, the Armory Board took action with relation to Covington Armory matter as follows:

" 'COVINGTON ARMORY: WHEREAS: The Covington Armory has been completed according to plans and specifications and there is still due the contractors, Kimes-Omlor-Lawrence & Hess the sum of $1,067.00 in full satisfaction of the state's obligations to them for all balances due because of the construction of said armory and

" 'WHEREAS: The said contractors wish a divided final estimate to be made in order that they may assign parts thereof pro rata to all their creditors furnishing labor and materials for said armory, namely:

" 'T. H. Norr	$36 40
" 'W. W. Minnick	97 08
" 'Board of Public Affairs	8 13
" 'J. H. Hecker	3 99
" 'J. R. Shuman	2 60
" 'Covington Lumber Co	368 48
" 'Claycraft Brick Co	159 90
" 'Hocking Valley Products Co	84 46
" 'National Lime & Stone Co	5 46
" 'American Electric Co	24 18
" 'Columbus Mill & Mine Supply Co	52 00
" 'National Tile Roofing Co	78 00
" 'R. A. Redinbo	92 23
" 'S. H. Thompson Mfg. Co	14 30
" 'McCrossing & Aspinall	14 96
" 'J. C. Wagner	10 46
" 'Frank Vanney	3 19
" 'Orville Ingle	2 36
" 'Roscoe Seas	2 29
" 'Orville Leonard	2 91
" 'Lloyd Corner	1 37
" 'James Stimmel	2 25
" 'Aggregate	$1,067 00

" 'RESOLVED: That said sum of $1,067.00 be approved for payment to said contractor according to law in the aggregate sum mentioned in twenty-two certified accounts according to the list stated in preamble and numbered

consecutively, 10th final A, 10th final B, etc. This manner of distribution of final estimate and payment thereof is subject to approval of attorney-general.'

"Pursuant to said resolution we have drawn the twenty-two certified accounts mentioned, and contractor has assigned same respectively to creditors as per list. In this way he has made them each a payment of 26 per cent. of what he owes them.

"If this procedure is the correct one, please indicate your approval as requested by resolution."

While it is true that the procedure which you outline in your communication results in the splitting of the cause of action and the creation of twenty-two debts where one had previously existed and it has generally been held that such assignments are unenforceable at law unless assented to by the debtor, yet I can see no objection, the contractor having assigned all his claims to the various creditors as per the list, in your recognizing such assignment and in the auditor of state drawing warrants as per the assignment.

In submitting the certified accounts mentioned and in the drawing of the vouchers the assignment should be attached to the vouchers in order that the transaction may fully appear by examination of the vouchers on file in the office of the auditor of state. Since the transaction is somewhat unusual I would further suggest that when you receive the warrants from the auditor of state's department, made out in the names of the various assignees, a receipt be taken by you from said assignees to be sent to the office of the auditor of state to be attached to the vouchers on file therein.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

156.

VILLAGE COUNCIL—HAS AUTHORITY TO ABOLISH BOARD OF HEALTH PREVIOUSLY ESTABLISHED AND SUBSTITUTE HEALTH OFFICER.

Under section 4404 G. C. the council of a village has the right to determine whether the health affairs of the village shall be in charge of a board of health or a health officer, and may elect to abolish a board of health previously established, and substitute therefor a health officer to be approved by the state board of health.

COLUMBUS, OHIO, April 2, 1917.

HON. FRED W. MCCOY, *Prosecuting Attorney, Carrollton, Ohio.*

DEAR SIR:—Under date of February 24, 1917, you submitted for an opinion from this department the following request:

"The council of the village of Carrollton, Ohio, on October 22, 1915, passed an ordinance and abolished the board of health of said village, and appointed a health officer for said village, and said appointment was approved by the state board of health; said officer was appointed until the second Monday, 1917.

"In your opinion has the council of a village authority to abolish a board of health once established and appoint a health officer who shall act instead of a board of health?"

Section 4404 General Code reads as follows:

> "The council of each municipality shall establish a board of health, composed of five members to be appointed by the mayor and confirmed by council who shall serve without compensation and a majority of whom shall be a quorum. The mayor shall be president by virtue of his office. But in villages the counel, if it deems advisable, may appoint a health officer, to be approved by the state board of health, who shall act instead of a board of health, and fix his salary and term of office. Such appointee shall have the powers and perform the duties granted to or imposed upon boards of health, except that rules, regulations or orders of a general character and required to be published, made by such health officer, shall be approved by the state board of health."

The provisions of the foregoing section charge the council of a village with the duty of either establishing a board of health composed of five members, to be appointed by the mayor and confirmed by council, or of appointing a health officer to be aproved by the state board of health. It is clear, therefore, that the village council has authority to determine, at its option, whether the health affairs of the village shall be conducted by a board or by a health officer.

Section 4224 G. C. provides that "an action of council shall be by ordinance or resolution." So the act of council in establishing a board of health should be by way of ordinance or resolution.

It is a general rule of law, well established, that the power to enact an ordinance or resolution includes also the power to repeal it, and that an office or position created by an ordinance or resolution may be abolished by the repeal of the same, and the incumbent thereby ceases to have any right to hold such office or position.

State ex rel. v. Jennings et al., 57 O. S. 415.

Where the council of a municipality has authority to create an office or position, the right to repeal the measure creating said office or position, and thereby abolish the office and position, is unquestioned, unless some express duty of creating and maintaining same is placed on the council by the legislature or its power in that respect is specifically limited.

An examination of the provisions of the General Code relating to village councils and village boards of health does not reveal any limitation or duty, except the one heretofore noted that the council must provide either a board or a health officer to have charge of the health affairs of the village. It would seem, therefore, that the mere substitution of one method for the other, both being permitted under the Code, would not constitute an act on the part of said council in excess of the powers granted it.

For the reasons given above, I am of the opinion that the council of a village has authority to abolish a board of health once established, and to appoint a health officer who shall act instead of the board of health.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

157.

COUNTY TREASURER—UNDER CONSTITUTION CANNOT HOLD OFFICE MORE THAN FOUR YEARS IN PERIOD OF SIX YEARS—INELIGIBLE TO BE ELECTED IF TERM WILL EXTEND BEYOND FOUR YEARS—IF SO ELECTED TO OFFICE, THERE IS A VACANCY IN SAID OFFICE FROM BEGINNING OF SUCH TERM.

The constitutional prohibition against holding the office of county treasurer by one person, for more than four years in a period of six years, renders a person ineligible to be elected to said office for a term which will extend beyond such four-year limitation, and such person so elected for a term, before the conclusion of which he will have served in such office for a longer period than four years consecutively, is ineligible to hold said office, and there is, at the beginning of such term, a vacancy in the office, which should be filled according to law.

COLUMBUS, OHIO, April 2, 1917.

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

DEAR SIR:—On February 15, 1917, you addressed the following inquiry to this office:

> "I desire to inquire further concerning the status of the treasurer of your county. Mr. B. C. Howell was elected treasurer of Warren county in 1910 and re-elected in 1912. Before the expiration of his first term, to wit: on June 25, 1913, he died. On that date the board of county commissioners passed a resolution appointing Frank D. Miller to be treasurer for the unexpired term. It will be seen that at the expiration of that term the office would become vacant for a term of two years. On August 26, 1913, the board of county commissioners, for the purpose of providing a treasurer for the two year term passed a resolution substantially as follows: 'On motion of Mr. Irons, seconded by Mr. Simpson, Frank D. Miller was appointed to succeed himself as treasurer of Warren county, Ohio, for the term beginning the first day of September, 1913, and his bond be fixed at the sum of $40,000.00. Passed on August 26, 1913.' In 1914, Mr. Frank D. Miller was elected as treasurer at the election held in that year and was commissioned by the governor to be treasurer of Warren county for two years from the first Monday of September, 1915. It will be seen that if Mr. Miller occupies the treasurer's office to the end of his present term, that he will have served more than four years continuously. Does this violate the restriction as to one person holding the office of treasurer not more than four years in six, Mr. Miller having been appointed and elected as above set forth?"

This inquiry evidently has reference to the constitutional provision governing the office of county treasurer, which is as follows:—

> "Article X, Section 3: No person shall be eligible to the office of sheriff or county treasurer, for more than four years, in any period of six years."

There have been two decisions of the supreme court since this provision was put into effect, permitting an incumbent to hold the office of county treasurer for more than four years.

State v. Harris, 77 O. S. 481.
State v. Pontius, 78 O. S. 353.

In both these cases, however, the warrant for that which otherwise would have been a violation of the constitution is found in the constitution itself by reason of an amendment adopted in 1905 providing for the election of county treasurers in even years, and to that end extending the term for one year in those cases in which it happened to expire in the odd numbered year. In both cases the extension was placed entirely upon the constitution, the legislation extending the term being in pursuance of the amendment and to carry it into effect.

In a case in the supreme court of Kansas, Demaree v. Scates, 20 L. R. A. 97, the word "eligible" is very fully considered, and all definitions collated in the opinion. The following excerpt from the opinion gives the different terms in which the word is defined:

> "The contention is over the meaning that should be given to the word 'eligible' in the statute. This word is determined by law and other standard lexicographers thus:
>
> "*Black:* 'Capable of being chosen;' 'competency to hold office.'
>
> "*Bouvier and Anderson:* 'This term relates to the capacity of holding, as well as that of being elected to, an office.'
>
> "*Abbott:* 'The term "eligible to office" relates to the capacity of holding, as well as the capacity of being elected.'
>
> "19 *Am. & Eng. Encyc. of Law* 397: 'Capable of being chosen;' 'implying competency to hold office, if chosen.'
>
> "*Worcester:* 'Legally qualified;' 'capable of being legally chosen.'
>
> "*Webster:* 'That may be selected;' 'legally qualified to be elected and to hold office.'
>
> "Some law writers define the word as 'legally qualified; as, eligible to office;' 'legally qualified to hold office;' 'electible;' 'proper to be chosen;' 'qualified to be elected.' Plaintiff contends that 'legally qualified' is the proper definition of the word 'eligible,' as used in this statute. On the other hand, it is contended by the defendant that 'eligible' means 'proper to be chosen;' 'qualified to be elected;' 'that may be elected'—that is, the candidate for county commissioner must be eligible to the office at the time of the election."

Judge Shauck expresses the same definition of the word and applies it directly to the case in hand:

> "The word 'eligible' in the third section of the 10th article refers as well to qualification to continue in office as to qualification to take office. By its terms the test of eligibility relates to continuance in, or occupancy of, office. It prescribes no qualification peculiar to the taking of office but as to the two offices of sheriff and treasurer, with respect to which there are peculiar reasons for limiting the duration of incumbency, it prescribes such limitation. The term has been usually so interpreted in similar connections."
>
> "(State ex rel. Kelly v. Thrall, 59 O. S. 400).
>
> "See State ex rel. v. Murray, 28 Wis. 96; Carson v. McPhetridge, 15 Ind. 326; Smith v. Moore, 90 Ind. 204; Gossman v. State ex rel., 106 Ind. 203; State ex rel. Perine v. Van Beck, 87 Iowa 569, 19 L. R. A. 622."

No ground can be found for the distinction between cases where the treasurer is appointed and where elected, or where the tenure is partly under each.

DeTurk v. Commonwealth, 129 Pa., 151.

The mere etymology of the word "eligible," indicating capable of selection, might be supposed to apply to the time of choosing by election or appointment. That, however, is contrary to the meaning defined by any of the authorities above cited, and is also an impossible meaning under this constitutional provision in which it is used—"eligible for more than four years."

This case differentiates from any of those above cited. They all go upon the subject of the qualification of the candidate at the time of the election and of the officer at the beginning of the term. This is the case where a man has the qualification necessary for election to the office and assuming the office under the election, but possesses a disqualification that is bound to render him ineligible before the expiration of the term.

There can be no kind of doubt that he has no right to hold this office after the expiration of the four years, which was the question you asked. The question, however, of his right to this office is more far-reaching than your inquiry assumes. It is doubtful whether he was qualified to be elected to the office at all, and even more than doubtful, for it is scarcely doubtful on the other hand.

When a person is elected to an office he is elected for the lawful term of that office, and the question of his eligibility must be whether he is qualified to hold that office for the whole of that term, for the law could not contemplate an election to a part of a term. The law could not countenance the election of a man to enter into an office who should be compelled immediately to leave it in order that it might be filled by appointment, and yet there could be no difference whether this man's eligibility was to continue one day or one year and three hundred and sixty-four days. The principle is the same. When he procured himself to be voted for at this election he knew he could not run for a full term, and that he could not lawfully serve out the term he was seeking. It was then known that before the beginning of this term he would have served more than two years, and that in order to serve out the term he would have been in office more than four years, which violates the law and the constitution. He was not a candidate for that office until June, but until the expiration of the term. He was not eligible for that office, not eligible to be elected to it. He, therefore, has not been the legal incumbent of the office but a mere intruder therein, a de facto officer only, and is entitled to serve only until the vacancy now existing in the office may be filled according to law.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

158.

OFFENSES—CLASSIFICATION—WHETHER STATE OR MUNICIPAL—IN CERTAIN CASES IN WHICH MITTIMI ARE SUBMITTED.

Different cases, in which mittimi are submitted, classified as to which are convictions under state law or ordinance of a municipal corporation.

COLUMBUS, OHIO, April 2, 1917.

The Ohio Board of Administration, Columbus, Ohio.

GENTLEMEN:—On March 21, 1917, you addressed to this department the following inquiry:

> "In conformity with your opinion No. 49, rendered February 23, 1917, and letter of March 9th, in which you state that 'a woman convicted of a violation of an ordinance cannot be sentenced to the Ohio reformatory for

women at Marysville,' we have examined the list of charges against the women now confined at the reformatory and find a number that seem to be, in all probability, violations against ordinances rather than state laws.

"In order to definitely determine whether or not these women should remain in custody at the reformatory for women, and whether women should in the future be received under such charges, we submit herewith for your consideration and opinion the certificates of sentence in the following named cases. * * *"

An examination of the commitments has been made as requested and it appears that in each case there is a brief reference to the offense for which each defendant was committed, which indicates the nature thereof, and from which it may be determined with reasonable certainty whether it be a violation of a statute, and if so what statute, or whether it be for violation of an ordinance. You have not left these certificates but you have left a list of the names, with the offense briefly indicated opposite each name, which list with the indication of offense is here copied and, for the sake of brevity, opposite each name is carried out either the word "State" or "City," indicating in this manner whether the prosecution is under the state law or the ordinance of a municipal corporation:

Bridget Fitzsimmons,	Cincinnati,	Drunkenness	City
Alice Weber,	Cincinnati,	Disorderly conduct	City
Mamie Henderson,	Cincinnati,	Drunkenness	City
Margaret Gardner,	Cincinnati,	Adultery	State
Nellie Bauman,	Cincinnati,	Unlawfully having morphine	State
Virgia Smallwood,	Cincinnati,	Petit larceny	State
Mabel Swift,	Cincinnati,	Drunkenness	City
Nellie McAbee,	Cincinnati,	Drunkenness	City
Minnie Weirauch,	Cincinnati,	Loite ing	City
Fannie O'Brien,	Cincinnati,	Loitering	City
Mollie Ryan,	Cincinnati,	Loitering	City
Bessie Brown,	Cincinnati,	Unlawfully having cocaine	State
Maggie Carter,	Cincinnati,	Disorderly conduct	City
Lucile Green,	Cincinnati,	Being common prostitute	City
Ella Taylor,	Cincinnati,	Renting rooms for prostitution	City
Kate Moss,	Cincinnati,	Loitering	City
Lillian Wilson,	Cincinnati,	Being common prostitute	City
Addie Smith,	Cincinnati,	Being common prostitute	City
Lucy Flannigan,	Hamilton,	Petit larceny	State
Anna Sanford,	Toledo,	Malicious destruction of prop'ty	State
Marie Ivory,	Toledo,	Cohabiting in adultery	State
Violet Colby,	Dayton,	Loitering for immoral purposes	City
Mabel Clark,	Dayton,	Loitering for immoral purposes	City
Bertha Clark,	Dayton,	Loitering for immoral purposes	City
Luella Shank,	Dayton,	Petit larceny	State
Vera Smith,	Toledo,	Petit larceny	State
Lillian Wilson,	Toledo,	Petit larceny	State
Hilda Tidball,	Coshocton,	Petit larceny	State

It cannot be said beyond any doubt that none of the above are incorrectly stated, by reason of the very brief statement in each mittimus, but it is highly probable that all are correctly indicated.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

159.

PROBATION OFFICERS—WHEN TWO OR MORE ARE APPOINTED—ONE MUST BE DESIGNATED CHIEF PROBATION OFFICER.

When two or more probation officers are appointed by the court under the provisions of section 1662 G. C., one of them must be known as chief probation officer.

COLUMBUS, OHIO, April 2, 1917.

HON. THOMAS M. WALTER, *Probate Judge, New Philadelphia, Ohio.*

DEAR SIR:—I have your letter of February 24, 1917, as follows:

"I am writing you for a little point of information and your opinion on the matter of appointment of probation officer as provided under section 1662 General Code.

"*Question.* Can I appoint a second probation officer of my county without designation as to which shall be the chief probation officer? That is, that each be appointed under the general name of probation officer clothed with the same powers and authority without giving any preference as to title.

"The circumstances are such here, that I would much prefer to do this, if under the particular section above, I can do so and it will be legally done.

"About a year ago we had a chief probation officer, who resigned, and the assistant, who is under civil service, was permitted by my predecessor to go on with the work single handed. It has now become necessary by reason of the large volume of juvenile work and that of mother's pension, that another probation officer be appointed.

"Both the present incumbent and the party seeking the appointment, desire that if it becomes absolutely necessary that I must style one as chief probation officer, that he be given this title. Both would be satisfied, however, if I can appoint them in a general way without designating any title preference.

"The old probation officer who had resigned had been chief probation officer without compensation (as he was also humane officer). When the new humane officer was appointed, he thought he should also receive the appointment as chief probation officer, same as his predecessor.

"The assistant claims the right to this title by reason of her seniority in the work. Hence the difficulty."

Section 1662 General Code reads:

"The judge designated to exercise jurisdiction may appoint one or more discreet persons of good moral character, one or more of whom shall be women, to serve as probation officer, during the pleasure of the judge. One of such officers shall be known as chief probation officer and there may be first, second and third assistants. Such chief probation officer and the first, second and third assistants, shall receive such compensation as the judge appointing them may designate at the time of the appointment, but the compensation of the chief probation officer shall not exceed twenty-five hundred dollars per annum, that of the first assistant shall not exceed twelve hundred dollars per annum, and of the second and third shall not exceed one thousand dollars per annum, each payable monthly. The judge may appoint other probation officers, with or without compensation, but the entire compensation of all probation officers in any county shall not exceed the sum of forty dollars for each full thousand inhabitants of the county at the last preceding federal

census. The compensation of the probation officers shall be paid by the county treasurer from the county treasury upon the warrant of the county auditor, which shall be issued upon itemized vouchers sworn to by the probation officers and certified to by the judge of the juvenile court. The county auditor shall issue his warrant upon the treasury and the treasurer shall honor and pay the same, for all salaries, compensation and expenses provided for in this act, in the order in which proper vouchers therefor are presented to him."

It seems that the provision of the section just quoted, to the effect that "one of such officers shall be known as chief probation officer," answers your question, and it is my opinion that the two persons referred to cannot be appointed as probation officers without designating one of them as chief probation officer.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

160.

COUNTY SUPERINTENDENT AND DISTRICT SUPERINTENDENT—ARE EACH ALLOWED THE SUM OF THREE DOLLARS PER DAY—FOR SERVICES RENDERED WHILE CONDUCTING INVESTIGATIONS UNDER SECTION 7827 G. C.—"OTHER EXPENSES" MEAN EXPENSES OTHER THAN FEES AND EXPENSES OF SUCH SUPERINTENDENTS.

The county superintendent and the district superintendent, as members of the county board of school examiners, are each allowed the sum of $3.00 *per day for services performed while conducting investigation required by section 7827 G. C., and the words "other expenses of such trial" mean the expenses of the trial other than said per diem fees and expenses of such superintendents.*

COLUMBUS, OHIO, April 2, 1917.

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

GENTLEMEN:—Complying with your request of January 26, 1917, I beg to submit my opinion upon the following statement of facts:

"When charges are preferred against a teacher as provided in section 7827 G. C. and the county examining board, two members of the board by law being the county superintendent and a district superintendent, and the latter by ruling of the attorney-general is not permitted any expense reimbursement, may these two members of the examining board draw the $3.00 per diem and expenses, as provided in section 7828 G. C.?"

The board of county school examiners for each county consists of the county superintendent, one district superintendent and one other competent teacher, the latter two to be appointed by the county board of education, and among their other duties they are empowered to investigate the conduct of persons holding teacher's certificates, as provided by General Code section 7827, which reads in part as follows:

"* * * If at any time the recipient of a certificate be found intemperate immoral, incompetent or negligent, the examiners, or any two of them, may

revoke the certificate; * * * Before any hearing is had by a board of examiners on the question of the revocation of a teacher's certificate, the charges against the teacher must be reduced to writing and placed upon the records of the board. He shall be notified in writing as to the nature of the charges and the time set for the hearing, such notice to be served personally or at his residence; and be entitled to produce witnesses and defend himself. The examining board may send for witnesses and examine them on oath or affirmation which may be administered by any member of the board touching the matter under investigation."

The fees and expenses of such hearing are provided for by section 7828 G. C., which reads as follows:

"The fees and per diem of examiners for conducting such investigation at three dollars a day each and other expenses of such trial shall be certified to the county auditor by the clerk and president of the examining board and be paid out of the county treasury upon the order of the auditor."

Your inquiry then is as to whether or not two of the members of said board of examiners may draw said $3.00 per day each for their services performed while holding an investigation, as provided by said section 7827, above quoted.

The salary of the county superintendent is provided for in section 4744-1, which reads as follows:

"The salary of the county superintendent shall be fixed by the county board of education, to be not less than twelve hundred dollars per year, and shall be paid out of the county board of education fund on vouchers signed by the president of the county board. Half of such salary shall be paid by the state and the balance by the county school district. In no case shall the amount paid by the state be more than one thousand dollars. The county board may also allow the county superintendent a sum not to exceed three hundred dollars per annum for traveling expenses and clerical help. The half paid by the county school district shall be pro-rated among the village and rural school districts in the county in proportion to the number of teachers employed in each district."

The salary of the district superintendent is provided for in section 4743, which reads as follows:

"The compensation of the district superintendent shall be fixed at the same time that the appointment is made, and by the same authority which appoints him; such compensation shall be paid out of the county board of education fund on vouchers signed by the president of the county board. The salary of any district superintendent shall in no case be less than one thousand dollars per annum, half of which salary not to exceed seven hundred and fifty dollars shall be paid by the state and half by the supervision district, except where the number of teachers in any supervision district is less than forty, in which case the amounts paid by the state shall be such proportion of half the salary as the ratio of the number of teachers employed is to forty. The half paid by the supervision district shall be pro-rated among the village and rural school districts in such district in proportion to the number of teachers employed in each district."

It will be noted that in neither of said sections is there contained language which

might be considered as restricting either of said superintendents from accepting other fees or salaries for other work or employment not incompatible with their regular duties as such superintendents. In fact, section 7834 specifically provides that each member of the county board of school examiners, except the clerk, who by law is the county superintendent, shall receive ten dollars for each examination of fifty applicants or less, fourteen dollars for each examination of more than fifty applicants and less than one hundred, eighteen dollars for each examination of one hundred applicants and less than one hundred and fifty, twenty-two dollars for each examination of one hundred and fifty applicants and less than two hundred, and four dollars for each additional fifty applicants, or fraction thereof, and the same to be paid out of the county treasury on the order of the county auditor.

My attention, however, has been called to certain decisions which prohibit members of boards of county commissioners from receiving compensation other than their regular salaries. The answer to that is that the compensation of county commissioners is provided for in General Code, section 3001, and said section contains the following sentence.

> "Such compensation shall be in full payment of all services rendered as such commissioner."

No such language is contained, as above noted, in the sections which provide for the compensation of either the district or the county superintendent.

My predecessor, Hon. Edward C. Turner, in opinion No. 1748, and found in the attorney-general's opinions for 1916, page 1129, held that the county superintendent is entitled to the compensation of three dollars per day, provided for in section 7828 G. C., for conducting investigations required by section 7827 G. C., and I concur in said opinion, and hold that the same also applies to the district superintendent. Your inquiry, however, goes a little further and mentions the matter of expenses. I do not understand that the term "expenses" as used in the phrase "at three dollars a day each and other expenses of such trial" refers to the expenses of the members of the examining board, but I do believe that the words "other expenses of such trial" mean whatever expenses are necessary in securing witnesses, a place to hold said investigation, and any and all other legitimate expenses made necessary on account of said investigation. If the expenses of the district superintendent are allowable, authority for such allowance must be secured from sections other than said section 7828, above quoted.

Answering then your inquiry, I advise you that the county superintendent and a district superintendent are allowed the sum of three dollars per day for services performed while conducting investigations under section 7827 G. C., and that the words "other expenses of such trial" mean the expenses of such trial other than the said per diem fees and personal expenses of such members of the examining board.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

161.

APPROVAL—SYNOPSIS—AMENDMENT TO ARTICLE XV, SECTION 9.

COLUMBUS, OHIO, April 2, 1917.

HON. JAMES A. WHITE, *Superintendent Anti-Saloon League, 175 South High Street, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter of March 31st to the following effect:

"The provisions of the law for the operation of petitions under the initiative and referendum seem to provide that the attorney-general pass upon a synopsis of the constitutional amendment to be submitted, and it seems to me to be necessary that we submit to you the entire amendment, in order that a proper synopsis may be prepared.

"You will find enclosed form of amendment, together with schedule and suggested synopsis."

The enclosure referred to in your letter is as follows:

"The full text of the proposed amendment to the constitution shall read as follows:

"BE IT RESOLVED BY THE PEOPLE OF THE STATE OF OHIO:

"Section 9. The sale and manufacture for sale of intoxicating liquors as a beverage are hereby prohibited. The general assembly shall enact laws to make this provision effective. Nothing herein contained shall prevent the manufacture or sale of such liquors for medicinal, industrial, scientific, sacramental or other non-beverage purposes.

"SCHEDULE

"If the proposed amendment be adopted, it shall become section 9 of article XV of the constitution, and it shall take effect one year and three months after the date of the election at which it is adopted, at which time original sections 9 and 9a of article XV of the constitution and all statutes inconsistent with the foregoing amendment shall be repealed.

"SYNOPSIS OF PROPOSED AMENDMENT TO BE KNOWN AS SECTION 9 OF ARTICLE XV OF THE CONSTITUTION.

"That a section to be known as section 9, article XV of the constitution be adopted so as to prohibit the sale and manufacture for sale of intoxicating liquors for beverage purposes, said amendment to take effect one year and three months after the date of the election at which it is adopted."

Pursuant to the provisions of section 5175-29e of the general Code of Ohio, I hereby certify that the synopsis above set out is a truthful statement of the contents and purpose of the proposed amendment to be known as section 9 of article XV of the constitution of Ohio.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

162.

THE SPECIAL LEVY OF TWO TENTHS OF A MILL TO REPAIR BRIDGES CONDEMNED BY COUNTY COMMISSIONERS—PROVIDED FOR IN SECTION 5643 G. C.—IS LIMITED TO A SINGLE LEVY—BONDS ISSUED IN ANTICIPATION OF COLLECTION SHOULD BE MADE PAYABLE WHEN TAX IS COLLECTED—THE LIMITATION IN SECTION 5643 DOES NOT APPLY TO LEVY FOR PAYMENT OF INTEREST ON AND PROVIDING A SINKING FUND FOR PAYMENT OF BONDS ISSUED UNDER SECTION 5644. THE FISCAL YEAR OF THE COUNTY WITH RESPECT TO TAXATION AND EXPENDITURE OF COUNTY FUNDS THUS RAISED BY COUNTY COMMISSIONERS COMMENCES ON MARCH 1st.

The special levy of two-tenths of a mill on each dollar of taxable property in the county for the purpose of rebuilding or repairing a bridge which has been condemned by the county commissioners by reason of same becoming dangerous to public travel, is limited by the provisions of section 5643 *G. C. to a single levy on one duplicate, and bonds or notes issued in anticipation of the collection of this special tax must be made payable when such special tax is collected.*

This limitation as to special tax authorized by section 5643 *of the General Code does not apply to the levy made by the county commissioners for the purpose of paying interest on and providing a sinking fund for the payment of bonds issued under the latter part of section* 5644 *G. C., and such levy may be made annually in such amount as may be necessary to pay the interest on said bonds and to create a sufficient sinking fund to pay the bonds as they mature.*

Sections 5649-3a *and* 5649-3d *G. C., the same being a part of the Smith one per cent law, considered in connection with sections* 2569 *and* 2596 *G. C. and together held to compel the conclusion that the fiscal year of the county with respect to the taxation and expenditure for county purposes of money thus raised commences on March 1st, at which time the commissioners make their first semi-annual appropriation authorized and required by said provisions of* 5649-3d.

COLUMBUS, OHIO, April 3, 1917.

HON. HARRY D. SMITH, *Prosecuting Attorney, Xenia, Ohio.*

DEAR SIR:—As previously acknowledged, I have your letter of March 12, 1917, asking for my opinion, in which you say:

"The board of commissioners of Greene county, Ohio, desire an opinion from your department on the following:

"Section 5643 of the General Code, provides for the rebuilding of an 'important bridge,' which is 'condemned for public travel by the commissioners,' and 'without first submitting the question to the voters,' may levy a tax for such purpose 'in an amount not to exceed in any one year two-tenths of one mill for every dollar of taxable property upon the tax duplicate of said county.'

"Such a bridge has been so condemned by the local commissioners. It will cost approximately $20,000.00 to rebuild this bridge, including approaches. A tax levy of two-tenths of a mill on the tax duplicate of this county will raise between $9,000.00 and $10,000.00.

"QUESTION 1. Is the amount that may be raised by two-tenths of a mill levy, the total amount that may be so expended in any one year, or might fifty thousand or one hundred thousand dollars be expended in any one year, provided bonds were issued and the maturities of the same were such that an annual levy of two-tenths of a mill would meet all interest and

maturities? In other words, does two-tenths of a mill fix the limit of the *amount of the expenditure* in any one year, or is that the limit of an *annual levy* to meet indebtedness incurred for that purpose?

"QUESTION 2. What is the year contemplated by the statute? If the limit provided is on the expenditure that may be made in any one year, is that year from January 1st to January 1st, or from September 1st to September 1st?"

With respect to your first question, I am clearly of the opinion that the special levy of two-tenths of one mill authorized by the provisions of section 5643 of the General Code for the purpose of rebuilding or repairing an important county bridge which has been condemned by the county commissioners for the reason that the same has become dangerous to public travel, is limited to a single levy on the one duplicate and that if bonds or notes are issued in anticipation of the collection of such special tax under the authority of the first paragraph of section 5644 of the General Code they must be made payable when such tax is fully collected.

My conclusion as to this question is in accord with that of my predecessor, Honorable E. C. Turner, as expressed by him in opinion No. 1837 addressed to Honorable Don C. Porter, prosecuting attorney of Coshocton under date of August 9, 1916. A copy of said opinion is herewith enclosed, and with respect to this opinion I desire to say that it fully meets my approval both as to the reasoning and conclusion.

In the opinion referred to Mr. Turner discusses the power of the county commissioners to borrow money for the purpose of rebuilding or repairing a county bridge which has been condemned under the authority given them by the latter part of section 5644 of the General Code, and in this opinion I do not deem it necessary, in view of the very full discussion of the question made in the opinion by Mr. Turner, above referred to, to do more than to state briefly my views with respect to the proper construction of said section 5643, 5644, and of sections 2434 and 5638 of the General Code, all of which have application to the matter of providing money for bridge construction and repair.

The general authority of the county commissioners to provide for the construction, improvement and repair of bridges is provided in section 2434 of the General Code. With respect to the question at hand this section provides in general terms for the purpose of erecting, repairing, improving or rebuilding necessary bridges the county commissioners

"may borrow such sum or sums of money as they deem necessary at a rate of interest not to exceed six per cent per annum and issue the bonds of the county to secure such the payment of the principal and interest thereof."

With respect to the matter of bridge construction generally, the provisions of sections 2434 of the General Code are undoubtedly limited by the provisions of section 5638 of the General Code, which, together with sections 5643 and 5644 of the General Code formerly constituted section 2825 of the Revised Statutes. Section 5638 of the General Code provides that except in case of casualty

"and as hereinafter provided"

the county commissioners shall not levy a tax appropriating money or issue bonds for the purpose of building a county bridge, the expense of which will exceed $18,000.00 without first submitting the question to the voters of the county.

It is clear from the provisions of sections 5643 and 5644 of the General Code, when read in connection with those of section 5638 of the General Code, that the provisions of the last named section have no application to the matter of rebuilding or repairing

an important county bridge which has been condemned by the county commissioners by reason of having become dangerous to public travel. For the purpose of rebuilding or repairing such bridge the county commissioners may make the special tax levy of two-tenths of one mill for every dollar of taxable property upon the tax duplicate of the county authorized by section 5643, and in anticipation of the collection of such special tax may issue bonds or notes of the county payable when said special tax is collected or the county commissioners for the purpose of rebuilding or repairing a county bridge which has been so condemned may proceed under the authority granted them by the latter part of section 5644 and borrow by the issue of bonds such sums of money as may be necessary for the purpose. For the purpose of paying the interest on such bonds and creating a sinking or debt fund for the payment of bonds as they mature the commissioners will be required to make an annual levy sufficient for the purpose.

As to your second question, section 5643 of the General Code should be read in connection with the provisions of the Smith One Percent Law, particularly sections 5649-3a and 5649-3d, General Code, and with sections 2569 and 2596 of the General Code.

Section 5649-3a of the General Code provides, in part, as follows:

> "On or before the first Monday in June, each year, the county commissioners of each county * * * shall submit or cause to be submitted to the county auditor an annual budget setting forth in itemized form an estimate stating the amount of money needed for the wants for the incoming year and for each month thereof."

Section 5649-3d of the General Code provides as follows:

> "At the beginning of each fiscal half year the various boards mentioned in section 5649-3a of this act shall make appropriations for each of the several objects for which money has been provided, from the moneys known to be in the treasury from the collection of taxes and all other sources of revenue, and all expenditures within the following six months shall be made from within such appropriations and balances thereof but no appropriation shall be made for any purpose not set forth in the annual budget nor for a greater amount for such purpose than the total amount fixed by the budget commissioners, exclusive of receipts and balances."

Section 2596 of the General Code provides in part:

> "On or before the 15th day of February, and on or before the 10th day of August, of each year, the county auditor shall attend at his office to make settlement with the treasurer of the county and ascertain the amount of taxes with which such treasurer is to stand charged. * * * "

Section 2569 of the General Code provides:

> "On the first business day of each month, the county auditor shall prepare in duplicate a statement of the finances of the county for the preceding month * * * and * * * submit such statement to the county commissioners, * * * "

Looking to the provisions of section 5649-3a it is manifest that it is thereby intended that the county commissioners in preparing the budget should have in mind the needs of every department of the county government for some certain year designated in the section as "the incoming year."

It is likewise clear that the proceeds of the several levies made by the county commissioners in the submission of the budget to the county auditor cannot be available for expenditures until the first half of said levy is collected at the December tax collection, the February settlement by the county auditor with the county treasurer is made, and appropriations have been made by the county commissioners, as provided by section 5649-3d of the General Code. It is apparent that such appropriation should be made as of the date of the first monthly balancing of accounts after the first semi-annual tax settlement between the county auditor and the county treasurer, which date would be March 1st, which is the beginning of the counties' fiscal year, and appropriations made at that time by the provisions of section 5649-3d cover a period of six months. Atlhough the fiscal year of the board of county commissioners may be for some purposes from September to September, the fiscal year of the county as such is, as above indicated, from March 1st to March 1st.

By way of application to the situation disclosed in your communication it may be noted that no authority is given the county commissioners to effectuate a tax levy of any kind except in and by the budget to be submitted by them under section 5649-3a of the General Code, and if the county commissioners of your county choose to levy a special tax provided in section 5643 of the General Code, such levy must be carried into the budget provided for in said section. If the county commissioners, on the other hand, desire to proceed under the authority given by the latter part of section 5644 of the General Code they may now borrow money in an amount sufficient to rebuild or repair the bridge, as may be desired, by an issue of bonds, and in such case the annual levy of the county commissioners for interest and sinking fund purposes will be carried into the annual budget provided for by said section 5649-3a.

In conclusion I may be allowed to suggest that the resolution of the county commissioners providing for an issue of bonds to cover the cost and expense of rebuilding or replacing this bridge, as may be decided, should clearly recite the fact that this bridge has been condemned by reason of having become dangerous to public travel, otherwise such resolution may be construed only as an exercise of the general authority given them by section 2434 of the General Code to provide money for bridge purposes, which authority, as we have seen, is subject to the provision of section 5638, which requires a favorable vote of the electors of the county before the bridge can be constructed costing more than $18,000.00.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

163.

HABITUAL CRIMINAL ACT—REPEAL OF SAME DEPRIVED BOARD OF MANAGERS OF THE OHIO PENITENTIARY OF AUTHORITY TO PAROLE PRISONER SENTENCED UNDER SAID ACT—VIOLATION OF SUCH PAROLE DOES NOT FORFEIT GOOD TIME.

A prisoner was sentenced April, 1894, to the Ohio penitentiary to serve three years and life, being an habitual criminal. On May 6, 1902, the habitual criminal act was expressly repealed, and on December 15, 1905, the governor commuted the prisoner's term to twenty years. On February 20, 1906, the board of managers of the Ohio penitentiary paroled him. This parole they revoked on November 11th of the same year, and declared forfeited 7 years and 4 months "good time" for such violation.

After the repeal of the habitual criminal act the board of managers of the Ohio penitentiary had no power to parole the prisoner, and therefore no authority to charge him with the loss of "good time" for violation of the parole.

COLUMBUS, OHIO, April 4, 1917.

HON. P. E. THOMAS, *Warden Ohio State Penitentiary, Columbus, Ohio.*

DEAR SIR:—I have your letter of March 5, 1917, as follows:

"I respectfully request your opinion based upon the following facts, as to the status of the case of Addison Lewis, serial No. 42929, and advice as to whether or not Lewis should be released at once.

"Lewis was tried at the April, 1894, term of court of Licking county on an indictment charging him with grand larceny and being an habitual criminal. He was received at this institution on May 31, 1894, to serve a term of three years and life—the 'Life' part of the sentence being for the fact that Lewis was proven to be an habitual criminal under the law in force at that time, and which has since been repealed.

"On December 15, 1905, Governor Herrick commuted the sentence of Addison Lewis to a term of twenty years, which with good time allowance would have expired on January 30, 1907. His maximum term under the commutation of twenty years would have expired on May 30, 1914.

"On February 20, 1906, the then board of managers of the penitentiary released Lewis on parole.

"While on parole Lewis committed the crime of 'forgery' in Pickaway county, and, being advised of the fact, the then board of managers revoked the parole of Lewis and ordered his return to the penitentiary, and all good time taken. This was done on November 11, 1906.

"Lewis was convicted of the crime of forgery and sentenced to the penitentiary to serve a term of ten years to take effect immediately after the expiration of the sentence he was serving at that time, and returned to the Ohio penitentiary on December 6, 1906.

"*Section* 2169 reads: 'The board of managers shall establish rules and regulations by which a prisoner under sentence other than for murder in the first or second degree, having served the minimum term provided by law for the crime of which he was convicted, *and not previously convicted of felony*, or *having served a term in a penal institution*, or a prisoner under sentence for murder in the first or second degree, having served under such sentence twenty-five full years, may be allowed to go upon parole outside the build-

ings and enclosures of the penitentiary. Full powers to enforce such rules and regulations is hereby conferred upon the board, but the concurrence of every member shall be necessary for the parole of a prisoner.'

"I wish, therefore, that you would advise me, if the opinion you rendered in the case of Harry Mapleson, serial No. 35623 (No. 50, Feb. 23, 1917), insofar as to whether the then board of managers had any power to grant this man Lewis a parole, as he had served previously for a felony, and in fact had been sentenced as a habitual criminal under the law then in force, is applicable in this case.

"Lewis was discharged from his sentence commuted to twenty years on July 25, 1914, and commenced his term of ten years on July 26, 1914, which will expire November 25, 1920.

"If, however, the board of managers had no power to grant Lewis a parole, and therefore no power to take away 'good time allowance' for a violation of same, his 20-years sentence (with good time allowance) would have expired on January 30, 1907, but having lost 45 days for a violation of prison rules his actual release date should have been March 15, 1907.

"His present term of ten years would then have started on March 16, 1907, and with good time allowance his present sentence would have expired on July 14, 1913, and his full maximum term will expire on March 15, 1917."

The habitual criminal act was passed May 4, 1885, 82 O. L., p. 237, and provided:

"Every person who, after having been twice convicted, sentenced and imprisoned in some penal institution for felony, whether committed heretofore or hereafter, and whether committed in this state or elsewhere within the limits of the United States of America, shall be convicted, sentenced and imprisoned in the Ohio penitentiary for felony hereafter committed, shall be deemed and taken to be an habitual criminal, and on the expiration of the term for which he shall be so sentenced he shall not be discharged from imprisonment in the penitentiary, but shall be detained therein for and during his natural life, unless pardoned by the governor, and the liability to be so detained shall be and constitute a part of every sentence to imprisonment in the penitentiary; provided, however, that after the expiration of the term for which he was so sentenced, he may, in the discretion of the board of managers, be allowed to go upon parole outside of the buildings and enclosures, but to remain while on parole in the legal custody and under the control of said board, and subject at any time to be taken back within the inclosure of said institution; and power is hereby conferred upon said board to establish rules and regulations under which such habitual criminals who are prisoners may so go out upon parole, and full power to enforce such rules and regulations, and to retake and reimprison any such convict so going out on parole, is hereby conferred upon said board, whose written order, certified by its secretary, shall be sufficient warrant to authorize any police officer to return to actual custody any such conditionally released or paroled prisoner; and it is hereby made the duty of all chiefs of police and marshals of cities and villages and the sheriffs of counties, and of all police officers and constables, to execute any such order in like manner as ordinary criminal process, and for the performance of such duty the officer performing the same shall be paid by said managers for his services, such reasonable compensation as is provided by law for similar services in other like cases."

I note that the prisoner referred to in your letter was sentenced to the Ohio penitentiary in April, 1894, to serve a term of three years and life under this act. On

May 6, 1902, the habitual criminal act was expressly repealed (95 O. L., p. 410). On December 15, 1905, Governor Herrick commuted Lewis' term to twenty years, and on February 20, 1906, the board of managers paroled him. This parole they revoked on November 11th of the same year.

The authority to parole prisoners in the Ohio penitentiary is found in section 2169 G. C., which was originally part of an act passed March 24, 1884 (81 O. L., 72), and amended May 4, 1885 (82 O. L., 236). The provision of section 2169 General Code to the effect that a prisoner to be eligible to parole must have "served the minimum term provided by law for the crime of which he was convicted, and not previously convicted of a felony, or having served a term in a penal institution," was in the original act, and has continued in the parole law to date. It is therefore clear that the prisoner Lewis, serving his third term, could not have been paroled by the board of managers of the Ohio penitentiary under authority of this section. If there was any authority to parole Lewis it was under the habitual criminal act itself, which granted the board of managers of the Ohio penitentiary authority to make rules and regulations for the parole of prisoners serving life terms as habitual criminals. The question, however, arising in this case is, could the board of managers lawfully parole Lewis under the parole provision of the habitual criminal act on February 20, 1906, four years after the habitual criminal act had been repealed?

On August 11, 1913, this department rendered an opinion on this very case, in which it was said:

> "By the terms of the habitual criminal act an habitual criminal was subject to parole. Lewis' sentence was for life, subject to such right of parole. The commutation by the governor could not place him in the category of a prisoner to whom a parole might be granted after serving the minimum term, consequently the question is whether the repeal of the habitual criminal act deprived Lewis of his right to a parole.
>
> "This raises a question of far-reaching effect and of the greatest importance, and while there is no saving clause in the repealing act, and there is no doubt of the power of the legislature to make the repeal, yet there is grave doubt as to its being effective to deprive Lewis of a right which was his under his sentence."

However, in that opinion no reference was made to the case of In re Kline, 70 O. S., page 25, the second branch of the syllabus of which reads:

> "A conviction and sentence under section 7388-11 Revised Statutes, commonly known as the 'habitual criminal act,' does not confer upon the prisoner a right to be paroled at the discretion of the board of managers which remains to him after the repeal of said act."

In this case the court said at page 28:

> "In State v. Peters, 43 Ohio St., 629, this court held that this statute (section 7388-11 Revised Statutes) was constitutional, and that it did not interfere with the executive or judicial departments of the state government, and the court so held for the reason that, the statute did not undertake to confer upon a prisoner the right to a pardon, absolute or conditional, nor to commute the sentence, nor to modify the sentence by shortening the term or by discharging the prisoner. The court construed this statute as being merely a 'disciplinary regulation,' which was clearly within the power and discretion of the legislature to make or not to make. As a disciplinary regulation it would no more confer a vested right upon the prisoner than would

any other rule or regulation which may be promulgated from time to time for the regulation of prisons and prisoners. It is not an essential part of the prisoner's sentence, and in its very nature and object it is subject to modification or repeal. And for the reason that it is not a part of the sentence, but extraneous to it, because it is only a tentative rule for prison government, a repeal of such legislation neither takes away any right of the prisoner nor in any manner affects his sentence theretofore made and put into execution. The prisoner still has the right to appeal to executive clemency for a pardon, and until a pardon shall be granted a sentence lawfully made and carried into effect under a valid statute must be enforced, although the statute has been repealed."

This is the only expression of the supreme court of this state on this question and it is clear that under this decision the board of managers had no authority to grant Lewis the parole referred to, and they could not, therefore, take any "good time" from him for violation of parole, as was decided in an opinion to you under date of February 23, 1917, in the case of Harry Mapleson.

It might be argued, however, that inasmuch as Lewis was originally sentenced by the court to a life term, he could not gain the "good time" allowed him on his commuted term of twenty years, since he could not be said to be a prisoner sentenced to twenty years within the meaning of section 2163 G. C., allowing diminution of sentence to prisoners sentenced for definite terms.

Section 2163 G. C. reads:

"A prisoner confined in the penitentiary, or hereafter sentenced thereto for a definite term other than life, having passed the entire period of his imprisonment without violation of the rules and discipline, except such as the board of managers shall excuse, will be entitled to the following diminution of his sentence:

"(a) A prisoner sentenced for a term of one year shall be allowed a deduction of five days from each of the twelve months of his sentence.

"(b) A prisoner sentenced for a term of two years shall be allowed a deduction of six days from each of the twenty-four months of his sentence.

"(c) A prisoner sentenced for a term of three years shall be allowed a deduction of eight days from each of the thirty-six months of his sentence.

"(d) A prisoner sentenced for a term of four years shall be allowed a deduction of nine days from each of the forty-eight months of his sentence.

"(e) A prisoner sentenced for a term of five years shall be allowed a deduction of ten days from each of the sixty months of his sentence.

"(f) A prisoner sentenced for a term of six or more years, shall be allowed a deduction of eleven days from each of the months of his full sentence.

"(g) A prisoner sentenced for a number of months or fraction of years shall be allowed the same time per month as is provided for the year next higher than maximum sentence."

The question then is, is the prisoner who was originally sentenced to a life term in the penitentiary and then commuted by the governor to a term of twenty years entitled to "good time" under the foregoing section, the same as if he (the prisoner) had been originally sentenced by the trial court to a term of twenty years?

In 29 Cyc., page 1561, it is said:

"Commutation of sentence or punishment is the change of the punishment to which a person has been condemned to a less severe one."

Commutation has also been defined as:

"Substitution of a less for a greater penalty or punishment. Anderson Law Dictionary.

"Substitution of a less for a greater punishment by authority of law. Lee v. Murphy, 22 Gratt. (Va.) 789."

In re Victor, 31 O. S., 206, the court held:

"Commutation is not a conditional pardon, but the substitution of a lower for a higher grade of punishment."

In this case the court said, at page 208:

"Where the punishment of a lunatic is commuted under this statute, the substituted punishment is a punishment prescribed by law, equally as if it had been the only punishment provided for the offense, *or the punishment inflicted by the sentence of the court.*"

This decision was affirmed in State v. Peters, 43 O. S., 629.

In the case of ex parte Collins, 94 Mo., 22, the statute provided that one who was "under the sentence of imprisonment for life" was entitled to a recommendation for pardon after having served fifteen years. The prisoner in that case was convicted of murder in the first degree and sentenced to death in the St. Louis circuit court. The governor commuted his punishment to imprisonment in the penitentiary for life. Thereupon that court, by an order to that effect, entered of record, sentenced the prisoner to imprisonment in the penitentiary for life. The question was then later raised as to whether the prisoner was "under sentence of imprisonment for life" since he had been originally sentenced to death and then commuted. The court said, at page 24:

"I do not regard the situation of the petitioner as at all affected, one way or the other, so far as the present question is concerned; whether he was originally sentenced to imprisonment for life or not, or whether his death sentence was commuted, as heretofore stated. He is now in the penitentiary by virtue of the sentence of the court; and he would have been thus in the penitentiary by virtue of such sentence, even if the court had made no subsequent order in the premises * * * . By the terms of the second section of the act, on which the petitioner relied when he was 'under sentence of imprisonment for life' was entitled to the benefits of that section by observing the conditions mentioned in the first. The words 'under sentence of imprisonment for life' are *broad enough, however, to cover and include in the sentence, whether it be considered as resulting from the act of the court or that of the executive. The words employed certainly make no distinction; and that if less plain than they are, the presumption in favor of liberty would authorize such construction.*"

In Am. and Eng. Ency. of Law, Vol. 24, page 597, it is said:

"The exercise of the power of commutation limits or modifies the original sentence of the court. It does not, however, annul the sentence, but, subject to the modifications, it makes it *pro tanto* an affirmance. Thus where a person sentenced to death has had his sentence commuted to life imprisonment, the status is the same as if his original sentence had been life imprisonment."

Reference is there made to an opinion of the Attorney-General of the United States, 5 Opinions of the Attorneys-General, page 370. This opinion related to the case of an Indian who had been sentenced to death and whose punishment was by the president commuted to life imprisonment. The statutes construed in that case are found in 4 Statutes at Large, U. S., 118, and page 739, and read as follows:

> "Section 15. And be it further enacted that in every case where any criminal convicted of an offense against the United States shall be sentenced to imprisonment and confinement to hard labor, it shall be lawful for the court, by which the sentence is passed, to order the same to be executed in any state prison, or penitentiary, within the district where such court is holden; the use of which prison or penitentiary may be allowed or granted by the legislature of such state for such purposes."
>
> "That whenever any criminal convicted of any offense against the United States shall be imprisoned, in pursuance of such conviction, *and of the sentence thereupon,* in the prison or penitentiary of any state or territory, such criminal shall in all respects be subject to the same discipline and treatment, as convicts sentenced by the courts of the state or territory."

In this case the question evidently was, whether or not it was proper to confine the Indian prisoner in the state pemitentiary under these statutes, because of the fact that he had not been sentenced by the court itself to imprisonment in the penitentiary within the meaning of the sections above quoted, but had been sentenced to death and this sentence later commuted by the president to a life term imprisonment. The Attorney-General said:

> "I have examined the letter which you were pleased to refer to me by the governor of Missouri, relative to the case of the Indian, Lee-Lee-Sah-Ma, who was sentenced to death and whose punishment was by your pardon commuted to 'imprisonment for life to the penitentiary of the state.'
>
> "In my opinion this Indian, under the operation of the conditional pardon which has been granted to him, stands in precisely the same legal condition as if he had been sentenced by the court 'to imprisonment for life in the penitentiary' in the state of Missouri. This is my construction of the acts of Congress (4 Statutes at Large 118, 739) and the law of Missouri, allowing to the United States the use of her penitentiary."

In consideration of these authorities, it seems clear to me that a prisoner whose life term has been commuted to twenty years by the governor of Ohio stands in precisely the same legal condition as if he had been originally sentenced to a term of twenty years and is therefore entitled to diminution of sentence for good behavior under section 2163 G. C.

It might, perhaps, be argued too that while the board of managers of the Ohio penitentiary had no authority to deduct the "good time" earned on this twenty year sentence from Lewis, because of violation of parole, they nevertheless had the authority to deduct it for violation of the prison rules and that their act in taking his time might be considered lawful in this way for this reason.

Section 2164 G. C. reads:

> "The board of managers may deduct from a prisoner a part or all of the good time gained, for a violation of the rules of discipline, or a want of fidelity and care in the performance of work, according to the aggravated nature or the frequency of the offense. The board may review the conduct record of a prisoner.

If a violation of the rules and discipline was committed through ignorance or circumstances beyond his control or abuse by an officer, the managers may restore to the prisoner the time lost by such violations."

This section was in force in 1906 when the board of managers released Lewis from the institution. The journal of the proceedings of the board of managers of the penitentiary clearly show that the time taken was for violation of parole and the record of revocation of parole reads as follows:

"The parole of Addison Lewis, Parole 1681, Serial No. 25584, was revoked, all good time declared forfeited, and return to prison ordered for leaving his place of employment and remaining idle and the fact that he is now in jail for forgery."

Now section 2164 gives the board of managers power to deduct "good time" which has been gained, "for a violation of the rules of discipline or want of fidelity and care in the performance of work." But since the board had no authority to parole Lewis, it could not be said that in his case the bounds of the penitentiary were extended to the state line and misbehavior anywhere within the state would constitute misbehavior in prison.

It is therefore clear that in the Lewis case, section 2164 could not possibly authorize the board to take any time for any misconduct of Lewis while outside the penitentiary walls. These things being true, Lewis should have commenced his ten year term on March 16, 1907, instead of July 26, 1914, and with the "good time" allowance under this ten year term, the same would have expired July 14, 1913, instead of November 25, 1920, and the prisoner's imprisonment should have been terminated on July 14, 1913.

I am therefore of opinion, in direct answer to your question, that Addison Lewis, No. 42929, should be released from the Ohio penitentiary immediately.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

164.

ANSWER TO NINE QUESTIONS RELATIVE TO THE DUTY OF THE BOARD OF AGRICULTURE IN REGARD TO EXAMINING, DESTROYING AND PLACING UNDER QUARANTINE ANIMALS AFFECTED WITH DANGEROUSLY CONTAGIOUS AND INFECTIOUS DISEASES.

1. (a) *When notice comes to the board of agriculture that cattle are affected with a dangerously contagious disease and they are placed under quarantine, the board not having made or caused to be made an examination of such cattle, then it is the duty of the board to have a proper examination made at the earliest moment, to determine whether or not the quarantine should be continued.*

(b) *When notice comes to the board of agriculture that cattle are affected with a dangerously contagious disease, said notice being brought to the attention of the board by an examination made by a veterinarian on the approved list of said board, the board may approve and adopt such examination and there would be no duty to make a further test at that time. If the quarantine is continued for a considerable length of time, then the board should determine whether they deem it necessary to destroy any animals and in that event a further test would be necessary.*

(c) *If the notice comes to the board from a person who owns or has in charge an animal which he knows or has reason to believe is affected with a dangerously contagious disease then the board should cause the proper examination to be made before quarantine, unless it is a case of absolute necessity, when quarantine could be laid at once and then it would become necessary for the board to have a proper examination made as soon thereafter as practicable.*

2. *Infected cattle need not be appraised unless the board determines it is necessary to destroy them under section* 1114 *G. C., in order to prevent the spread of the disease.*

3. *It is the duty of the board to cause an examination to be made of all cattle reported to them to be affected with a dangerously contagious disease, notwithstanding that prior examination had been made by a local veterinarian.*

4. *The board can not refuse approval of claims for compensation of destroyed animals merely because the owner has had his cattle tested by a local or private veterinarian prior to the official examination caused to be made by the board.*

5. *The board can adopt any reasonable rule or regulation it deems necessary to carry out the purposes of the law. So called form 7 is not authorized in its entirety.*

6. *Mere refusal to sign form 7 is not sufficient cause for the board to refuse to approve claims for compensation for cattle destroyed by its order.*

7. *The board is authorized to appoint, in such manner as they deem proper, appraisers to fix the value of animals reported to be destroyed, and such appraisers must be disinterested citizens.*

8. *The board, under section* 1114 *G. C. is authorized to appraise animals about to be destroyed.*

9. *The board should keep a record containing the history of all its proceedings, including orders appraising, quarantining or ordering slaughtered infected animals.*

COLUMBUS, OHIO, April 5, 1917.

The Board of Agriculture, Columbus, Ohio.

GENTLEMEN:—I have your inquiry under date of February 8, 1917, wherein you submit nine questions for opinion. I will attempt to answer them seriatim.

Your first question is:

"1. If it comes to the attention of the board of agriculture that cattle

are infected with tuberculosis and are placed under quarantine, is the board in duty bound under the statute to make a test or examination to ascertain whether they are tubercular?"

Your question asks whether the board of agriculture is in duty bound under the law to make a test or examination to ascertain whether cattle are tubercular or not, when "it comes to the attention of the board that such cattle are infected with tuberculosis and are placed under quarantine."

To intelligently answer your inquiry, it becomes necessary to consider how cattle are placed under quarantine. Section 1112 G. C. is the only section that *expressly* points out the manner of and provides for quarantine, but I am inclined to believe that under section 1108 the board of agriculture possesses such plenary powers that they could lay a quarantine other than under the provisions of section 1112 G. C.

Section 1108 G. C. (106 O. L. 149) provides as follows:

"The board of agriculture shall promote and protect the live stock interests of the state, prevent the spread of dangerously infectious and contagious diseases and co-operate with the bureau of animal industry of the United States department of agriculture in such work. The board of agriculture may use all proper means in the prevention of the spread of infectious and contagious diseases among domestic animals and in providing for the extermination of such diseases."

This section, a legitimate exercise by the legislature of the police power of the state, sets forth the broad and general powers and duties with which the board of agriculture is invested. Provision is made that they shall promote and protect the live stock interests of the state, prevent the spread of dangerously infectious and contagious diseases, and the section further provides for harmonious action on the part of the state with the federal officers. They are invested with all proper means necessary to prevent the spread of infectious and contagious diseases among domestic animals and are authorized, if possible in every conceivable, proper way, to stamp out communicable diseases to which stock are subject.

The board of agriculture was called into existence in pursuance of a policy which the legislature deemed calculated to promote the interests of an important industry of the state, and the legislative intent is clear that it sought to endow that board with certain powers which it deemed necessary for the maintenance of the health of live stock and the prevention of contagious diseases with which the stock are liable to be affected.

Assuming, then, that it has come to the attention of your board in some other manner than by notice from the owner or from some person in charge of the cattle, that he has reason to believe that they are infected with a dangerously contagious and infectious disease, and assuming further that there has been no examinatio of such cattle, but that the board, in the exercise of the broad powers that the law and the very nature of their duty gives them, orders a quarantine of said stock, then it is my opinion that the board is in duty bound, at the earliest possible moment, to cause a test or examination of the stock, in order to determine whether or not they are tubercular to the extent that a quarantine should be continued. This would only be fair to the owner of such stock and also protection to the board, as they would not be warranted in continuing the quarantine unless the animals were so contagiously infected as would necessitate such isolation.

It has been brought to my attention that the board of agriculture under their rules has a list of veterinarians of the state that they have designated an "approved list." I am further advised that the board has approved the names of the persons on this list, because they deem them qualified and competent to practice veterinary

medicine and surgery, and that in carrying out the inspection laws among the states it has been the rule and custom of the board to in some manner adopt and approve tests and examinations of the veterinarians on such approved list.

Assuming a case of a veterinarian on the approved list having made an examination of the animals and reported same to the state board, and that the board, approving and acting upon such examination, orders a quarantine, then, for the purposes of the quarantine alone, I am inclined to the view that the board, having officially recognized and approved the examination, and the notice not having come in the manner stated in section 1112 G. C., would have no duty placed upon it to make a further test at that time; but if the quarantine were continued any length of time, then the board in their judgment should determine whether or not, in order to protect the live stock interests of the state, it is necessary to destroy any of these animals. In the latter event another situation would arise and it would become necessary, under section 1114 G. C., to have a test or examination made by a veterinarian in the employ of the board. If the quarantine were laid by virtue of section 1114 G. C., that is, if the notice were given by the person owning or who was in charge of the animals, then the proper examination, as disclosed by that section, should have been made prior to the order of quarantine.

Section 1112 G. C. (106 O. L. 149) provides:

> "If a person owns or has in charge an animal which he knows or has reason to believe is affected with a dangerously contagious or infectious disease, he shall give notice of such fact immediately to the board of agriculture, a member thereof, or the sheriff or constable of the proper county. Thereupon, the board of agriculture shall at once cause a proper examination to be made by competent veterinarians of the diseased or infected animals, and, if the disease affecting such animals is found to be dangerously contagious or infectious the board shall order the diseased animals or those which have been exposed to the contagion be strictly quarantined, in charge of such person as the board shall designate, and order any premises or farms where diseased animals are found or have been recently kept to be put in quarantine. No domestic animals shall be brought to or removed from the premises or places so quarantined."

This section, imposing in the first part the duty upon the owner of any animal which he knows or has reason to believe is affected with a contagious malady, of giving notice of that fact to the proper officers therein named, describes what the board of agriculture must do upon receipt of said notice.

This section and section 1108 G. C. should be read and construed together. While I am of the opinion that ample power is given under section 1108 G. C. for the board to do all reasonable things found practically necessary to carry out the duty of protecting the live stock interests of the state, preventing the spread of dangerously infectious and contagious diseases and stamping out such diseases, and that this section alone would authorize them, either on their own initiative or upon notice coming to them from the owner of the animals or in any other manner, to order a quarantine of such animals, still, since the legislature has seen fit to prescribe a specific procedure when the notice is given by the owner or one in charge of such animals, it is my view that the provisions of section 1112 G. C. in those cases should be carried out.

I am further of the opinion that the proper examination provided in section 1112 G. C. should also always be made or caused to be made by the board before an order of quarantine is issued, except in the most urgent cases, when necessity demands that, owing to the highly dangerous contagiousness of the disease, immediate action be taken.

I desire to call your attention, however, to what might be deemed a "proper examination" and I am now speaking of the examination under section 1112 G. C. which precedes the order of quarantine. As I construe the law, when notice of the fact that

an animal is affected with a dangerously contagious or infectious disease comes to the board, either from information furnished by the owner or in any other manner, a duty forthwith devolves upon the board to cause an examination to be made to determine whether or not the animals are infected. The statute says that this examination must be caused to be made by the board "by competent veterinarians."

As was said by Burch, J., in Cory v. Graybill, 149 Pac. 419:

> "There are veterinarians and veterinarians. As in other professions, some members are competent and reliable, and some are not; and it is not inconceivable that an unscrupulous dealer in Illinois might be able to secure, without difficulty, certificates of health for a herd of diseased cattle which he desired to dispose of."

Now, this statute provides for an examination by a *competent* veterinarian, and since the board causes the examination to be made, they are to be the judge and their selection should be a person whom they deem to be competent. If this examination is made by a veterinarian in the employ of the board, one who is an appointee and holding an official position in the state's service, his examination would be effectual for not only the purposes of section 1112 G. C., but also for the purposes of section 1114 G. C., of which I will speak later in answer to another of your questions. But it is my view that the competent veterinarian spoken of in section 1112 need not necessarily be an appointee of the board, but may be any veterinarian whose competency is recognized by the board. The veterinarians on the approved list would of course be deemed competent by the board, or they would not be on such list.

If such unofficial veterinarian makes the examination and the board receives and approves the result of that examination, then it is my view that if the board determines that the malady is dangerous or infectious, the board shall order the diseased animals, as well as those which have been exposed to the contagion, to be quarantined.

Now, if the board in its wisdom decides that nothing further is to be done than merely to quarantine the animals so that they might be treated and the disease cured, even though the examination is made by an unofficial veterinarian, no further step is required.

But if the board, in carrying out its duty under the statute to exterminate the disease, deems it necessary to destroy any of the animals thus quarantined, the fact that an unofficial or local veterinarian has made the examination, upon which the order of quarantine issued, is not sufficient. That would require, as provided by section 1114 G. C., before an animal could be killed, that an examination be made "by a competent veterinarian in the employ of the board, and the disease, with which it is affected or to which it has been exposed, adjudged a dangerous and contagious malady."

It might be well to say at this point that the idea of "quarantine" imports merely a temporary isolation. "Quarantine," as its name indicates, was originally for a forty day period, although it is frequently used for terms of variable length.

The Standard dictionary defines "quarantine:"

> "1. The interdiction for a fixed period of time (originally forty days) of all communication with persons, ships, or goods arriving from ports or places infected with contagious disease, or having or being supposed to have infectious disease on board.
>
> "2. * * *
>
> "3. The enforced isolation of any person or place infected with contagious disease; loosely, any enforced isolation, or restraint within limits, as for punishment.

"4. * * *."

It is my opinion that if a quarantine be laid, such quarantine should only continue for such reasonable period as is necessary to conserve the live stock interests of the state and prevent the spread of the infection which necessitated the quarantine. If the report upon which the board acted in ordering the quarantine is of a character to evidence a necessity for destroying some of the animals in order to prevent the further spread of the disease or to provide for its extermination, then there is a duty upon the board, acting with a sound discretion, to proceed, under the provisions of section 1114 G. C., in the destruction of such animals. This, as I have already said, would necessitate an examination of such quarantined animals by a competent veterinarian *in the employ of the board*, even if therefore an unofficial or local veterinarian had made the test which resulted in the order of quarantine.

Therefore it is my opinion that if the board, without any examination, owing to the absolute necessity of the case, orders a quarantine as soon as they know the cattle are infected, then it is their duty at once to make the test or examination, to determine whether the cattle are tubercular or not. If the order of quarantine is placed owing to knowledge that comes to the board by reason of some examination that has been made by some unofficial veterinarian without having been ordered to do so by the board, then it is their duty as soon as possible to verify the reasons that caused the quarantine to be ordered, by making or causing to be made a proper examination of such cattle, in order to determine whether this quarantine should continue.

If the order of quarantine has been regularly placed under the provisions of section 1112 G. C., that is, if on notice from the owner or the person in charge of the cattle the board caused an examination to be made by a competent veterinarian, then they are not required to make a further test unless the cattle were so dangerously infected that it would become the board's duty to destroy them or some of them.

As stated before, if it become necessary to destroy any of the cattle, then an examination would have to be made by a veterinarian in the employ of the board, unless such examination had been made contemporaneously with the order of quarantine by such veterinarian and so recently that it would satisfy the board of the facts necessary to be found under the provisions of section 1114 G. C.

I desire to call attention to the fact that the statute is silent as to raising a quarantine once laid. This does not seem right and I would suggest that it would be good policy for the board, after a reasonable time, to make tests to determine whether or not the quarantine should continue.

Your second question is:

"2. If they are found to be infected with tuberculosis, is the board by law compelled to appraise those cattle?"

I take it from this inquiry that you desire to know whether or not, if the cattle are found to be infected with tuberculosis, from the examination made under the provisions of section 1112 G. C., it would be the imperative duty of the board to appraise the cattle. In my discussion of the first question I have practically answered the question in the negative, if the board after having quarantined the cattle decide that they are not so dangerously contagious or infected that they might not be taken care of and possibly cured, or in any event that it is not necessary to destroy any of them. But if it is determined by the board, in order to prevent the spread of the disease, that it is necessary to destroy the animals, then it becomes necessary to appraise the animals to be killed; and further, if an examination has not been made by a competent veterinarian in the employ of the board, such examination must be first made before the animals can be destroyed.

Section 1114 G. C. (106 O. L. 150), provides:

> "If, in order to prevent the spread of any dangerously contagious and infectious disease among the live stock of the state, the board of agriculture deems it necessary to destroy animals affected with or which have been exposed to dangerously contagious or infectious disease it shall determine, through its secretary, what animals shall be killed and appraise or cause them to be appraised by disinterested citizens as provided by law. After being appraised, the board, shall in like manner, cause such animals to be killed and their carcasses disposed of in such manner as it directs, but no animal shall be killed under the provisions of this section until it has been examined by a competent veterinarian in the employ of the board, and the disease with which it is affected or to which it has been exposed adjudged a dangerous and contagious malady."

A reading of section 1114 G. C. discloses that after animals are quarantined, the duty is imposed upon the board to first determine whether or not, in order to prevent the spread of the disease, the board deems it necessary to destroy any animals affected with or which have been exposed to the disease.

Next, having determined that it is necessary to destroy some of the animals, it is made the duty, under this section, of the board through its secretary to determine what animals shall be killed.

Then the next step, and before such animals could be killed, is, it must appear that these animals to be killed have been examined by a competent veterinarian in the employ of the board, and the disease with which they are affected or to which they have been exposed must be adjudged to be a dangerous and contagious malady.

The statute makes it necessary also, before the animals can be destroyed, that the board shall "appraise or cause them to be appraised by disinterested citizens as provided by law." The language of the section in reference to the appraisal by disinterested citizens is certainly ambiguous, but I think a fair implication warrants the holding that appraisal can be made in two ways, either by the board itself or by disinterested citizens appointed by the board for that purpose.

Your board asked an opinion of my predecessor, who advised you in opinion No. 1166, under date of January 12, 1916, that you were without authority to pay the salaries and expenses of a board of appraisers that you had attempted to appoint to determine the value of cattle which had been tested and condemned on account of being infected with tuberculosis. I think his opinion only went to the question asked and that his holding was that a *permanent* board of appraisers could not be appointed, nor could they be paid, owing to the fact there was no appropriation or fund for that purpose. I concur in his conclusion. But while the board could not appoint a standing board of appraisers and unfortunately there has been no provision made for the payment of any appraisers, and, owing to the ambiguity of the statute, it is somewhat difficult to determine exactly what is intended by the legislature, still it is my opinion that if the board can obtain the services of disinterested citizens without cost, they would be authorized to do so, as this would give the board an idea of the value of the cattle and afford them at least that much light when the matter came before the board of approving the claims which would be made subsequently under the statute for the purpose of having the state compensate the owners for the destruction of such diseased cattle.

Your third question is:

> "3. If a man has had his cattle tested by a local veterinarian and finds from said test that his cattle have tuberculosis, and then asks the state to

make a further examination, can the state refuse to make such an examination?"

This question involves an examination of section 1112 G. C. supra, which has been discussed in answer to the previous questions. Under its provisions it is the duty of the owner or a person in charge of an animal which he knows or has reason to believe is affected with a dangerously contagious or infectious disease, to give immediate notice of that fact to the board of agriculture or member thereof, or to the sheriff or constable of the proper county. When this notice comes to the board in this manner it is the bounden duty of the board of agriculture to have a proper examination made of these infected animals by a competent veterinarian.

It might be that the only manner in which the person owning the animals or having them in charge could determine whether or not they were infected would be to call in some local veterinarian. He might be a competent or incompetent veterinarian. The owner would probably be taking advantage of such means and employ such persons as were at hand. There is no inhibition in the law against him so doing, nor is there any provision of statute compelling him to discover the disease in any particular manner.

I am of the opinion that if a man has had his cattle tested or examined by a local veterinarian, and that test or examination discloses that the stock is tubercular, and he reports that fact to the state board, it is the duty of such board, under section 1112 G. C. to have an examination made by a competent veterinarian under their supervision, to determine whether or not the disease exists. The mere fact that the stock has been theretofore inspected, examined or tested by some one called by the owner, does not relieve them of this statutory duty. The law imposes the duty of *causing* the proper examination to be made, and no matter what has preceded the obtaining of the notice, when the notice comes to the board it is their statutory duty to cause an examination to be made in the manner provided by section 1112.

Your fourth question is:

"4. If the state should make a further examination and quarantines his cattle, can the board refuse to recommend payment for the cattle that were tested by the local veterinarian and found to be tubercular?"

For the purposes of answering this question, I will assume that you mean the state board has been notified by the owner, or some person in charge of an animal, that such animal is believed to be affected with a dangerously contagious or infectious disease, and that the question of the destruction of the animal, and whether or not compensation could be made for same is presented, and the fact appears that the owner has had the animal tested by a local veterinarian, who found same to be tubercular, and that said test was not caused to be made by the board.

Section 1116 G. C. provides (106 O. L. 150):

"When approved by the board of agriculture all claims of owners of animals killed under the provisions herein relating to the board shall be paid from funds appropriated by the general assembly for that purpose."

This is the section that provides for the manner of payment for animals killed, upon approval of the claim by the board of agriculture. It is to be assumed that the board would exercise a sound discretion in their approval, and that they would not act unreasonably, capriciously or arbitrarily. They would be acting wholly without authority to refuse to approve a just claim merely because the owner had had a local veterinarian make an examination for his benefit, and advise said owner whether

or not the stock is infected. The fact that the prior test or examination was made or caused to be made not by the board, but by the owner, would have absolutely nothing to do with the matter.

The only thing the board of agriculture should and would be interested in, when passing upon the claim, was whether or not the animals were killed under the provisions of the statute, whether or not the amount claimed was just, and whether or not the case was within the inhibitions of section 1115 G. C., which provides that no compensation shall be made to a person who has brought animals affected with such contagious disease into this state or from a district in which contagious disease existed, or who has wilfully concealed the existence of such disease among his stock or on his premises or who, by wilful neglect or purposely has contributed to the spread of such contagion. This section further provides that no compensation shall be paid for certain animals that are destroyed because they are affected with glanders or farcy, if they were so diseased when they passed into the possession of their owner.

Your fifth question is:

"5. Has the board of agriculture the right to adopt a rule or form such as is herewith enclosed, commonly known as form 7?"

Form 7 provides:

"Form No. 7. Revised July, 1910. Revised Dec. 23, 1912. Revised 1915.

"STATE BOARD OF AGRICULTURE.

"G. A. Stouffer,
"Secretary.

A. S. Cooley, D. V. M.,
State Veterinarian.

"REQUEST OF OWNER FOR INSPECTION AND TUBERCULIN TEST OF DAIRY HERD.

"At Expense of State Board of Agriculture of Ohio Bureau of Live Stock Industry.

"————————, Ohio————————, 191—

"To the State Board of Agriculture of Ohio, Columbus, Ohio.

"GENTLEMEN:—I wish to have my ENTIRE HERD inspected and tested with tuberculin and the diseased animals, if any, disposed of according to the rules and regulations of your board.

"I understood that this inspection and test are to be made at the expense of the state, and in consideration thereof I agree to thereafter observe the precautions and measures, and to comply with the means recommended by your board, to prevent the reintroduction and redevelopment of tuberculosis in my herd.

"I certify that his request is voluntary on my part and that the cattle for which I request inspection and test have been in my possession since ————————.

"Respectfully,
"Name————————,
"Address————————,
"———————— County, Ohio.

"My herd includes the following animals: Cows, ———; heifers over six months of age, ———; bulls over six months of age, ———; steers, ———; calves under six months of age, ———; Total, ———.

"The milk from this herd is used by ———————————— for————————————. The cattle are ————————————.
"(Breed)

"I desire to have my herd tested for the following reasons.

"(Eighteen blank lines here.)

"Fill out all blank spaces, sign application and affidavit, having signature to latter properly witnessed, and return to DR. A. S. COOLEY, state veterinarian, Columbus, Ohio.

"RULES AND REGULATIONS

"Of the State Board of Agriculture of Ohio,

"For inspecting and testing cattle with tuberculin, and measures recommended to prevent the reintroduction and redevelopment of tuberculosis."

"(a) The owner of the cattle to be tested must agree to furnish all necessary assistance. One or more careful men employed on the farm, the number depending on the size of the herd, will be needed.

"(b) All reacting (diseased) animals must be killed and burned or buried, except animals in good flesh, which may be disposed of by slaughter where federal, state or municipal inspection is maintained; or may be disposed of locally by a state inspector or a specially approved veterinatian.

"(c) After all diseased cattle have been removed the stable or stables must be disinfected according to the directions given below. Such changes in the construction of the stables as may be necessary to insure better sanitary conditions, will be indicated by a veterinarian in the employ of the state board of agriculture, and must be made at the expense of the owner of the herd or premises.

"INSTRUCTIONS FOR DISINFECTION.

"Remove all litter, manure, fodder, etc., scrape floors and walls with a sharp hoe and thus remove every particle of dried manure, dirt, etc. (this cannot be done too thoroughly). Remove all rotten and loose woodwork, boards, etc., from the sides and floors. Sweep the mangers thoroughly and remove all accumulations of food and waste in and about them. Scrub the mangers and feed boxes with hot water and soap or with a solution of lye. Then thoroughly apply any of the following disinfectants:

"No. 1. One to five hundred per cent. solution of bichloride of mercury. (Two ounces of the drug to eight gallons of water.)

"N. 2. A five per cent. solution of cresolis compositus U. S. P.

"No. 3. A five per cent. solution of crystal carbolic acid.

"Every particle of exposed surface, every crack, crevice, nail hole, etc., of the walls, ceilings, floors, mangers and feed boxes, must be soaked with this solution. Poor or careless disinfection is no disinfection at all. After everything is thoroughly dry the entire interior of the stable may be whitewashed. If the bichloride of mercury is used the mangers and feed boxes should be washed with hot water to remove the drug which otherwise might poison the animals.

"After this the stable should, if possible, remain perfectly empty for a few weeks, and during this time and ever after should be exposed to as much air and sunshine as possible; both of these are enemies of disease germs and conducive to good health in animals. All litter, rotten wood, etc., removed previous to disinfection, should be burned or removed to a safe place. Manure would best be spread in a thin layer on a large, flat field and thus exposed to the disinfecting action of the sun's rays. If there is a dirt floor in the stable several inches of the top layers should be removed with the manure. The dirt thus removed may be replaced with fresh earth, but the better method is to put in a good cement or concrete floor.

"New animals must not be introduced into the herd unless they have been tested with tuberculin and found free from tuberculosis. If such animals react, no compensation will be allowed. Such tests may be made only by veterinarians in the employ of the state board of agriculture or by private veterinarians approved by said board for such work.

"The herd originally tested as well as all newly introduced tested animals will be retested after six months or one year by a veterinarian in the employ of the state board of agriculture at dates determined by the board, and until the herd is found free from disease. Thereafter the herd must be kept free from disease at the expense of the owner.

"AS TO COMPENSATION.

"When reactors are found after testing as provided by the laws of Ohio and the rules of this board, two men from the board of appraisers will be sent to make the official appraisal of the condemned animals. Compensation for animals condemned and destroyed according to the laws of the state and the rules of the board of agriculture is to be allowed as provided in sections 1114, 1115, and 1116 of the General Code.

"No claims for compensation will be approved unless all the conditions herein stated are met. Compensation will not be allowed for animals introduced into a herd subsequent to the first state test nor for animals added after a herd is declared free from tuberculosis. The owner of such herd in making application for a first test, agrees to permit official retests and to continue to comply with the regulations herein contained in order to prevent the reintroduction of tuberculosis into the herd. Reacting cattle must be disposed of within one year from the time they are condemned unless permission is given to keep such animals under the Bang system.

"To obtain compensation under the law and rules of the state board of agriculture for any animal hereafter brought into the state of Ohio from any other state, Canada, or any foreign country, such animal must be reported to the state veterinarian of Ohio at the time the animal is brought into the state. Further, said animal shall have been tested by a veterinarian approved by the state board of agriculture, and said test approved as free from tuberculosis by the state veterinarian of Ohio within six months from the time the animal is brought into this state. Should said animal be condemned under a subsequent test after one year from time of entry into this state, then these rules for compensation shall apply.

"AFFIDAVIT.

"I,----------, of----------,
Ohio, hereby certify that I have read the conditions as outlined above and fully understand that I must comply with all of said conditions before any

claim for animals destroyed by order of the state board of agriculture on acoount of tuberculosis will be approved for payment by said board. I also agree to accept the compensation fixed by the board of appraisers on any animals that may be slaughteted as directed by the board of agriculture.

"Name_____

"Address_____

"Subscribed and sworn to before me this_____day of _____191__.

"_____Notary Public in and for_____County, Ohio."

Section 1098 G. C. provides:

"The board of agriculture shall adopt reasonable and proper rules and regulations to govern its proceedings and to regulate the mode and manner of all investigations, inspections and hearings not otherwise specifically provided for."

This section empowers the board of agriculture to make and adopt all reasonable and proper rules and regulations and use all proper means in the prevention of the spread of dangerously contagious or infectious diseases and such as they properly deem necessary for the extermination of such diseases.

In the giving of the power to the board to adopt rules the legislature recognized the patent fact that, in view of the very nature of the subject, it was impossible to prescribe rules which could apply to all sections, cover all contingencies and relate to all the multitudinous, administrative details of the system which had been enacted. Both principle and authority abundantly sustain the propriety and necessity of such legislation.

While it is true that a legislative body may not delegate to an administrative board the power to legislate, it usually, in the act of creating the board, endows it with power to make such rules or regulations as are necessary to carry into effect the provisions contained in the statutes relating to the subject.

The rules promulgated by the board must conform strictly to the power granted in the statute; otherwise they are void and of no effect.

Railway Co. v. Masterson, 95 Tex. 262.
Roberson v. State, 43 S. W. 989.

A statute establishing a state live stock sanitary board, empowering it to make rules and regulations for the effective enforcement of the law and providing a penalty for the violation of its rules, is not unconstitutional as a delegation of legislative authority.

State v. McCarty, 59 So. Rep. 543.

In Ingram v. State, 39 Ala. 247, an act had been attacked which prohibited the distillation of grain in the state of Alabama, except under the direction of the authority of the governor. One of the sections of that act provided that it should be the duty of the governor

"*under such rules and regulations as he may prescribe* to cause such an amount of grain to be distilled or converted into alcohol or spirituous liquors, as in his judgment is consistent with the common defense and general welfare."

In that case the supreme court said:

"The objection that the act is invalid, because it transfers legislative power to the governor, is not well taken. The governor is simply the agent,

> appointed by the legislature, *to carry out the provisions of the law.* He, it is true, is intrusted with a large discretion in the exercise of the powers conferred upon him; but we are unable to see upon what principle this feature of the law can be held to invalidate it."

This but follows the well established doctrine that while the legislature can not delegate its power to make laws, it can make a law to delegate a power to determine some fact or state of things upon which the law makes or intends to make its own action depend.

In considering an act authorizing the state board of health to make rules and regulations concerning the pure food and drug law of the state of Indiana, the supreme court of that state, in Isenhour v. State, 157 Ind., 517, says:

> "This class of legislation emanates from an exercise of the police power of the state for the protection of the public health. The power of the legislature, and its right to determine for itself when an emergency for such legislation exists, and the means and instrumentalities necessary to accomplish the end in view, is no longer a doubtful question. The particular character of the subject, embodying, as it does, considerations of sanitary science, is such as to require for just legal control something more than legislative wisdom to accurately designate the subjects and instances intended to be affected. The classification of these subjects and the prescribing of rules by which they may be determined by a qualified agent, is *not legislation,* but merely the exercise of administrative power. The *law itself* is perfect and effective in all its parts. In respect to the matters to be determined by the state board of health in its execution, it awaits the performance of those duties. When *performed,* the *law operates* upon the things done by the board. While unperformed, the law remains ready to be applied whenever the preliminary condition exists."

The same court, in Blue v. Beach, 155 Ind. 121, says:

> "In order to secure and promote the public health, the state creates boards of health as an instrumentality or agency for that purpose, and invests them with the power to adopt ordinances, by-laws, rules and regulations necessary to secure the objects of their organization. While it is true that the character or nature of such boards is administrative only, still the powers conferred upon them by the legislature, in view of the great public interest confided to them, have always received from the courts a liberal construction; and the right of the legislature to confer upon them the power to make reasonable rules, by-laws, and regulations is generally recognized by the authorities."

Our own supreme court, in Cincinnati, Wilmington & Zanesville R. R. Co. v. Commissioners, 1 O. S. 77, at page 88, Judge Ranney speaking, says:

> "The true distinction is between a delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first can not be done. To the latter no valid objection can be made."

In Theobald v. State, 10 C. C. (N. S.) 536, Marvin, J., states that the provisions for the adoption of rules and regulations by the chief examiner of steam engineers clearly makes him not a legislative, but an administrative officer, with power to execute the statutes enacted by the general assembly.

In Board of Education v. Sawyer, 7 N. P. (N. S.) 401, Doyle, J., at page 405, used the following language:

> "The Fourteenth Amendment to the Constitution of the United States was not designed to interfere with the power of the state to exercise its police powers *to prescribe regulations* to promote the health, peace, morals, education and good order of the peolpe, and to legislate so as to increase the industries of the state, develop its resources and add to its wealth and prosperity. Barbier v. Connolly, 113 U. S. 27; Mugler v. Kansas, 123 U. S. 623; Kemmler, in re, 136 U. S. 436";

and at page 411 the court uses this significant language:

> "In the exercise of its right the state in many instances must vest authority in the authorities of some of the political subdivisions of the state, *or in state officers*, the power to make such necessary and reasonable regulations as are necessary to secure the health, safety and well-being of the community in respect to the matters legislated upon, and also in other instances to pass upon the things necessary to be done in order to carry out the provisions made in the state statutes.
>
> "There are some dangerous things to be regulated, concerning the treatment of which the legislature can not anticipate. It can make general requirements, but the detalis must be worked out by some administrative officer. See Ozan Lumber Co. v. Bank, 207 U. S. 251, and cases cited on page 253."

So I think it will be conceded that there is ample precedent and authority for the board of agriculture to make and adopt rules and regulations, and the only question presented is whether or not this rule, commonly known as "Form 7," is reasonable and proper.

A reading of the first page of said form 7 discloses that it is an application on behalf of an owner to have an entire herd inspected and tested with tuberculin, and that the diseased animals, if any, be disposed of according to the rules of the board. This test is to be made at the expense of the state, and the owner agrees to observe and comply with the precautions and rules recommended by the board to prevent the reintroduction and redevelopment of tuberculosis in the herd. There is a certificate that this request is made voluntarily, and the time when the cattle came into the owner's possession is stated. This portion of form 7 is to be signed with the name and address of the applicant.

It is stated by Timlin, J., in Adams v. Milwaukee, 144 Wis. 371:

> "Considerable difference of opinion appears to exist among those having a reputation for learning, with respect to the efficacy of the tuberculin test for ascertaining the presence of tuberculosis in cattle. This test is made by a hypodermic injection of a toxic product of the tubercule bacilli, which causes a described and recognized rise of temperature in the animal afflicted with tuberculosis, but has no effect, or a different effect, upon cattle not so afflicted. It seems to be agreed, at least in this case, that the bovine type of tubercule bacillus is in form and otherwise distinguishable from the human type, by miscroscopic examination. It is claimed by some that the bovine type of tuberculosis is not ordinarily communicable to the human system, in the absence of abrasion, through the alimentary canal. There is also a lack of evidence to establish that tuberculosis of the human lungs, or consumption as it is commonly called, in its ordinary form, is caused by the bovine type of bacillus. Nevertheless the prevention of this common and

> usually fatal disease is by some of the experts put forward as a ground of support for the ordinance in question. There is evidence, and also findings, to the effect that tuberculosis generally is a disease caused by micro-organisms known as 'tubercule bacilli;' that there is a mammalian type of this bacteria subdivided into bovine and human bacilli, and that human beings are susceptible to infection from the bovine tubercule bacilli by ingestion, inhalation, or inoculation. This bovine tuberculosis is communicable to the human being through the medium of milk or its products taken as food. Bovine tuberculosis prevails among cattle in the country adjacent to Milwaukee. The tuberculin test, while not infallible, is the only reliable and useful means for testing cattle for tuberculosis."

Indiana, Delaware, Maine, Maryland, Michigan, Minnesota, New York, North Dakota, Oregon, South Carolina, South Dakota, Tennessee, Vermont and Virginia have by statute recognized the efficacy of the tuberculin test for ascertaining the presence of tuberculosis in cattle, and this legislation, with many decisions of states where the test is not made a statutory one, but recognized as authoritative, manifests a widespread recognition, both of danger of infection from bovine tuberculosis and of the efficacy of the tuberculin test.

Even though there are conflicting scientific beliefs and theories in such matters, it is for the board of agriculture to determine upon which theory it will base its police regulations, and unless this is clearly and manifestly wrong courts would not interfere on the ground that the theory was incorrect. This application, and I now speak of that portion of form 7 referred to immediately preceding, seems to contemplate that an owner who neither has possession of the knowledge, nor has reason to believe that his herd is affected with a dangerously contagious or infectious disease, desires the board of agriculture to make an inspection. He may have a suspicion of some malady or not. He may merely seek, out of an abundance of precaution, a determination of his own belief that his herd is in an entirely healthy condition.

Since there is a duty imposed upon the board of agriculture to provide by all proper means for the extermination of these diseases, I conclude that in their discretion they can make such tests and examination for that purpose as they deem proper, and since there is not as to this particular herd a mandatory duty like there would be if notice was brought home to them that the herd was infected, to cause an examination to be made, it is entirely reasonable that they should prescribe a written form of application to be signed by the owner, asking for the character of examination that it appears to me the part of the form on the first page of form 7 prescribes. I am therefore of the opinion that so much of said form as appears on pages 1 and 2 of the paper called form 7, down to and including the words: "I desire to have my herd tested for the following reasons—(stating the reasons)," is a reasonable regulation for the purposes intended.

Now, coming to the remaining part of said form 7, headed "Rules and Regulations," and ending with the affidavit, to my mind even if the matters preceding the affidavit contained only such things as the law prescribes, there would be no power in the board of agriculture to compel any person to subscribe to and make said affidavit. The affidavit itself certifies that the affiant has read the conditions contained in the form preceding the affidavit, and that he understands that he must comply with all of the conditions before any claim for animals tested by order of the board will be approved for payment. It further states that affiant agrees to accept the compensation fixed by the board of appraisers on any animals that may be slaughtered as directed by the board.

In concurring as I do with the opinion of my predecessor, No. 1166 supra, of course any agreement to accept the compensation fixed by a board of appraisers would be unavailing because under that opinion the state board has no right to constitute or have such a board of appraisers.

But aside from that, I would deem it an unreasonable regulation to attempt to compel an owner to make an affidavit of the character as appears in form 7, which possibly would be in conflict with the provisions of the law as to compensation. This would appear to be an attempt on the part of the board to prescribe a rule which would penalize a person who might subsequently ask for compensation for cattle destroyed.

The statute provides for the compensation to be made for animals slaughtered by the board under the law. The statute further, in section 1115 G. C. provides on what basis the value shall be determined. The same section contains this provision:

> "Section 1115. * * * No compensation, however, shall be made to a person who has brought into this state animals affected with such contagious disease, or from a district in which such contagious disease existed, or who has wilfully concealed the existence of such disease among his stock or on his premises, or who, by wilful neglect or purposely has contributed to the spread of such contagion. In case the destruction of a horse, mule, or ass affected with glanders or farcy, no compensation for it shall be made, if it were so diseased when it passed into possession of its owner. In appraising animals to be killed as hereinbefore provided, the board shall make such additional allowance as it shall deem proper because said animals are pure bred or pedigreed."

These express provisions, declaring when compensation shall not be given under familiar principles seem to me to exclude any other provisions such as by regulation or rule of the board to prevent or forfeit compensation.

I do not deem it necessary to specifically take up the rules and regulations found in this form, preceding the affidavit spoken of and following the prior application blank which is to be signed by the owner and which I have held under the interpretation I have given that application is a reasonable regulation for that purpose.

I take it that your board has other rules and regulations than the ones contained in form 7. Any rule and regulation adopted by the state board of agriculture which is reasonable and which is effective in carrying the law into execution can be adopted, and it is only proper and right that a copy or notice of these regulations be given or sent to all persons for whose guidance these rules are intended. It does not seem reasonable to me, nor can I see the utility of prescribing a rule that all persons coming under a specific regulation should have to sign up a copy of same. In the case of prosecution for violation, all that would be necessary to show would be the proper adoption of the rule and that the party had notice of same.

It is therefore my opinion that the board is without authority to compel an owner to sign up any form containing the rules and regulations of the board pertaining to quarantine or destruction of his animals and obtaining compensation therefor, and that so much of form 7 as prescribes same is unauthorized.

I further hold that the board has no authority to prescribe that any person should make affidavit to any form or sign any form, and on his failure so to do that they penalize a person in any manner.

Your sixth question is:

> "6. If a man has his cattle tested by the state and the state finds them to be infected with tuberculosis and appraises them, but the owner of the cattle refuses to sign form 7, is the owner of the cattle entitled to be reimbursed by the state under the statutes, notwithstanding that he refuses to sign form 7?"

Section 1116 supra provides that when claims of owners of animals killed under provisions of law are approved by the board of agriculture, they shall be paid from funds appropriated by the general assembly for that purpose.

As you have seen in my discussion of your question 5, it is my opinion that failure to sign form 7 or any other prescribed form should not, and could not in law, militate against the rights of the owner of destroyed cattle for compensation. So if the board, proceeding under section 1114 G. C., destroys animals, and, considering the the owner's claim, finds that the owner would be entitled to compensation in the amount determined, but for the fact that he had refused to sign form 7, they would be acting entirely without the law and exceeding their authority to disapprove said claim on that ground alone. As I said before, the law provides when compensation shall not be made. I take it that the provisions of the statute are exclusive. The board can neither add to nor subtract from the provisions found in the statute.

My answer to your question therefore is that such owner would be entitled to the approval of his claim, notwithstanding that he had refused to sign form 7.

Your seventh question is:

> "7. Has the board of agriculture the right to employ appraisers, or should the appraisers be chosen as follows: One by the board, another by the owner of the cattle, and the two so chosen to select the third?"

It is unfortunate that the legislature, in the language used in section 1114 G. C. supra was not more specific on the question of appraisal. This section provides that the board

> "* * * shall determine through its secretary, what animals shall be killed and appraise or cause them to be appraised by disinterested citizens as provided by law. * * *"

This language fully empowers the board of agriculture to make the appraisement themselves, and just as specifically authorizes the board to "cause them to be appraised by disinterested citizens as provided by law."

While some question may be raised as to the lack of provision of law on the subject, it is my view that reading the act as an entirety and keeping in mind the purposes for which the legislature enacted it, and the broad, plenary powers given the board, it scarcely requires inference to hold that the board is authorized to make the selection, in the event they do not appraise, of disinterested citizens to make the appraisal.

These cattle are not taken for public use after the analogy of eminent domain, but they are destroyed for the public good, under the police power. They are not destroyed until a scientific test, recognized as proper and reliable and applied by a "competent veterinarian in the employ of the board" had shown and it had been adjudged that they were either affected or had been exposed to a dangerous and contagious malady, and it would be absolutely unreasonable, merely because the board of agriculture could not make the appraisement, that the owner should lose his property.

Of course there is no duty to make reparation to the owner, and Ohio, like many of her sister states could have legally prescribed the destruction of such cattle without recompense, and compel the owner to stand the loss for the public good. The books are full of cases upholding such procedure. But in her well known liberality the state has by statute authorized such compensation to be made for such destroyed animals as is approved by the board of agriculture.

Sitting, then, in a quasi judicial capacity, the board is interested, among other things, in determining what would be a just recompense under the law to the owner for the property so destroyed. The appraisal of this property is for the purpose of affording light to the board. It is my view that the statute intended, and I hold that the statute should be construed to mean, that in the event the board does not

make the appraisement they select such number of appraisers as they deem proper, so long as they are in the opinion of the board "disinterested citizens," and that the appraisers so appointed by the board should make the appraisement under section 1114 G. C.

Your question is whether or not one appraiser could be selected by the board, another by the owner, and the two so chosen to select the third. The statute provides that the board shall determine, through its secretary, what animals shall be killed, and appraise or cause them to be appraised, &c. There would be no authority for the owner of cattle selecting one of the appraisers nor for the appraiser so selected, with one chosen by the board, to select the third appraiser.

The statute does not fix the number of appraisers, but it is my opinion that the board may do so and that the board of agriculture alone can appoint or select the appraisers. This would not preclude the suggestion of names to the board for the purpose of appointment or selection, but the appointment or selection would have to be made by the board itself.

Your eighth question is:

> "8. Is it legal for the members of the board of agriculture to appraise cattle or animals infected with a dangerous or contagious disease?"

As stated in answer to the question immediately preceding, I think that section 1114 G. C. is full authority to the board of agriculture to appraise the infected stock that they have determined to destroy.

Section 1085 G. C. provides:

> "Any investigation, inquiry or hearing, which the board of agriculture is empowered by law to hold or undertake may be held or undertaken by or before any one member of the board of agriculture or before any member or members of the board of agriculture. All investigations, inquiries, hearings, decisions and orders made by any one or any two members of the board shall when approved and confirmed by the board of agriculture be deemed to be the order of the board of agriculture. All matters of general policy shall be decided by a majority of the board."

I think that the above section fully authorizes two or more members to constitute an appraising board to appraise infected stock, and that it then would be their duty to report their action, for approval, to the board. The mere fact that subsequently under section 1116 G. C. the board would be called upon to approve the claims of the owners who seek to obtain compensation from the state for animals destroyed, would not in any way affect the right and authority of the board to make the appraisement under the other provision of the statute. This approval of the claim under section 1116 G. C. is a condition precedent before the fund appropriated by the legislature is available for the payment of such claims. And sitting, then, in a semi-judicial capacity, the board passes upon the entire matter, and I do not believe that the mere fact that the appraisement was made by the same board which approves the claim, would make the slightest difference one way or the other.

Your ninth question is:

> "9. When the board has been informed, or when it comes to the attention of the board that animals are infected with a dangerous or contagious disease, and the veterinary department makes an examination and finds that said animals are so infected, should the board by resolution declare

those animals infected with a dangerous or contagious disease and order them appraised, quarantined or slaughtered, and should such proceedings be made a matter of record in the minutes of the board?"

Section 1088 supra provides:

"The secretary of the board shall take and subscribe to an oath similar to that of the members of the board, keep full and correct records of all transactions and proceedings of the board of agriculture and perform such other duties as may be required by the board."

Section 1099 G. C. provides:

"Sessions of the board of agriculture shall stand and be adjourned without further notice thereof on its records. All the proceedings of the board shall be shown on its record of proceedings, which shall be a public record, and all voting shall be by calling each member's name by the secretary and each member's vote as cast shall be included in the record of proceedings."

From a reading of these sections in conjunction with section 1085 supra, which certainly implies that when action is taken by one or more members of the board such action must be approved and confirmed by the board, which would necessitate a meeting of which a record would be kept, it is apparent to my mind that all of the official acts of the board, including the matters specifically inquired about in question 9, should be made a matter of record, and I am of the opinion that the record of proceedings spoken of in section 1099 G. C. would be the minutes of the board.

Whether these matters should be acted upon and thus get into the minutes by motion, resolution or some other parliamentary form, would be immaterial, as the statute does not prescribe the manner in which the orders of the board should be adopted. Any manner, so that there should be a record of the proceedings of the board, would be all that the law would require. Since sections 1112, 1119, 1120 and 1121 G. C. prescribe penalties for violations of the provisions relating to the board of agriculture, the necessity for a record of all their acts is readily apparent.

In a Kansas case, found in 66 Pac. Rep. 641, under the title Asbell v. Edwards, the second paragraph of the syllabus reads as follows:

"2. The live stock sanitary commission is a body of special and limited jurisdiction, and, in the quarantining of cattle to prevent the spread of disease, is authorized to proceed in a summary manner, and not according to the ordinary course of judicial procedure. Its acts, therefore, are to be confined strictly within the limits of the jurisdiction conferred; and, when the record of its proceedings ordering the quarantining of cattle fails to show the existence of the facts which alone will authorize the making of the order, such order does not constitute a justification for any action taken under it."

The court at page 643 says:

"The live stock sanitary commission, although not a court, is nevertheless invested with powers judicial in character. The duty of determining by investigation of the facts whether a man's property shall be seized and withheld from him is essentially judicial. The power to make this determination is conferred on an inferior tribunal, one proceeding in a most summary manner, and not according to the course of the common law. The unquestioned rule in such cases is that rightfulness or regularity of action in acquiring

jurisdiction will not be presumed, but all such must affirmatively appear on the face of the proceedings, else the record of such proceedings will not constitute a defense against collateral attack. 1 Bailey, Jur. Sec. 129 et seq In Rex v. Croke, 1 Cowp. 26, it was ruled by Lord Mansfield that 'where by statute a specific authority is delegated to particular persons, affecting the property of individuals, it must be *strictly pursued, and appear to be so upon the face of their proceedings.*' "

When it is considered that section 1089 G. C. grants the board of agriculture of Ohio power and authority to establish some eight or ten bureaus and other like subdepartments, the necessity for a record of their proceedings in their different activities at once appears.

I do not know what has been the practice of your board, but since, like a court, the board only speaks by its record, I take it that all its acts, as required by section 1099 G. C., are duly spread upon and shown by "its record of proceedings." The existence of facts that call the law into operation in the particular instance should always be made a matter of record both for the sake of perpetuating the transactions of your board and as evidence of what orders and regulations the board has made.

Under section 1088 G. C. it is made the duty of the secretary of the board to "keep full and correct records of all transactions and proceedings of the board of agriculture," and under section 1099 G. C. the record "shall be a public record."

The reasons for these statutory provisions are readily apparent. The citizen who is interested is entitled to know exactly what the board has done. The person whose property was taken or whose property rights are invaded, under the authority of the law "controlling necessity," is not legally bound, nor can the board depend upon an ephemeral order by word of mouth or a mere memorandum that may have but a fleeting existence. A permanent, accessible record is required by the statute. And in event that the different bureaus established by the board keep separate minutes, such records must each and all be approved by the board of agriculture, duly attested by the secretary to authenticate them, in order that the matters and things done and performed may constitute the acts of the board of agriculture.

Answering your specific question, it is my opinion that the various proceedings on the part of the board, as stated in said question, should be made a matter of record in the minutes of the board.

Before concluding it might be well to state that the foregoing opinion is based entirely on the sections of the law now in force, namely, the act passed by the legislature under date of April 21, 1915, approved April 21, 1915, and found in 106 O. L. 143, and further to call attention to the fact that since this opinion has been in the course of preparation sections 1085, 1088, 1099, 1108, 1112, 1114 and 1115 G. C., which are the sections construed herein, with other sections pertaining to the board of agriculture, have been amended by the present legislature in the act known as amended house bill No. 115, Mr. Bragg, passed March 21, 1917, signed by the governor March 29, 1917, and filed with the secretary of state March 31, 1917, and which, unless a referendum is filed, will become a law ninety days after said last mentioned date. If there is no referendum and the act becomes a law at the end of the referendum period, then at that time the amendment of section 1114 G. C. in said amended house bill No. 115, will furnish a complete answer to your questions 2 and 7, and the answers to the other questions will, when the new act becomes effective, have to be read in the light of the changes made by the amendments to the several sections amended.

The present opinion, I repeat, is a construction of the sections referred to as they now stand under the act of 1915, and, as they will stand until the new act goes into effect, if it does go into effect, at the end of the referendum period.

I may have been somewhat prolix in my discussion of the questions asked, and perhaps have been guilty of repetition in formulating the different answers, but, as

will be seen, the questions are so interrelated that this was a natural consequence, almost a necessary result. It has been my object to give as concisely as the question would permit what I consider to be the legal construction of the sections of the Code involved.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

165.

SUPPLEMENT TO OPINION No. 119. TAX LEVIES—UNDER SECTION 7419 G. C. CAN ONLY BE MADE IN EXCESS OF THE LIMITATIONS OF THE SMITH ONE PER CENT. LAW IN CASES OF EMERGENCIES —A REFUNDER OF ILLEGAL TAXES CANNOT BE MADE BY AUDITOR WHEN SAME ARE VOLUNTARILY PAID—MAY BE MADE WHEN A JUDGMENT OR FINAL ORDER HAS BEEN MADE BY A COURT OF COMPETENT JURISDICTION ADJUDGING THE PARTICULAR LEVY ILLEGAL.

COLUMBUS, OHIO, April 5, 1917.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I have your favor of March 24, 1917, referring to opinion No. 119, addressed by this department to you under date of March 17, 1917.

In your communication referring to the former opinion you call my attention to certain local conditions as to existing aggregate and combined tax rates in some of the taxing districts in Miami county. This condition disclosed in your communication raised a question as to the correctness of certain general observations made by me with respect to the proper construction of section 7419 of the General Code in the light of the supreme court cases discussed in the former opinion. These observations, which strictly speaking, were not essential to the determination of any question made by you, are found on pages 4 and 5 of said opinion No. 119.

Though I am not convinced that these observations in the abstract are incorrect as a construction of section 7419 of the General Code, further consideration as to the application of the provisions of section 2 of article XII of the state constitution convinces me that the same are incorrect in their application to the local conditions disclosed in your communication of March 24, 1917.

The levy made by the county commissioners of Miami county, under section 7419 was made as an emergency levy outside of all limitations of the Smith one per cent. law, notwithstanding the fact that this levy was so made, I am inclined to the view that the budget commission of Miami county could have legally effectuated a small part of the levy made by the county commissioners by reducing under the provisions of section 5649-3c the estimate of the county commissioners, so that the same, together with the aggregate of all other taxes to be levied by the local taxing districts would have come within the exterior limitations of the Snith one per cent. law applicable to such local taxing districts.

The budget commissioners, however, did not do this, but allowed the levy made by the county commissioners under section 7419 to stand as a whole, and in as much as the supreme court in the case of Staley, auditor, v. State ex rel. Hunt, et al., has by its judgment in this case reversing the lower court, which upheld the legality of the tax, in effect determined the whole of said tax to be illegal, I am of the opinion

that provision should be made for refunding and remitting the whole of said illegal tax to full amount of the levy, which I am advised was a levy of 1.4 mills upon all the taxable property in the county.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

166.

DISCHARGED SOLDIER—NOT EXEMPT FROM PAYMENT OF FEE FOR OPERATING SHOOTING GALLERY.

There is no statutory authority in Ohio exempting a discharged soldier from the payment of whatever license fee may be imposed upon the business of operating a shooting gallery.

COLUMBUS, OHIO, April 5, 1917.

HON. ROGER D. HAY, *Prosecuting Attorney, Defiance, Ohio.*

DEAR SIR:—I have your letter of March 13, 1917, as follows:

"I am writing you in reference to an inquiry which came to my office but as I could not find any law covering the same I thought it would be best to get an opinion from your office.

"There is a section of the General Code which provides as follows: That an honorably discharged soldier who had served as a private or other officer in the service of the United States during the late rebellion is entitled to a pedler's license.

"There is an honorably discharged soldier in the county of Defiance, state of Ohio, who wants to place a shooting gallery in operation in the city of Defiance and be exempt from any municipal tax license or county tax. Kindly advise me if this can be done?"

Sections 6347, 6349 and 6351 of the General Code read:

"Section 6347. When a person files with the auditor of a county, under oath, which may be administered by such auditor, a statement of his stock in trade in conformity with law requiring the listing of such stock for taxation by merchants or others, and pays to the treasurer of such county the proportionate amount of taxes on such stock in trade in conformity with law, and complies with the terms set forth in section sixty-three hundred and forty-nine, such auditor shall issue to him a license to peddle such stock anywhere in this state.

"Section 6349. Before receiving such license the applicant, if intending to travel on foot, shall file with the county auditor the county treasurer's receipt for twelve dollars; if intending to travel on horseback or in a one-horse vehicle, he shall file such receipt for twenty dollars; if intending to travel in a two-horse vehicle, he shall file the receipt for twenty-eight dollars; or, if intending to travel in a boat, watercraft or on a railroad car, he shall file it for sixty dollars. He shall also pay to the auditor the sum of fifty cents as the auditor's fee for granting the license.

"Section 6351. An applicant for the license, provided in section sixty-three hundred and forty-seven, proving to the auditor to whom such application is made that he has served as a soldier or sailor in the service of the

United States during the late rebellion of the Spanish-American war, and has been honorably discharged therefrom, shall pay to such auditor as his fee for such license the sum of fifty cents, and shall not be required to make any other or further payment. He shall be exempted from paying any fee for a municipal or other license, as required by law or ordinance, during the period covered by the license issued to him by such auditor."

It will be noted from the above that an honorably discharged soldier can secure a license to peddle stock on the payment of the sum of fifty cents. This, of course, has no bearing upon the operation of a shooting gallery and I know of no other statute exempting a discharged soldier from the payment of whatever license fee may be imposed upon that occupation by the proper authority.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

167.

CONVICT LABOR—CANNOT BE USED TO MANUFACTURE BRICK—FOR SALE IN OPEN MARKET.

The board of administration is not authorized to use convict labor to manufacture brick for sale in the open market.

COLUMBUS, OHIO, April 5, 1917.

The Ohio Board of Administration, Columbus, Ohio.

GENTLEMEN:—Under date of January 31, 1917, you addressed the following inquiry to this department:

"Referring to the question of prison-made brick: Will you please render us an opinion as to whether or not we are at liberty to sell these brick in the open market provided the same are conspicuously marked 'Prison-Made' in accordance with the Constitution of the State of Ohio."

In considering this matter let us reverse the usual order of proceeding and look first at the statutes and afterwards at the constitution, for the reason that in this instance the natural order is reversed and the constitution made from the statutes instead of the latter being made to conform to the requirements of the former.

When the sentiment of organized labor first revolted against competition of convict labor it found expression in an act of the legislature, now General Code section 6213 to section 6218, having reference to a restriction to such competition and providing regulations and restrictions of the sale of convict-made products, the principal feature of which was to give notoriety or publicity in each case that the products offered for sale were produced by such labor, and required that where articles were the product of such labor, whether local or imported from another state, they should be branded, labeled or marked "Convict-Made." This act is found in 90 O. L. 319, 320.

A few years later, when this sentiment became more pronounced, or when its influence on legislation became stronger, much more sweeping provision was enacted, which is found in 98 O. L. 177, and is now found in sections 2228 et seq. of the General Code, which entirely prohibit such competition, with a certain exception hereinafter noted.

Section 2228 of the General Code is as follows:

> "The board of managers of the Ohio penitentiary, the board of managers of the Ohio State reformatory, or other authority, shall make no contract by which the labor or time of a prisoner in the penitentiary or reformatory, or the product or profit of his work, shall be let, farmed out, given or sold to any person, firm, association or corporation. Convicts in such institution may work for, and the products of their labor may be disposed of, to the state or a political division thereof, or for or to a public institution owned or managed and under the control of the state or a political division thereof, for the purposes and according to the provisions of this chapter."

The germ of exception alluded to in the original act was found in section 2230, to which certain sub-sections have been added by way of amplification, which appears in 102 O. L. 418, and again as sub-sections to section 2227, an act of six sections which is found in 103 O. L. 725.

This last scheme of legislation centered upon section 2228, above quoted, effects a repeal of section 6213 of the General Code by implication, or if not it restricts its operation to a few rare and limited cases.

Two purposes are apparent and prominent in this legislation: First, to prevent the competition between free labor and convict labor; second, to use convict labor freely in the service of the departments of state and its political divisions in the construction or repair of all kinds of buildings and public works. This brings us to the constitutional provision on the subject in which these two purposes find expression in the fundamental law—article II, section 41 of the Constitution. The different provisions of this section will here be separated and so stated for the sake of clearness. First, no person under sentence in a penal institution shall "be required * * * to work at any trade, industry or occupation, wherein or whereby his work, or the product or profit of his work, shall be sold, farmed out, contracted or given away; * * *" This standing alone would be clear, unambiguous and peremptory. It is followed, however, with the statutory provision which, as above stated, is practically repealed by implication:

> "and goods made by persons under sentence to any penal institution or reformatory, without the state of Ohio, and such goods made within the state of Ohio, excepting those disposed of to the state or any political subdivision thereof, or to any public institution owned, managed or controlled by the state or any political subdivision thereof, shall not be sold within this state unless the same are conspicuously marked 'prison made'."

These two provisions are contradictory. The last of the three provisions found in this section accomplishes the other purpose mentioned above:

> "Nothing herein contained shall be construed to prevent the passage of laws providing that convicts may work for, and that the products of their labor may be disposed of to, the state or any political sub-division thereof, or for or to any public institution owned or managed and controlled by the state or any political sub-division thereof."

It should have been stated that section 6213 and its kindred provisions found their way into that chapter of the General Code under the head of "labels and marks," while the other sections are under provisions for penal institutions. The constitutional convention, however, saw fit to construct this section by putting together the different statutory provisions quoted above.

The conflict between the different provisions in the same section is there, arising in the manner above described. Between these conflicting provisions there can be no doubt as to which is to prevail. The intent of the legislature in reference to the subject of convict labor and its competition with free labor of the state is of general importance. Its adoption marks an epoch in legislative history. The demand for it was unquestionable and insistent. The other was comparatively unimportant. Without this consideration, however, the ordinary rules of construction compel the enforcement of the first proposition; it is a peremptory requirement, the second proposition is not, except upon a condition there be such article to sell. If by such provision you provide that such article cannot be sold without being branded, but by another provision you provide that they cannot be sold at all, you enforce both by enforcing the main one. If you do not allow them to be sold at all they certainly will never be sold without branding. The conflict, therefore, must be settled by permitting this great intention to prevail. The will of the people being the fundamental law in this respect.

Recognizing the dignity and independence of labor is of the essence of democratic institutions of our state. This recognition of it has been placed in the constitution in order to insure that such free labor shall not be debased by competition with convict labor. It is wisely provided, however, that recognition and enforcement of this great principle shall not interfere with that other practical and proper economical consideration whereby the product of this labor is preserved to the advantage of the people of the state in the construction of its public works. The two present no conflict of principle, though the one is as high above the other as humanity is above the mere things that men use.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

168.

BOARD OF EDUCATION—MAY PERMIT USE OF SCHOOL PROPERTY FOR GRANGE MEETINGS—SUCH MEETINGS SHALL NOT INTERFERE WITH USE OF PROPERTY FOR SCHOOL PURPOSES.

The board of education may permit the use of a school house and rooms therein, and the grounds and other property under their control, for holding grange meetings. The boards may regulate such use, but the same shall in no manner interfere with the use of such property for school purposes.

COLUMBUS, OHIO, April 5, 1917.

HON. D. M. CUPP, *Prosecuting Attorney, Delaware, Ohio.*

DEAR SIR:—In your letter of March 22, 1917, you request my opinion on the following statement of facts:

> "I have been appealed to by the board of education of Brown township rural school district to advise them whether or not the board of education had authority to permit meetings of the grange to be held in the centralized school building of such district. As I am informed, these meetings are held for the benefit of and are open only to the membership of the grange, which I am informed is also a secret organization in which membership can be obtained only by the candidates being elected thereto by the member of the local organization.

"I desire to call your attention to section 7622-3 General Code, paragraph four thereof."

Your inquiry involves a consideration of section 7622-3 G. C. and the other sections in the chapter in which said section is contained and which relate to the same subject. Section 7622-3 G. C. provides as follows:

"The board of education of any school district may, subject to such regulation as may be adopted by such board, permit the use of any school house and rooms therein, and the grounds and other property under its control, when not in actual use for school purposes, for any of the following purposes:

"1. For giving instructions in any branch of education, learning or the arts.

"2. For holding educational, civil, social or recreational meetings and entertainments, and for such other purposes as may make for the welfare of the community. Such meetings and entertainments shall be non-exclusive and open to the general public.

"3. For public library purposes, as a station for a public library, or as reading rooms.

"4. For polling places, for holding elections and for the registration of voters, for holding grange or similar meetings."

Said section was enacted May 27, 1915. Prior to that time the sections of the General Code, referring to the matters mentioned in the above section, were much more general in their nature. To illustrate: General Code section 7722 provided:

"When in the judgment of a board of education, it will be for the advantage of the children residing in any school district to hold literary societies, school exhibitions, singing schools, religious exercises, select or normal schools, the board of education shall authorize the opening of the school houses for such purposes. The board of education of a school district in its discretion may authorize the opening of such school houses for any other lawful purposes. But nothing herein shall authorize a board of education to rent or lease a school house when such rental or lease in any wise interferes with the public schools in such district, or for any purpose other than is authorized by this chapter."

In construing the above section my predecessor, Hon. Edward C. Turner rendered an opinion on April 3, 1915, No. 197, in which he held:

"The board of education has no authority in law to rent a school building, or part thereof, to a secret society for the purpose of holding lodge sessions and such social functions and entertainments of such society as are not open to all persons in the community on equal terms or which will not, in the judgment of the board of education, benefit the people of the community."

So that it was following the time of the rendition of the above mentioned opinion that the legislature supplemented said section 7622 by house bill No. 549, which included the above section 7622-3, and was entitled:

"An act to repeal sections 2457-1 and 2457-2 of the General Code and to supplement section 7622 by sections 7622-1 to 7622-7, inclusive, providing for the use of school buildings and other public buildings and grounds for educational and recreational purposes."

In the act which contained sections 2457-1 and 2457-2, when originally enacted, and being H. B. No. 41, entitled "An act to provide for, aid and encourage the civic, social and moral development of the local communities throughout the state," passed April 17, 1913, there was also contained section 2457-3 which provided that boards of county commissioners be authorized to provide for the organization and maintenance of civil and social centers throughout the country, to employ an expert director to superintend and administer the same and to levy a tax and create a fund for the payment of all the expenses involved in the social and educational work contemplated in this act.

In construing said last mentioned section my predecessor, Hon. Timothy S. Hogan, held that the county commissioners had no power to expend money in the public treasury for the purpose of establishing social centers, that such objects were foreign to the usual county expenditures as provided by law and that they had no authority to pay the salary of a social service director and other necessary expenses connected with social centers.

So that it seems to me the legislature expressed a clear intention when it enacted General Code section 7622-3, which permitted the use of school houses for the purposes mentioned thereon, subject, however, to such regulations as may be adopted by the board of education, which body has general control of school houses.

It will be noted that section 7622-3, above quoted, is divided into paragraphs or numerical subdivisions. For instance, subdivision 2 provides for the holding of educational, civic, social or recreational meetings and entertainments, and for such other purposes as may make for the welfare of the community, and then provides:

> "Such meetings and entertainments shall be non-exclusive and open to the general public."

The next numerical subdivision refers to public libraries and reading rooms and then subdivision 4 provides for holding elections and "for holding *grange* or similar meetings." I can gather but one intention from the said language and that is, that it was the intention of the legislature to permit the board of education of any school district, subject to such regulations as might be adopted by the board, to permit the use of any school house and rooms therein and the grounds and property under its control, when not used for school purposes, to be used for holding grange meetings.

Yours very truly,
JOSEPH MCGHEE,
Attorney-General.

P. S.—I am not passing on constitutionality of the act, in its entirety.

JOSEPH MCGHEE,
Attorney-General.

169.

ANSWER TO NINE QUESTIONS RELATIVE TO CONTRACT BETWEEN COUNTY COMMISSIONERS OF MIAMI COUNTY AND THE DIRECTORS OF THE MIAMI CONSERVANCY DISTRICT.

1. *The contract attached is not void, neither is it entirely good and enforcible. Its provisions are severable and in the main not illegal.*

2. *The provision in said contract of an intention to co-operate with the conservancy directors of the Miami conservancy district so far as the commissioners may do so according to law, is not illegal.*

3. *The county commissioners have the power to grant to said conservancy directors the right to maintain levees across the county highways.*

4. *The county commissioners may contract with the conservancy directors as to the grade of the road in crossing.*

5. *The commissioners have the right and duty of maintaining roads and streets after such grade has been changed for the purpose of crossing such levees.*

6. *The county commissioners cannot contract with regard to paving of county highways and thereby bind their successors in office indefinitely.*

7. *The county commissioners by contracting with the conservancy directors as to a release of damages or protection against damages to abutting property cannot bind the owners of such property. The provision of the contract in that respect is binding on the conservancy directors so far as they can be bound by law.*

8. *This department will not undertake to decide what acts might be in contempt of court in the absence of a complete record of the case in which the order of injunction in question is made, and all additional facts in reference thereto.*

9. *There is no objection to a provision in a contract of this character to expressly limit all stipulations to be performed by the commissioners by such language as "insofar as said board of county commissioners may legally and properly do so," or similar language. The provision, however, is unnecessary, as such limitation exists in the nature of the case without it.*

COLUMBUS, OHIO, April 5, 1917.

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

DEAR SIR:—I have your communication of February 15th, 1917, which includes a contract between the commissioners of your county and the directors of the Miami conservancy district and consists of nine inquiries in reference thereto, which are as follows:

> "1. Whether or not the county commissioners have power to enter into such a contract.
>
> "2. On the second page of said proposed contract the first paragraph declares the intention to co-operate and assist on the part of the commissioners. Is this within their legal authority?
>
> "3. Have they the right to grant to the district the right to maintain the levees, mentioned on said second, third, fourth and fifth pages, where same are upon county property or across public highways?
>
> "4. Have the commissioners the right to contract as to what the grade of the road should be which must go over said levees, as specified on the sixth and seventh pages of said proposed contract?
>
> "5. Have the commissioners the right to contract to maintain such roads,

streets and avenues in the manner prescribed in the fifth, sixth and seventh lines on page seven of the proposed contract?

"6. Have the commissioners the right to contract with regard to the paving as provided under the head of paving on page seven in said proposed contract (particularly have they the right to agree that no paving shall be done except in a manner to be approved by the chief engineer of said district)?

"7. Does section four appearing on pages seven and eight of said proposed contract provide and effectually release from damage on abutting property in favor of the county?

"8. In the year 1914, the county commissioners of Warren county attempted to build a retaining wall on the west side of the Great Miami river and extending northward from the suspension bridge mentioned in the contract above referred to, and attempted to let a contract for such purpose. The performance of that contract was enjoined by the courts (not, as I understand, because the county commissioners did not have the power to build such wall, but on account, I think, of questions arising on the specifications and form of contract and form of execution thereof) and the commissioners were enjoined from paying anything to the contractor for the work which he had performed thereon, he having constructed, or partially constructed, from 100 to 200 feet of said wall at the northern end thereof (the total wall intended to be about 1,350 feet long). Subsequently it appeared that the county did not own the land upon which this partial construction had taken place. After the injunction above referred to was granted, I understand it was held by the court of common pleas that the county commissioners had jurisdiction to build a wall on the west side of this river, and in still another proceeding I understand that the court of common pleas in this county held that for the county to purchase the land upon which the partially completed wall stood at a price which would enable the owner thereof to compensate the contractor who had commenced constructing the wall would be a violation of the original injunction. All of these proceedings took place before I was in office and I am not very familiar with exactly what occurred. After the proceedings above referred to, a contract, in an independent proceeding of the county commissioners, was awarded to another party for approximately 700 feet of wall running northward from the suspension bridge, this 700 feet of wall being necessary in the restoration and replacement of one of the county roads which was damaged by the 1913 flood. This latter wall was located on land which belonged to the county. It will thus appear that there is now a 700 foot wall belonging to the county extending from the suspension bridge northward, that there is then a gap of from 400 to 600 feet and then the original piece of wall which was partially constructed under the contract was enjoined — the land on which the 700 foot wall was constructed being the land mentioned in section one on page two of the proposed contract as lying between the Miami river and the street or highway in the village of Franklin, known as Miami Ave., and the wall being referred to at the bottom of said page of said contract. Under this set of facts, would the proposed contract in any way violate the injunction granted against the performance of the first contract of the building of the wall which I mentioned above, and would it in any way render the county or the county commissioners liable to the contractor the performance of whose contract was enjoined as above set forth?

"9. Would it not be proper in a contract of this character to insert in all cases where the commissioners are extending any right the limitation, 'Insofar as said board of county commissioners may legally and properly do so,' or language to that effect?"

The contract is as follows:

"CONTRACT

"between

"THE BOARD OF COUNTY COMMISSIONERS OF WARREN COUNTY, OHIO,

"and

"THE MIAMI CONSERVANCY DISTRICT.

"This instrument of writing made between The Board of County Commissioners of Warren County, Ohio, hereinafter designated the 'commissioners,' and The Miami Conservancy District, a body corporate and a political subdivision of said state duly established and organized under the provisions of the statute known as the 'Conservancy Act of Ohio,' having its office at the city of Dayton, Ohio, and hereinafter designated the 'district',

"Witnesseth: That whereas the board of directors of said district has, pursuant to the provisions of said conservancy act, and for the purpose of protecting life and property against floods in the valley of the Miami river in said state, duly adopted an official plan for said district, which said official plan has been duly approved by the court as in said act provided, and which plan is subject to immaterial modifications in order to adapt it to local conditions throughout said district as provided therein and in said conservancy act, and which said official plan thus adopted and approved is of record in the office of said district, at Dayton, Ohio, to which record thereof reference is here made;

"And, Whereas it is necessary for said district, in order to execute said official plan, and in order to accomplish the objects and purposes thereof, to construct and to perpetually maintain and operate certain parts of the levees and other works and structures provided for therein, over and upon certain lands belonging to said county of Warren located in the village of Franklin in said county, and also over and upon certain parts of certain streets, avenues, alleys and roads located in Franklin township in said county, which said lands and said parts of streets, avenues, alleys and roads are within said district and are hereinafter particularly described;

"And, Whereas said commissioners intend hereby to co-operate with and assist said district in constructing, maintaining, using and operating the works provided for in said official plan, to the extent which it may do so under the provisions of said conservancy act and the other laws of said state:

"Now, Therefore, in consideration of the sum of One Dollar ($1.00), paid by said district and received by said county of Warren, and for and in consideration of the advantages which will accrue to said county and its inhabitants, and to said district, by reason thereof, and of the promises and covenants on the part of each said commissioners and said district, as hereinafter set forth, the said commissioners and said district do hereby mutually agree as follows, to wit:

"LEVEE, ETC., ON COUNTY PROPERTY.

"Section I. The said commissioners do hereby give and grant to said district, its successors and assigns forever, the right to construct and to perpetually maintain the levee, or part of levee, and such other structures as are or may be provided for in said official plan, over and upon that parcel or tract of land belonging to said county of Warren and situate in the village of

Franklin, being all of those parcels of land lying between the Miami river and the street or highway in said village known as Miami avenue, and being those certain parcels of land conveyed to said county by Philip Nickel and the heirs of Joseph D. Reed, deceased, and also the right to construct and to perpetually maintain upon and over and along said Miami avenue, which is now and always has been a county road, such parts of said works which are now or may be provided for by said official plan, and also the right to perpetually control and maintain the said tracts or parcels of land above described in so far as may be necessary for the execution of said official plan and to accomplish the objects and purposes thereof; provided, however, that no structure of any kind shall be erected or permanently maintained by said district upon said Miami avenue which will at any point be located less than 30 feet from the westerly line of said avenue, and provided further, that nothing shall be done by said district which will impair the stability of the concrete retaining wall heretofore erected on said land by said county, or which shall endanger the present security of the suspension bridge across the river.

"LEVEES UPON AND ACROSS STREETS AND ROADS.

"(Here follows a detailed description of such roads.)

"APPROACHES AT LEVEE CROSSINGS.

"And it being intended that the construction and maintenance of said levees, or parts of levees, upon and across certain parts of those of the aforesaid streets, avenues and roads which are next hereinafter mentioned shall not, except during the work of construction, interfere with or obstruct the same for the purposes of public travel, the said district hereby agrees, at the time of constructing said levees, to construct in connection therewith approaches having uniform slopes, not exceeding five (5) per cent., and not less than seventeen feet in width, for the following distances from the center lines of said levees across the same, to wit:

"(Here follow specifications for five such crossings.)

"And said district also hereby agrees to surface all of the traveled parts of the top of said levees at each and all of said five crossing points last above mentioned, and also the said approaches thereto, for a width of not less than 17 feet, with a coating of good gravel sufficient to make the same suitable for public travel, except where the same may, as is hereinafter provided, require paving with brick or other material; and said district also hereby agrees to construct on either side of each and all of said approaches where the same are more than five feet high, a good substantial guard rail; but it is agreed that after said approaches shall have been thus constructed and protected the said commissioners or other authorities who may be required by law to maintain said roads, streets and avenues, of which they will be a part, shall maintain said approaches and said guard rails.

"PAVING.

"Section III. Nothing in this instrument contained shall be construed to prevent said commissioners, or any other lawful authority, from paving the top surface of any of said parts of levees at said five crossing points aforesaid, or the approaches thereto, with brick or other material, but no such

paving shall be done except in the manner approved by the chief engineer of said district, and this to the end that said parts of said levees shall not thereby be rendered ineffectual for the purposes intended by said official plan; and in the event any of said streets, avenues or roads shall have been paved prior to the construction of said levees and approaches by said district, then, and in any such case, the said district hereby agrees to pave the top surfaces of said parts of levees and the said approaches, and in so doing to use material of equal quality and to conform to the same plans and specifications, so far as applicable, as may have been used in said prior paving, it being agreed and understood, however, that said district may, in such repaving use such part of the brick and other material, if any, used in the original paving as may be available; and provided further, that said district shall have the right, if the same be demanded and provided for at a suitable time during the progress of the work of such prior paving, by paying, or obligating itself for the payment of, the additional cost thereof, to have said parts of levees and said approaches constructed and paved in connection with said work.

"DAMAGES TO ABUTTING PROPERTY.

"Section IV. The said district hereby agrees, before commencing the construction of any of said work herein provided for, by settlement, or by proper legal proceedings, to compensate the owners of all property abutting upon those parts of said streets, avenues, alleys and roads above described where said levees and the approaches thereto are to be constructed, for all damages which will result to such property by reason of such construction and the maintenance thereof, and to hold said commissioners and said county of Warren free and harmless by reason of any and all such damages.

"Section V. And it is hereby further agreed that nothing herein contained shall be construed as, or shall constitute, a waiver of the legal right on the proper authorities of said district to assess the said county of Warren for benefits which may accrue to it by reason of the execution of said official plan as provided in said conservancy act, and also that none of the rights herein given and granted to said district shall be a credit upon, or an offset against, any such assessed benefits.

"IN WITNESS WHEREOF, etc., etc.

"(Duly executed and acknowledged.)"

1. Your first question is whether or not the county commissioners have power to enter into such contract. If you mean to inquire whether the whole contract is absolutely void, the answer is —no. The different provisions of the contract are severable, and in the main are within the power of the commissioners, although as to some of them it is doubtful whether they be so. It follows, however, from this capability of separation that those which are valid are in no manner affected by any that might be void, and the answer as to its different provisions and detail will necessarily appear in discussing the other inquiries.

2. This question, likewise, as separated from those that follow, is not of much consequence, as it consists simply of a declaration of intention, and of course they have the power to declare their intention whether that intention be to act in accordance with law or otherwise. There can be no objection, however, as it is merely a preamble and is expressly confined by the phrase to the extent which it may do so under the provisions of said conservancy act and the other laws of said state.

3. The answer to this inquiry relates back to the first, as here is the real test of the power of the commissioners. The county commissioners are the general rep-

resentatives of the county, and have a great deal of authority, the extent and limits of which are to be found scattered through a great number of sections of the General Code. They have not only these express powers given in all these sections, but such incidental powers as are necessary to carry the principal ones into effect.

There are two lines of authorities upon the subject of the power of county commissioners, seemingly contradictory. One set of cases seems to give them most extensive and plenary capacity as the general representatives of the county, the other class seems to restrict them to the letter of the various statutes dealing with their duties in detail, only allowing enough implied power to carry the express into effect.

These two series of precedents, upon analysis, are found to be not so conflicting but that a harmonious system of law may be evolved out of all of them. This reconciliation comes from observing that the restricted class consists of cases involving statutes dealing with details which they regulate while the more liberal ones deal with the board in its general representative capacity.

Section 2408 G. C., purporting to define their general authority, is very meagre and restricted, and in examining this, and all the sections, it should be in reference to the political history of the state and the decisions of the courts in reference thereto. This will not be attempted either with any comprehension or any especial detail, but only by reference to a few cases where the subject is conspicuous and pronounced. The subject gets into the very early reports, and the supreme court expresses a very expansive theory on their authority in an early case, viz.:

Carder v. Commissioners, 16 O. S. 354 in which they declare:

> "The county commissioners is the body—the quasi-corporation—in whom is vested by law the title to all the property of the county. In one sense they are the agents of the county; in another sense they are the county itself. It is in this latter sense that they acquire and hold in perpetuity the title to its property. In this capacity they not only act for the county, but also act as the county."

This extended interpretation of their authority still prevails and is cited with approval in a recent case.

State v. Allen, 86 O. S. 244.

The above is cited by reason of its general application to the authority of the commissioners. A much earlier case declared the same doctrine with nearer reference to the present inquiry.

Widow, etc. of Reynolds, deceased v. Commissioners, 5 Ohio 204.

The syllabus says with the greatest possible brevity:

> "Where real estate is vested absolutely in the county commissioners for public purposes, they may dispose of it in the same manner as individuals."

The facts and opinion in the case bear out this broad statement to the fullest extent.

A long time after this decision the legislature enacted what is now G. C. 2447 granting authority to the commissioners to sell real estate.

From the above case it is apparent that this section was merely declaratory of power they already possessed. The last legislature added a supplemental section in the nature of a restriction, requiring such sale to be by resolution adopted by a majority of the commissioners. There is probably no doubt (considering this provision

of the contract for that purpose as a sale) that the commissioners have passed such resolution in the present case either definitely or by the resolution authorizing the execution of the contract. The interest in real estate granted by that provision of the contract is the equivalent of a perpetual lease. This was held in Widow v. Commissioners, supra, to be a conveyance of a chattel interest. Later decisions, however, and the weight of authority establish it as an interest in land. The distinction is not important, as the authorities granting power to sell are broad enough to include leases, if indeed the latter are not more plainly than the former within the power.

The right to sell land, if given by the statute above mentioned, might exclude the idea of giving it away, as is done in the present instance, which makes the above consideration of the authorities important. But it is safe to assume in a case like the present, where the transfer of an interest in real estate is in co-operation with another public body, and for a distinctly public purpose, that the commissioners have the right to make the grant.

4. The answer to your fourth inquiry largely involves the same general considerations discussed in the third above, to which attention is again called.

The authority of the commissioners in reference to roads is statutory, but always with the concomitant that such statutes are to be construed with the above general extensive authority of the commissioners. These statutes have many times been modified, and are now found in what is commonly known as the "Cass" law. It is a common practice for county commissioners to change the grade of county roads, slight or moderate changes being made as a matter of common practice without any proceedings for that purpose.

It has also been considered that they have not the right to make radical and entire changes without statutory authority, as in such cases as where they change the road at a grade crossing of a railroad, either to place it above or below the latter, for which purpose they have authority in section 6956-1 and 6956-2 G. C. The contemplated changes of grade in this instance are probably equally as great or greater than that involved in the case of the railroad crossings. However, the commissioners have no choice about the matter, as the authority is given the conservancy directors to change the grade *ad libitum*. Among a long list of acts which the latter may do as provided in section 6828-15 G. C., we find "to construct or elevate roadways and streets." Such directors have, however, a dominant power or eminent domain (section 6828-17), which is expressly given them over all townships, villages, counties and cities. The powers of the conservancy commission are plenary and autocratic. It is not too much to say they supersede all other powers, both of individuals and the public, in reference to the real property of the district, as applied to the purpose of their office and duties. So that if the elevation of the roads inquired about can be made without the authority and against the will of the county commissioners, it would seem that they should have power to contract as to proper approaches for such higher grades to pass over such levees.

The proposed changes can be made, and will be if the conservancy directors so determine. The county commissioners are not compelled to make ineffectual resistance, neither do they have to sit idly by and permit that which is inevitable to take its random course. They have jurisdiction and power to act for the interest of their constituents in an intelligent and business-like manner. Instead of compelling a condemnation proceeding by their inaction, they may save the expense and delay thereof by a reasonable agreement. And this may consist in an arrangement whereby the *status quo* may be preserved as far as the nature of the improvement permits, and saving the county present and future expense in making the changes that are unavoidable.

5. There can be no doubt, after these roads are changed, of the duty of the commissioners to maintain them in the same manner that they do other roads, as after

such change they will have no different legal character from what they did before. This, of course, bears no reference to the distribution of powers and duties between county commissioners and township trustees.

6. I know of no authority, and can conceive of no theory, upon which the county commissioners would have the right to delegate to the engineer of the conservancy district the power to decide the manner, terms, or specifications of future paving. The purpose of the approval of the engineer, however, is stated as follows: "and this to the end that said parts of said levees shall not thereby be rendered ineffectual for the purposes intended by said official plan." This restricts the interference with paving to the actual necessity of the case, and as the conservancy authorities have complete power over the district in that respect, the question of the power of the commissioners to contract for it is not very important. It is also true that it is not a matter of consequence to the county whether this provision be binding, and the conservancy commission, being sure of its own powers, and having good counsel at command, is asking no opinion.

It may, at least, be said of this provision of the contract, from the standpoint of either party to it, that there is nothing in it that can be injurious.

7. If the commissioners are liable, or become liable to any one in damages, they can not answer such person by sending him to the directors of the conservancy district. "A" may contract with "B" that "B" will pay damages caused by "A" to "C." This can not compel "C" to look to "B" but may enable "A" to call on "B" to be made whole should "A" be mulcted in damages.

There is some provision in the conservancy law for the conservancy district to become liable for such damages. They have, as we have seen, authority to condemn; and section 6828-17 provides that in the exercise of that right

> "care shall be taken to do no unnecessary damage to other public utilities, and, in case of failure to agree upon the mode and terms of interference, not to interfere with their operation or usefulness beyond the actual necessities of the case, etc."

And it is provided that upon a change of plan, if the change does not

> "actually increase resulting damages for which the board is not compelled to make amicable settlement. (Section 6828-37.)"

no action other than a resolution shall be necessary.

Without pursuing the subject further it may be stated that while it is not now possible to forecast all that may be hereafter held by the courts upon various phases of the conservancy act, including this under consideration, yet this provision is as well worded to fix the obligation as could well be done.

8. It would not be proper to submit a direct answer to your eighth question. No one should undertake to say what act would be contempt of court by way of violation of injunction, without having the order of injunction before him, and having that, it might be necessary to have the whole record of the case, and then with the whole record before you it might still be necessary to have additional extrinsic facts applying it to the question in hand. All these sources of information are at your command, and by an examination of them you can readily determine whether the case you partly describe would be, or not, a violation of such order. It is impossible to state, by a study of the facts as stated in your inquiry, just exactly whether or not any suggested action would violate this order.

9. There would be no impropriety in the insertion of the matter set out in this

inquiry in the contract. However, the limitation is there as a matter of law without being expressed, and it would hardly be necessary to reform and re-execute the contract for the mere purpose of including it.

Yours very truly,
JOSEPH MCGHEE,
Attorney-General.

170.

APPROVAL—FINAL RESOLUTION FOR ROAD IMPROVEMENT IN WASHINGTON COUNTY.

COLUMBUS, OHIO, April 5, 1917.

State Highway Department, Columbus, Ohio.

GENTLEMEN:—I have your communication of March 23, 1917, in which you ask my approval of supplemental final resolution made in reference to the following improvement:

> "Washington county—Section 'H', Hockingport-Powhatan road, Pet. No. 1351, I. C. H. No. 7."

I have carefully examined this resolution and find the same correct in form and legal.

There is one suggestion, however, that I desire to make, and that is the fact that it sets out in the resolution the following:

> "In all a distance of about 53.8 miles."

It occurs to me that this must be an error, and I call it to your attention so that if it is it can be corrected.

Yours very truly,
JOSEPH MCGHEE,
Attorney-General.

171.

APPROVAL—FINAL RESOLUTION FOR ROAD IMPROVEMENT IN MAHONING COUNTY.

COLUMBUS, OHIO, April 5, 1917.

State Highway Department, Columbus, Ohio.

GENTLEMEN:—I have your communication of April 3, 1917, in which you ask my approval of a final resolution made in reference to the following described highway:

> "Mahoning county—Section 'b', Youngstown-Lowellville road, Pet. No. 3132, I. C. H. No. 14."

I have examined the said final resolution carefully and find the same correct in form and legal.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

172.

GIRLS' INDUSTRIAL HOME—CLOTHING FURNISHED INMATES THEREOF—NOT CHARGE AGAINST COUNTIES—SECTIONS 1815 AND 1816 G. C. APPLY ONLY TO BENEVOLENT INSTITUTIONS.

Sections 1815 *and* 1816 *of the General Code apply only to benevolent institutions, therefore do not apply to the Girls' Industrial Home at Delaware. For this reason the counties of the state cannot be compelled to reimburse the state for the expense of clothing inmates of such institutions.*

COLUMBUS, OHIO, April 6, 1917.

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

DEAR SIR:—I have your letter of February 27, 1917, as follows:

> "We have a claim certified under section 20 of the General Code for clothing furnished for inmates of the girl's industrial school. It appears that items therein as to two inmates are in dispute, as follows:
>
> "Two girls were committed by the proper court in Hardin county to an institution of Delaware county, and by arrangement were taken into such Delaware county institution. Thereafter, the juvenile court of the city of Delaware committed the girls to the girls' industrial school.
>
> "Proof of these facts have been furnished. The question is whether, upon such proof being supplied to the matron of the girls' industrial school, the bill of account should be made against Hardin county, or whether we shall compel Delaware county to pay the bill."

Your question raises the inquiry, first of all, as to whether or not the counties of the state are to be charged with the expense of clothing furnished by the girls' industrial school to its inmates.

General Code sections 1815 and 1816 read:

> "Section 1815. All persons now inmates of, or hereafter admitted into, a benevolent institution, except as otherwise provided in this chapter, and except as otherwise provided in chapters relating to particular institutions, shall be maintained at the expense of the state. They shall be neatly and comfortably clothed and their traveling and incidental expenses paid by themselves or those having them in charge.
>
> "Section 1816. In case of failure to pay incidental expenses or furnish necessary clothing, the steward or other financial officer of the institution may pay such expenses, and furnish the requisite clothing, and pay therefor from the appropriation for the current expenses of the institution, keeping and reporting a separate account thereof. The account so drawn, signed by such officer, countersigned by the superintendent shall be forwarded by such officer to the auditor of the county, from which the person came; and such auditor shall issue his warrant, payable to the treasurer of state for the amount of such bill and charge the amount to the current expense fund. The county auditor shall then collect the account in the name of the state as other debts are collected."

It has been suggested that although the reading of these sections would not indicate that they referred to the girls' industrial school at Delaware, nevertheless a review of the history of them might lead to the opposite conclusion. These sections were originally sections 631 and 632 of the Revised Statutes of 1880. They were placed

in chapter I of Title 5. Title 5 consisted of twelve chapters and was entitled "Benevolent Institutions." Chapter 1 related to the general provisions; chapter 2, trustees; chapter 3, officers; chapter 4, board of state charities; chapter 5, institution for the deaf and dumb; chapter 6, institution for the blind; chapter 7, institution for the feeble minded youth; chapter 8, Ohio soldiers' and sailors' orphans' home; chapter 9, asylum for the insane; chapter 10, Longview asylum; chapter 11, Reform school; chapter 12, girls' industrial home.

The sections relating to the girls' industrial home remained in this position in the Revised Statutes until the formation of the General Code. At this time the girls' industrial home was placed with the boys' industrial school under the chapter entitled correctional institutions. Section 631 Revised Statutes became section 1815 of the General Code. Section 631 R. S. reads:

> "All persons admitted into any institution, except as otherwise provided in chapters relating to particular institutions, shall be maintained at the expense of the state, subject only to the requirement that they shall be neatly and comfortably clothed, and their traveling incidental expenses paid by themselves, or those having them in charge."

In adopting section 1815 of the General Code, supra, the legislature substituted for the phrase "all persons admitted into any institution" the phrase "all persons admitted into a benevolent institution." Section 1815 G. C. was then later amended in 101 O. L., page 157, to read as it does at the present time.

The statutes do not at any place say just what institutions are to be classed as benevolent, correctional or penal, and the only indication we have of what the legislature intended in this respect is the classification in the Revised Statutes and the Code. In the Revised Statutes the Girls' Industrial Home was classified as a benevolent institution, and later, in the formation of the General Code, taken out of that class and placed in the class of correctional institutions, and then when doing this the legislature saw fit to adopt section 1815 in place of section 632 R. S. and make it apply only to benevolent institutions.

It is my opinion that after the adoption of the General Code section 1815 G. C. applied only to such institutions as were classed in the General Code as benevolent institutions, and it has not, since that time, applied to the Girls' Industrial Home.

This conclusion is strengthened by the fact that it is easily seen, from a study of the purpose and character of the Girls' Industrial Home, that it is a correctional institution and not a benevolent one. I am therefore of the opinion that sections 1815 and 1816 of the General Code do not apply to the Girls' Industrial School at Delaware, and for that reason the counties of the state cannot be compelled to reimburse the state for the expense of clothing the inmates of such institution.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

173.

VICE-PRESIDENT OF SCHOOL BOARD—IN ABSENCE OR INABILITY OF PRESIDENT TO ACT—MAY ATTEND MEETING TO SELECT MEMBER OF COUNTY BOARD OR DISTRICT SUPERINTENDENT.

The vice-president of a school board acts in the place of the president in the absence or inability of the president to act.

Where the president is unable to attend the meeting to select a member of the county school board, or the meeting to select the district superintendent, the vice-president may attend and perform the duties of president.

COLUMBUS, OHIO, April 6, 1917.

HON. FRANK B. PEARSON, *Superintendent of Public Instruction, Columbus, Ohio.*

DEAR SIR:—In your inquiry of March 12, 1917, you submit for my opinion the following:

> "Section 4728 G. C. provides that the members of a county board of education shall be elected by the presidents of the various village and rural boards of education in such county school district.
>
> "Section 4739 G. C. provides: 'Such district superintendent shall be elected by the presidents of the village and rural boards of education within such district * * *.'
>
> "In case that the president of a local board of education is prevented from attending either of the above meetings, has the vice-president of such board of education power to vote in the election of a county board member or that of a district superintendent? In case the vice-president should not have this power ex-officio, would the board have the right to empower the vice-president to cast a vote in such meetings?"

General Code section 4747, which provides for the election of the president of a school board, also provides for the election of a vice-president, which two officials, together with a clerk of the board, are the only officers of boards of education provided for in the organization of such boards. It has only been of recent years that a vice-president for said board was provided for—to be exact, in the year 1910. Prior to that time the only officers of the board mentioned were the president and the clerk. The law, as it then read, specified that the treasurer of a city, village or township district should be treasurer of the school board, which latter law has been amended to provide that the duties of treasurer should be performed by the clerk. At the time the law only provided for the president and clerk of a school board there also existed a statute which has remained unrepealed, and is numbered 4753, which provides that if the president or clerk is absent at any meeting of the board of education, the members present shall choose one of their number to serve in his place for the time being, and the latter section is in contradiction to section 4747, above mentioned, as far as the vice-president is concerned, if the vice-president has any duties to perform. It must be presumed, I think, that the legislature, when it provided for a vice-president without prescribing the duties of the office, meant that that official should perform his usual and ordinary duties, and it is therefore necessary to determine just what duties generally devolve upon a vice-president.

The word "vice" as a preposition means "in the place of or instead;" that is, a vice-president, following the definition in the Standard dictionary, is

> "One who is to act, on occasion, in the place of a president."

and, as defined by Webster,

> "An officer next in rank below a president,"

thus making that official an officer of the next lower rank than the president. The president, as the term implies, is the head or chief officer of the board, one who presides at the meetings of the board and performs all proper and necessary duties, whether designated or not, which are required to be performed by such officer in the proper transaction of the business of the board. He may be and often is given special duties and in the sections of the General Code mentioned in your inquiry is designated as the person to represent the board in the selection of members of the county school board and in the selection of district superintendents. But it seems to me that the language of those sections means more than simply the designation of a person to perform a duty.

General Code section 4728 provides in part:

> "Each county school district shall be under the supervision and control of a county board of education composed of five members who shall be elected by the presidents of the various village and rural boards of education in such county school district. *Each district shall have one vote* in the election of members of the board of education, except as is provided in section 4728-1 G. C. * * *."

Sections 4728-1 G. C. provides:

> "All school districts other than the village and city school district within a civil township shall be jointly entitled to one vote in the election of members of the county board of education. The presidents of the board of education of all such districts in a civil township shall meet for the purpose of choosing one from their number to cast the vote for members of the county board of education. If no such meeting is held in any year for the purpose of choosing one from their number to cast the vote of such boards, the president of the board having the largest tax valuation shall represent all such districts of the civil township at the election of the county board members. A board of education of a rural district having territory in two or more civil townships shall vote with the boards of education of the district of the civil township in which the greater part of its taxable property is located."

It seems to me it was not the intention of the legislature to designate a particular person to act upon a particular matter, but rather, using the language of section 4728 G. C., that "each *district* shall have one vote;" that is, provided the district composed approximately an entire civil township, and if there was more than one board of education in a civil township, then the word "district" seems to have included not only the individual school district, but the entire township, as a district entitled to one vote. It is true by the provisions of General Code 4729

> "the presidents of the boards of education of the various village and rural school districts in each county school district shall meet and elect five members of the county board of education,"

and in General Code section 4739.

> "such district superintendents shall be elected by the presidents of the village and rural boards of education within such district."

except, as said last mentioned section also provides,

> "that where such supervision district contains two or less rural or village school districts the boards of education of such school districts in joint session shall elect such superintendent."

So that it is not the designation of any particular individuals to act, but the individuals who represent the districts.

Now it is clear to me if the president of a school board were absent from a meeting, the vice-president would be in duty bound to perform the duties which devolve upon the president.

It was held by my predecessor in opinion No. 553, and found in opinions of the attorney-general for 1915, page 1089, that when the office of the president of a school board became vacated by resignation, it was the duty of the vice-president to perform the duties of that office and that no provision is made for filling a vacancy in the office of president which may occur during the term of one year for which he is elected. I concur in the conclusion reached in that opinion.

It is also held in Pond v. National Mortgage Debenture Company, 50 Pac. 973, that:

> "The vice-president is an officer nearest in rank below the president and in the absence of the president of a corporation it is the duty of the vice-president to act as president and at such times he is the chief officer of the corporation."

I am free to admit that there seems to be a dearth of decisions on this proposition and I conclude it is only so because the rule is so generally accepted as the proper one that where there is a vice-president, he, by the very nature of his office, must perform the duties of president on the occasions that the same are not performed by the president on account of absence, inability, or other proper reasons.

It does not seem to me that a school district or school districts, which are under the control of school boards, should go unrepresented at such important meetings as those at which members of county boards of education are chosen or those at which district superintendents are chosen, simply because a particular individual might be incapacitated or unable to attend when there seems to be no way to fill the vacancy. I must rather take the view that it is the district which is to be represented and if the person designated, to wit, the president, is not able to represent same, then the person who acts in the place of or in his stead, viz., the vice-president, is the proper person to attend and perform the duties of president.

I therefore advise you that in case the president of a local board of education is prevented from attending either the meeting at which the county school board members are elected, or the meeting at which the district superintendent is chosen, the vice-president of the board of education has power to attend and participate in said meeting.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

174.

DIRECTOR OF PUBLIC SERVICE—CANNOT BY ORDINANCE BE MADE EX-OFFICIO CLERK OF DEPARTMENT OF PUBLIC SERVICE.

A city can not by ordinance make the director of public service ex-officio clerk of the department of public service.

COLUMBUS, OHIO, April 6, 1917.

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

GENTLEMEN:—I am in receipt of a communication from C. C. McCormick, city solicitor of Wellston, Ohio, dated March 16, 1917, asking for an opinion upon a question which is of such state-wide importance that I am directing an opinion thereon to you. The following was submitted:

> "I desire to submit formally the following question: Can a city such as Wellston by ordinance make the director of public service ex-officio clerk of the department of public service?
>
> "In explanation I may call your attention to the fact that in this city the municipality practically owns and operates all of its utilities, and it would be considerable saving in efficiency if these two offices could be combined."

Section 4323 G. C. provides:

> "In each city there shall be a department of public service which shall be administered by a director of public service. The director of public service shall be an elector of the city, shall be appointed by the mayor and shall serve until his successor is appointed and qualified. He shall make rules and regulations for the administration of the affairs under his supervision."

Section 4324 G. C. provides:

> "The director of public service shall manage and supervise all public works and undertakings of the city, except as otherwise provided by law, and shall have all powers and perform all duties conferred upon him by law. He shall keep a record of his proceedings, a copy of which, certified by him, shall be competent evidence in all courts."

Section 4326 G. C. provides:

> "The director of public service shall manage municipal water, lighting, heating, power, garbage and other undertakings of the city, parks, baths, play grounds, market houses, cemeteries, crematories, sewage disposal plants and farms, and shall make and preserve surveys, maps, plans, drawings and estimates. He shall supervise the construction and have charge of the maintenance of public buildings and other property of the corporation not otherwise provided for in this title. He shall have the management of all other matters provided by the council in connection with the public service of the city."

Section 4327 G. C. provides:

> "The director of public service may establish such sub-department as may be necessary and determine the number of superintendents, deputies,

inspectors, engineers, harbor masters, clerks, laborers and other persons, necessary for the execution of the work and the performance of the duties of this department."

From the foregoing sections, particularly section 4324, it is evident that the director of public service in the city of Wellston is authorized to manage and supervise all the public works of the city, including the municipally owned public utilities. There is a duty imposed upon him by statute of keeping "a record of his proceedings," and the question of establishing such sub-departments as may be necessary and determining the number of employes of various kinds are left to his discretion.

It is for the director of public service to determine when he needs a clerk or clerks and in the event in his discretion he decides that there is no necessity for a clerk and that the duties of the office are such that he can perform all the duties that a clerk might perform, he can abolish the position.

The director of public service would not become ex-officio clerk of the department of public service; neither is it necessary that there should be an ordinance making him such clerk ex-officio, or that the offices be combined. The director of public service having created the place, merely does away with it, and the fact that the statute makes it his duty to keep the records of his department, renders the clerical duties as much a part of his duties as any other.

Therefore, in direct answer to your question I would say that a city can not by ordinance make the director of public service ex-officio clerk of the department of public service.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

175.

COUNTY SURVEYOR OF THIS STATE—EMPLOYED BY JOINT BOARDS —ON CONSTRUCTION OF INTER-STATE COUNTY DITCHES— MAY BE PAID COMPENSATION FROM TIME TO TIME—REGARDLESS OF CUSTOMS AND LAWS OF OTHER STATE.

In a proceeding for the construction of an improvement under the chapter "Interstate County Ditches," an engineer appointed or employed by the joint boards is not compelled to wait for his compensation until the completion of the work, but the same may be allowed and paid from time to time in accordance with section 6535 *General Code.*

COLUMBUS, OHIO, April 6, 1917.

HON. C. A. STUBBS, *Prosecuting Attorney, Celina, Ohio.*

DEAR SIR:—On February 26, 1917, there was received at this department an inquiry from you which is as follows:—

"Under the inter-state ditch law, our county surveyor, as one of the appointed engineers, is working on an inter-state ditch located wholly in the state of Indiana.

"As I understand it, according to the laws of Indiana, engineers are not permitted to draw their fees until the work is wholly completed.

"I will thank you for an opinion as to whether or not the engineer from Ohio must wait until such completion before he can draw his fees, or whether he can draw them from time to time during the progress of the work."

The provision of the inter-state ditch law providing for the compensation of the engineer is found in section 6588 G. C., which is as follows:

> "The fees of all officials and assistants in the improvement and construction of such ditches, shall be as for like services in county ditch work."

The provision in the county ditch law governing the same is in section 6529 G. C., which is as follows:

> "A surveyor or engineer shall receive five dollars per day for the time actually employed on the work designated for him to do, and the necessary and actual expenses for the time so employed."

These two sections fix his right to compensation and the amount thereof. Your inquiry is as to when he is entitled to receive the same. Although the work done by this officer is done in the state of Indiana, it is done for the authorities in Ohio, and the Indiana laws in no manner govern the same.

The provisions of our own statutes as to the time of payment are found in section 6535 G. C., which is as follows:

> "Fees under this chapter shall be paid out of the county treasury as soon as the bill of items thereof is examined and allowed by the county commissioners, and the auditor shall issue orders therefor on such allowance. For the amounts, so paid, except to the commissioners, auditor and probate judge, the commissioners shall order the general county fund to be reimbursed for the money raised for the respective improvements."

You are, therefore, advised that the engineer may be paid in accordance with the provisions of this section and without regard to the law or customs in the state of Indiana.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

176.

WHEN COUNTY COMMISSIONER WHO HAS BEEN ELECTED TO SUCCEED HIMSELF—DIES DURING FIRST TERM—VACANCY CREATED —APPOINTMENT SHOULD BE MADE TO FILL VACANCY GENERALLY —WITHOUT REGARD TO TENURE—SUCCESSOR SHOULD BE ELECTED TO FILL UNEXPIRED TERM AT NEXT GENERAL ELECTION.

When a county commissioner elected to succeed himself dies after the election, and before commencing the term for which he was elected, a vacancy is thereby created which may and should be immediately filled by the probate judge, the auditor and recorder of the county.

The appointment should be made to fill the vacancy generally without express limitation in the order of appointment respecting the tenure of the appointee; but the person so appointed will be entitled to hold his office not only for the remainder of the term during which the vacancy occurred, but also thereafter, and until at the next regular election for county officers a successor for the remainder of the then unexpired term is elected and has qualified. At such next regular election there should be an election to fill out the unexpired term and one for the regular term commencing on the third Monday of September, 1918.

COLUMBUS, OHIO, April 6, 1917.

HON. HARRY D. SMITH, *Prosecuting Attorney, Xenia, Ohio.*

DEAR SIR:—I have your letter of March 22, 1917, requesting my opinion as follows:

> "Mr. J. C. Conwell, a member of our board of county commissioners died March 21, 1917. His present term of office expires the third Monday in September, 1917. At the regular election in November, 1916, he was elected to succeed himself as a member of the board of commissioners, the term for which he was elected commencing the third Monday in September, 1917, and terminating the third Monday in September, 1919.
>
> "FIRST. There seems to be no question as to the authority of the officers named, to appoint at this time, a commissioner to serve until the third Monday in September, 1917, the expiration of Mr. Conwell's present term of office, particularly in view of the fact that the term expires more than a year previous to the next election for state and county officers in November, 1918.
>
> "SECOND. It seems equally clear, that at this time, the appointment should be for the present unexpired term only, as the appointing power can not anticipate the vacancy which will also occur on the third Monday in September, 1917, the beginning of Mr. Conwell's new term of office.
>
> "THIRD. It is not so clear, as for what length of time the appointment shall be made to fill the vacancy beginning the third Monday in September, 1917, when the time comes to make the appointment.
>
> "I. Shall the appointment be for the full term commencing the third Monday in September, 1917, and terminating the third Monday in September, 1919?
>
> "II. Shall the appointment be from Monday in September, 1917, until the first Tuesday after the first Monday in November, 1918, the date of the next election for state and county officers, and at that election, a commissioner elected to serve from the day of election until the third Monday in September, 1919?"

The situation which you describe and the questions which you present require consideration of the following sections of the General Code:

> "Section 2396. When a commissioner is *elected* to fill a vacancy occasioned by death, resignation or removal, he shall hold his office for the unexpired term for which his predecessor was *elected.*
>
> "Section 2397. If a vacancy in the office of commissioner occurs more than thirty days before the next election for state and county officers, a successor shall be elected thereat. If a vacancy occurs more than thirty days before such election, or within that time, and the interest of the county requires that the vacancy be filled before the election, the probate judge, auditor, and recorder of the county, or a majority of them, shall appoint a commissioner, who shall hold his office until his successor is elected and qualified."

The second of the above two sections makes it very clear that the authority to appoint to fill the vacancy created by the death of one of the commissioners now exists and may be exercised by the probate judge, the auditor and the recorder of the county, or a majority of them at any time. Nevertheless, I do not agree with you that the tenure of the appointee will be terminated on the third Monday in September, 1917, for reasons which I will point out in discussing the second question as submitted by you. Otherwise, I agree with you on the first point.

On the second point it is my opinion that the appointment now to be made will vest in the appointee authority to hold until his successor is elected and qualified. Such tenure is not, in my opinion, limited to the remainder of the unexpired term. Section 2396 G. C. does limit the tenure of a person *elected* to fill a vacancy in the office to the unexpired term of his predecessor; but section 2397 contains no similar limitation upon the tenure of a person appointed.

The two sections which have been quoted are not materially different from section 10 of the General Code, which provides as follows:

> "When an elective office becomes vacant, and is filled by appointment such appointee shall hold the office until his successor is elected and qualified. Unless otherwise provided by law, such successor shall be elected for the unexpired term at the first general election for the office which is vacant that occurs more than thirty days after the vacancy shall have occurred. This section shall not be construed to postpone the time for such election beyond that at which it would have been held had no such vacancy occurred, nor to affect the official term, or the time for the commencement thereof, of any person elected to such office before the occurrence of such vacancy."

In this section we see that the person elected holds for the unexpired term, but the person appointed holds until there is an election.

Under this section, questions like that which you submit, have arisen more than once, i. e. a vacancy in an existing term has occurred in the interval between the election and the commencement of the term for which the election was held, by the death of an incumbent who had been elected to succeed himself. The holding has uniformly been that the appointment necessarily made under such circumstances authorizes the appointee to hold, not merely until the expiration of the term, but on into the next term and until his successor is elected and qualified. This was the exact situation in

State ex rel. v. Speidel 62 O. S. 156.

Other decisions which may be cited are:

State ex rel. v. Dahl, 55 O. S. 195.
State ex rel. v. Metcalfe, 80 O. S. 244.

The principle which you mention to the effect that the appointing power cannot anticipate a vacancy has no application here. It was properly enunciated in the case cited by you under entirely different facts. In that case the appointment which was declared invalid had been made at a time when there was actually an incumbent in possession of the office. Of course, the court properly held that the power to appoint to a vacancy could not be exercised until a vacancy actually existed, even though the certainty of a vacancy might be foreseen. Such would be the case, for example, if a sheriff-elect should die between the date of election and the time of the commencement of the term for which he was elected, and the incumbent should be then serving his second term, without capacity by virtue of the constitutional provision to continue to hold the office after the expiration of that term. The occurrence of a vacancy in such an office could be plainly foreseen, but such vacancy would not exist until the expiration of the term, and the official action required to fill the vacancy could not be taken until it actually existed.

As stated, this principle has no application here. A vacancy does exist, and the power to fill it may now be exercised. There is no such thing as a vacancy in a *term*—the vacancy exists in the *office*. This is clearly pointed out in State v. Metcalfe, *supra*, wherein the court makes use of the following language:

> "This view is strengthened and we think made conclusive by a consideration of the policy respecting vacancies in office, and the filling of the same, manifested by legislation and the trend of judicial decision since the adoption of the present constitution. The policy has been to secure continuity of service and avoid unnecessary vacancies. It has never been the policy of the state to create vacancies in office for the mere purpose of giving somebody an opportunity to fill them."

Similar expressions of even more direct application to the case in hand will be found in the opinion in State ex rel. v. Speidel, *supra*.

In short, under the statutes as they stand, the question can very briefly be disposed of by the statement that the duration of the tenure of the appointee is a matter with which the appointing power has nothing whatever to do. That power is exhausted when an appointment to fill a vacancy is made; the law then determines the question of tenure. Even if the appointing board should attempt to limit the tenure of the appointee to a period of time ending on the third Monday of September, 1917, such limitation would be regarded as mere surplusage. State ex rel. v. Darby, 12 C. C. 235.

It is my opinion, therefore, on the second point suggested by you that the appointing power should merely fill the vacancy without attempting to stipulate the period of the appointee's tenure, and that, as a matter of law, the person appointed would be entitled to remain in the office until such convenient date after the first Monday in November, 1918, on which a successor should then be elected to fill out the unexpired term may qualify. At the election in 1918, of course, there should be two elections for the particular membership in the board of county commissioners, one to fill out the unexpired term, and the other for the regular term commencing on the third Monday in September, 1919.

This conclusion makes it unnecessary for me to consider the third question which you state in the form in which you have submitted it.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

177.

TOWNSHIP TREASURER—ENTITLED TO TWO PER CENT. OF ALL MONEYS RECEIVED AND PAID OUT ON ORDER OF TOWNSHIP TRUSTEES—IN REDEMPTION OF BONDS ISSUED UNDER SECTION 6976 TO 7018, INCLUSIVE, NOW REPEALED.

In the redemption of bonds issued under and by virtue of sections 6976 *to* 7018, *inclusive, G. C., now repealed, the township treasurer is entitled to receive two per cent. of all moneys received by him and paid out by him upon the order of the township trustees in the redemption of such bonds.*

COLUMBUS, OHIO, April 6, 1917.

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

DEAR SIR:—I have your communication of March 10, 1917, in which you ask my opinion about certain matters therein set out. Your communication reads as follows:

> "I desire your opinion on the following matter:
>
> "Bonds were issued under section 6976 to 7018, inclusive, of the General Code, as these sections read prior to the enactment of the Cass law. The township makes a levy for the redemption of these bonds at maturity, and the payment of interest thereon. The money is then disbursed or paid out by the treasurer in the usual manner in payment of these bonds and the interest. What compensation is the treasurer entitled to?
>
> "Section 7015, as it read at that time, made special provision concerning the compensation of the treasurer for money paid out by him under and pursuant to the above mentioned sections. The question is: Do the provisions of section 7015, as it formerly existed, have reference to the money paid out by the treasurer in the retiring of the bonds and the payment of the interest, or did it have reference only to his compensation on the money paid out to the contractor and the like in the performance of the work?
>
> "Section 3318 of the General Code provides for the compensation of the treasurer. However, section 7015, as it formerly read, being part of a special act, had preference, and on moneys paid out under sections 6976-7018, the treasurer received the compensation prescribed by 7015, but I have not seen any opinion from your department as to whether or not the treasurer is compensated as prescribed by 7015 or 3318 on money paid out in the retirement of the bonds issued thereunder, as well as the interest thereon."

In arriving at the conclusion as to what is the correct answer to the question proposed in your communication, I desire first to note the general provisions of law which control in the matter of the compensation to which a township treasurer is entitled for services rendered.

Section 3318 G. C. provides as follows:

> "The treasurer shall be allowed and may retain as his fees for receiving, safe keeping and paying out moneys belonging to the township treasury, two per cent. of all moneys paid out by him upon the order of the township trustees."

It will be noted in this section that the township treasurer is entitled to two per cent. of all moneys paid out by him *upon the order of the township trustees.* The ques-

tion then arises as to what moneys would be paid out by the township treasurer under the order of the township trustees. We find this question answered in section 3316 G. C., which reads as follows:

> "Section 3316. No money belonging to the township shall be paid out by the treasurer, except upon an order signed personally by at least two of the township trustees and countersigned personally by the township clerk."

From this section it is evident that no money can be paid out by the township treasurer except upon an order signed by at least two of the township trustees. Hence we are safe in assuming that the township treasurer would be entitled to two per cent. of the moneys received by him from any source whatsoever and paid out for the redemption of bonds which were issued under and by virtue of sections 6976 to 7018 inclusive, G. C., and which are still outstanding. That is, he would be entitled to this amount unless there is some provision specifying a different compensation for the township treasurer in the matter of paying out money for the redemption of said bonds.

Now, let us turn to the sections which control in the issuing of the bonds in reference to which your question arises.

Section 7015 G. C. provides as follows:

> "The treasurer of such township shall receive and disburse all money arising from the provisions of this subdivision of this chapter. He shall receive as compensation therefor one-half of one per cent. of the first ten thousand dollars, or less, distributed in any one year, and one-fourth of one per cent. of any amount in excess of ten thousand dollars, to be paid out of the township funds, and he shall not receive other compensation for services rendered under such subdivision."

From this section it is seen that the township treasurer is to receive a different compensation than that set out in section 3318 G. C., for services which he may render under and by virtue of the subdivision of which section 7015 G. C. is a part, namely, he is to receive one-half of one per cent. of the first ten thousand dollars distributed in any one year, and one-fourth of one per cent. of any amount in excess of ten thousand dollars, and he shall not receive other compensation for services rendered under such subdivision.

At this point I desire to call attemtion to an opinion rendered by Hon. Timothy S. Hogan, found in Vol. II of Annual Report of the Attorney-General, 1911-1912, at p. 1426. The request made of the department at that time was as follows:

> "Request has been made of me for an opinion by the trustees, clerk and treasurer of Sharon township, this county, whether the township treasurer is entitled to a per cent. on money raised by taxation for the purpose of paying interest and redeeming bonds issued in previous years for road improvement under the provisions of General Code, sections 6976 to 7018, inclusive.
>
> "The treasurer in office at the time the proceeds of the particular bond issue were received took his commission of one-half of one per cent. (½ of 1%), etc., as provided by section 7015."

The syllabus of the finding of the department reads as follows:

> "For the distribution of all moneys, raised by virtue of the provisions of sections 6976-7018 General Code, providing for taxation and bond issues

for road improvements, whether it be of the moneys received by the sale of bonds and distributed to the contractor, or whether it be funds raised by taxation and distributed to bond holders, the treasurer is entitled to the payment provided for by section 7015, General Code, and no other compensation for such service can be allowed him."

In the body of the opinion, at p. 1428, we find the following line of argument:

"Section 7015 General Code makes it the duty of the township treasurer to receive and disburse all moneys arising from the provisions of this subdivision, whether secured by the issue of bonds or by taxation. The money raised on the sale of bonds and distributed to the contractors, as well as the money raised by taxation and distributed to the bondholders is money received and distributed by virtue of that subdivision.

"The compensation of the treasurer is based upon the amount distributed by him. It might occur that the same treasurer would receive and distribute the money secured upon the sale of bonds and also the money raised by taxation to redeem the bonds.

"The bonds, however, may run as long as thirty years and different treasurers be required to handle the money. If compensation were allowed upon the money raised by the sale of the bonds and not upon the money secured by taxation to meet such bonds, the first treasurer would receive compensation for work which was to be partly performed by his successor, or successors.

"The compensation of the treasurer of the township is based upon the amount distributed by him. The moneys raised upon the bonds and the money secured by taxation are each distributed, there are two separate distributions.

"Section 7015 General Code provides that the treasurer shall receive no other compensation for such services than therein provided. This provision of the statute prevents him from drawing the compensation provided in section 3318 General Code.

"It is my conclusion that the township treasurer is entitled to compensation upon all moneys raised by virtue of the provisions of sections 6976 to 7018, inclusive, of the General Code, and distributed by such township treasurer, whether said money is raised by the sale of bonds or by taxation. His rate of compensation for such services is fixed by section 7015, General Code, and is based upon the amount actually distributed by him. Money placed in a bank or depository and money paid to a successor in office would not be money distributed by him."

I quote from this opinion at considerable length because I believe the law of the case is set out correctly therein. From the above we see that the conclusion of Mr. Hogan is as follows:

That the township treasurer is entitled to compensation upon all moneys raised by virtue of the provisions of sections 6976 to 7018, inclusive, G. C., and distributed by such township treasurer, whether said money is raised by the sale of bonds or by taxation, but that the rate is fixed by section 7015 G. C.

Now, the next question is, to what compensation is the township treasurer entitled, in view of the fact that said sections 6976 to 7018, inclusive, G. C., are repealed?

Mr. Hogan in his opinion states the following:

"Section 7015 G. C. provides that the treasurer shall receive no other

compensation for such services than therein provided. This provision of the statute prevents him from drawing the compensation provided in section 3318 G. C."

Since the repeal of this section, of course your township treasurer cannot look to the same in order to ascertain what his compensation is for services rendered. So it is my opinion that he must now look to the general provisions of the statutes in reference to compensation for services rendered by township treasurers. As said before, these sections are 3316 and 3318 G. C.

Therefore, it is my opinion that the township treasurer is entitled to two per cent. of all moneys belonging to the township treasury, which he receives, safely keeps and pays out upon the order of the township trustees. To be sure, it is evident, if he does not receive the money and does not pay the same out, he is not entitled to such compensation. It must be received by him and actually distributed by him in order to entitle him to the two per cent. as compensation.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

178.

APPROVAL—TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE OF VILLAGE OF CLEVELAND HEIGHTS, OHIO.

COLUMBUS, OHIO, April 9, 1917.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"IN RE:—Bonds of the village of Cleveland Heights in the sum of $12,620.00, for the purposes of constructing sewers in said village."

I have examined transcript of the proceedings of the council and other officers of the village of Cleveland Heights, Ohio, relating to the above bond issue; also the bond and coupon form attached, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds, drawn in accordance with the form submitted and signed by the proper officers, will, upon delivery, constitute valid and binding obligations of said village of Cleveland Heights.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

179.

APPROVAL—TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE OF VILLAGE OF CLEVELAND HEIGHTS, OHIO.

COLUMBUS, OHIO, April 9, 1917.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"IN RE:—Bonds of the village of Cleveland Heights, in the sum of $9,379.00, for the purpose of improving highways leading into the village of Cleveland Heights."

I have examined transcript of the proceedings of the council and other officers of the village of Cleveland Heights, Ohio, relating to the above bond issue; also the bond and coupon form attached, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds, drawn in accordance with the form submitted and signed by the proper officers, will, upon delivery, constitute valid and binding obligations of said village of Cleveland Heights.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

180.

APPROVAL—TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE OF VILLAGE OF CLEVELAND HEIGHTS, OHIO.

COLUMBUS, OHIO, April 9, 1917.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"IN RE:—Bonds of the village of Cleveland Heights in the sum of $2,021.00 for the purpose of enlarging the water works for supplying water to said village and the inhabitants thereof."

I have examined transcript of the proceedings of the council and other officers of the village of Cleveland Heights, Ohio, relating to the above bond issue; also the bond and coupon form attached, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds, drawn in accordance with the form submitted and signed by the proper officers, will, upon delivery, constitute valid and binding obligations of said village of Cleveland Heights.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

181.

LIQUOR LICENSE INSPECTORS—WHETHER OR NOT THEY ARE IN CLASSIFIED CIVIL SERVICE—QUESTION OF MIXED LAW AND FACT TO BE DETERMINED IN FIRST INSTANCE BY STATE CIVIL SERVICE COMMISSION—SUBJECT TO REVIEW BY THE COURTS.

Whether or not the inspectors in the state liquor licensing department are in the classified civil service of the state is a question of mixed law and fact which, in the first instance, is to be determined by the state civil service commission, subject to review by the courts.

COLUMBUS, OHIO, April 10, 1917.

State Liquor Licensing Board, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your communication in which you make the following inquiry of this department:

> "The inspectors of this department are detectives of the department. Their work is in the highest degree confidential and requires that kind of ability which seems to be borne in some men and is entirely lacking in others. Best results are obtained with the greatest degree of secrecy of operation and on that account there should be as little publicity connected with the appointment and personnel of the inspectors as possible.
>
> "This department has demonstrated in an experience of over three years that good inspectors cannot be secured as a result of an examination. We have had men of ability and of sufficient qualifications to secure for them a percentage of 99.44 in an examination and yet were absolutely worthless in active work. On the other hand, some of the most successful inspectors we have used do not possess educational qualifications sufficient to pass an examination for janitor. If we are required to select these men as a result of a civil service examination, there is no way in which we can drop a man who is of no value to us except at the expense of much red tape and a final discharge for incompetency, whereas, although a man may be of no service in our particular work, yet he might be of great service to the state in some other position where his qualifications would be of value. In order to secure a proper force of good inspectors it should be possible for us to appoint them temporarily, trying them out in the particular work for which we require them and if they fail to be of benefit, no matter how well qualified they might be for other service, we should have the right to drop them when fairly tested and appoint others and in that way secure a proper working force of inspectors through whom this department can render and receive the greatest degree of efficiency and obtain the best results.
>
> "Under these circumstances we believe that the inspectors or detectives of this department should not come under the provisions of the civil service classification, and we therefore request your opinion as to whether or not the civil service classification may be dispensed with so far as concerns them."

The reasons set out in your communication why these positions should be held as unclassified should receive careful consideration at the hands of the civil service commission, and no doubt will be given due weight and influence by them.

The duties of these inspectors as set forth by you are very similar to those of deputy fire marshals of whom it is said by former Attorney-General Turner in volume II of the Opinions of the Attorney-General for the year 1915, page 1478, under date of August 7, 1915:

"That the position of assistant fire marshal is a confidential one abundantly appears. They are to make investigations which are to be secret. They are to co-operate with prosecuting attorneys and assist them in the preparation of the trial of criminal cases. Like every investigation which precedes an indictment, their investigations partake of the character of secret service. As the state fire marshal points out in his letter, incendiarism is one of the most difficult crimes to detect. It is difficult not only to determine who has committed the crime, but even to determine whether or not a crime has been committed. It is necessary, therefore, that the proceedings of the assistant fire marshals, as well as the deputy fire marshals, be surrounded by absolute secrecy. The information which they acquire is absolutely confidential, to be imparted only to their superior officer, the state fire marshal, or to the prosecuting attorney. It would be difficult to imagine a plainer instance of a confidential position than the one now under consideration.

"For the sake of clearness I may say that the fire marshal is correct in his contention that there is no practical distinction between the position of assistant fire marshal and deputy state fire marshal, except with respect to the first deputy. I should have to advise that 'deputy fire marshals' are not within the description of paragraph 8 of section 8 of the present civil service law (except as to the first deputy) any more than are the assistant fire marshals, but such deputy fire marshals are the incumbents of confidential positions, just as are the assistant fire marshals, and the civil service commission may determine whether it is practicable to ascertain the merit and fitness of applicants therefor by competitive examinations."

The above excerpt is from an opinion given to the civil service commission itself, and it will be observed that after stating by very necessary inference that such deputy fire marshals are in the unclassified service, the quotation above concludes by submitting to the commission the function of deciding whether they be so.

And there are opinions by both of the last two incumbents of this office as to positions that are in the unclassified service to the effect that even though they be so in the unclassified service as a matter of law, yet the decision is in the first instance for the civil service commission, subject to the supervision of the courts.

In an opinion from the Attorney-General on December 27, 1913, Reports of Attorney-General for 1913, page 722, it is held:

"A secret service officer appointed by the prosecuting attorney is not in the classified service *under the civil service law.*"

In the opinion proper is found the following:

"Is it practicable to hold examinations for this position? The determination of this question is left, in the first instance to the civil service commission, subject to review by the courts, as is held in the opinion as to assistant city solicitors and assistant prosecuting attorneys."

An equivalent decision in the following administration was in an opinion given the civil service commission January 16, 1915, Vol. I of the Opinions of the Attorney-General, page 3, the syllabus of which is as follows:

"Whether it is practicable to determine the merit and fitness of officers and employes by competitive examination is a question in the first instance for the civil service commission, but subject to review by the courts. In deter-

mining this practicability, the commission should look to the nature of the duties and the relation of the employes to the head of the offices as well and particularly to the nature of the duties of the office of the appointing power.

"The secretary to the governor, the stenographer to the governor, and all other employes in the governor's office, who from the nature of the service rendered, or by reason of their location in the governor's office, are in position to observe the transactions or obtain information relative to matters that may legally come before the governor, are not within the classified service for reason that, *as a matter of law,* it is impracticable to determine their merit and fitness by competitive examination."

The opinion begins as follows:

"The answer to your question rests solely upon the correct decision as to whether it is practicable to determine the merit and fitness of officers and employes in the governor's office by competitive examination. This is a question in the first instance for your commission, but subject to review by the court.

"In determining this practicability you will look to the nature of the duties and the relation of the employes in his office to the governor, as well as, and particularly, to the nature and duties of the office of governor."

The whole opinion, which is very apropos and interesting, proceeds upon the same theory.

I cannot agree with the theory embodied in these quotations. If, as a matter of law, the positions are excluded from the classified sercice, then it follows as a matter as certain as demonstration can be of anything that the civil service commission can take but one course. You have then a vain thing, submission of a matter to a tribunal for decision that can only be decided one way. It would follow, with what appears to be equal certainty, that the appointing power, when it comes to make an appointment in the unclassified service, is like anyone else about to take any other action; that is to say, he must not violate the law; and every man in all the undertakings of life acts at his peril and takes the responsibility of deciding for himself whether his proposed conduct be lawful or unlawful, and otherwise could not act at all, which is getting back to first principles and is purely elemental and absolutely of the first essence of all law. It seems strange for instance that anybody should have had any question about the private secretary to the governor. The civil service commission is not a court. If it were it would be absolutely bound by its own decisions. The present or future commission may conclude that the governor's secretary should be in the classified service. At least they were close enough at one time to ask the question, Would the governor, therefore, be called upon to submit to them, in the first instance, whether he should select his man from their eligible list, or would he totally disregard their idle claims and proceed to make his own selection? The answer to the present question is that it should be submitted, in the first instance, to the civil service commission. This is distinctly upon the ground that it is not here found as a matter of law that the merit and fitness of these inspectors cannot be determined by competitive examinations.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

182.

DISAPPROVAL—TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE OF THE PLYMOUTH SPECIAL SCHOOL DISTRICT.

COLUMBUS, OHIO, April 13, 1917.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bond issue of Plymouth special school district in the sum of $35,000.00 for the purpose of enlarging, furnishing and equipping school buildings in said district."

I am herewith forwarding to you, without approval, transcript relating to the above bond issue.

The resolution providing for said issue of bonds was adopted by the board of education of said school district pursuant to a vote of the electors of said school district, a majority of whom voted in favor of the said bond issue, so it appears. The election at which the question of this bond issue was submitted was one authorized by the provisions of section 7625 General Code, but before the board was authorized to submit said question to a vote of the electors of the school district, it was required by the provisions of said section 7625 General Code to find affirmatively that the funds at its disposal or that could be raised by a bond issue by the board of education without a vote of the people under the provisions of section 7629 was not sufficient for the purpose. This finding, which should properly have been made in the resolution submitting the question to a vote of the electors, was jurisdictional to the right of the board to submit the question to a vote of the electors, and in as much as no finding was made by the board the election was unauthorized and the bond issue was likewise unauthorized.

In addition to the foregoing defect in the proceedings indicated by the transcript, which in itself is fatal to the validity of the bond issue, the transcript fails to show what, if any, notice was given by the clerk of the election; and moreover, fails to show that the result of the election was canvassed by the board of education, as required by the provisions of section 5120 General Code, which provides that in school elections the returns shall be made by the judges and clerks of each precinct to the clerk of the board of education of the district not less than five days after the election, and that the board of education of the district shall canvass such returns at a meeting to be held on the second Monday after the election, and that the result thereof shall be entered on the record of the board. The transcript shows that returns of this election were canvassed by the board of deputy state supervisors of elections of Richland county, and that a majority of the electors voting on the proposition of said bond issue voted in favor thereof. A board of education, however, is not authorized to issue bonds pursuant to an election held under the provisions of section 7625 General Code without itself canvassing the returns of the said election and certifying the result thereon on its record.

The resolution of the board of education following the election and providing for the issue of these bonds is defective in the following particulars:

1st. The interest said bonds are to bear is made payable annually instead of semi-annually as required by the provisions of section 7627 General Code, and

2nd. Said resolution does not contain any provision providing for an annual levy on all the taxable property of the district for the purpose of paying interest on said bonds and providing a sinking fund to pay the same at maturity, as required by the provisions of section 11, article XII of the state constitution.

The transcript on this bond issue is further defective in not setting out a large number of the items of information necessary in the consideration of bond issues of this kind, but in as much as the above mentioned defects in the proceedings relating to this bond issue in themselves require me to hold this issue of bonds to be invalid, other defects in the proceedings or in the transcript relating to the same need not be here specifically mentioned.

For the reasons above set forth I am of the opinion that said bond issue should be rejected, and I enclose the transcript herewith.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

183.

TREASURER OF STATE—HAS NO AUTHORITY TO FURNISH BOND TO CITY OF PORTLAND—TO INDEMNIFY SAID CITY AGAINST LOSS BY REASON OF LOSS OF INTEREST COUPONS BY PREDECESSOR IN OFFICE.

There is no authority of law for the treasurer of state to furnish a security bond for the purpose of indemnifying the city of Portland against any loss which said city might suffer by reason of its payment of interest on certain of its bonds, the interest coupons of which bonds, while on deposit with the state treasurer, under the state deposit law, were clipped and lost or destroyed by one of his predecessors in office.

COLUMBUS, OHIO, April 13, 1917.

HON. CHESTER E. BRYAN, *Treasurer of State, Columbus, Ohio.*

DEAR SIR:—I have your letter of March 17, 1917, in which you state that your office is in receipt of communication relative to the loss of three hundred dollars' worth of coupons under former treasurer of state, R. W. Archer, which communication you refer to this department for advice as to what to do under the circumstances. With your letter are the following enclosures:

"(1) Affidavit of R. W. Archer, former treasurer of state, averring that certain coupons, numbered 373 to 392, both inclusive, had been clipped from certain bonds, to wit, bonds of the state of Oregon, county of Multnomat, city of St. Johns improvement bonds, by said state treasurer, who held said bonds for the City Savings Bank and Trust Company of the city of Alliance, Ohio, under the depository law, and that each of said coupons, while in the office of the treasurer of state, were by accident lost or destroyed and can not be found nor produced nor delivered to the owners. This affidavit was sworn to by said R. W. Archer on the 9th day of December, 1916.

"(2) Bond sought to be given by the City Savings Bank and Trust Company of Alliance, Ohio, to the city of Portland, which it seems is successor by merger to all the rights and obligations of the city of St. Johns, Oregon, for the purpose of indemnifying said city of Portland against any loss which it might sustain in paying the amount called for by said lost or destroyed coupons.

"(3) Copy of letter from the department of finance of the city of Portland, Oregon, under date of February 5, 1917, refusing to accept any bond of

a corporation without the state, and not licensed to do business in the state of Oregon.

"(4) Copy of another letter from said department of finance under date of March 6, 1917, in which the city treasurer advises that the commissioner of finance insists that the City Savings Bank & Trust Company of Alliance furnish a surety bond, executed by a bonding company licensed to do business in the state of Ohio, and approved by him.

"(5) Letter from the City Savings Bank & Trust Company of Alliance, Ohio, under date of March 16, 1917, addressed to 'Mr. Chester E. Bryan, treasurer, state of Ohio, Columbus, Ohio,' calling attention to the various documents heretofore mentioned, relating to the $300.00 in coupons which were lost by his predecessor in office, and stating that Mr. Archer, the former treasurer, had advised said City Savings Bank & Trust Company that a bond would be furnished, if necessary, by his department, to cover the amount of the lost coupons. The bank asks the present treasurer to furnish a surety bond to the city of Oregon for the purposes of the indemnity required."

Without citing the various statutes on the matter of the duties of the treasurer of state, and particularly those statutes referring to the state board of deposit, which are found at sections 321 et seq. G. C. I will state that from a complete examination of all the statutes that might possibly bear on the question submitted, I am unable to find any provision which authorizes you to furnish the bond requested. Neither is there any provision of law for your furnishing a bond indemnifying a person who has suffered from loss owing to some action of one of your predecessors in office. Neither is there any fund out of which you could pay for such or similar bond.

Therefore, it is my opinion that there is no duty or liability on your part, and that you have no authority to comply with the request of the City Savings Bank & Trust Company of Alliance, Ohio, to furnish a bond for the purpose of indemnifying the city of Portland against any loss resulting from injury suffered by loss or destruction of certain interest coupons clipped from bonds on deposit with the treasurer of state under the depository act by your predecessor in office.

I am returning to you all the papers submitted.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

184.

FEES—ALLOWED SHERIFF FOR TRANSPORTATION OF PRISONERS —NOT COSTS IN CASE—MUST BE PAID BY COUNTY REGARDLESS OF SOLVENCY OF DEFENDANT—MUST BE PAID BY SHERIFF INTO FEE FUND.

Cost of transportation of prisoners to the workhouse under section 12385 *General Code is not a part of the costs of the case. In state cases these costs are paid out of the county, treasury, and when allowed the sheriff they stand upon the same basis as other fees earned by him in his official capacity, and must be paid into the sheriff's fee fund.*

COLUMBUS, OHIO, April 13, 1917.

HON. GEORGE C. VONBESELER, *Prosecuting Attorney, Painesville, Ohio.*

DEAR SIR:—I have your letter of March 5, 1917, as follows:

"Are the fees of the sheriff, or other officer, transporting a person to the

workhouse, a part of the costs in the case? May the allowance to the sheriff in addition to his salary as provided for in section 2846 be made up in part of his fees under section 12385, as well as fees in criminal matters, provided for under section 2846, provided these fees are for services in misdemeanors upon conviction where the defendant proves insolvent, or must his fees under the provisions of section 2846 be limited only to the costs in the case created up to the time of his leaving for the workhouse?

"Sometimes section 2846 has been called the 'lost cost section.' It seems to us that if that designation is correct at all, it should be the 'lost fee section.' We cannot see why the fees under section 12385 are not a part of the sheriff's legal fees as well as those created in a criminal case prior to the time of conviction.

"*Our question then finally is* whether the sheriff may retain his fees under section 12385 in misdemeanors, where the defendant proves insolvent, as a part of his legal fees in addition to his salary under the provisions of section 2846, allowed by the county commissioners upon the certificate of the clerk."

Section 12385 G. C. reads:

"The sheriff, or other officer, transporting a person to such workhouse shall have the following fees therefor; six cents per mile for himself, going and returning, and five cents per mile for transporting each convict, and five cents per mile going and coming for the services of each guard, to be allowed as in penitentiary cases, the number of miles to be computed by the usual routes of travel, to be paid in state cases out of the general revenue fund of the county on the allowance of the county commissioners, and, in cases for the violation of the ordinances of a municipality on the order of the council thereof."

Section 2846 G. C. reads:

"Upon the certificate of the clerk and the allowance of the county commissioners the sheriff shall receive from the county treasury in addition to his salary his legal fees for services in criminal case wherein the state fails to convict and in misdemeanors upon conviction where the defendant proves insolvent, but not more than three hundred dollars shall be allowed for the services rendered in any one year of his term. The fees of the sheriff in cases of lunacy, epilepsy, feeble-minded, boys' industrial school, girls' industrial home, school for blind, school for deaf, and for serving subpoenas for grand jury witnesses, and summoning jurors, except in appropriation cases, shall be paid out of the county treasury upon certificate of the proper officer of the court in which the services were rendered."

It is clear that section 2846 G. C. refers only to such fees in criminal cases as may be included in the cost bill. This is evident from the provision that the county commissioners may allow such fees "in misdemeanors upon conviction where the defendant proves insolvent," for the clear inference is that if the defendant does not prove insolvent he is to pay these fees himself, and since he could not be made to pay any fees in the case not included in the costs, the statute must refer only to those fees included in the costs. Otherwise the phrase "where the defendant proves insolvent" would be meaningless.

The next question is, can the fees allowed the sheriff under section 12385 G. C. be included in the costs and can they therefore be allowed the sheriff by the commissioners when the defendant proves insolvent under section 2846?

In Encyc. on Pleading and Practice, Vol. 8, page 979, it is said:

"Costs to be taxed and included in a judgment in a criminal proceeding consists of those items incurred in the prosecution for services rendered therein, which are made taxable by law, as distinguished from general expenditures necessary to the administration of criminal law, and fixed as definite public charges."

In the case of State ex rel. v. Commissioners, 6 Ohio Dec. page 240, it was held:

"The word 'cost' is of frequent occurrence in the statutes of Ohio but is not synonymous with 'expense.' Expense is costs when made so by statute.

"The word 'costs' has a legal signification. It includes only those expenditures which are by law taxable and to be included in the judgment, and which denotes the expense which a person is entitled to recover by reason of him being a party to legal proceedings.

"Jury fees are not costs, and shall not be taxed as part of the costs in any legal proceeding, civil or criminal."

The same view is taken by the court in the case of State ex rel. v. Gilbert, 77 O. S. 333.

I can find no Ohio statute providing that fees of the sheriff, for transporting prisoners to the work house under section 12385, should be taxed as costs and therefore under authority of the above case they are not to be included in the cost bill. This being so, section 2846 General Code has no reference to it.

This conclusion is strengthened by the fact that section 12385 General Code makes the sheriff's fees, in transporting prisoners in state cases, a charge upon the county fund.

It is therefore my opinion that the fees allowed the sheriff for transporting prisoners under section 12385 of the General Code are no part of the costs in the case and must be paid, regardless of the question of the defendants' solvency in said case, by the county and that when these fees are allowed the sheriff they stand upon the same basis as other fees earned by him in his official capacity and must be paid into the sheriff's fee fund.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

185.

PROSECUTING ATTORNEY—APPLICATION TO COURT TO FIX BOND—AMOUNT OF BOND FIXED BY STATUTE—SECTION 2419 PROVIDES FOR EQUIPMENT OF OFFICE—MAY NOT BE PAID UNDER SECTION 3004—SECTIONS 2914 AND 2915 PROVIDE FOR PAYMENT OF OFFICIAL HELP—SUCH HELP MAY NOT BE PAID UNDER SECTION 3004—MAY TEMPORARILY EMPLOY DETECTIVE TO BE PAID FROM FUND ALLOWED UNDER SECTION 3004 G. C.—EXPENSES INCURRED IN DISCHARGE OF DUTY IN CRIMINAL MATTER PAID FROM FUND ALLOWED BY SECTION 3004 G. C.

(1) *The prosecuting attorney should make application to the probate or common pleas court to fix the bond required to be given by the prosecutor under section* 3004 *G. C.*

(2) *The amount to be allowed the prosecuting attorney under section* 3004 *G. C. is fixed by law, viz., an amount equal to one-half his official salary and the court is without any authority to change this amount.*

(3) *Section* 2419 *G. C. makes provision for offices for county officials and the expense of furnishing and equipping such offices for the prosecuting attorney may therefore not be paid under section* 3004 *General Code.*

The prosecuting attorney may pay his railroad fare and automobile hire, and other such expenses incurred in the discharge of his duties in criminal matters, out of section 3004 *General Code.*

Sections 2914 *and* 2915 *G. C. make provision for the appointment by the prosecuting attorney of assistants, clerks and stenographers, and therefore he may not use any of the fund provided in section* 3004 *for the payment of such official help.*

The prosecuting attorney may temporarily employ a detective or secret service officer from time to time under section 3004 *G. C., and pay him out of the fund allowed the prosecutor under such section.*

COLUMBUS, OHIO, April 13, 1917.

HON. CHARLES M. CALDWELL, *Prosecuting Attorney, Waverly, Ohio.*

DEAR SIR:—I am in receipt of your letter of March 21, 1917, as follows:

"I would like to have your instructions as to the provisions of section 3004 of the General Code of Ohio.

"1. This section provides that 'upon the order of the prosecuting attorney the county auditor shall draw his warrant, etc., but further on provides that the prosecuting attorney shall give bond in a sum not less than his official salary to be fixed by the court of common pleas or probate court. Do I understand that it is necessary to make a formal application to one of these courts to fix the bond?

"2. I take it that it is not necessary to make an application to the court to fix the amount to be drawn by the prosecuting attorney under this section, as said amount is fixed, being an amount equal to one-half of the official salary.

"3. This section further provides that this allowance is made to provide for expenses which may be incurred in the performance of official duties and in the furtherance of justice. Would you kindly indicate what of the following expenses are legitimate expenses under this section?

"(a) If the county commissioners fail to provide a suitable office for the prosecuting attorney, can he rent an office and

"(b) If the prosecuting attorney needs an assistant to assist him in

investigating matters appertaining to the business of the county, can he pay such assistant out of the funds provided by this section?

"(c) Under this section is he permitted to pay all legitimate expenses such as railroad fare, automobile hire, the services of a detective if necessary in looking up evidence, or in attending to the business of the county, or in the prosecution of criminal cases?

"(d) You will note that section 2914 of the General Code provides the judge of the court of common pleas to fix an aggregate sum to be expended for the compensation of assistants, clerks and stenographers. In the event this has not been done, can such assistants be paid out of the funds provided by 3004?

"(e) Also note section 2915-1 G. C. Is this section exclusive or would the compensation of a detective be a proper expense under section 3004? This section provides that the compensation of a secret service officer shall be so much per year, payable monthly. In the small counties it is not desirable to appoint such officer for more than a few days at a time, hence it would seem to be a better plan if it were in the power of the prosecuting attorney to pay him for the services performed, and I am therefore asking if same can be done under section 3004."

Section 3004 General Code reads:

"There shall be allowed annually to the prosecuting attorney in addition to his salary and to the allowance provided by section 2914, an amount equal to one-half the official salary, to provide for expenses which may be incurred by him in the performance of his official duties and in the furtherance of justice, not otherwise provided for. Upon the order of the prosecuting attorney the county auditor shall draw his warrant on the county treasurer payable to the prosecuting attorney or such other person as the order designates, for such amount as the order requires, not exceeding the amount provided for herein, and to be paid out of the general fund of the county.

"Provided that nothing shall be paid under this section until the prosecuting attorney shall have given bond to the state in a sum not less than his official salary to be fixed by the court of common pleas or probate court with sureties to be approved by either of said courts, conditioned that he will faithfully discharge all the duties enjoined upon him, by law, and pay over, according to law, all moneys by him, received in his official capacity. Such bond with the approval of such court of the amount thereof and sureties thereon and his oath of office inclosed therein shall be deposited with the county treasurer.

"The prosecuting attorney shall annually before the first Monday of January, file with the county auditor an itemized statement, duly verified by him, as to the manner in which fund has been expended during the current year, and shall if any part of such fund remains in his hands unexpended, forthwith pay the same into the county treasury. Provided, that as to the year 1911, such fund shall be proportioned to the part of the year remaining after this act shall have become a law."

(1) Inasmuch as it is the duty of the probate or common pleas court to fix the amount of the bond to be given by the prosecuting attorney under section 3004, which shall be a sum not less than his official salary, and since nothing can be paid under this section until the bond is furnished, it would seem necessary for the prosecuting attorney to call the attention of the probate or common pleas court to the necessity for such bond and make application to such court to fix the amount of the same.

(2) I agree with your opinion that the amount to be allowed the prosecuting attorney under section 3004 of the General Code is fixed by law, viz., "an amount equal to one-half the official salary," and the court is without authority to change that amount. Therefore, of course, it is not necessary to make an application to the court to fix the amount to be drawn by the prosecuting attorney under this section.

(3) (a) Section 2419 G. C. provides as follows:

> "A court house, jail, offices for county officers, and an infirmary, shall be provided by the commissioners when, in their judgment, they, or any of them, are needed. Such buildings and offices shall be of such style, dimensions and expense, as the commissioners determine. They shall provide all rooms, fire and burglar proof vaults and safes, and other means of security in the office of the county treasurer, necessary for the protection of public moneys and property therein."

Under this section it is the duty of the county commissioners to furnish an office "of such style, dimensions and expense, as the commissioners determine" for the prosecuting attorney, and there being, therefore, express and ample provision for this expense, I am of the opinion that the same may not be paid under section 3004 G. C.

(b) Your question 3(b) is not quite clear to me. If you mean by "an assistant to assist him in investigating matters" an assistant attorney, this question is answered by the answer to your question 3(d). If you mean an assistant who acts in the nature of a detective or secret service official, this is answered by the answer to your question 3(e).

(c) I know of no express provision of law allowing the prosecuting attorney railroad fare, automobile hire and such expenses incurred in the discharge of his duties, and I am of the opinion that inasmuch as they are "incurred by him in the performance of his official duties and in the furtherance of justice" and are "not otherwise provided for," they may be paid by the prosecuting attorney under section 3004 G. C.

(d) Section 2914 of the General Code provides as follows:

> "On or before the first Monday in January of each year in each county, the judge of the court of common pleas, or if there be more than one judge, the judges of such court in joint session, may fix an aggregate sum to be expended for the incoming year, for the compensation of assistants, clerks and stenographers of the prosecuting attorney's office."

Section 2915 G. C. reads:

> "The prosecuting attorney may appoint such assistants, clerks and stenographers as he deems necessary for the proper performance of the duties of his office, and fix their compensation, not to exceed in the aggregate the amount fixed by the judge or judges of the court of common pleas. Such compensation after being so fixed shall be paid to such assistants, clerks and stenographers monthly from the general fund of the county treasury upon the warrant of the county auditor."

In an opinion rendered August 26, 1914, found on page 1160 of the Attorney-General's reports for that year, former Attorney-General Hogan held:

> "Sections 2914 and 2915 G. C. provide for the appointment by the prosecuting attorney for such assistants as he deems necessary for the proper performance of his duties, and for a fund out of which such assistants are to be compensated.
>
> "Where it is necessary for some other attorney to perform duties connected

with the prosecuting attorney's office, such assistants should be provided and paid under sections 2914 and 2915; the fund provided by section 3004, General Code, cannot be used for this purpose."

Attorney-General Hogan said:

"A reading of these sections (sections 2914 and 2915) will show that it is not necessary that the assistant devote all his time to county work and that any situation that may arise can be met under these sections.

"Section 3004 provides for expenditures 'not otherwise provided for.' As I have just stated that the situation you mention (employment of an attorney to assist the prosecutor) is provided for by sections 2914 and 2915, I do not believe that the fund mentioned in section 3004 can be expended for such services."

This same ruling was made in an opinion rendered under date of January 22, 1916, by former attorney-general Turner, and found on page 118 of the Opinions of the Attorney-General for 1916, in which he held:

"Prosecuting attorneys may not use moneys drawn under section 3004 G. C. to pay assistants, clerks or stenographers who are appointed under and by virtue of section 2915 G. C."

I agree with the opinions of my predecessors and am therefore of the opinion, in answer to your question, that assistants, clerks and stenographers for prosecuting attorneys cannot be paid out of the funds provided by section 3004 of the General Code.

"(e) Section 2915-1 General Code reads:

"The prosecuting attorney may appoint a secret service officer whose duty it shall be to aid him in the collection and discovery of evidence to be used in the trial of criminal cases and matters of a criminal nature. Such appointment shall be made for such term as the prosecuting attorney may deem advisable, and subject to termination at any time, by such prosecuting attorney. The compensation of said officer shall be fixed by the judge of the court of common pleas of the county in which the appointment is made, or if there be more than one judge, by the judges of such court in such county in joint session, and shall not be less than one hundred and twenty-five dollars per month for the time actually occupied in such service nor more than one-half of the official salary of the prosecuting attorney for a year, payable monthly, out of the county fund, upon the warrant of the county auditor."

Section 2915-1 G. C., above quoted, makes provision for the appointment of a secret service officer to be regularly employed, as such. I note from your question that what you desire is to appoint a secret service officer for "a few days at a time." There is no provision in law for the appointment of such a secret service officer and the appointment of such a temporary officer being clearly "in the furtherance of justice," it is my opinion that you may appoint a secret service officer temporarily to serve for a few days at a time and pay him out of the fund allowed you under section 3004 G. C.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

186.

COUNTY SCHOOL DISTRICTS—REDISTRICTING THEREOF UPON APPLICATION OF THREE-FOURTHS OF RESIDENTS OF VILLAGE AND RURAL DISTRICT BOARDS—TERMINATES CONTRACTS OF DISTRICT SUPERINTENDENTS EXTENDING BEYOND SCHOOL YEAR—SUPERVISION DISTRICT CANNOT BE CREATED WITH FEWER THAN THIRTY TEACHERS—REDISTRICTING OF COUNTY SCHOOL DISTRICT TAKES EFFECT FIRST MONDAY IN SEPTEMBER FOLLOWING REDISTRICTING.

Redistricting of the county school district into supervision districts upon the application of three-fourths of the presidents of the village and rural district boards has the effect of terminating contracts of district superintendents which extend beyond the school year. Such district superintendents have no vested rights in such contracts which will defeat redistricting legislation.

No supervision district can be created with fewer than thirty teachers, but the county superintendent may be compelled to personally supervise not to exceed forty teachers which shall supersede the necessity of district supervision of those schools.

Redistricting of the county school district takes effect September first following such redistricting act, and affects the term of employment of a district superintendent only if in conflict therewith.

COLUMBUS, OHIO, April 14, 1917.

HON. CHARLES M. CALDWELL, *Prosecuting Attorney, Waverly, Ohio.*

DEAR SIR:—In your inquiry of April 6, 1917, my opinion is requested on the following statement of facts:

> "Our county school board divided Pike county into three supervision districts, and the presidents of the boards of education within each district elected a district superintendent for each district for the term of one year. Prior to the expiration of the first year, two of these district superintendents were re-elected for a term of three years, and have now served two of the said three-year terms.
>
> "Now, three-fourths of the presidents of the village and rural district boards of the county have made application to the county board to redistrict the county and it seems to be the general desire that there should be one supervision district. Under section 4738 the county board *shall* redistrict the county. The following questions arise:
>
> "1. Two of the three district superintendents having been employed for a term of three years, and only having served two years thereof, if the county is made a single supervision district, does that terminate the employment of the two district superintendents who were employed for three years? There was no written contract, but the president of the boards of education met and by a vote employed the district superintendents and gave notice of such employment to the county superintendent.
>
> "2. If the county is redistricted so that the districts of these two district superintendents should have less than thirty teachers in each, then under section 4738 is such district done away with? And would that fact terminate the employment of the district superintendents who were employed for three years?
>
> "3. Suppose the county board of education, upon the application aforesaid, should make Pike county one supervision district (there now being three), will the redistricting not take effect until the expiration of the present

employment of these district superintendents? Or will the term of the aforesaid district superintendents be discontinued when their districts are abolished?"

General Code section 4738 provides as follows:

> "The county board of education shall divide the county school district, any year, to take effect the first day of the following September, into supervision districts, each to contain one or more village or rural school districts. The territory of such supervision districts shall be contiguous and compact. In the formation of the supervision districts consideration shall be given to the number of teachers employed, the amount of consolidation and centralization, the condition of the roads and general topography. The territory in the different districts shall be as nearly equal as practicable and the number of teachers employed in any one supervision district shall not be less than thirty. The county board of education shall, upon application of three-fourths of the presidents of the village and rural district boards of the county, redistrict the county into supervision districts. The county board of education may at their discretion require the county superintendent to personally supervise not to exceed forty teachers of the village or rural schools of the county. This shall supersede the necessity of the district supervision of these schools."

General Code section 4739 provides for the election of district superintendents. General Code section 4741 provides for the term of such district superintendents and General Code section 4742 provides for the re-election of district superintendents. In your inquiry you state that your county school district was divided under section 4738 G. C. into three supervision districts and three-fourths of the presidents of the village and rural districts boards of education of the county have made application to the county board of education under and by authority of the provisions of section 4738 to have said county school district redistricted. This, under the terms of the above quoted section, said boards of education had a right to do and there is no escape therefrom by the county board of education provided said application is made in good faith.

In opinion No. 49, dated March 9, 1917, this department held that the language of that part of section 4738 which says the county board of education *shall* divide and that part which provides that the number of teachers employed shall not be less than thirty, is mandatory, so that when three-fourths of the presidents of the village and rural district boards petition the county board to redistrict, the county board must accordingly act.

But you further state that in two of said supervision districts the district superintendent has been hired for a term which extends beyond the school year, that is, beyond August 31, 1917. In the same opinion referred to above this department held that district superintendents of such districts have no vested right in their contracts for more than one year, which would defeat any such redistricting legislation, and that they cannot hold over. I am enclosing you herewith a copy of said opinion.

Answering your first question, then, I advise you that the redistricting has the effect to terminate said contracts at the end of the school year.

In answer to your second question, I advise you that if the county school district is redistricted so that the number of teachers in any district is less then thirty, then under section 4738 such district is not entitled to a district superintendent, for section 4738 provides that no district shall have less than thirty teachers. Said section, however, provides that the county superintendent may be required to personally

supervise not to exceed forty teachers which shall supersede the necessity of the district supervision of those schools and under the reasoning in answer to your first question the employment of the district superintendent who has served only two years of the three would be terminated.

In answer to your third question, if the county board of education should make only one district instead of the three which now exist, such redistricting shall take effect the first day of September following the redistricting act.

The latter part of said third question is answered in my answer to your first question.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

187.

BOARD OF EDUCATION—IN DISSOLVED SCHOOL DISTRICT—MAY COLLECT MONEY DUE FOR TUITION AND PAY DEBTS.

When a school district is dissolved under provisions of section 4682-1 *G. C., the board of education of such district may collect money due said district for tuition and pay or arrange to pay the debts thereof.*

COLUMBUS, OHIO, April 14, 1917.

HON. S. W. ENNIS, *Prosecuting Attorney, Paulding, Ohio.*

DEAR SIR:—In your letter of March 3, 1917, you request my opinion upon the following statement of facts:

> "In August of 1916 the Grover Hill village school district of Paulding county, Ohio, legally dissolved in accordance with the provision of section 4682-1 of the General Code of Ohio, and became a part of Latty township rural school district.
>
> "At the time of said dissolution there was owing by said rural school district to said village school district the sum of about $600.00 for tuition, which was then unpaid.
>
> "The village board of education had debts and obligations owing by it in excess of said amount and no money in the treasury of said village district to meet the same. Can the village school district under such circumstances collect this money from the rural district of which it has become a part?"

General Code section 4682-1 provides:

> "A village school district containing a population of less than fifteen hundred may vote at any general or special election to dissolve and join any contiguous rural district. After approval by the county board such proposition shall be submitted to the electors by the village board of education on the petition of one-fourth of the electors of such village school district or the village board may submit the proposition on its own motion and the result shall be determined by a majority vote of such electors."

When such district, then, has voted to dissolve, that is, when the proposition submitted by authority of the above mentioned section carries by a majority vote of the electors therein, it is necessary for the business of the district to be finished

or closed up. Disposition of the property of such school district is provided for by General Code section 4683 as follows:

> "When a village school district is dissolved, the territory formerly constituting such village district shall become a part of the contiguous rural district which it votes to join in accordance with section 4682-1, and all school property shall pass to and become vested in the board of education of such rural school district."

While the above section provides what shall become of the property, it does not provide the method of disposing of the indebtedness, but section 4689 G. C. provides:

> "The provisions of law relating to the power to settle claims, dispose of property or levy and collect taxes to pay existing obligations of a village that has surrendered its corporate powers, shall also apply to such village school district and the board of education thereof."

It is unnecessary, then, to look to the provisions of law which authorize the officers of villages which surrender their charters to settle the claims against such villages and pay the existing obligations.

General Code section 3514 provides:

> "Such surrender of corporate powers shall not affect vested rights or accrued liabilities of such village, or the power to settle claims, dispose of property, or levy and collect taxes to pay existing obligations, but after the presentation of such petition, council shall not create any new liability until the result of the election is declared, nor thereafter, if such result is in favor of the surrender of corporate powers. Due and unpaid taxes may thereafter be collected, and all moneys or property remaining after such surrender shall belong to the school district embracing such village."

Applying the provisions of the above section to a school district, it is ascertained that no such surrender of the corporate powers of the school board shall affect vested rights or accrued liabilities of such school board and that the school board has power to settle claims, dispose of property or levy and collect taxes to pay existing obligations, keeping in mind, however, that after the presentation of the petition provided for in section 4682-1 the school board shall not create any new liability until the result of the election is declared, nor thereafter if said election carries. In your case the indebtedness of the district, then, must be provided for by your board of education before the dissolution is complete, and in order to pay said indebtedness it is necessary for the board to collect whatever money there is due to said village school district. Among the amounts due is the amount of six hundred dollars, due from the rural school district for tuition and it is proper for your school board to collect said $600.00 and apply same on the indebtedness of the district. In case sufficient funds cannot be raised other than by levy, it is perfectly proper for your board, even since said vote was taken to dissolve, to levy and collect whatever taxes are necessary in order that the existing indebtedness shall be paid.

There is one thing for your board to keep in mind. You have no right to create any new obligations.

Answering your question specifically, then, I advise you that the Grover Hill village school district may collect from the Latty township rural school district said sum of $600.00 for tuition and apply same on the indebtedness of said Grover Hill village district.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

188.

APPROVAL—FORM OF CONTRACT AND BOND SUBMITTED BY STATE HIGHWAY DEPARTMENT.

COLUMBUS, OHIO, April 14, 1917.

State Highway Department, Columbus, Ohio.

GENTLEMEN:—I have your communication of recent date in which you enclose the form of a contract which your department has been using for some time, and which you desire this department to approve or to suggest changes as it may see fit.

The form of contract and bond which you submit is as follows:

"AGREEMENT.

"This agreement, made this_____day of_____A. D. 191___, between the state of Ohio, hereinafter called the party of the first part, and_____
_____
of_____or_____successors, executors, administrators and assigns, hereinafter called the party of the second part.

"Witnesseth: That for and in consideration of payments hereinafter mentioned, to be made by the party of the first part, party of the second part agrees to furnish all materials, appliances, tools and labor and perform all the work required for_____of section _____of_____ road, I. C. No_____township_____
_____county, petition No_____state of Ohio, according to the plans and specifications and to the satisfaction and acceptance of the party of the first part.

"The party of the second part further covenants and agrees that the following papers shall be bound with or accompany, and be an essential part of this contract, plans and specifications, agreement, proposal and contract bond and approximate estimate and proposal.

"In consideration of the foregoing premises the party of the first part agrees to pay to the party of the second part the sum of_____
_____dollars ($_____).

"In Witness Whereof, the party of the first part has hereunto subscribed by the state highway commissioner, and the party of the second part has affixed_____name.

"ATTEST:

"_____State of Ohio,

"Secretary state highway department.

By_____

"State highway commissioner.

"Approved by

_____

_____ "Contractor:

_____ _____

"Commissioners of_____ "By_____

County, Ohio.

"This_____ day of

_____191__"

"PROPOSAL AND CONTRACT BOND.

"KNOW ALL MEN BY THESE PRESENTS, That we (*1)_____
_____
_____
hereinafter called the principal, as principal, and (*2)_____
_____
_____
hereinafter called the surety, as surety, are held and firmly bound unto the state of Ohio, in the sum of_____
_____dollars ($_____), lawful money of the United States, for the payment of which, well and truly to be made, we do hereby bind ourselves, our successors, heirs, executors, administrators and assigns, jointly and severally, firmly by these presents.

"WHEREAS, said principal has filed with state highway commissioner of the state of Ohio, a written bid or proposal for the construction and completion of_____of section_____of _____road, I. C. H. No_____in_____township_____ county, petition No_____, a copy of which proposal is, hereto attached.

"NOW, THEREFORE, THE CONDITION OF THIS OBLIGATION IS SUCH, that if the said proposal be accepted and said principal shall within ten (10) days after receiving notice thereof, enter into proper contract with said state of Ohio, for the construction and completion of said improvement, and shall well, truly and faithfully comply with and perform each and all the terms, covenants and conditions of such contract, on his (its) part to be kept and performed, according to the tenor thereof; and will perform the work embraced therein, upon the terms proposed and within the time prescribed, and in accordance with the plans and specifications furnished therefor, and to which reference is here made and the same are made a part hereof, as if fully incorporated herein; and shall fully pay all direct or indirect damages that may be suffered during the construction of such improvement by reason of the negligence of the contractor in the construction thereof, and until the same is finally accepted; and shall pay all claims of subcontractors, material men and laborers arising from the construction of said improvement; and shall save the state of Ohio and the county of_____free and harmless from the payment of any claim or claims of subcontractors, material men or laborers on account of the construction of said improvement; then this obligation shall be null and void, otherwise to be and remain in full force and virtue in law.

"And the said surety hereby stipulates and agrees that no changes, extensions, alterations, deductions or additions, in or to the terms of said contract, or in or to the plans and specifications accompanying the same shall in any wise affect the obligation of said surety on its bond.

"Signed and sealed, this_____day of_____A. D. 191___

"In presence of:

_____
"Contractor.

_____ "By_____
_____ _____
_____ _____
_____ _____
_____ _____
"Bondsmen."

"NOTICE

"Attach corporate seal if principal is corporation. Attach corporate seal of surety company if such surety is accepted.

"(1*) If a corporation, insert "Organized under the laws of the state of_____, with its principal place of business at_____ _____in_____

"(*) If a surety company, insert "Organized under the laws of the state _____and duly authorized to transact business within the state of Ohio."

After a certain form has been used for a number of years and the public, as well as the department become accustomed to the same, I am not in favor of making changes in the same unless said changes are very important.

I have looked over said contract and bond very carefully and in the main have no suggestions to make in reference to the same.

However, this contract and bond is drawn in reference to a line of conduct which the department has followed for quite a long time, which line of conduct I do not feel is exactly in accordance with statutory provisions. Your department has adopted the rule that when a bidder sends in his bid he must at the same time send in a contract duly signed upon his part and dated as of the same day as the bids are to be opened. Also a bond must accompany the contract. Then after the bids are opened and your department ascertains who is the lowest and best bidder, you sign the contract for the state and return the same to the successful bidder, and the proposed contracts and bonds of the unsuccessful bidders are also returned to them. This is not in exact conformity to law. The provisions of the statutes seem to infer the following course:

First: Advertisement;

Second: The reception of bids;

Third: The opening of bids and the selection of the lowest and best bidder;

Fourth: Notifying the successful bidder;

Fifth: A filing of a bond by the successful bidder and the entering into a contract.

I am aware that this course is a little more uncertain than the course you follow, and would take a little more time, and I might say that I am not sure either that any harm can come to the state through the course your department has adopted. The only difficulty is this; the statutes provide that you can not enter into a contract until you have received the final resolutions from the county commissioners in which they agree to assume their part of the cost and expense of the improvement. (Section 1218 G. C.)

These final resolutions can not be entered into until the auditor of the county files a certificate that the moneys necessary to carry out the resolutions are in the treasury or are in process of collection. Now supposing the contract is dated as of the date upon which the bids are opened, and you do not get the final resolutions of the county commissioners and the certificate of the auditor until some time thereafter, and then your department, after receiving the final resolutions and the certificate signs the contract.

Now the question is when is this contract entered into. Is it the date upon which it is dated or the date upon which your department signs it. If the court should construe the date of the contract to be the date on which it is dated, then your department would be entering into a contract before you received the final resolutions, which would be contrary to the provisions of section 1218 G. C. But if the court should construe the execution of the contract to be as of the date your department signs it, then every-

thing would be regular because the contract would be executed after the receiving of the final resolutions and certificate.

Other than this question I see no objection whatever to the form of your bond and contract, and I am offering this more in the way of suggestion than advice.

If you desire to proceed as you have been you cannot better the form of the bond or the contract. If you desire to proceed strictly according to the provisions of the statute you would be compelled to modify the form of the bond to a slight extent.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

189.

APPROVAL—FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN ADAMS AND CLINTON COUNTIES.

COLUMBUS, OHIO, April 14, 1917.

State Highway Department, Columbus, Ohio.

GENTLEMEN:—I have your communication of April 7, 1917, in which you ask my approval of certain final resolutions therein set out, as follows:

> "Adams county—Section 'C,' West Union-Sinking Springs road. Pet. No. 2009-T, I. C. H. No. 124.
>
> "Clinton county—Section 'g,' Cincinnati-Chillicothe road, Pet. No. 2189-T, I. C. H. No. 8."

I have examined these final resolutions entered into by the township trustees and find them regular in form and legal.

I might suggest that in the resolution signed by the trustees of Meigs township, Adams county, the certificate signed by the township clerk does not contain the name of the township in the body of said certificate, but I do not feel that this is at all vital and do not consider that any action thereon is necessary unless you care to return it to the clerk for this insertion. Otherwise the resolutions are regular in form as well as legal.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

190.

MEMBER OF BOARD OF EDUCATION—IN TERRITORY WHICH WAS TRANSFERRED FROM ONE RURAL SCHOOL DISTRICT TO ANOTHER —PRIOR TO TAKING EFFECT OF SECTION 4692 G. C.—HOLDS OFFICE TO END OF TERM FOR WHICH HE WAS ELECTED.

Where territory, in which a member of a board of education lives, was transferred from one rural school district to another, prior to the taking effect of General Code section 4692, as now amended, such member will, under the decision of Thompson ex rel. v. Clemens, 92 O. S. 284, hold said office to the end of the term to which he was elected as a member of such board.

COLUMBUS, OHIO, April 14, 1917.

HON. HARRY M. RANKIN, *Prosecuting Attorney, Washington C. H., Ohio.*

DEAR SIR:—I acknowledge receipt of your communication in which you ask my opinion on the following statement of facts:

> "Mr. Horace Wilson, in November, 1913, was elected a member of the board of education in what was known as Oswald school district in Marion township, Fayette county, Ohio, and qualified for said office and entered upon his duties on January 1, 1914. He was elected for a term of four years, which term would expire on December 31, 1917, unless his term was sooner terminated by the facts herein stated.
>
> "On October 15, 1914, the county board of education passed a resolution transferring the territory in what was known as Oswald school district in Marion township to the Bloomingburg school district. It was provided in said resolution that the transfer should take effect and be in force on and after June 1, 1915.
>
> "The question arises whether or not Mr. Wilson is still a member of the board to which he was elected."

When Mr. Wilson, your board member, was elected in 1913, the General Code providing for the length of the term of a member of a board of education read as follows:

> "*Section* 4745. The terms of office of members of each board of education shall begin on the first Monday in January after their election, and each such officer shall hold his office four years and until his successor is elected and qualified."

and the term of Mr. Wilson would, therefore, expire, according to law, on the 31st day of December, 1917.

In 1914 the school laws were amended and codified and among the new sections which were at that time added was one which affected all officers and members of boards of education, and reads as follows:

> "*Section* 4735. The present existing township and special school districts shall constitute rural school districts until changed by the county board of education, and all officers and members of boards of education of such existing districts shall continue to hold and exercise their respective offices and powers until their terms expire and until their successors are elected and qualified."

Construction was given by our supreme court to said section in the case of Thomp-

son ex rel v. Clemens, 92 O. S., 284, and in a matter very similar to the case under consideration here and which last mentioned case arose in Fayette county. The following language is used by the court in said decision on page 286:

> "It was undoubtedly the purpose of the general assembly by the adoption of this section, in order to continue the existing school machinery, to provide that all members of the boards of education then in office should continue until the expiration of their terms and until the election and qualification of their successors. *It means exactly what it says and Clemens, being a member of the board of education of Jasper township at the time when the law took effect, was entitled to hold the same until the expiration of his term.*"

The above case was decided June 4, 1915, and seven days after General Code section 4692 was amended to read in part as follows:

> "The county board of education may transfer a part or all of a school district of the county school district to an adjoining district * * * of the county school district. * * * if a member of the board of education lives in a part of a school district transferred the member becomes a non-resident of the school district from which he was transferred and ceases to be a member of such board of education. * * *"

The language of the above part section 4692 is plainly in contradiction to the language of section 4735, but section 4692, as amended on May 27, 1915, did not take effect until August 25, 1915, and the transfer of the territory in which Mr. Wilson lived became effective June 1, 1915, so that in order for section 4692 to apply to his case it must necessarily be given a retrospective effect. This, I am of the opinion, should not occur. Both sections 4692 and 4735 can be given effect. Section 4735 shall apply to all members of boards of education where the district lines remain unchanged or which district lines were changed before section 4692 became effective, and section 4692 shall apply to only those districts where the boundary lines have been changed since section 4692 became effective.

Answering your question, then, I advise you that, following the decision of Thompson v. State ex rel. Clemens, Mr. Wilson will serve as a member of said school board until the end of his term, to wit: December 31, 1917.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

191.

THE STATE CANNOT PAY MORE THAN FIFTY PER CENT OF THE COST OF CONSTRUCTION, ETC., OF INTER-COUNTY HIGHWAYS—IN CASE OF TWO OR MORE IMPROVEMENTS STATE NOT AUTHORIZED TO PAY MORE THAN FIFTY PER CENT OF ONE ALTHOUGH THE TOTAL DOES NOT AVERAGE MORE THAN FIFTY PER CENT.

In the construction, improvement, maintenance and repair of inter-county highways, the state, under the provisions of section 1213 G. C., cannot pay more than fifty per cent of the cost and expense of one improvement, even though the amount expended by the state on the other improvement, or improvements, is enough less than the half of the cost and expense thereof, to reduce the total amount expended in the county to fifty per cent of the cost and expense of all the improvements.

COLUMBUS, OHIO, April 16, 1917.

State Highway Department, Columbus, Ohio.

GENTLEMEN:—I have your communication of April 9th, 1917, in which you ask my opinion in reference to a certain matter set out therein.

Your communication reads as follows:

"I respectfully direct your attention to the following portion of section 1213 G. C., 105-106 O. L. page 637, which reads as follows:

" 'Whenever there are one or more improvements to be made in a county and the cost and expense thereof does not exceed twice the amount apportioned by the state to a county, then the state shall pay fifty per cent of such cost and expense.'

"I respectfully request an opinion from you as follows:

"When a county wishes to co-operate against inter-county highway funds on two separate contracts, may the state pay more than one-half the cost of one and less than one-half the cost of the other if the total of the two falls within the amount of inter-county money allotted to that county for one year?"

The section from which you quote reads in full as follows:

"Whenever there are one or more improvements to be made in a county, and the cost and expense thereof does not exceed twice the amount apportioned by the state to a county, then the state shall pay fifty per cent of such cost and expense.

"Whenever there are one or more improvements to be made in a county, and the cost and expense thereof exceeds twice the amount apportioned by the state to a county, then the state shall pay such proportion of the cost of said improvement or improvements as may be agreed upon by the state highway commissioner and the county commissioners or township trustees."

The first part of this section provides that whenever the cost and expense of the improvement to be made in a county, whether it be one or more than one, does not exceed twice the amount apportioned by the state to a county, then the state shall pay fifty per cent. of such cost and expense.

The second part of said section provides that when the cost and expense of the improvement made in a county, whether it be one improvement or more than one, exceeds twice the amount apportioned by the state to a county, then the state shall

pay such proportion of the cost of such improvement or improvements, as may be agreed upon by the state highway commissioner and the county commissioners or township trustees.

Now your question is as to whether in the event that there are two improvements made in a county the state could pay more than fifty per cent. of the cost and expense of one improvement provided it would pay enough less than fifty per cent. of the cost and expense of the other improvement, so as to bring the amount paid by the state upon both improvements within the amount apportioned by the state to the county.

In order to answer this question we will have to look further than merely to section 1213 G. C. In studying the provisions of this chapter (G. C. 1178 to 1231-3) it seems to have been the policy of the legislature to limit the state to fifty per cent. of the cost and expense of any one improvement, that is, while the state may by agreement pay less than fifty per cent. of the cost and expense of an improvement, yet they cannot pay more than fifty per cent.

Section 1214 G. C., which immediately follows upon section 1213 G. C., provides:

> "Except as otherwise provided in this chapter, the county shall pay twenty-five per cent. of all cost and expense of the improvement. Fifteen per cent. of the cost and expense of such improvement * * * shall be apportioned to the township or townships in which such road is located. Ten per cent. of the cost and expense of improvement, * * * shall be a charge upon the property abutting on the improvement."

From this section it is evident that it was the intention of the legislature that the state should bear but fifty per cent. of the cost and expense of any improvements. It is provided in other sections of the statute that the county and township may pay more or less than the amount set out in this section; but nowhere in the statutes can I find a provision that would seem to indicate that the state is to pay more than fifty per cent., with two exceptions which I shall note later on.

Section 1194 G. C. provides:

> "The county commissioners or township trustees may expend any amount available by law for the construction, improvement, maintenance or repair of inter-county highways or main market roads within the county, providing the county commissioners or township trustees by resolution agree to pay the cost and expense of said improvement over and above the amount received from the state, and the amount assessed against abutting property owners, and the amount so contributed by the county or township shall be expended in the same manner as state aid money."

From the provisions of this section it is seen that the county commissioners or township trustees may expend any amount that they may have on hand which is available under the law for the improvement, provided they enter into an agreement to pay all over and above the amount received from the state; but there is no provision herein that the state shall pay more than one-half of the cost and expense.

Section 1197 reads in part as follows:

> "The cost of the construction or improvement of such bridge or culvert shall be apportioned equally between the state and county unless the county has by resolution agreed to pay more than one-half of the cost of said improvement."

Thus indicating that the county may pay more than one half of the cost of said im-

provement, but there is no indication whatever that the state may pay more than one-half of the improvement.

Section 1207 G. C. provides that the county commissioners of a county may relieve the township or townships of any part their apportionment up to the entire cost and expense of such improvement without any assessment or charge whatever upon the township or townships. It further provides that the township trustees may by resolution assume any part or all of the cost and expense of such highway improvement which would otherwise have been paid by the county, but there is no indication whatever in these provisions that the state may assume any part of the amount which the county and township is to pay under the provisions of section 1214, G. C.

From all this it seems to have been the intention of the legislature that the state in any improvement shall pay no more than one-half of the cost and expense thereof.

There are a few exceptions to this, but I do not believe they modify the general rule in its application to the proposition submitted by you.

Section 1191 G. C. provides that the state may, if neither the county nor any township in the county makes application for state aid, pay the full cost and expense of an improvement less the ten per cent. to be assessed against the abutting property owners, and section 1217 G. C. provides that

> "Where the application for said improvement is made by the township trustees, the state may assume all or any part of the county's proportion of the cost of said improvement."

It might be inferred from this reading that the state may assume, in addition to one-half of the cost and expense, also the cost and expense which would otherwise be borne by the county under the provisions of section 1214 G. C., but as I said, neither of these sections would modify the general rule in its application to the question asked by you.

Hence, answering your question specifically, I am of the opinion that the state can not pay more than fifty per cent. of the cost and expense of any improvement made within a county, and therefore the state could not pay more than fifty per cent. in one improvement and less than fifty per cent. in another, even though the sum of the two would not exceed the amount apportioned by the state to any county.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

192.

STATE BOARD OF HEALTH—WHEN WATER SUPPLY OF VILLAGE IS FOUND TO BE IMPURE—AND NOT PRACTICAL TO REMOVE SOURCE OF POLLUTION—MAY ORDER INSTALLATION OF PURIFICATION PLANT—WHETHER OR NOT REVENUES WILL COMPENSATE COMPANY NOT TO BE TAKEN INTO CONSIDERATION IN DETERMINING WHETHER OR NOT SAID ORDER IS REASONABLE.

Where the state board of health has found the public water supply of a village impure and dangerous to health and that it is not practicable to sufficiently improve the character of such supply by removing the sources of pollution affecting it, and such board has ordered the installation of a purification plant to remedy the situation, the fact that the revenue received by the water company may be insufficient to compensate the company for the expense of this improvement may not be taken into consideration in determining whether or not the order of the board of health is a reasonable one under section 1257, when it does not appear that any less expensive remedy can be had to relieve the situation.

COLUMBUS, OHIO, April 16, 1917.

The State Board of Health, Columbus, Ohio.

GENTLEMEN:—I have your letter of March 3, 1917, as follows:

"Under date of August 20, 1914, the state board of health adopted the following order, addressed to the City Water Works Company, of Pittsburgh, Pa., owning and operating the water works at Sebring, Ohio:

" 'BE IT ORDERED by the state board of health of Ohio, that the City Water Works Company, of Pittsburgh, Pa., owning and operating the water works at Sebring, Ohio, shall install and have in operation prior to January 1, 1916, a water purification plant of a design satisfactory to the state board of health to purify the public water supply of Sebring.'

"This order was duly signed by the governor and attorney-general and forwarded to the City Water Works Company. Under date of February 25, 1916, the state board of health was notified by the attorney for this company that the order was protested and that J. M. Chester, of Pittsburgh, Pa., had been named as the referee in behalf of the water works company. Pursuant to action by the state board of health, Philip Burgess, of Columbus, Ohio, was named as referee in behalf of the state board of health. The conditions of the order are still under consideration by these referees.

"Under date of January 22, 1917, and again under date of March 1, 1917, the state board of health was notified by its referee that a matter of difference existed as to the interpretation of the phrase: 'The necessity and reasonableness of such order may be submitted to two reputable and experienced sanitary engineers, etc.' I have been requested by Mr. Burgess to obtain from you your opinion as to the interpretation to be placed upon the words 'necessity' and 'reasonableness.'

"For your information, I enclose a copy of the order and the letters from Mr. Burgess under date of January 22, and March 1, with my replies thereto. Your early consideration of this request will be appreciated."

Sections 1252, 1253, 1254 and 1257 read:

"*Section* 1252. Whenever the board of health or health officer of a city or village, or ten per cent. of the electors thereof file with the state board

of health a complaint in writing, setting forth that it is believed that the public water supply of such city or village is impure and dangerous to health, the state board of health shall forthwith inquire into and investigate the conditions complained of.

"*Section* 1253. If a state board of health finds that the public water supply of a city or village is impure and dangerous to health and that it is not practicable to sufficiently improve the character of such supply by removing the source or sources of pollution affecting it, or if the board finds that such water supply is being rendered impure by reason of improper construction or inadequate size of existing water purification works, it shall notify such city, village, corporation or person owning or operating such water supply of its findings and give them an opportunity to be heard."

"*Section* 1254. After such hearing, if the state board of health determines that improvements or changes are necessary and should be made, it shall report its findings to the governor and attorney-general, and upon their approval, the board shall notify such city, village, corporation or person owning or operating such water supply to change the source of supply or to install and place in operation water purification works or device satisfactory to the board, or to change or enlarge existing water purification works in a manner satisfactory to the board within a time to be fixed by the board, which time shall be subject to the approval of the governor and attorney-general.

"*Section* 1257. If an order of the state board of health, when approved by the governor and attorney-general, and made in pursuance of the provisions of this chapter relating to public water supply, is not acceptable to any city, village, corporation or owner affected thereby, such city, village, corporation or owner shall have the right of appeal, as follows: The necessity and reasonableness of such order may be submitted to two reputable and experienced sanitary engineers, one to be chosen by such city, village, corporation or owner, and the other by the board who shall not be a regular employe. Such examiners shall act as referees. If the engineers so chosen are unable to agree, they shall choose a third engineer of like standing, and the vote of the majority shall be final."

I note from the correspondence attached that it is the claim of the water company that the order referred to is not a reasonable one within the meaning of section 1257 General Code unless "the revenues received by the company are sufficient to compensate the company for additional expense incurred by the construction, maintenance and operation of the purification devices that may be required under the order of the board."

In the case referred to the board of health found that "the public water supply of the village of Sebring is impure and dangerous to health and that it is not practicable to sufficiently improve the character of such supply by removing the sources of pollution affecting it." This finding gave them authority to order changes under section 1254 G. C., which they did in the following language:

"BE IT ORDERED by the state board of health of Ohio, that the city water works company, of Pittsburgh, Pa., owning and operating the water works at Sebring, Ohio, shall install and have in operation prior to January 1, 1916, a water purification plant of a design satisfactory to the state board of health to purify the public water supply of Sebring."

Section 1257 G. C. provides that if this order was not acceptable to the city, village, corporation or owner affected thereby, such city, village, corporation or owner shall have the right of appeal to two referees who shall be reputable and experienced

sanitary engineers and if these referees cannot agree they shall choose a third engineer of like standing and the vote of the majority shall be final. My view of this section leads me to believe that it is the duty of the referees mentioned to determine two things in connection with this order: (1) Is it practicable to sufficiently improve the character of the present water supply by removing the source of pollution affecting it, and (2) if not, is the remedy ordered (a water purification plant of a design satisfactory to the state board of health) a reasonable one?

It will be noted that the statute provides:

> "The necessity and reasonableness of such order may be submitted to two reputable and experienced sanitary engineers, one to be chosen by such city, village, corporation or owner, and the other by the board who shall not be a regular employe. Such examiners shall act as referees. If the engineers so chosen are unable to agree, they shall choose a third engineer of like standing and the vote of the majority shall be final."

From this provision and a careful perusal of the above sections I am inclined to the view that the reasonableness of the order is to be determined by these engineers by the application of scientific principles to the situation before them, with due regard to a proper economy. In other words, they must, after determining that a remedy is necessary in a given instance, ask themselves if the remedy ordered by the board of health is a reasonable one from a scientific and economic standpoint, but they may, I think, give consideration to the cost of the remedy only when it is possible to make a choice of one from two or more remedies, either or any of which would bring about a proper result. In the case you refer to it does not appear that any suggestion has been made by any of the parties that some other less expensive but effective remedy can be found to correct the situation at Sebring other than the installation of a water purification plant.

This being so and it apparently being agreed that the board of health was right in finding "that the public water supply of the village of Sebring is impure and dangerous to health and that it is not practicable to sufficiently improve the character of such supply by removing the sources of pollution affecting it," I am of the opinion that the fact that the revenues received by the company may be insufficient to compensate the company for the expense of this improvement may not be taken into consideration in determining whether or not the order of the board of health is a reasonable one under section 1257 General Code. Very truly yours,

JOSEPH MCGHEE,
Attorney-General.

193.

LOCAL REGISTRAR OF VITAL STATISTICS—AUTHORIZED TO ISSUE BURIAL PERMITS ONLY FOR DEATHS OCCURRING WITHIN HIS OWN DISTRICT.

A local registrar appointed by the state registrar of vital statistics is only authorized to issue permits for burial for deaths occurring within the territory for which he has been appointed.

COLUMBUS, OHIO, April 16, 1917.

HON. J. E. MONGER, *State Registrar, Department of State Bureau of Vital Statistics, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your communication of March 19, 1917, in which you state:

"We are enclosing letter from Delmer Logue of Atwater township, Portage county.

"Will you kindly give us your interpretation of the law upon this matter? This is a question which is frequently asked us, and in the past it has been the custom to allow such procedure.

"We are in doubt about the legality of the matter, and would thank you for an opinion."

The communication from the local registrar of Atwater township, Portage county, Ohio, asks if it would be legal for a local registrar to issue burial permits for another township, when the death occurred in the other township and the undertaker lives in the township of the registrar. The reason assigned for the desire to issue the permit is that it would be a convenience to the undertaker, who would be saved many miles drive over bad roads to the office of the registrar of the township in which the death occured.

The statutes providing for the bureau of vital statistics will be found in sections 197 et seq. G. C.

Section 197 G. C. provides, among other things, that:

"Each city, village and township shall constitute a primary registration district."

Section 198 G. C. provides, among other things, that the secretary of state "shall enforce the provisions of this chapter thoroughly and uniformly throughout the state."

Section 201 G. C. provides that in villages the village clerk, and in townships the township clerk, shall be the local registrar, and that with the approval of the state registrar each local registrar shall appoint a deputy who in case of absence, illness or disability of the local registrar shall act in his stead.

Section 202 G. C. authorizes the township registrar, with the approval of the state registrar, when it is necessary for the convenience of the people in a township, to appoint one or more sub-registrars within portions of the township designated by the state registrar.

Section 204 G. C. provides:

"The body of a person whose death occurs in the state shall not be interred, deposited in a vault or tomb, cremated, or otherwise disposed of, or removed from or into a registration district, until a permit for burial, removal or other disposition shall have been properly issued by the local registrar of the registration district in which the death occurs. No such burial or removal permit shall be issued by any registrar until a complete and satisfactory certificate of death has been filed with him, as hereinafter provided."

Section 214 G. C. provides:

"Prior to any disposition of the body, the undertaker, or person acting as undertaker, shall obtain and file a certificate of death with the local registrar of the district in which the death occurred, and secure a burial or removal permit. He shall obtain the personal and statistical particulars required from the person best qualified to supply them and the signature thereto and address of his informant. He shall present the certificate to the attending physician, if any, or to the health officer or coroner, as directed by the local registrar, for the medical certificate of the cause of death, and other

particulars necessary to complete the record, as specified in the preceding two sections. He shall state the facts required relative to the date and place of burial, sign his name thereto with his address, and present the completed certificate to the local registrar, who shall then issue a permit for burial, removal, or other disposition of the body."

Section 217 G. C. provides:

"No sexton or person in charge of any premises in which interments are made shall inter, or permit the interment or other disposition of a body, unless it is accompanied by a burial, removal or transit permit, as herein provided. Each sexton, or person in charge of a burial ground, shall indorse upon the permit the date of interment and sign his name thereto.

"All permits so indorsed shall be returned to the local registrar of the district within ten days from the date of interment, or within the time fixed by the local board of health. He shall keep a record of all interments made in the premises under his charge, stating the name of the deceased person, place of death, date of burial, and name and address of the undertaker. Such record shall at all times be open to public inspection."

Section 222 G. C. provides among other things that each undertaker shall, without delay, register his or her name, address and occupation with the local registrar of the district in which he or she resides or may hereafter establish a residence.

Section 233 G. C. provides that local registrars shall strictly and thoroughly enforce the provisions of preceding sections *in their districts.*

Without any detailed discussion, it is apparent, from a mere reading of the sections constituting the scheme of the vital statistics law, especially section 204 G. C. supra, that the local registrars are empowered and authorized to perform their duties only in the districts for which they are appointed. Their jurisdiction, it is plainly evident, is limited by the confines of the particular territory for which they have been selected. It would cause interminable confusion if, merely to afford convenience for undertakers, permits might be issued indiscriminately without the district for which the local registrar was appointed. If the local registrar could issue a burial permit to an undertaker who had his place of business in the township of the local registrar, for the burial of a person who had died in one township, there would be nothing to prevent him issuing burial permits to the same undertaker and for the same reason of convenience, to any township that this particular undertaker might happen to be called to conduct funerals. The statutes themselves limit his jurisdiction to his own territory, and any other provision of the statutes, much less a strained construction of them, would cause confusion and probably break down the very system that was sought to be put in force.

It is therefore my opinion that the local registrar is limited in the granting of permits for burial to deaths occuring within the territory for which he has been appointed and in this particular case that the local registrar of Atwater township is without authority to issue a permit for burial in another township when the death occurred in the other township.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

194.

THE PLAN OF THE YOUNG MEN'S BUSINESS CLUB OF SPRINGFIELD FOR EMPLOYEES SAVING CLUB—DOES NOT REQUIRE SUPERVISION OF BANKING DEPARTMENT.

The plan set out in the attached inquiry does not show anything demanding or authorizing any supervision or interposition by the Banking Department.

COLUMBUS, OHIO, April 16, 1917.

HON. PHILLIP C. BERG, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—On March 15th, you addressed to this department the following request for an opinion:

> "A representative of the Young Business Men's Club of Springfield, Ohio, has made a request for a ruling by this department on the proposition of an Employees' Savings Club Plan which the club is desirous of inaugurating among the various factories in Springfield.
>
> "Data bearing on the organization and operation of the proposed plan are herewith enclosed.
>
> "Will you please render an opinion on the question as to whether or not there is any thing in the plan that this department could not approve under the banking laws.
>
> "We will thank you for a return of the enclosures with your opinion."

The proposed plan attached to your inquiry is as follows:

"EMPLOYEES SAVING CLUB PLAN.

"ORGANIZATION:—

"The name of the club should be the same as the factory in which it is organized. Its purpose is the systematic saving of a specified amount out of each pay envelope. Any officers may be elected by the members, but the one necessary officer is the club representative or cashier. It is his duty to receive the deposits of the members and act as their banker.

"OPERATION:—

"Each member of the club signs an order as follows:

"I hereby authorize the cashier of_____
_____
to deduct_____
from my pay envelope each pay and to deposit the same to my credit in the savings department of the_____Bank.

"It is understood that I may change or cancel this agreement at any time.
Number_____Name_____

"The club representative receives from the company's cashier on each pay day a check covering the amount withheld from the pay envelopes, together with a list of the depositors and the amount to be credited to each member. Three copies are made of this list, one for the company's cashier, one for the club representative, and one for the bank. The club representative takes the money, the list and the members' pass books to the bank where the entries are properly made. The pass books are made out in the name of the individual club members, and are kept under the joint care of the cashier

and the club representative. The bank pays the regular rate of interest direct to the depositor, crediting it on the pass book in the usual way.

"The following memorandum is inserted in each pay envelope of the club members:

"There has been deposited in_____Bank $_____to your credit making your balance on account $_____

"Signed_____

"A depositor may withdraw his money or any part thereof at any time by getting his bank book from the cashier and presenting it at the bank. On the other hand, the member may increase or decrease the amount withheld each pay day upon a written order at any time or at such times as the club by-laws designate."

The above plan might properly be described as a scheme for a voluntary association among employes of a business institution for the mutual encouragement of thrift among its members. It contains no element of compulsion, and no element of contract liability among the members in respect to entering into the organization, or continuing therein, or in withdrawing therefrom. Every act of every member is done upon the exercise of his own will, with no compulsion and no influence but the gentle influence and example of his fellow members. While a member has authorized his employer to make a deduction from his wages, that authority is entirely in his own control and may be withdrawn at any time without ceremony and without excuse. No penalty is attached to any act or any failure by any member; neither does any officer, agent or employe receive any compensation. Every cent of wages withdrawn from a member's pay check remains his own money, and while temporarily out of his control, yet with a string attached by which he pulls it back to himself whenever he cares to, and along with it its earnings.

The general authority of the superintendent of banks is indicative of the general jurisdiction of the banking department. It is found in section 711 G. C., which is as follows:

"The superintendent of banks shall execute the laws in relation to banking companies, savings banks, savings societies, societies for savings, savings and loan associations, savings and trust companies, safe deposit companies and trust companies, and every other corporation or association having the power to receive, and receiving money on deposit, chartered or incorporated under the laws of this state. Nothing in this chapter contained shall apply to building and loan associations."

We go, then, to the list of subjects control of which is provided for in said section to ascertain which, if any, includes the subject in hand. Those subjects are:

"banking companies, savings banks, savings societies, societies for savings, savings and loan associations, savings and trust companies, safe deposit companies and trust companies, and *every other corporation or association* having the power to receive, and receiving money on deposit, chartered or incorporated under the laws of this state. * * *"

The scheme in hand, if included in any of the above, would have to be designated as a "savings society" or a "society for savings," if these titles were used in a general descriptive sense. They are, however, used in the section to designate certain existing corporations. This association might with propriety be styled such "society for savings." Some of the sections of the chapter are acts and parts of acts passed sub-

sequently to the above, and provide for such control when it is a person, who engages in the business contemplated in the law, but nowhere is there any provision which reaches such a loose, voluntary and innocent association as this. It receives no money on deposit itself, but only encourages and assists its members to make such deposits in a bank already under the regulation of the department. It neither receives nor needs any authority from the laws to do any of the things projected. The only person or organization coming within the purview of the chapter is already under the control of the law. That is to say, the bank which is to receive the deposits is already under the control of your department. The employer of the members does nothing in the nature of financial transactions, except in co-operating to have each member pay in according to a direction of the member himself. The club representative, so-called, does no more than act as a messenger to carry the member's money to the bank. The bank in receiving it does nothing but what it does for every other depositor—takes his money and makes an entry in the passbook. The only circumstance that is different from that of an ordinary depositor in any sense is that a passbook is not handed back to the actual depositor and not kept in his possession. It is, however, in possession of his agent, and therefore constructively in his own.

Of course it would be possible for the employer and the club representative to combine and cheat the depositor. The latter, however, in this respect, is no worse off than any other person who commits the custody of his passbook to an agent. In fact he has protection which the ordinary person under such circumstances does not have, for the reason that it requires such combination with his employer, who is almost certain to be a responsible business person or company, and he has a check on the club representative in that every pay check which he receives notifies him of the amount deducted.

You are, therefore, advised that this proposition is entirely out of the contemplation of the statutes creating and controlling your department, that no necessity for such control exists, and that there is no reason, either substantial or technical, requiring any supervision by the banking department.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

195.

SECTION 2571 G. C.—AUTHORIZING TRANSFER OF MONEY FROM UNDIVIDED TAX FUND TO AN EXHAUSTED COUNTY FUND—NOT REPEALED BY SECTION 5649-3d—MAY NOT BE EXPENDED UNTIL APPROPRIATED BY COUNTY COMMISSIONERS UNDER SECTION 5649-3d—SECTION 2296 NOT APPLICABLE TO SUCH TRANSFER—AND SAME MAY BE MADE WITHOUT FILING PETITION IN COMMON PLEAS COURT.

1. *Though the provisions of section* 2571 *G. C., authorizing the county auditor and county treasurer, on direction of the county commissioners, to transfer moneys from the undivided tax fund to an exhausted county fund, are not repealed by implication, by the provisions of section* 5649-3d *G. C., moneys transferred to an exhausted county fund under the provisions of section* 2571 *G. C. are not available for expenditure until such moneys shall have been appropriated by the county commissioners in the manner provided by section* 5649-3d *G. C.*

2. *The provisions of sections* 2296 *et seq. G. C. do not apply to the particular transfer of funds authorized and provided for by section* 2571 *G. C., and the transfer of funds authorized by section* 2571 *G. C. may be effected without filing a petition in the court of common pleas for authority to make such transfer.*

COLUMBUS, OHIO, April 16, 1917.

HON. JAMES F. FLYNN, *Prosecuting Attorney, Sandusky, Ohio.*

DEAR SIR:—As previously acknowledged, I have your favor of March 12, 1917, asking opinion of this department, in which you say:

> "On June 20, 1916, an opinion was rendered to the bureau of inspection and supervision of public offices, being No. 1714, which recites as follows:
>
> " 'Generally speaking, the effect of the provision of section 5649-3d G. C. is to render the provisions of section 2571 G. C. inoperative.'
>
> "Does the above mean that when a fund is exhausted the commissioners cannot make an order authorizing the auditor and treasurer to transfer from undivided tax funds, to the fund so exhausted, the amount of money as provided in section 2571?
>
> "If you say that, according to the opinion above referred to, the commissioners still may transfer from the undivided tax funds, to, say, the general county road fund, is it necessary to file a petition in the common pleas court under section 2296, before the commissioners can authorize the auditor and treasurer to transfer such fund?"

The language quoted in your communication is found in opinion No. 1714, of my predecessor, Hon. E. C. Turner, addressed to the bureau of inspection and supervision of public offices under date of June 20, 1916.

In answering your first question it may be well to note briefly and in a general way the effect of various statutory provisions with respect to the distribution and expenditure of county moneys, prior to the enactment of section 5649-3d G. C., as a part of the Smith one per cent. law, so called. County moneys were then, as now, divided into particular *"funds,"* said funds representing the various particular purposes for which county tax levies were authorized to be made.

Section 5699 G. C., as it then read, provided in this respect as follows:

> "The county auditor shall carefully ascertain the net amount of taxes collected for each particular purpose. A specific fund shall not be used for

> any other purpose than that for which it was levied until such purpose has been satisfied. The amount collected from the tax on dogs shall be applied to indemnify loss by injury to sheep, so far as needed for that purpose."

All orders and warrants drawn pursuant to the same, calling for the payment out of county moneys, were likewise drawn against some particular county fund, and if there was money in the county treasury to the credit of the fund on which a warrant was drawn, such warrant was required to be paid; otherwise the county treasurer was required to endorse the same as not paid, for want of funds (Secs. 2675-2676 G. C.).

Section 2571 G. C., referred to in your communication, furnished a means of replenishing an exhausted county *"fund,"* by empowering the county commissioners by order entered on their journal, to authorize the county auditor and treasurer to transfer undivided tax moneys to such exhausted fund, in an amount not to exceed three-fourths of the amount estimated by the auditor and treasurer to belong to such fund. This section further provides that at the next semi-annual distribution of taxes the amount so transferred shall be deducted from the total amount found to be due such fund.

Section 2571 G. C. is still a part of the statutory law of this state and section 5649-3d G. C. does not, as I see it, affect an implied repeal of the provisions of this section, and when moneys are transferred to an exhausted county fund, under the provisions of section 2571 G. C., there would be money in the treasury to the credit of such fund, within the provisions of section 2675 G. C., as to a warrant drawn against such fund.

Section 5649-3d G. C., however, applied in its entirety, adds another requisite to that imposed by sections 2675 and 2676 G. C., and requires that county moneys to be available for expenditure should not only be in the county treasury to the credit of the proper fund, but should also be appropriated by the county commissioners to the objects for which the money in such fund is provided.

Said section 5649-3d G. C. provides as follows:

> "At the beginning of each fiscal half year the various boards mentioned in section 5649-3a of this act shall make appropriations for each of the several objects for which money has to be provided, from the moneys known to be in the treasury from the collection of taxes and all other sources of revenue, and all expenditures within the following six months shall be made from and within such appropriations and balances thereof, but no appropriation shall be made for any purpose not set forth in the annual budget nor for a greater amount for such purpose than the total amount fixed by the budget commissioners, exclusive of receipts and balances."

From the plain terms of this section, all expenditures shall be made from and within the appropriation made by the county commissioners at the beginning of the fiscal half year, and even though moneys are transferred to an exhausted county fund by proceedings under section 2571 G. C., such moneys would not legally thereby become available for expenditures; for though this money so transferred would then be in the treasury to the credit of such fund, such money would not stand to the credit of the appropriation account until thereafter appropriated at the beginning of the next fiscal half year, and until so appropriated, a warrant drawn against the moneys in such funds could not be legally honored for payment, even if such warrant could be legally issued at all by the county auditor, which to my mind is a proposition more than doubtful.

Though not clearly so stated in the opinion of my predecessor, above referred

to, it was doubtless in the sense indicated and required by the considerations herein noted that he used the language quoted in your communication.

In answering your second question, I do not deem it necessary to set out or to discuss at length the provisions of sections 2296 et seq. G. C., which empower the commissioners of a county or the corresponding officers of other political subdivisions to transfer moneys from one fund to another, or to a new fund created under the respective supervision of such officers, on authority first had from the court of common pleas on an application or petition to be filed in such court for the purpose.

It is sufficient, for the purpose of this opinion, to note that the scheme or plan with respect to the transfer of moneys from one legal fund to another, authorized and provided for by the provisions of sections 2296 et seq. G. C., is general in its scope, applying to all political subdivisions and to the moneys had by them in fund, while section 2571 G. C. is special in its nature, applying only to counties and to the particular situation therein provided for.

Under familiar rules of statutory construction applicable to the question at hand, I am of the opinion that the provisions of section 2571 G. C. are in nowise limited by the provisions of sections 2296 et seq., and that in effecting a transfer of funds under the provisions of section 2571 G. C. it is not necessary for the county commissioners to file a petition in the court of common pleas for authority to make the transfer therein provided for.

Very truly yours,
JOSEPH McGHEE,
Attorney-General.

196.

ROADS AND HIGHWAYS—STATE ROADS MUST BE MAINTAINED BY STATE HIGHWAY COMMISSIONER—COUNTY ROADS BY COUNTY COMMISSIONERS—TOWNSHIP ROADS BY TOWNSHIP TRUSTEES—COUNTY HIGHWAY SUPERINTENDENT HAS CHARGE AND SUPERVISION OF CONSTRUCTION, ETC., OF BRIDGES, HIGHWAYS AND CULVERTS—FOREGOING INCLUDES DRAINAGE.

State roads must be maintained by the state highway commissioner, county roads by the county commissioners, and township roads by the township trustees (Section 7464 G. C.) This includes the matter of drainage.

But the county highway superintendent has general charge and supervision of the construction, improvement, maintenance and repair of all bridges, highways and culverts, whether known as township, county or state highways (Section 7184 G. C.) This includes the matter of drainage.

COLUMBUS, OHIO, April 16, 1917.

HON. J. L. HEISE, *Prosecuting Attorney, Circleville, Ohio.*

DEAR SIR:—Your communication of March 20, 1917, in which you ask for certain information, was duly received. Said communication reads as follows:

> "I have the honor of calling upon you for information in regard to the drainage connected with a county road. Said road was built in Pickaway county in 1873. The plans and specifications called for drainage by the use of side ditches five feet in width on each side of said road.
>
> "All the drainage in question lies wholly in Monroe township and on the east side of said road. At the time this road was built the land on the east

side and all along the drainage now in question was owned by one man, the father of the two men now owning this land and questioning the rights of each other in said drainage. The father, while living, in connection with the road authorities, kept an open ditch along the east side of the road, which served as the drainage of his own land as well as that of the road.

"At the death of the father, this land was divided between these two sons, and the line dividing this land between them gave to each one a part of this drainage; hence, each owner knew at this time the relation that this drainage bore to his part of the land. This open ditch remained as the drainage for this land some time after it was divided. Then both of these owners entered into an agreement with the township trustees to put in tile in this ditch and close it. The cost of the tile and labor of putting them in was borne by these two owners and the township trustees jointly. The tile started near the residence of the upper tenant and carried the water along the land of both tenants and the road, until it emptied into a natural watercourse on the land of the lower tenant. The lower tenant put a culvert over this tile ditch for access to his land and to protect the tile ditch. In a few years the tile was found to be too small for the water it had to carry, became choked and filled, and refused to work. The culvert of the servient tenant broke down and was not rebuilt but he continued to cross over it in that condition and thus broke the tile beneath it, which helped to block the working of the tile. This lack of drainage by the tile caused a pond of water to form between the residence of the upper tenant and this road. The water remains in this pond for a long period at a time, covering a part of the house yard of the upper tenant, also soaks the road bed, but does not cross it. The lower tenant has completely filled up the open ditch and has built a wire fence crossing the east line of the road and enclosing a part of the land of this county road, but no part of the elevated road bed.

"The dominant tenant has applied to the county commissioners to have this ditch or drainage opened. The servient tenant threatens injunction and suit for damages if this drainage be opened. The dominant tenant also threatens the commissioners with suit for damages if the ditch be not opened.

"Whose official duty is it to open this ditch and what is the procedure —all the steps to be taken?

"As the dominant tenant is pressing this matter very hard, I should thank you very much for an early reply."

After studying your communication carefully, I am of the opinion that the matter in dispute has more to do with the private rights than it has to do with the rights of the public; that it has more to do with the property abutting upon the highway than with the highway itself, and that the answer to the matter therein set out would be more for the benefit of the owners of the abutting property than for the benefit of public officials. Of course this department has no jurisdiction whatever over private rights or private property.

You suggest that one party interested threatens an injunction proceeding, and the other threatens a suit for damages. As to which course is pursued, if either, this department has no interest or concern.

There is no statement made in your communication as to whether the public is suffering through an injury to the highway, due to the conditions existing as therein set out. But inasmuch as the public may owe the abutting property owners certain rights and duties in reference to the repair and maintenance of this drain, the question as to what public official has charge of the matter suggested by you is a proper one for this department to consider. In answering this question, it must be remem-

bered that the public highway includes not only the portion traveled, but also all that portion not traveled but lying within the bounds of the highway as originally laid out. With this in mind, let us consider the matter as to who has charge of the public roads of the state.

Section 7184 G. C. provides as follows:

> "The county highway superintendent shall have general charge, subject to the rules and regulations of the state highway department, of the construction, improvement, maintenance and repair of all bridges and highways within his county, whether known as township, county or state highways, and such county highway superintendent shall see that the same are constructed, improved, maintained, dragged and repaired as provided by law, and shall have general supervision of the work of constructing, improving, maintaining and repairing the highways, bridges and culverts in his county, subject, however, to the provision hereinafter made for the designation, by the state highway commissioner, of an engineer, other than the county surveyor, to have charge of state work in such county."

The provisions of this section apply not only to the traveled portion of the highways, but any portion of the highways as originally laid out. And if it is found necessary, for the preservation or maintenance of the highways for public travel, that drains be constructed, repaired and maintained, this also would come under the jurisdiction of the county highway superintendent.

Of course, in quoting section 7184 G. C., it is necessary also for us to have in mind the provisions of section 7464 G. C. In this section we find that the public highways of the state are divided into three classes, namely, state roads, county roads and township roads. The section further provides that the state roads shall be maintained by the state highway department, the county roads shall be maintained by the county commissioners, and the township roads shall be maintained by the township trustees. That is, the state highway department has general jurisdiction over the state roads, the county commissioners general jurisdiction over the county roads and the township trustees general jurisdiction over the township roads. But the general charge and supervision of the work of constructing, improving, maintaining and repairing the highways, bridges and culverts, whether known as township, county or state highways, are lodged in the county highway superintendent by the provisions of section 7184 G. C.

On the matter of drainage, I desire to call your attention to the provisions of section 7207 G. C., which in part provides as follows:

> "The county highway superintendent or any one acting under his authority, when authorized by the county commissioners or township trustees, may enter immediately:
>
> "1. Upon any lands adjacent to any of the highways in the county for the purpose of opening an existing ditch or drain, or for digging a new ditch or drain *for the free passage of water for the drainage of highways.* * * *."

This provision plainly evinces an intention upon the part of the legislature to place the question of drainage in the control of the county highway superintendent. But it will be noticed that this right given under said section is limited to this matter "for the free passage of water for the drainage of *highways.*"

You suggest that the servient tenement is not properly maintaining the drive-

way or approach leading from the public road to his premises. On this question I desire to call your attention to section 7212 G. C. This section reads in part as follows:

> "The owners or occupants of land shall construct and keep in repair all approaches or driveways from the public roads under the direction of the county highway department. * * *."

So that the county highway superintendent has charge and oversight of this matter of seeing that all approaches or driveways from the public roads to the premises of abutting property owners are so constructed and kept in repair as not to interfere with the rights of the public and also with any rights which the public might owe the abutting property owners.

Answering your question specifically, as to what public official has charge of the rights of the public in the matters set out in your communication, it is my opinion that the county highway superintendent has direct charge and oversight over the said matters.

In giving this opinion, however, I am not in any way attempting to settle the difficulties which have arisen between the adjoining abutting property owners, but merely the question as to what public official has direct charge and oversight of the matters in question, so far as they affect the public, or in so far as the public owes duties to the abutting property owners.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

197.

EXPENSES—INCURRED BY HEALTH OFFICER—IN SUPPLYING NURSE AND NECESSARY ARTICLES TO RESIDENT OF TOWNSHIP OUTSIDE OF VILLAGE WHEN QUARANTINED IN VILLAGE—MUST BE PAID BY VILLAGE.

When a resident of a township outside of a village is taken sick with a contagious disease while in said village and is duly quarantined, and the health officer furnishes nursing and necessary articles for such quarantined person, the bills for said nursing and other necessary articles, when properly certified by the health officer, and when such quarantined person is unable to make payment, by force of section 4436 G. C. must be paid by the village.

COLUMBUS, OHIO, April 16, 1917.

HON. C. M. CALDWELL, *Prosecuting Attorney, Waverly, Ohio.*

DEAR SIR:—In your communication of March 6, 1917, you ask for an opinion upon the following statement of facts:

> "Sometime ago a resident of Newton township, Pike county, was taken sick in the village of Piketon. The case was pronounced scarlet fever and quarantined by the health officer of the village of Piketon, who furnished medical assistance, nurse and certain necessary articles. The bills for nursing and for certain articles furnished were presented to the county commissioners, who asked my advice concerning payment of same, and I advised them to reject the bills for the reason that same were payable by the municipality of Piketon under the provisions of section 4436 of the General Code.

The parties interested asked me to write the attorney general's office and ask if there is not some way by which the county commissioners could legally pay these bills, their reason being that the village has no funds with which to pay."

Section 4436 G. C. provides:

"When a house or other place is quarantined on account of contagious diseases, the board of health having jurisdiction shall provide for all persons confined in such house or place, food, fuel, and all other necessaries of life, including medical attendance, medicine and nurses, when necessary. The expenses so incurred, except those for disinfection, quarantine, or other measures strictly for the protection of the public, when properly certified by the president and clerk of the board of health, or health officer where there is no board of health, shall be paid by the person or persons quarantined, when able to make such payment, and when not by the municipality in which quarantined."

This section makes it the duty of the board of health to provide the matters and things set forth in the section for all persons confined in the quarantined house, and makes the expense of furnishing the supplies, etc., referred to in your question, chargeable against the person or persons quarantined, when they are able to make such payment; but further provides that in the event they are unable to make such payment, such expenses must be a charge against the municipality.

Section 4451 G. C. provides:

"When expenses are incurred by the board of health under the provisions of this chapter, upon application and certificate from such board, the council shall pass the necessary appropriation ordinances to pay the expenses so incurred and certified. The council may levy and set apart the necessary sum to pay such expenses and to carry into effect the provisions of this chapter. Such levy shall, however, be subject to the restrictions contained in this title."

This section is full authority for council to provide for the payment of all proper expenses incurred and certified under the board of health chapter.

Dustin, J., in Meily v. City of Columbus, 6 O. C. C. (N. S.) 398, construing section 2128 of the Revised Statutes, which is section 4436 General Code, now under consideration, uses the following language:

"If dealers were required to wait for a written contract and the passage of an ordinance appropriating the money before furnishing supplies under such circumstances with any assurance of payment, the quarantined family might die of starvation or of cold.

"If food and fuel were not forthcoming as needed, the family would be justified in breaking the quarantine in order to solicit or earn a living, thus spreading infection throughout the city.

"The very emergencies of the case demand prompt and effective action upon the part of the board of health, without awaiting the slow processes of the law required in other matters."

While this case has no direct bearing upon the question under discussion, since the question raised there was whether a petition which pleads an oral contract with

the board of health, for the furnishing of necessaries to a family quarantined, was good as against a general demurrer, still it does show the necessities of cases arising under these statutes.

If the resident of Newton township, spoken of in your inquiry, was furnished the supplies and things stated, and the bill for same was properly certified to by the health officer, then whenever the quarantined person is not able to pay said bill it must be paid by the municipality in which the quarantine is maintained.

There is no provision for charging such payment back to the township or municipality in which the quarantined person might reside. The only time there can be such a charge back is when a person with a contagious disease is quarantined and is a legal resident of another county of the state and is unable to pay such expense. Then, under the provisions of section 4438 G. C., such expense shall be paid by the county in which he has a legal residence, if notice and a sworn statement of the amount of such expense are sent to the infirmary directors, now the county commissioners, of such county, within thirty days after the quarantine in such case is discharged. There is no such provision for a resident of a township outside of a municipality having his bill, incurred in quarantine in the municipality, charged back against the township.

In 18 O. C. C. (N. S.) at p. 196, there will be found a case decided by the circuit court of Summit county, to wit, Village of Barberton v. Frederick Lohmers, indicative of how the courts looked upon the provisions of section 2128, R. S., which is now section 4436 G. C. This was an action to recover compensation for medical services to quarantine smallpox patients alleged to be unable to pay therefor themselves, within the meaning of section 2128 R. S.

The board of health of the village was properly apprised of the situation, but failed to take any action, and a physician rendered medical aid to the quarantined smallpox patient. The court held that he was entitled to recover compensation from the municipal corporation.

Judge Henry, at p. 197, indicates that he believes that the statute of its own force imposes a legal obligation underlying the prescribed duties of boards of health in such cases, and that no affirmative action of the board of health was a condition precedent to the bringing of an action by the physician. He quotes from Trustees, etc., v. Ogden, 6 Ohio 23, in which it was held that:

> "Overseers of the poor of the proper township are bound to support a casual pauper, if found within the limits of the township, and requiring support";

and that:

> "Where, after notice the overseers of the poor refuse to provide for a pauper, an individual furnishing a necessary supply, may recover the amount in an action against the township."

Judge Henry further says:

> "In that case the underlying legal obligation of the township rested on a meager footing of express statutory provision, reinforced, however, by the inherent urgency of the cases provided for."

Here we have a statute which needs no construction, but plainly provides that when the quarantined person is unable to pay for certain supplies, they shall be a charge against the municipality.

I can find nothing in the statutes which would in any way authorize this bill to

be a proper or legal charge against the county commissioners or the county. The village must take some steps to pay this claim, just the same as they would be compelled to take steps to provide for the payment of any other legal demand against said village.

Very truly yours,
JOSEPH McGHEE,
Attorney-General.

198.

APPROVAL—FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN SANDUSKY COUNTY.

COLUMBUS, OHIO, April 16, 1917.

State Highway Department, Columbus, Ohio.

GENTLEMEN:—I have your communication of April 11, 1917, in which you ask my approval of the following final resolutions:

"Sandusky county—Sec. 'Q' of the Sandusky-Clyde road, Pet. No. 2891, I. C. H. No. 276.

"Sandusky county—Sec. 'r' of the Sandusky-Clyde road, Pet. No. 2891, I. C. H. No. 276.

"Sandusky county—Sec. 'r' of the Sandusky-Clyde road, Pet. No. 2891, I. C. H. No. 276."

I have examined carefully the resolutions attached to your communication and find them correct in form and legal. I am therefore returning the same with my approval endorsed thereon.

Very truly yours,
JOSEPH McGHEE,
Attorney-General.

199.

SENATE—WITHOUT POWER TO ALLOW OFFICERS OR EMPLOYES—ADDITIONAL COMPENSATION FOR EXTRA SERVICES GENERALLY—NOR FOR EXTRA SERVICES WITHIN THE SCOPE OF THEIR DUTIES—SENATE BILL No. 56 A NULLITY.

The senate is without power to allow to any of its officers or employes compensation additional to that initially fixed for "extra services" generally, nor even for specific extra services within the scope of their several official duties or employments.

COLUMBUS, OHIO, April 17, 1917.

HON. W. S. PEALER, *Clerk of Ohio Senate, Columbus, Ohio.*

DEAR SIR:—I have your letter of April 4, 1917, enclosing copy of senate resolution No. 56, passed by the senate of the eighty-second general assembly, which is as follows:

"S. R. No. 56.

"Mr. Kennedy offered the following resolution:

"Relative to compensation of employees of the senate.

"RESOLVED, That the custodians of cloak room, doorkeepers, committee room attendants, and porters be allowed an additional sum of $1.50 each per day, the assistant postmaster and pages an additional sum of $1.00 each per day, with the exception of Fay Scobey, who shall receive $1.50 per day for each day during the session of the 82nd general assembly, as payment for additional services rendered during the session, and be it further

"RESOLVED, That the clerks, sergeant-at-arms, telephone attendants, assistant bill clerk and stenographers shall be paid the sum of $50.00 each for extra services rendered the senate of the 82nd general assembly.

"Said sum of $50.00 not to be paid to any clerk or sergeant-at-arms retained permanently in the employ of the senate of the 82nd general assembly, to be paid on voucher signed by the clerk of the senate."

Concerning this resolution, you request my opinion as follows:

"The auditor of state has raised the question of the legality of the resolution and has not issued warrants therefor although I have certified the pay roll covered by said resolution to said auditor's office.

"Will you kindly give me a ruling as to the legal status of said resolution?"

The question which you submit can not be answered without additional information which I have obtained from the journals of the senate.

On Monday, January 1, 1917, the first day of the session of the 82nd general assembly, senate resolution No. 9 was adopted. It provided in substance as follows:

"Resolved, that the following named persons be appointed by the senate to the places designated:

"Stenographers (Here follow the names of nine persons).

"Doorkeepers (Here follow the names of six persons).

"Custodians of cloak room (Here follow the names of three persons).

"Telephone attendants (Here follow the names of two persons).

"Assistant Postmaster (Here follows the name of one person).

"Bill service (Here follows the name of one person).

"Committee room attendants (Here follow the names of four persons).

"Pages (Here follow the names of four persons).

"Said stenographers to be paid for their services $5.00 a day each, telephone attendants $5.00 a day each, custodian of the cloak room, doorkeepers, committee room attendants and bill service $3.50 a day each, assistant postmaster $4.00 a day and pages $2.50 a day each."

On the same day senate resolution No. 8 was passed, providing for the appointment of two additional sergeant-at-arms.

On the same day senate resolution No. 6 was passed, authorizing the lieutenant governor to appoint one stenographer and one page, their compensation to be the same as that of the stenographers and pages of the senate, and on the same day the president of the senate appointed two persons, one as stenographer and the other as page, in compliance with the resolution.

On Tuesday, January 9, 1917, another page was appointed by the senate, his compensation to be the same as that paid to other pages of the senate (senate resolution No. 20).

On Monday, January 15, 1917, the resignation of one of the custodians of the

cloak room was noted, and by senate resolution No. 25 his successor was appointed and the compensation of such successor fixed the "same as that of the other custodians of cloak room."

On Thursday, January 18, 1917, by senate resolution No. 27, a person was appointed as assistant bill clerk, and his compensation was fixed at "the same as that fixed by law for other clerks of the senate."

On Thursday, January 25, 1917, a person was appointed as porter in the senate and his compensation fixed at the rate of $3.50 per day (senate resolution No. 31).

I have not traced the matter further as I assume that other porters were subsequently employed and that possibly there were other changes in the official force of the senate; nor have I noted the initial election of the regular force of clerks and statutory sergeants-at-arms, which occurred of course on the first day of the session.

It is sufficient to note, as the result of the transactions above described, that the various employes referred to in senate resolution No. 56 were all appointed or elected early in the session.

The printed copies of the daily senate journal, which have been furnished me, stop with that of Saturday, March 10, 1917, on which date an adjournment was taken to Tuesday, March 20, 1917. At that time senate resolution No. 56 had not been adopted. I assume, therefore, that senate resolution No. 56 was adopted not earlier than Tuesday, March 20, 1917, which was substantially at the close of the session of the eighty-second general assembly.

According to its express terms, senate resolution No. 56 allows pay for additional services "for each day during the session of the eighty-second general assembly" to certain employes, and to others allows the payment of "$50.00 each for extra services rendered;" from all of which the inference clearly follows that the senate has in this resolution made an effort to allow compensation to certain of its officers and employes for past services, in addition to the compensation which officers and employes were entitled to receive according to the terms of the resolutions and provisions of law applicable thereto at the time of their appointment. This the senate cannot lawfully do.

Insofar as clerks and sergeant-at-arms and their assistants are concerned, the compensation of such officers of the senate is regulated by section 51 G. C., as amended 106 O. L. 14. This section provides in part that:

> "The clerks, assistant clerks, sergeant-at-arms and the first, second and third assistant sergeant-at-arms of the senate and house of representatives shall each be paid five dollars for each day's attendance during the session. * * *."

By virtue of this section the senate is without power to determine the compensation of clerks, assistant clerks and sergeants-at-arms named in this section. It may create and fill the positions, but the compensation attaching to the positions is provided by law and is a matter over which the senate has no control.

As to other employes, the matter is regulated by section 56 G. C. as amended 106 O. L. 13, as follows:

> "The compensation of assistant sergeant-at-arms, other than those mentioned in section 51, and the employees of either house, shall be fixed by resolution of such house and not changed during the term for which fixed."

The meaning and effect of this section are so plain as to require no comment on my part.

I presume that said resolution No. 56 must have been adopted in the belief that, notwithstanding the statutes above referred to, the senate had the power to make

additional allowances for "extra services," by which I presume is meant services in addition to what the senate considered a reasonable and ordinary amount of service from each employe. In my opinion, however, the senate has no authority to evade the statutes in this way. The resolution shows on its face that the senate did not contemplate particular extra services, for it allows additional compensation to certain of its employes for each day during the session of the assembly.

No more palpable violation of section 56 G. C. could be imagined than this, even if the senate actually had the power to pay for specific extra services. But in my opinion the senate is without power to allow pay for extra services to its officers and employes. The compensation fixed by statute or by the initial resolution is deemed to be in full of all services which the senate may exact of them within the scope of their respective employments. There is nothing on the face of the resolution to show that the extra services therein referred to are not services within the scope of the employments of the various officers and employes therein referred to.

My opinion is, therefore, that senate resolution No. 56 is a nullity.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

200.

APPROVAL—CONTRACT BETWEEN THE AMERICAN SEATING COMPANY AND OHIO BOARD OF ADMINISTRATION AND BOND TO SECURE SAME.

COLUMBUS, OHIO, April 18, 1917.

Ohio Board of Administration, Columbus, Ohio.

GENTLEMEN:—I have examined the contract entered into on the 28th day of March, 1917, between The American Seating Company, a New Jersey corporation, and your board, for the furnishing of 5,800 out-door chairs for the live stock exhibit building located on the state fair grounds at Columbus, Ohio, and the bond to secure said contract, and I find the same to be in compliance with law and have approved the same.

I have this day filed in the office of the auditor of state the contract and bond and have turned over to Mr. Harry C. Holbrook, your architect, the balance of the papers submitted.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

201.

CITY COUNCIL—POWERS LEGISLATIVE ONLY, IN REGARD TO LITIGATION—MUNICIPALITY MAY COMPROMISE CLAIMS FOR DAMAGES—AUTHORITY VESTED IN SERVICE DIRECTOR AND CITY SOLICITOR TO USE CERTAIN FUND TO COMPROMISE CLAIMS FOR DAMAGES—NOT DELEGATION OF LEGISLATIVE POWER.

1. *The powers of the city council with respect to municipal litigation are legislative only in character.*

2. *A municipality has the right to compromise or settle disputes or damage claims, which is inferred or implied from the right to sue or be sued or to contract and be contracted with.*

3. *The vesting of authority in the director of public service with the approval of the city solicitor to use a certain definite fund for the purpose of settling or compromising any and all claims against the city arising out of a certain street improvement is not a delegation of legislative power but amounts merely to the authorization of the performance of purely administrative functions.*

COLUMBUS, OHIO, April 19, 1917.

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

GENTLEMEN:—Under date of March 6, 1917, you submitted for my opinion the following request:

> "The electors voted for the issuing of bonds for the improvement of certain streets. The council passed an ordinance for the issue of said bonds, section 4 of which reads as follows:
>
> " 'Ordinance 287-1916. Section 4. The proceeds from the sale of said bonds, except the premium and accrued interest thereon, shall be credited to a fund for the improvement aforesaid and shall be paid out and expended upon the order of the director of public service, and shall be expended by said director of public service for the purpose specified in section 1 of this ordinance, which purposes shall be deemed to include the purchase of the necessary material and equipment to properly carry on said work and to include the purchase of said property without condemnation proceedings filed in court.' (Passed June 27, 1916.)
>
> "The city council proposes to enact an ordinance, section 2 of which reads as follows:
>
> " 'Section 2. That all claims for damages resulting therefrom shall be judicially inquired into after the completion of the proposed improvement; and that the city solicitor be, and he is hereby authorized and directed to institute proceedings in a court of competent jurisdiction to inquire into such claims, after the completion of the proposed improvement; provided, however, that at any time prior to the institution of the proceedings hereinabove authorized, the director of public service, with the approval of the city solicitor may, and said director, with such approval hereby is authorized to settle or compromise any and all claims against the city directly or indirectly arising because of said improvement, and the said director is authorized and directed to pay the amount of such settlements or compromises, including judgments in the proceedings above authorized, and all the expenses incident thereto, out of the funds provided for said improvement by ordinance 287-1916, passed June 27, 1916; and provided further that the authority herein conferred shall be construed as additional to and not as limiting that heretofore conferred on the said director of public service by said ordinance 287-1916.'

"The question arises, whether the city council may delegate to the director of public service, with the approval of the city solicitor, the authority to settle or compromise any and all claims against the city directly or indirectly arising because of said improvement."

The request that you submit makes necessary a discussion and determination of the character and extent of the powers and duties of the council, director of public service and solicitor of a municipality.

The following sections and parts of sections of the General Code contain the provisions of law relating to the powers and duties of the council of a city which are applicable to the particular question.

"*Section* 4206. The legislative power of each city shall be vested in, and exercised by a council, * * *"

"*Section* 4211. The powers of council shall be legislative only, and it shall perform no administrative duties whatever and it shall neither appoint nor confirm any officer or employe in the city government except those of its own body, except as is otherwise provided in this title. All contracts requiring the authority of council for their execution shall be entered into and conducted to performance by the board of officers having charge of the matters to which they relate, and after authority to make such contracts has been given and the necessary appropriation made, council shall take no further action thereon.

"*Section* 4224. The action of council shall be by ordinance or resolution, * * *"

"*Section* 4240. The council shall have the management and control of the finances and property of the corporation, except as may be otherwise provided, and have such other powers and perform such other duties as may be conferred by law."

It is clear from a perusal of the provisions of the foregoing sections that as a general proposition it was the intention of the legislature to vest city councils with legislative power only. As will be noted, provision is made that they shall perform no administrative duties whatever, except when the law provides so specifically. Hence, in ascertaining the bounds within which a city council may act it is essential that we bear in mind two propositions, viz.:

1. Does the particular act involve the exercise of legislative power or executive power.

2. If the act in question is executive in character, has the council been vested with authority to do that particular thing?

The following part of section and sections of the General Code provide as follows:

"*Section* 3615 *G. C.* Each municipal corporation shall be a body politic and corporate, which shall have perpetual succession, may use a common seal, sue and be sued, * * *"

"*Section* 3616 *G. C.* All municipal corporations shall have the general powers mentioned in this chapter, and council may provide by ordinance or resolution for the exercise and enforcement of them."

"*Section* 4308 *G. C.* When required so to do by resolution of the council, the solicitor shall prosecute or defend, as the case may be, for and in behalf of the corporation, all complaints, suits and controversies in which the corporation is a party, and such other suits, matters and controversies as he shall, by resolution or ordinance, be directed to prosecute, but shall not be required to prosecute any action before the mayor for the violation of an ordinance without first advising such action."

The preceding sections in effect authorize the council of a city to provide by ordinance or resolution for the exercise and enforcement of the power to sue and be sued and to provide by resolution or ordinance that the city solicitor shall appear on behalf of a municipality in municipal suits, matters and controversies. These powers are certainly legislative in character as they refer to the making of laws in the form of ordinances and resolutions that are to govern the matter of municipal litigation. An investigation of the Code generally does not reveal any provision that authorizes a city council to exercise administrative functions in litigation matters nor can that right be inferred from any express provision.

The power of a municipality to compromise or settle disputes or damage claims is inferred or implied from the right to sue or be sued or to contract or be contracted with and the authorities seem to be practically in unison on this point.

> "Unless forbidden by charter or general law applicable a municipal or other public corporation has power to settle and compromise disputed claims in its favor or against it before or after suit has been begun thereon. The capacity to contract and be contracted with or to sue and be sued gives the implied power to settle disputed claims, controversies and matters in litigation."
>
> McQuillin on municipal corporations, section 2479.
> Quinby v. Cleveland, 16 O. F. D. 583, 9 O. L. R. 313.
> Dillon on municipal corporations, 5th edition, section 821-822.

Pertinent sections of the General Code are as follows:

> "*Section* 4246. The executive power and authority of cities shall be vested in a * * * solicitor, director of public service, * * *"
>
> "*Section* 4324. The director of public service shall manage and supervise all public works and undertakings of the city, except as otherwise provided by law, and shall have all powers and perform all duties conferred upon him by law. He shall keep a record of his proceedings, a copy of which, certified by him, shall be competent evidence in all courts.
>
> "*Section* 4325. The director of public service shall supervise the improvement and repair of streets, avenues, alleys, lands, lanes, squares, wharves, docks, landings, market houses, bridges, viaducts, aqueducts, sidewalks, play grounds, sewers, drains, ditches, culverts, ship channels, streams and water courses, the lighting, sprinkling and cleaning of public places, the construction of public improvements and public works, except those having reference to the department of public safety, or as otherwise provided in this title.
>
> "*Section* 4326. The director of public service shall manage municipal water, lighting, heating, power, garbage and other undertakings of the city, parks, baths, play grounds, market houses, cemeteries, crematories, sewage disposal plants and farms, and shall make and preserve surveys, maps, plans, drawings and estimates. He shall supervise the construction and have charge of the maintenance of public buildings and other property of the corporation not otherwise provided for in this title. He shall have the management of all other matters provided by the council in connection with the public service of the city."

It is apparent that under section 4246 supra that the solicitor and director of public service are vested with the executive power and authority of the city in so far as their particular powers and duties extend. Section 4308 supra charges the

solicitor with the duty and vests him with the power of representing the corporation in all suits, matters and controversies when required so to do by the council. He is, in other words, the legal officer of the corporation and is the proper party to represent it in all legal matters. Sections 4324, 4325 and 4326, supra, set forth the powers and duties of the director of public service that are applicable to the matter here in question. The provisions of the last mentioned sections indicate clearly that the director of public service performs the executive or administrative functions of the city in regard to those matters which refer to what is known as the public service of the city and under this head is classed a street improvement.

In view of the foregoing, the conclusion necessarily follows that the exercise of the power of a municipality to sue and be sued and the corollary right to compromise and settle disputes or damage claims involves the exercise of both legislative and executive authority. The rule is general that legislative power cannot be delegated by a legislative body to any other body or authority. Hence, it is essential to determine what acts or what procedure with respect to the settlement of damage claims are legislative and what are administrative or executive. It is often difficult to define the line which separates legislative power to make laws from the executive power which administers or executes the laws. Difficulty arises especially in determining what authority or discretion may be conferred upon a body other than the legislative without contravening the principle stated above that legislative power cannot be delegated.

The general principle governing the question of delegation of legislative power has been well stated by Ranney, Judge, in C. W. & Z. R. R. Co. v. County Commissioners, 1 O. S. 88, in the following language, which has been often cited in many jurisdictions:

> "The true distinction, therefore is, between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made."

Applying the rule of law as laid down by Judge Ranney to the fact of the particular case, we find that the council acting in its legislative capacity has passed an ordinance authorizing the issue of bonds to provide funds to be used in paying the cost and expense of making a certain improvement; that the amount of money received from the sale of said bonds is the extent to which the officers authorized to have said improvement made may go. We further find that the director of public service and the city solicitor are authorized to settle or compromise any and all claims against said city arising out of said improvement; that said director is authorized and directed to pay the amount determined upon out of the fund which has been appropriated for said improvement. We take it then that the council has vested in the director of public service, who represents the city in an administrative capacity in the exercise of its functions in the way of improving streets, and in the city solicitor, who represents it at all times in legal matters, the authority to exercise discretion in the compromise or settlement of damage claims arising out of a certain improvement, but limited, however, to the extent of the amount of money appropriated for that purpose. It seems clear therefore that the authority vested in these last two mentioned officials does not amount to a delegation of legislative power for they are not authorized to make any laws but are merely authorized to exercise discretion in the execution of the law which the legislative body has made.

In the case of City of Akron v. Dobson, 81 O. S., 66, at pages 76 and 77 the court

uses language which is illustrative of the provisions of law above stated and which is as follows:

> "Prior to the adoption of the municipal code of 1902, the city council was an administrative, as well as a legislative body, and one of the reforms contemplated by the adoption of the new code was to make its powers legislative only. * * * The council provides the money for carrying on the government, either by a levy of taxes, or an issue of bonds, and it is proper that it should have some control over the expenditures, but considering these sections in the light of the purpose of the code we think their requirements are met by an ordinance making an appropriation and stating generally the purpose for which it is made, and authorizing the directors to enter into contracts to effect that purpose. If the directors do not have or retain the confidence of the council, it is in the power of the council to be more specific."

I am therefore of the opinion that the vesting of authority in the director of public service with the approval of the city solicitor to use a certain definite fund for the purpose of settling or compromising any and all claims against the city arising out of a certain street improvement, is not a delegation of legislative power but amounts merely to the authorization of the performance of purely administrative functions.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

202.

UNDER SEC. 7198 G. C.—APPROVAL OF COUNTY COMMISSIONERS SHOULD BE GIVEN BEFORE THE EMPLOYMENT OF LABOR AND PURCHASE OF MATERIAL BY COUNTY HIGHWAY SUPERINTENDENT. MATERIALS, ETC., MAY BE PURCHASED BY COUNTY HIGHWAY SUPERINTENDENT UNDER SEC. 7198 WITHOUT CERTIFICATE OF AUDITOR AS PROVIDED FOR IN SEC. 5660—AUDITOR MUST CERTIFY THAT MONEY IS IN TREASURY TO THE CREDIT OF THE FUND FROM WHICH IT IS TO BE DRAWN, BEFORE COMMISSIONERS MAKE ORDER TO PAY SUCH BILLS. COUNTY HIGHWAY SUPERINTENDENT MAY PURCHASE MATERIALS FOR ROAD REPAIR GENERALLY—NOT LIMITED TO SINGLE CONTRACT UNDER SEC. 7198.

1. *Under the provisions of section* 7198 *G. C., the county highway superintendent may initiate certain plans and measures which he desires to carry out, but before he executes these plans and measures he must secure the approval of the county commissioners.*

2. *Under the provisions of said section the county highway superintendent may enter into contracts for the employment of labor and the purchase of material without the the county auditor filing his certificate as provided for in section* 5660 *G. C. But before the county commissioners make an order for the payment of the bills so made by the county highway superintendent, under the provisions of said section* 7198 *G. C., the county auditor would have to certify that the money is in the treasury to the credit of the fund from which it is to be drawn under the provisions of section* 5660 *G. C.*

3. *The powers granted the county highway superintendent under said section* 7198 *G. C. are not limited to a given contract or improvement, but are given to enable him to perform the general duties of keeping the roads and bridges of the community in repair.*

COLUMBUS, OHIO, April 19, 1917.

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

GENTLEMEN:—I have your communication of March 22, 1917, in which you ask for certain information therein set out. Your communication reads as follows:

> "We respectfully request your written opinion upon the following questions:
>
> (1) Should the approval mentioned in section 7198 General Code (Supplement) precede or follow the purchase of material, or the employment of labor made by the county highway superintendent under the provisions of said section?
>
> (2) Where a purchase of material is made by the county highway superintendent under the provisions of section 7198 General Code, is the certificate of the county auditor, under the provisions of section 5660 General Code, necessary?
>
> (3) May the county highway superintendent under section 7198 General Code purchase material for general road repairs, or is he limited to the purchase of material for a given improvement?

The section about which you make inquiry is section 7198 G. C., which section reads as follows:

"Section 7198. The county highway superintendent may, with the approval of the county commissioners or township trustees, employ such laborers, teams, implements and tools, and purchase such material as may be necessary in the performance of his duties."

I will first attempt to answer the question which is contained in the first proposition set out in your communication, which question reads as follows:

"1. Should the approval mentioned in section 7198 General Code (supplement), precede or follow the purchase of material, or the employment of labor made by the county highway superintendent under the provisions of said section?"

In order to arrive at the answer to your first question, we must consider the accepted meaning of the term "approval." The dictionaries define "approve" as follows:

"To pronounce good, proper or legal; give sanction to, as by official act; ratify, confirm; form or express a favorable judgment concerning."

It will be noted that section 7198 G. C. reads:

"The county highway superintendent may, with the approval of the county commissioners or township trustees, employ, etc."

It does not say that:

"The county highway superintendent may employ such laborers, teams, implements and tools * * * as may be necessary in the performance of his duties,"

which action of the county highway superintendent shall afterwards be approved by the county commissioners; but he may, "with the approval of the county commissioners * * * employ." Thus the approval of the county commissioners is, to say the least, concurrent with the act of employment or purchase by the county highway superintendent.

In other words, the county highway superintendent initiates plans, measures and programs which he desires to follow. Then the county commissioners approve them, if they so see fit to do; after which the county highway superintendent executes the said plans or measures.

Hence, answering your inquiry specifically, it is my opinion that the approval mentioned in section 7198 G. C. precedes the purchase of material and the employment of labor by the county highway superintendent. This is in harmony with the finding of my predecessor, Hon. Edward C. Turner, in opinion No. 1361, found in vol. 1, p. 458, opinions of the attorney-general for 1916.

But I might say in passing that if the county highway superintendent employed labor, etc., and purchased material without the approval of the county commissioners, and the county commissioners afterwards should see fit to place their O. K. upon the acts of the county highway superintendent and allow the bills so made by him, the acts of the county highway superintendent could be considered as having the approval of the county commissioners from the beginning.

This order of the county commissioners made after the acts of the county highway superintendent would be what is called in legal phrase a *nunc pro tunc* order, that is, it would be an order made after the acts done, which would have the force and effect of an order made before. But the statute contemplates in my opinion

that the approval should be given before the employment of labor and the purchase of material, and county commissioners should not adopt the course of giving their approval and consent after the county highway superintendent has acted. And what is said of the county commissioners of course also applies to the township trustees.

The second question contained in your communication is as follows:

> "2. Where a purchase of material is made by the county highway superintendent under the provisions of section 7198 General Code is the certificate of the county auditor, under the provisions of section 5660 General Code, necessary?"

It will be noted that this question has to do with not only the provisions of section 7198 G. C., but also with the provisions of section 5660 G. C. Section 5660 G. C. in part reads as follows:

> "The commissioners of a county, the trustees of a township and the board of education of a school district, shall not enter into any *contract, agreement or obligation* involving the expenditure of money, or pass any resolution or order for the *appropriation* or *expenditure* of money, unless the auditor or clerk thereof, respectively, first certifies that the money required for the payment of such obligation or appropriation is in the treasury to the credit of the fund from which it is to be drawn, etc."

It will be noted that this section naturally divides itself into two parts:

1. The commissioners of a county, the trustees of a township and the board of education of a school district, shall not enter into any *contract, agreement or obligation* involving the expenditure of money, unless the auditor or clerk thereof first certifies that the money is in the treasury, etc.

2. The commissioners of a county, the trustees of a township and the board of education of a school district, shall not pass any resolution or order for the *appropriation* or *expenditure* of money, unless the auditor or clerk thereof certifies that the money is in the treasury, etc.

Your question has to do with this: Is it necessary for the county auditor to file his certificate to the effect that the money is in the treasury, before the county highway superintendent may enter into a contract for the employment of labor or the purchase of material?

It will be noted that section 5660 G. C. makes no provision for any other officials than county commissioners, township trustees and boards of education. So that it is my opinion that it is not necessary that the auditor or clerk certify that money is in the treasury to the credit of the proper fund, before the county highway superintendent can enter into the contracts provided for in section 7198 G. C.

But it will be noted that section 5660 G. C. provides also that the commissioners of the county shall not make an order for the expenditure of money unless the auditor certifies that the same is in the treasury to the credit of the fund from which it is to be drawn.

Hence, when the bills which are made, due to the contracts of the county highway superintendent, are presented to the county commissioners for payment, said county commissioners could not order said bills paid until the auditor certifies that the money is in the treasury.

Therefore, answering your second question specifically, it is my opinion that the county highway superintendent can enter into contracts provided for in section 7198, without the certificate of the county auditor, but the county commissioners can not make the order for the payment of these bills so made by the county highway superintendent, until the county auditor certifies that the money is in the treasury to the credit of the proper fund.

The third question in your communication reads as follows:

> "(3) May the county highway superintendent under section 7198 General Code, purchase material for general road repairs, or is he limited to the purchase of material for a given improvement?"

It seems that the provisions of section 7198 G. C. refer in general to the duties of the county highway superintendent. These duties are set out in part in sections 7192, 7193, 7196 and 7197 G. C. It will be seen that under the provisions of these sections no particular work or improvement is contemplated. For instance, in section 7192 G. C.:

> "The county highway superintendent shall keep the highways of the county at all times in good and suitable conditions for public travel. He shall generally supervise the construction, improvement, maintenance and repair of the bridges and culverts on the highways of the county, the cost of which shall be borne by the county, unless otherwise provided by law."

Section 7193 G. C. provides in part:

> "The county highway superintendent shall cause such highways, bridges and culverts to be kept free from obstructions by snow or otherwise," etc.

Section 7196 G. C. provides that he shall erect suitable sign-posts and erect substantial fences along winding grades.

From all these provisions I am of the opinion that section 7198 G. C. does not contemplate any particular improvement or any particular work, but contemplates generally the work that the county highway superintendent has to do.

So that answering your third question specifically, I would say that the county highway superintendent is not limited to the purchase of material for any given improvement, but that he can, with the approval of the county commissioners, employ labor and teams and purchase material he may need from time to time to enable him to perform the duties which are set out in the above named sections, as well as in other sections of the General Code.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

203.

APPROACHES AND DRIVEWAYS—COST OF CONSTRUCTING SAME NOT TO BE INCLUDED IN ESTIMATE OF COST OF CONSTRUCTING AND REPAIRING THE HIGHWAYS—COST THEREOF TO BE PAID FROM GENERAL COUNTY FUND. APPROACH OR DRIVEWAY—MEANS ALL DRIVEWAYS WHICH LEAD FROM PUBLIC ROAD TO PREMISES OF ABUTTING PROPERTY OWNER. COMPENSATION FOR DESTRUCTION OR RECONSTRUCTION OF APPROACH DEPENDS ON WHETHER COUNTY COMMISSIONERS OR TOWNSHIP TRUSTEES HAVE JURISDICTION AND SUPERVISION OF CONSTRUCTION, ETC., OF PUBLIC ROAD.

1. *Under the provisions of section* 7212 *G. C., the cost of the construction of approaches and driveways, or compensation to the abutting property owner for the destruction of approaches and driveways, is not to be included in the estimate of the cost and expense of constructing or repairing the highway and paid from the fund created for the construction or repairing of the highway, but same must be taken from the general fund of the county or township.*

2. *The words "approach or driveway," as used in said section* 7212 *G. C., apply to all approaches or driveways which lead from the public road to the premises of an abutting property owner, or to any part of the premises, and which the property owner maintains and uses in the full enjoyment of his rights and privileges as a property owner.*

3. *If the township trustees had jurisdiction and supervision of the construction or repair of the public road, then in that event they are the persons either to compensate the owner or occupant for the destruction of the approach or driveway, or to reconstruct said approach or driveway. If, on the other hand, the county commissioners or the state highway commissioner had jurisdiction and supervision over the construction or repair of the public road, then the county commissioners are the persons either to compensate the owner or occupant or to reconstruct the approach or driveway.*

COLUMBUS, OHIO, April 19, 1917.

HON. S. L. GREGORY, *Prosecuting Attorney, Wilmington, Ohio.*

DEAR SIR:—I have your communication of March 15, 1917, in which you ask me for certain information in reference to matters therein set out. Your communication reads as follows:

> "I write you for an opinion at request of the county commissioners of this, Clinton county, in a matter in which both state and county are interested. On August 19, 1915, a contract was let to improve an inter-county road. No mention was made in the specifications as to farm approaches (old section 1192-1, new section 7212 G. C.). Now is there any legal obligation on the county or the state to build the farm approaches in this case under either of the sections mentioned or under any other sections of the statute?
>
> "Also please define farm approaches as to kind and number."

While you mention in your communication section 1192-1 G. C., yet, inasmuch as this section has been repealed, and inasmuch as the provisions of said section, in my opinion, have nothing to do with the construction to be placed upon section 7212 G. C., which you also mention in your communication, I shall not quote nor comment upon said section 1192-1 G. C., now repealed.

But as you suggest, section 7212 G. C. is the one that controls in the matters about which you ask in your communication. Said section reads as follows:

> "Section 7212. The owners or occupants of land shall construct and keep in repair all approaches or driveways from the public roads under the direction of the county highway superintendent, provided, however, that if, in the construction or improvement, maintenance and repair of any road, the approach or driveway of an abutting property owner is destroyed, the county commissioners or township trustees, shall compensate such abutting property owner or occupant of said lands for the destruction of such approach or driveway, or in lieu thereof, authorize the county highway superintendent to reconstruct the same."

It will be noted that this section naturally divides itself into three subdivisions, namely:

> "(1) The owners or occupants of land shall construct and keep in repair all approaches or driveways from the public roads under the direction of the county highway superintendent.
>
> "(2) If, in the construction or improvement, maintenance and repair of any road, the approach or driveway of an abutting property owner is destroyed, the county commissioners or township trustees, shall compensate such abutting property owner or occupant of said lands for the destruction of such approach or driveway."
>
> "(3) 'Or in lieu thereof,' they may 'authorize the county highway superintendent to reconstruct the same.' "

Now, with the above analysis of section 7212 G. C. let us proceed with the consideration of the matters suggested in your communication. First, you suggest that in a certain contract entered into on August 19, 1915, to improve an inter-county road, no mention was made in the specifications as to farm approaches. In my opinion there was no necessity that such a mention should be made in the plans and specifications prepared by the proper official. If this matter were suggested in the plans and specifications for the said improvement, the same matter would also have to be considered in making an estimate of the cost and expense of such improvement, but in my opinion the cost and expense of reconstructing or repairing an approach or driveway should not be included in the estimate of the cost and expense of the construction or improvement of the highway. This answers, as I take it, the one suggestion made in your communication.

Secondly, let us notice what interpretation should be placed upon the words "approach or driveway" as used in section 7212 G. C. You ask in your communication as to whether said words should be interpreted to mean just one approach or driveway or whether they should be interpreted to mean more than one.

The practical side of this question has to do with the fact that many land owners have not only a way or drive which leads naturally and directly to the farm buildings located upon the farm, but they have ways or drives leading from the public highway into different fields upon the farm. These ways or drives are used for hauling grain from the fields onto the public highway, and thence to the farm buildings, and in hauling manure, etc. from the farm buildings onto the public highway, and thence into the field or fields. That is, instead of the farmer driving over his own land to where a certain field is, he will drive out onto the highway from his barn or house and then back into a field, over a drive from the public road which he maintains. Or

he may maintain driveways or approaches over which he drives in leaving one field of his farm to go on the public road and then from the public road back into another field of his farm.

Now, the question is as to whether the words "approach or driveway," as used in section 7212 G. C., apply merely to the approaches or driveways which lead naturally and directly to the premises as a whole of the abutting property owner, or whether they apply to all the approaches and driveways which he maintains and uses in order that he may have the full enjoyment of his rights and privileges as a property owner.

It must be remembered that the abutting property owner has title to the land to the center of the public road, subject, however, to the easement of the public to use the same for travel and matters incident thereto. He has a right to plant trees and use the sides of the public road so long as he does nothing to interfere with the easement which the public has in the public highway. He has the right to use and maintain driveways and approaches from the public road to his premises or any part of his premises, so long as he does nothing to interfere with the rights of the public in and to said public road. All these rights he enjoys as a property owner.

If the public, in the construction or repair of the traveled portion of the public road, destroys any of these approaches and driveways so maintained and used by an abutting property owner in the enjoyment of his rights and privileges as an abutting property owner, why should not the public either replace them in such a manner as to enable the property owner to use them to the same extent and in the same manner as he enjoyed them before their destruction? Or if the public does not care to reconstruct them, then compensate the owner so that he may reconstruct them? This would seem to be right. It would seem to be just; and it is my opinion that such was the intention of the legislature in enacting this section; that the legislature intended that all abutting property owners should be protected in the rights and privileges which they enjoyed as property owners before the construction or improvement, maintenance or repair of any public road.

Hence, answering your question specifically, it is my opinion that the words "approach or driveway," as used in said section, apply to all approaches or driveways which lead from the public road to the premises of an abutting property owner, or to any part of the premises, and which the property owner maintains and uses in the full enjoyment of his rights and privileges as a property owner. The same principle would control in the matter, whether the county commissioners or township trustees reconstruct the approaches or driveways so described, or whether they compensate the abutting property owner for such destruction.

In passing, however, let me say that under the provisions of said section 7212, abutting property owners or occupants must keep in repair all approaches or driveways under the direction of the county highway superintendent. This is provided for under the first part of said section. And all said approaches or driveways constructed by occupants or owners since the taking effect of the provisions of said section 7212 must be constructed under the direction of the county highway superintendent.

Now, the next question that naturally arises is this: Said section 7212 G. C. provides that the county commissioners or township trustees shall either compensate the abutting property owner or occupant, or shall authorize the county highway superintendent to reconstruct the same. When will the county commissioners act and when will the township trustees act under and by virtue of the provisions of said section 7212 G. C.?

It is my opinion that the township trustees would act under and by virtue of the provisions of this section whenever the improvement, construction, maintenance or repair had been done under their authority and supervision, and that the county commissioners would act under and by virtue of the provisions of said section when-

ever the said improvement, construction, maintenance or repair had been made either under the authority and supervision of the county commissioners or under the authority and supervision of the state highway commissioner.

As I view it, this answers the questions in your communication.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

204.

APPROVAL—FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN CHAMPAIGN COUNTY.

COLUMBUS, OHIO, April 19, 1917.

State Highway Commissioner, Columbus, Ohio.

DEAR SIR:—I have your communication of April 12, 1917, in which you ask my approval of a final resolution therein set out, as follows:

> Champaign county—Sec. "P-2" Urbana-West Jefferson road, Pet. No. 2146, I. C. H. No. 188.

I have examined said final resolution carefully and find same correct in form and legal. I am therefore returning the same to you with my approval endorsed thereon.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

205.

ANNEXATION OF TOWNSHIP TO ADJOINING CITY—TOWNSHIP TRUSTEES RESIDING WITHIN CITY AND OUTSIDE OF TOWNSHIP FORFEIT OFFICE——FUNDS AND INDEBTEDNESS OF TOWNSHIP AND CITY SHOULD BE DIVIDED UNDER SECTION 3544—AFTER DIVISION GENERAL ROAD FUND OF TOWNSHIP CANNOT BE USED TO REPAIR ROAD NOW WITHIN CITY.

A portion of a township was annexed to an adjoining city and two of the township trustees live within the annexed portion of the township. Held,

1. *Trustees residing within the city of Akron and without the township forfeit their offices.*

2. *Equitable division of the funds and indebtedness of the township and city should be made under authority of and in the manner provided by section 3544 General Code, read in connection with the provisions of the statutes governing the annexation of said territory to said city.*

3. *After such division no part of the general road repair fund of the township may be used for the repair of roads formerly within the township, but now lying within the city of Akron.*

COLUMBUS, OHIO, April 20, 1917.

HON. C. G. ROETZEL, *Prosecuting Attorney, Akron, Ohio.*

DEAR SIR:—I have your letter of February 5, 1917, as follows:

> "Will you kindly render this office an opinion upon the following questions:

"In May, 1916, a large part of Portage township, in Summit county, was annexed to the city of Akron. Two of the trustees, the treasurer and the clerk, duly elected, qualified and acting officers of Portage township, are now, on account of the annexation, residents of the city of Akron.

"1. Do said officials retain their office and can they perform the duties connected with the said offices?

"2. If they do retain office, do they hold their office until their successors are duly elected and qualified at the next general election of township officers?

"3. Is the city of Akron entitled to any portion of the funds now in the hands of the township treasurer and which were collected from the residents of Portage township prior to the annexation and who are now residents of Akron?

"4. Can the funds now in the hands of the township treasurer and collected prior to the annexation, be used by the township trustees for repair of roads formerly in Portage township but now in the city of Akron?"

Your supplementary letter of February 21, 1917, is as follows:

"Replying to your letter of the 20th inst., in reference to the funds now in the hands of the treasurer of Portage township, Summit county, Ohio, would say that the funds referred to were raised by a general levy for general road improvements throughout the township, and not for any special road improvements."

You also inform me that the township and city boundary lines were, prior to annexation, and will again soon be, co-extensive.

Article 15, section 4, of the Constitution of 1851, provides:

"No person shall be elected or appointed to any office in this state unless he possesses the qualifications of an elector."

Sections 3261 and 3262 of the General Code read:

3261. "If by reason of non-acceptance, death, or removal of a person chosen to an office in any township, except trustees, at the regular election, or upon the removal of the assessor from the precinct or township for which he was elected, or there is a vacancy from any other cause, the trustees shall appoint a person having the qualifications of an elector to fill such vacancy for the unexpired term."

3262. "When for any cause a township is without a board of trustees or there is a vacancy in such board, the justice of the peace of such township holding the oldest commission, or in case the commission of two or more of such justices bear even date, the justice oldest in years, shall appoint a suitable person or persons, having the qualifications of electors in the township to fill such vacancy or vacancies for the unexpired term."

Section 3261 G. C. was originally section 20 of an act entitled "An act to provide for the incorporation of townships," passed March 5, 1831, 29 O. L., p. 484, and read:

> "That when by reason of non-acceptance, death or removal of any person chosen to office in any township at the annual meeting, as aforesaid, or in case where there is a vacancy, the trustees shall appoint a person having the qualifications of an elector, to fill such vacancy; and the person thus appointed shall take the same oath and be liable to the same penalty as though he had been chosen at the annual meeting."

Section 3262 G. C. was originally section 1 of an act passed on March 21, 1874, and entitled "An act to authorize the filling of vacancies in the boards of trustees of townships," and read:

> "Section 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF OHIO, That when any township shall for any cause be without a board of trustees, or for any cause there shall be a vacancy in the board of trustees of any township, it shall be the duty of the justices of the peace of such township to appoint a suitable person or persons having the qualifications of electors in such township, to fill the vacancy or vacancies that have occurred or may hereafter occur in any such board of trustees, and the justices of the peace discharging said duty shall make out a certificate in writing of said appointment or appointments, and file the same with the clerk of the township in which said vacancy occurred, who shall record the same; and the person or persons thus appointed shall take the same oath or affirmation required of like officers chosen at any annual election, and hold their offices until their successors shall be duly elected and qualified. Provided, that this act shall be supplemental and subject to the act entitled an act supplementary to an act passed April 17, 1872 (vol. 69, page 76), entitled an act to incorporate the original surveyed townships, passed March 14, 1831, and to repeal an act therein named."

The legislature also thereafter amended section 20 of the act first above referred to by the addition of the words "except trustees," making it read as it does today in section 3261 General Code.

From a review of this bit of legislative history it is clear that originally the legislature provided for the filling of vacancies of all township offices and recognized that a removal from the township was a cause for vacancy. Later in 71 O. L., p. 35, they saw fit to make separate provision for filling vacancies in the board of township trustees snce it was evident that a board could not appoint its own successors. In doing this they gave the justice of the peace power to fill the vacancies occuring in the board of trustees of any township for any cause, but did not specify the causes for vacancy. It does not seem to me that there is anything in this action that could be interpreted as a repudiation by the legislature, insofar as township trustees were concerned, of its former position that a removal from a district was cause for vacancy. Just the opposite is indicated by the fact that it provided in the act of March 21, 1874, 71 O. L. p. 35, above quoted, that the justice of the peace should "appoint a suitable person or persons, having the qualifications of electors, of such township to fill the vacancy or vacancies that have occurred or may hereafter occur in any such board of trustees," showing clearly that they still had the resident qualifications for township trustees in mind.

In Dillon on Municipal Corporations, page 635, section 371, it is said:

> "Non-residents of the corporation have, however, been held competent

to be elected to office when residence was not expressly required, but the decisions cannot, perhaps, be said to conclude the point, and, if extended to the higher offices, are hardly consistent with the fundamental idea of municipal or local self-government."

In a note under this section it is said:

"Municipal officers may be elected from non-residents of the corporation when there is no statute or constitution prohibiting it, particularly when the office to be filled is *one requiring professional skill and not representative or legislative in its character.* State v. Blanchard (city surveyor) 6 La. An. 515. The conclusion was reached with hesitation, but the whole court concurred."

In 29 Cyc., page 1377, it is said:

"Residence within the district over which the jurisdiction of the office extends is often also made a necessary qualification by statute. In the absence of such an express provision, however, there would seem to be no reason for holding that residence within the district is necessary to eligibility provided the other qualifications mentioned in the statute are present."

Elliott on Municipal Corporations, page 179, section 181:

"A non-resident is eligible to office unless contrary is provided by statute."

In State ex rel. v. Walker, 17 Ohio, page 135, the court held:

"On the formation of a new county, the county commissioners of any of the counties from which the new county is formed, who resides within its limits, cease to be commissioners of the old county, unless they remove within it."

The court in this case said, at page 140:

"By the first section of the act establishing boards of county commissioners, passed March 5, 1831, it is enacted 'that there shall be established in each organized county of this state, a board of commissioners, to be elected by the qualified electors of the county at the annual election in October. By the sixth section each commissioner, before entering upon the duties of his office, is required to take an oath or affirmation faithfully and impartially to discharge the duties of the commissioner of the county *in which he resides.* These provisions of the statute seem to indicate that the office of commissioner of a county can only be held by a resident of the county, and *when we take into consideration the general duties of the board of commissioners, the fact that they are the representatives of the county in its corporate capacity,* that they are the corporate body in all suits and contracts, relating to the interests and funds of the county, etc., we cannot doubt that non-residence within the county is a disqualification, which necessarily vacates the office."

It will be seen from a consideration of the above case that the only statutory indication of legislative intention in connection with the residential qualifications of county commissioners was that the statute provided that the commissioner should, before entering upon his duties, take an oath or affirmation "faithfully and impartially

to discharge the duties of a commissioner *of the county in which he resides.*" This, to me, does not seem entitled to as much weight as the statutory expressions in sections 3261 and 3262 General Code upon the subject of residential qualifications for township trustees and inasmuch as the township trustees act for the township in much the same manner as the county commissioners for the county, it would seem by the same process of reasoning as adopted by the supreme court of this state in the case of State v. Walker, supra, that a non-residence within the township would be such a disqualification as would necessarily vacate the office.

Therefore it is my opinion, in answer to your first question, that the township trustees, by reason of their now residing without the township, are disqualified and may no longer hold their positions on such board.

This answer to your first question makes a reply to your second question unnecessary.

Answering your third question I beg to call your attention to an opinion rendered by my predecessor, Hon. Edward C. Turner, on May 25, 1916, and addressed to Hon. C. P. Kennedy, prosecuting attorney, Akron, Ohio (see opinions of the attorney-general for 1916, page 918). This opinion dealt, I think, with the very same situation which confronts you now. In this opinion it was held:

> "In case of the annexation of territory from one or more townships to a city, under authority of and in the manner provided by section 3558 et seq., an equitable division of the funds and indebtedness of said township or townships and the proper apportionment thereof may be made under authority of and in the manner provided by section 3544 G. C. read in connection with the provisions of the statutes governing the annexation of said territory to said city."

I have carefully read this opinion and agree with the same and therefore advise you in accordance therewith that an equitable division of the funds and indebtedness of the township and city should be made as provided for in section 3544 General Code.

After the division referred to under section 3544 is made, the remaining township funds will, of course, be used for township purposes only, and therefore after such division has been made, no part of the general road repair fund of the township could be used for the repair of roads formerly in the township, but now in the city of Akron.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

206.

MOTHER'S PENSION LAW—COURT MAY MAKE ALLOWANCE TO MOTHER—WHEN THE ABSENCE OF SUCH ALLOWANCE WOULD CAUSE HER TO WORK REGULARLY AWAY FROM HOME—OR WHEN SHE WOULD BE COMPELLED TO WORK ON OUTSIDE EMPLOYMENT IN HER OWN HOME.

Section 1683-3 *G. C. authorizes the juvenile court to make an allowance to a mother when in the absence of such allowance she would be required to work regularly away from her home or when in the absence of such allowance she would be required to be engaged regularly in outside employment in her own home.*

COLUMBUS, OHIO, April 21, 1917.

HON. JOHN C. STOUGHTON, *Probate Judge, Logan, Ohio.*

DEAR SIR:—I have your letter of March 19, 1917, asking for an interpretation of section 1683-3 General Code, referring to the allowance of mothers' pensions, especially in connection with that provision to the effect that "the allowance shall be made only when in the absence of such allowance the mother would be required to work regularly away from her home."

Section 1683-3 General Code reads:

> "Such allowance may be made by the juvenile court, only upon the following conditions: First, the child or children for whose benefit the allowance is made must be living with the mother of such child or children; second, the allowance shall be made only when in the absence of such allowance, the mother would be required to work regularly away from her home and children, and when by means of such allowance she will be able to remain at home with her children, except that she may be absent for work for such time as the court deems advisable; third, the mother must in the judgment of the juvenile court be a proper person, morally, physically and mentally, for the bringing up of her children; fourth, such allowance shall in the judgment of the court be necessary to save the child or children from neglect and to avoid the breaking up of the home of such woman; fifth, it must appear to be for the benefit of the child to remain with such mother; sixth, a careful preliminary examination of the home of such mother must first have been made under the direction of the court by the probation officer, the agent of an associated charities organization or humane society, or in the absence of such probation officer, society or organization in any county, the sheriff of such county shall make such investigations as the court may direct, and a written report of the result of such examination or investigation shall be filed with the juvenile court, for the guidance of the court in making or withholding such allowance."

The evident purpose of the mother's pension law was to keep the mother at home with her children and under such circumstances as would afford her sufficient time to properly care for them, upon the theory that where the mother is a proper person it is better for the children that they be kept at home under her influence and care than sent to some institution which, however maternal in its aims, must of necessity afford its juvenile inmates a degree of protection and encouragement far below that inspired by a mother's love.

Section 1683-3 G. C. provides in part:

"the allowance shall be made only when in the absence of such allowance the mother would be required to work regularly away from her home and children and when by means of such allowance she will be able to remain at home with her children, except that she may be absent for work for such time as the court deems advisable;"

I take it what you wish to know in connection with this clause is whether or not a mother who is regularly employed by outside parties in her own home can be given an allowance under this section.

Attention is called to the fact that the statute does not require as a condition precedent to the allowance that the mother be employed "away from home," but it provides that she be employed "away from her home *and children*." This means, I think, that whenever she must engage in employment that will take her away from her home *or* from her children she is, if other conditions are properly met, entitled to an allowance. If she must work regularly at home for outside parties, her employment can certainly be said to take her away from her children, for even though she is at home, in the same house with them, she cannot, under such circumstances, give them the proper care and attention.

Attention is called to another provision of section 1683-3 G. C. which tends to strengthen the conclusion that the law intends to assist all mothers employed at home as well as a mother employed away from home. That provision is this:

"Such allowance shall, in the judgment of the court, be necessary to save the child or children from neglect."

Now it is quite clear that a mother engaged regularly at home in outside employment must, of necessity, neglect her children to at least some extent and it is also clear that if the state should make her an allowance, enabling her to quit such employment and devote her time at home to her children, the state by such allowance would be saving these children from neglect within the meaning of the provision of section 1683-3 just quoted.

For these reasons I am of the opinion that under section 1683-3, General Code, an allowance may be made to a mother when in the absence of such allowance she would be required to work regularly away from her home or when in the absence of such allowance she would be required to be engaged regularly in outside employment in her own home, subject, of course, to the other provisions of the statute.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

207.

ANNEXATION OF TOWNSHIP TO ADJOINING CITY—UNDER AGREEMENT OF TOWNSHIP SCHOOL BOARD WITH CITY BOARD TO PAY CERTAIN PERCENTAGE OF MONEY ON HAND, LESS AMOUNTS CERTIFIED TO BY TOWNSHIP SCHOOL CLERK—A RESOLUTION BY TOWNSHIP BOARD OFFERING CERTAIN SUM FOR A SITE AND COMMENCING CONDEMNATION PROCEEDINGS DOES NOT CREATE LEGAL OBLIGATION AGAINST BOARD, THEREFORE CANNOT BE DEDUCTED FROM AGREED PERCENTAGE.

Part of a township recently was annexed to the city of Toledo. An agreed upon percentage of the township's school moneys, both in hand and in process of collection, was to be paid to the city school district. However, all sums that the township school clerk had certified to were to be deducted from the moneys in hand.

Prior to this agreement the township board had adopted a resolution that a written offer of $500.00 *be made for a tract of land, no certification being made. The township board had also taken steps in probate court to condemn land for which* $3,000.00 *had been offered, no certification being made.*

HELD: That under this agreement neither the $500.00 *referred to nor the amount to be paid for the tract of land involved in the condemnation proceeding should be deducted from the moneys on hand by the township board prior to their payment of forty per cent. of such moneys to the city board.*

COLUMBUS, OHIO, April 21, 1917.

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

GENTLEMEN:—I have your letter of March 6, 1917, as follows:

"We would respectfully request your written opinion upon the following matter:

"Part of a township recently was annexed to the city of Toledo. An agreed upon percentage of the township's school moneys, both in hand and in process of collection, was to be paid to the city school district. However, all sums that the township school clerk had certified to were to be deducted from the moneys in hand.

"Prior to this agreement the township board had adopted a resolution that a written offer of $500.00 be made for a tract of land, no certification being made. The township board had also taken steps in probate court to condemn land for which $3,000.00 had been offered, no certification being made.

"*Questions:* Did the above proceedings put upon the township district obligations that would have to be considered in a settlement with the city district? Or, should they be ignored? If the former, must a settlement between the boards be delayed until the real estate proceedings have ended? Would proper certification have altered the situation?"

You also inform me that the agreement referred to provided in part as follows:

"That the president and clerk of this board be, and they are hereby authorized and directed to draw a voucher payable to the board of education of the city school district of the city of Toledo, Ohio, for forty (40) per cent. of the said moneys as this board may have on hand on this date and to which the clerk of this board has not made certification."

When the resolution offering $500.00 for the tract of land was made by the town-

ship board, the certificate of the clerk under section 5660 General Code should have been filed. Inasmuch as this was not done, the offer was void and the township board incurred no obligation whatever by said resolution.

In regard to the condemnation proceedings:

Sections 7624 and 3697 read:

> "Section 7624. When it is necessary to procure or enlarge a school site or to purchase real estate to be used for agricultural purposes, athletic field or play ground for children, and the board of education and the owner of the property needed for such purposes are unable to agree upon the sale and purchase thereof, the board shall make an accurate plat and description of the parcel of land which it desires for such purposes, and file them with the probate judge, or court of insolvency, of the proper county. Thereupon the same proceedings of appropriation shall be had which are provided for the appropriation of private property by municipal corporations."
>
> "Section 3697. When a municipal corporation makes an appropriation of property, and fails to pay or take possession thereof, within six months after the assessment of compensation shall have been made, its right to make such appropriation on the terms of the assessment so made shall cease and determine, and lands so appropriated shall be relieved from all incumbrance on account of any of the proceedings in such case, and the judgment or order of the court directing such assessment to be paid shall cease to be of any effect, except as to the costs adjudged against the corporation. Upon motion of any defendant, such costs may be retaxed, and a reasonable attorney's fee paid to the attorney of such defendant, which, together with any other proper expenses incurred by the defendant, may be included in the costs."

From this latter section it is clear that after the appropriation proceedings are completed, the school board still has the right to refuse to accept property condemned. It follows, therefore, that in the case mentioned the township board had not completely obligated itself at the date of the agreement set out herein to take over the property involved in the appropriation proceeding.

Neither was it necessary for the clerk of the board to have filed his certificate under section 5660 G. C. at the time the resolution to appropriate was adopted. See Pansing v. Village of Miamisburg, 11 O. C. C. (n. s.), 511; affirmed in 79 O. S.

From the foregoing it will be seen that because of the failure to file the certificate in connection with the resolution offering the $500.00, and by reason of section 3697 G. C. in connection with the appropriation proceeding, the township board had not at the time incurred a legal obligation with respect to the purchase of the one tract of land or the appropriation of the other. This being so they may or may not have had these proceedings in mind when they agreed upon the division of the funds. However, judging from the agreement which they entered into, they did not. The agreement provides that the township board is to pay over to the board of education of the city of Toledo forty per cent. of the moneys which the township board had on hand and "to which the clerk of this board has not made certification."

In neither case above mentioned was any certification made by the clerk, and therefore under this agreement the money to be expended, if these propositions were carried out, could not have been deducted from the monies on hand.

It is therefore my opinion, in direct answer to your question, that neither the $500.00 offered by the board for the tract of land referred to, nor the amount to be paid for the other tract in process of condemnation should be deducted from the monies on hand by the township board before the forty per cent. is computed to be paid according to the agreement of the board of the city of Toledo. If this ruling works a hard-

ship on the township board, they have their remedy in that they are not compelled to proceed further with either the purchase of the one tract or the appropriation of the other.

Yours very truly,
JOSEPH MCGHEE,
Attorney-General.

208.

PROCEEDS OF SALE OF COUNTY REAL ESTATE—BY COUNTY COMMISSIONERS—MAY BE USED TO CONSTRUCT, MAINTAIN, ETC., NECESSARY BUILDINGS FOR COUNTY CHILDREN'S HOME—REGARDLESS OF SECTION 5638 G. C.—SAID FUNDS CANNOT BE USED TO PURCHASE NEW SITE.

1. *When the county commissioners sell real estate belonging to the county, they may create a special fund out of any part of the proceeds realized from the sale, from which they can construct, equip, maintain or repair the necessary buildings for a county children's home, without any reference to the provisions of section* 5638 *G. C.*

2. *No part of this fund can be used for the purchase of a new site for a county children's home. Hence, the provisions of section* 5638 *G. C. apply in the matter of purchasing a site for the county children's home.*

COLUMBUS, OHIO, April 21, 1917.

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

DEAR SIR:—I have your communication of March 30, 1917, in which you ask my opinion as to certain matters therein set out. Your communication reads as follows:

> "The commissioners of this county have concluded to sell the present children's home site and purchase a new one, using the proceeds from the sale of the old with which to buy the new site and erect buildings thereon at a cost of about $50,000.00.
>
> "In an opinion submitted by former Attorney-General Turner to the Bureau of Inspection and Supervision of Public Offices, being opinion No. 1526, it was held that the county commissioners may sell at public sale real estate of the county when the interests of the county so require, or when the same is not needed for public use; the manner of disposal is one for their discretion, and if the interest of the county will be best subserved the same may be sold in lot or parcels.
>
> "The commissioners have asked me to prepare the necessary papers to dispose of this property under sections 2447 and 2447-1 of the General Code. The question presents itself to my mind as to whether or not the commissioners have the necessary authority, in view of the provisions of section 5638 of the General Code to make this expenditure, without first submitting the question to the voters of the county."

Section 5638 is as follows:

> " 'The county commissioners shall not levy a tax, appropriate money or issue bonds for the purpose of building county buildings, purchasing sites therefor, or for land for infirmary purposes, the expenses of which will exceed

$15,000.00, except in case of casualty, and as hereinafter provided; or for building a county bridge, the expense of which will exceed $18,000.00, except in case of casualty, and as hereinafter provided; or enlarge, repair, improve, or rebuild a public county building, the entire cost of which expenditure will exceed $10,000.00; without first submitting to the voters of the county, the question as to the policy of making such expenditure.'

"I would also call your attention in this connection to sections 2433 and 2434 of the General Code.

"You will, therefore, readily observe that the question herein raised was not passed upon in said opinion No. 1526."

As you suggest in your communication, the opinion you received from my predecessor, as of date April 29, 1916, covers merely the question of the sale of the present site of the children's home and the manner in which the county commissioners may conduct said sale. So we are now at the point as to how the county commissioners shall proceed after the sale of the present site is made.

From what you say in your present communication and what you said in the communication of my predecessor, I am taking it as a fact that the proceeds realized from the sale of the present site will be more than sufficient to take care of the cost of another site and the erection of the necessary buildings thereon. I am assuming this to be a fact for the reason that you set out in your former communication to the bureau of inspection and supervision of public offices that the present location is worth $100,000.00, and in your communication to me you suggest that the county commissioners are about to invest $50,000.00 in a new site and the necessary buildings thereon.

The section under which your county commissioners are proceeding to sell the present site is section 2447 G. C. This section reads as follows:

"Section 2447. If, in their opinion, the interests of the county so require, the commissioners may sell any real estate belonging to the county, and not needed for public use; and, in case of the sale of such real estate not used for county purposes, the proceeds of such sale or such parts thereof as the board of commissioners may designate may be placed by the commissioners in a separate fund to be used only for the construction, equipment, maintenance or repair of other county buildings, and the provisions of section 5638 of the General Code shall not apply to appropriations or expenditures of said fund."

It will be noted that under the provisions of this section the county commissioners may set aside all the proceeds realized from the sale, or any part thereof, in a separate fund. It further provides that the moneys in this fund shall be used *only* for the construction, equipment, maintenance or repair of other county buildings. And it further provides that the provisions of section 5638 G. C. shall not apply to appropriations or expenditures of said fund.

From the provisions of this section the county commissioners can easily take care of the matter of providing for the construction, equipment, maintenance and repair of the necessary buildings to be erected for the county children's home. They will simply have to create a fund out of the proceeds of the sale of the present site and place a sufficient amount in said fund to take care of the construction and equipment of the necessary buildings. This money then can be appropriated by the county commissioners without any reference to the provisions of section 5638 G. C., and therefore without any necessity of submitting the proposition, as to the wisdom of the expenditure, to the voters of the county.

But it will be noticed under the provisions of this section that this fund can be

used *only* for the construction, equipment, maintenance or repair of county buildings. It therefore can not be used to purchase another site for your county children's home. So that in the matter of the purchasing of a site, we are driven to the provisions of section 5638 G. C. This section reads in part as follows:

> "Section 5638. The county commissioners shall not levy a tax, appropriate money or issue bonds for the purpose of building county buildings, *purchasing sites therefor*, or for land for infirmary purposes, the expenses of which will exceed $15,000.00, * * * without first submitting to the voters of the county, the question as to the policy of making such expenditure."

Now, the question immediately arises as to the amount of money your county commissioners will invest in a site for a children's home. If they invest $15,000.00 or less in said site, they can invest without first submitting to the voters of the county the question as to the policy of making such expenditure. But if they invest more than $15,000.00 in a site, it will be necessary for them first to submit the question to the voters of the county. This is true even though they have the funds necessary to purchase said site without levying a tax or without issuing bonds. This for the reason that section 5638 G. C. provides that the county commissioners can not appropriate money for any of the purposes mentioned in said section when the cost exceeds a certain amount without first submitting the question to the voters of the county.

There is no question that the county commissioners may use a part of the proceeds of the sale of the present site for the purchase of a new site, but in doing this they will be compelled to appropriate the money out of some fund, with which to purchase the new site. And when they appropriate money under the provisions of section 5638 G. C., and the amount appropriated is more than $15,000.00, the question must be submitted to the voters of the county.

In your communication you made reference to sections 2433 and 2434 G. C. The provisions of these sections will not help us to solve the problem which you have on your hands. Section 2433 G. C. provides as follows:

> "Section 2433. When, in their opinion, it is necessary, the commissioners may purchase a site for a court house or jail, or public comfort station, or land for an infirmary, or a detention home, or additional land for an infirmary or county children's home at such price and upon such terms of payment, as are agreed upon between them and the owner or owners of the property. The title to such real estate shall be conveyed in fee simple to the county."

It will be noted that the only power given to the county commissioners in this section, in so far as it pertains to county children's home, is to purchase "additional land for a county children's home." This would not apply to the purchase of a site for a county children's home. The same reasoning applies to section 2434 G. C.

Hence, answering your question specifically, it is my opinion that the county commissioners may create a special fund out of any part of the proceeds realized from the sale of the present site of the county children's home, from which special fund they may use sufficient money to construct, equip, maintain and repair the buildings necessary to be erected on said site, without any reference to the provisions of section 5638 G. C.; and they may appropriate any part of the balance of the proceeds realized from the sale of the present site, for the purchase of a new site for the county

children's home, but in the event the amount invested in the new site is more than $15,000.00, it will be necessary for your commissioners first to submit the question as to the policy of making such expenditures to the voters of your county.

Very truly yours,
JOSEPH McGHEE,
Attorney-General.

209.

STATE DEPOSITORY—DEPOSITS MUST BE EITHER CASH OR BONDS—TIME CERTIFICATE OF DEPOSIT INSUFFICIENT—TREASURER NOT AUTHORIZED TO PAY INTEREST ON CASH DEPOSITS.

A foreign trust company making a deposit under section 9778 G. C. with the treasurer of state, in cash, may not be allowed interest on the deposit so made.

Such deposit must be either in cash or bonds—a time certificate of deposit in a state depository is insufficient.

COLUMBUS, OHIO, April 21, 1917.

HON. CHESTER E. BRYAN, *Treasurer of State, Columbus, Ohio.*

DEAR SIR:—I acknowledge receipt of your letter of April 9, 1917, submitting a file of correspondence between you and The Otis Steel Company and The Guardian Savings and Trust Company, respectively, both of Cleveland, and both relating to certain matters in connection with a deposit which you hold in your official capacity for the Trustees, Executors and Securities Insurance Corporation, Ltd., of London, England.

It appears that the deposit at present exists in the form of bonds which are about to mature. The Trust Company does not desire at the present time to reinvest the deposit and for that reason asks you the following questions:

> "1. If the deposit is converted into cash, may interest be paid to the depositor thereon at the average rate on inactive state deposits?
>
> "2. If this can not be done, may the treasurer of state accept, in lieu of cash or securities, a certificate of deposit upon a state depository bank, maturing in six months?"

Sections 9778 and 9779 G. C. govern the matter concerning which the inquiry is made. They provide as follows:

> "Section 9778. No such corporation either foreign or domestic shall accept trusts which may be vested in, transferred or committed to it by an individual, or court, until its paid in capital is at least one hundred thousand dollars, and until such corporation has deposited with the treasurer of state in cash fifty thousand dollars if its capital is two hundred thousand dollars or less, and one hundred thousand dollars if its capital is more than two hundred thousand dollars, except that, the full amount of such deposit by such corporation may be in bonds of the United States, or of this state, or any municipality or county therein, or in any other state, or in the first mortgage bonds of any railroad corporation that for five years last past paid dividends of at least three per cent. on its common stock.
>
> "Section 9779. The treasurer of state shall hold such fund or securities deposited with him as security for the faithful performance of the trusts

assumed by such corporation, but so long as it continues solvent he shall permit it to collect the interest on its securities so deposited. From time to time said treasurer shall permit withdrawals of such securities or cash, or part thereof, on the deposit with him of cash, or other securities of the kind heretofore named, so as to maintain the value of such deposit as herein provided."

These sections are not ambiguous in any way. What is expressly authorized by them to be done, may be done; what is not expressly authorized by them to be done, there is no authority to do. Though the treasurer of state may lawfully permit the depositor to collect the interest on securities deposited with him under these sections, there is no authority for him to pay interest at any given rate upon cash so deposited.

Your first question must therefore be answered in the negative.

Your second question is to be answered by observing that the deposit must be either in cash or in bonds. In my opinion a time certificate of deposit, not payable on demand, is neither cash nor bonds.

Therefore the second question must be answered in the negative.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

210.

COUNTY COMMISSIONERS—UNDER SECTION 5656 G. C.—MAY NOT BORROW MONEY TO COVER OVERDRAFT IN COUNTY FUND—NOR PAY OBLIGATION INCURRED IN VIOLATION OF SECTION 5660 G. C.

County commissioners may not borrow money under authority of section 5656 G. C. for the purpose of covering an overdraft in a county fund; neither may obligations against such fund incurred in violation of the provisions of section 5660 G. C. be funded under said section 5656 G. C.

COLUMBUS, OHIO, April 23, 1917.

HON. CHARLES G. WHITE, *Prosecuting Attorney, Batavia, Ohio.*

DEAR SIR:—As previously acknowledged I am in receipt of your favor of March 7, 1917, in which you ask my opinion on facts stated by you as follows:

"We are placed in this position in our county and the commissioners have asked me to secure an opinion from your office. The bridge fund of our county is now overdrawn about $9,000.00 and there is no immediate relief in sight. It has been the custom of our commissioners to issue a note to some bank in the county for the payment of overdrawn amounts in this fund. I can find no authority for doing this and have so informed the commissioners. They, however, feel that since it has been done in the past that it should not be stopped at this time and argue that the men who have honestly done this work for the county should be paid in some manner, and have insisted that I consult your department and ascertain if there is not some way that they can issue either notes or bonds to take up these obligations.

"I desire to say also, that the auditor did not certify that the necessary funds were on hand to pay these bills. If there is any way that this can be met

I would appreciate finding it out, as well as the commissioners, but I have spent not a little time investigating the matter before referring to your office, and found none."

To my mind your communication is somewhat ambiguous. It is not altogether clear whether you mean to say that there is an actual overdraft in the county bridge fund to the amount of $9,000.00 caused by payment out of the county treasury of the claim against the county bridge fund in the amount of $9,000.00 in excess of the amount standing to the credit of the bridge fund, or whether you mean that obligations to the amount of $9,000.00 in excess of the amount of the credit of the county bridge fund have been incurred which obligations are still unpaid. It does appear, however, that the county auditor did not certify that the necessary funds were on hand to pay the claims which gave rise to the situation as stated in your communication. With respect to this, section 5630 of the General Code, in so far as applicable to the question at hand, provides that the commissioners of the county shall not enter into any contract, agreement or obligation involving the expenditure of money, or pass any resolution or order for the appropriation or expenditure of money unless the county auditor first certifies that money required for the payment of such obligation or appropriation is in the treasury to the credit of the fund from which it is to be drawn, or has been levied and placed on the duplicate and in process of collection and not appropriated for any other purpose; while section 5661 General Code provides that all contracts, agreements or obligations or orders and resolutions entered into or passed contrary to the provisions of section 5660 General Code shall be void.

If the claims against the county bridge fund mentioned in your communication were paid out of the county treasury without necessary money standing to the credit of the county bridge fund an illegal overdraft in such fund was thereby created, and it is clear that the county commissioners have no authority to restore such fund by issuing deficiency bonds for want of statutory authority in the premises, neither can they borrow money under the provisions of section 5656 General Code for the reason: 1st, that this section applies only to the funding of unpaid legal indebtedness, and for the reason, 2nd, that the overdraft was illegally created.

If, on the other hand, the claim against the county bridge fund still remains unpaid the same can not be funded under the provisions of section 5656 of the General Code for the reason, as I infer to be the fact from your communication, that the county auditor did not furnish the certificate required by section 5660 at the time the contracts were entered into out of which the claims against the county bridge fund arose. This being so, the contracts were void under the provisions of section 5661 General Code and the claims arising under the same are illegal; and in as much as section 5658 General Code provides with respect to the question at hand that no indebtedness of the county shall be funded under section 5656 unless such indebtedness is first determined to be an existing valid and binding obligation of the county it is apparent that section 5656 General Code has no application to these claims.

In this connection it may be suggested meeting the possible condition of an actual overdraft in the county bridge fund as hereinabove defined that the county commissioners may by following the procedure provided for in sections 2296 et seq. of the General Code make a transfer of the money from some other county fund to the county bridge fund. Not knowing what the condition of the other funds of your county is, I am not, of course, in position to make any recommendation along this line.

In conclusion I might say that in as much as there is no question with reference to the limitation of the tax rate here made I see no reason why it was necessary to create an overdraft in the county bridge fund or create obligations against the same without there being sufficient money in the county treasury to the credit of the bridge fund; for under the general power granted to the county commissioners by section 2434 General Code they could have issued bonds for the purpose of constructing, repairing or im-

proving bridges up to the amount of $18,000.00 without the vote of the people provided for in section 5638 General Code, or if an emergency was presented within the provisions of section 5643 General Code the county commissioners could have borrowed the money by the issue of bonds under the provisions of section 5644 General Code without a vote of the people without reference to the amount of such bond issue.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

211.

CONSOLIDATION OF OHIO CORPORATION WITH FOREIGN CORPORATION—SHARES OF STOCK OF SAID COMPANY NOT EXEMPT FROM TAXATION UNDER SECTION 5372 G. C.—SUCH COMPANY AN OHIO CORPORATION WITHIN MEANING OF, AND STOCK EXEMPT FROM TAXATION UNDER SECTION 192 G. C.

The shares of stock of a railroad company formed by consolidation of an Ohio corporation with a company of another state are not exempt from taxation in this state under the provisions of section 5372 General Code, but the company so formed is an Ohio corporation within the meaning of section 192 General Code, and the shares of stock of such railroad company are exempt from taxation in this state under said section 192 General Code, which provides that no person shall be required to list for taxation a share of capital stock of an Ohio corporation.

COLUMBUS, OHIO, April 23, 1917.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I have the honor to acknowledge receipt of your communication of March 8, 1917, asking for an opinion, in which you say:

> "The commission is in receipt of an inquiry from the auditor of Hamilton county as to whether the stock of The Pittsburgh, Youngstown & Ashtabula Railroad Company in possession of residents of Ohio is taxable in this state. The history of the organization of this company as given in Poor's Manual of Railroads is as follows:
>
> " 'Chartered January 13, 1906, in Ohio, and January 16, 1906, in Pennsylvania. Consolidation, effective as of January 1, 1906, of the Pittsburgh, Youngstown & Ashtabula R. R. Company (see manual for 1905, page 767), and the New Castle & Beaver Valley R. R. Company (see manual for 1905, page 763). The property was originally leased to the Pennsylvania Company from year to year at an annual rental equal to the net earnings of the road after deducting operating expenses and taxes. Stockholders on May 15, 1910, voted to lease the property to the Pennsylvania Company for 999 years, from July 1, 1910, on the following general basis: 1. The efficient operation and maintenance of the property; 2. The maintenance of the corporated organization; 3. The payment of a guaranteed rental sufficient to pay the interest on the funded debt and other obligations, and a dividend of 7 per cent. on the preferred and common capital stock; 4. Betterments to meet from time to time, the demands of the increasing business, the cost of which shall be represented by capital stock or bonds to be issued by the company and to bear such rate of dividend or interest as may be satisfactory

to the lessee; and 5. The failure to pay the rental provided in the lease, and perform all of the covenants therein contained, for ninety days, shall work a forfeiture of the lease.'

"Kindly advise the commission whether such stock is taxable in Ohio."

Section 2 of article XII of the State Constitution, among other things, provides that

"Laws shall be passed, taxing by a uniform rule all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise; * * *."

Sections 5324 and 5328 of the General Code provide as follows:

"Section 5324. The term 'investment in stocks' as so used, includes all moneys invested in the capital or stock of a bank whether incorporated under the laws of this state or the United States, or an association, corporation, joint stock company, or other company, the capital or stock of which is or may be divided into shares, which are transferable by each owner without the consent of the other partners or stockholders, for the taxation of which no special provision is made by law, held by persons residing within this state, either for themselves or others.'

"Section 5328. All real or personal property in this state, belonging to individuals or corporations, and all moneys, credits, investments in bonds, stocks, or otherwise, of persons residing in this state, shall be subject to taxation, except only such property as may be expressly exempted therefrom. Such property, moneys, credits, and investments shall be entered on the list of taxable property as prescribed in this title."

In view of the general provisions of section 5328 of the General Code, above quoted, and the fact that the question made by you calls for a consideration and construction of statutory provisions exempting from taxation shares of stock in a corporation under certain circumstances, it may be well at this point to note the cardinal rule of construction applicable to the consideration of statutes granting immunity from taxation that they are to be construed in all strictness and all questions of doubt relative thereto resolved against the claimed exemption.

On this point, the supreme court of this state in the case of Lee v. Sturgis; Insurance Company V. Ratterman, 46 O. S., 153, 159, says:

"* * * where an exception or exemption is claimed, the intention of the general assembly to except must be expressed in clear and unambiguous terms. 'The exemption must be shown indubitably to exist. At the outset every presumption is against it. A well-founded doubt is fatal to the claim. It is only where the terms of the concession are too explicit to admit fairly of any other construction that the proposition can be supported.' Intent to confer immunity from taxation must be clear beyond a reasonable doubt, for, as in the case of a claim of grant, nothing can be taken against the state by presumption or inference. * * *"

Among other cases supporting the rule of construction above noted are:

Cincinnati College v. State, 19 Ohio, 110;
Lander v. Burke, 65 O. S., 532, 542;
Watterson v. Halliday, 77 O. S., 150, 170.

The question made by you immediately depends upon the consideration and construction of section 5372 and section 192 of the General Code, which are as follows:

> "Section 5372. Personal property of every description, moneys and credits, investments in bonds, stocks, joint stock companies or otherwise, shall, except as otherwise provided, be listed in the name of the person who was or became the owner thereof on the day preceding the second Monday of April, in each year, and the transfer or sale of any taxable property subsequently thereto shall not authorize any person to omit the same from his list nor the assessor to fail to assess the same in the name of the person who would have been required to list it, although such listing be not made until after the sale or transfer of such property; but all such property shall be listed for taxation in the same manner as if no sale or transfer thereof had been made. No person shall be required to list for taxation any shares of the capital stock of a company, the capital stock of which is taxed in the name of such company.
>
> "Section 192. No person shall be required to list for taxation a share of the capital stock of an Ohio corporation; or a share of the capital stock of a foreign corporation, the property of which is taxed in Ohio in the name of such corporation; or a share of the capital stock of any other foreign corporation, if the holder thereof furnishes satisfactory proof to the taxing authorities that at least two-thirds of the property of such corporation is taxed in Ohio and the remainder is taxed in another state or states, provided such corporation, as a fee for the privilege of exercising its franchise in Ohio, pays annually the same percentage upon its entire authorized capital stock that is required by law to be paid by a domestic corporation on its subscribed or issued capital stock."

By the provisions of section 5372 it is clear that the question as to exemption of shares of stock from taxation in this state does not depend upon whether the company is a foreign or domestic corporation, but does depend upon whether its capital stock is taxed in the name of such company. The term "capital stock" as used in section 5372 is represented by whatever it is invested in, and means corporate property.

> Jones v. Davis, 35 O. S. 474, 477.
> Hubbard v. Brush, 61 O. S. 252, 261.

The shares of stock, which are the subject of the inquiry made by you and as to which you ask my opinion, are, I assume, shares in the consolidated corporation now known as "The Pittsburgh, Youngstown & Ashtabula Railroad Company," and not those of the constituent company of the same name, for the scheme of consolidation provided by law as to railroad companies contemplates the conversion of the stock of the constituent companies in exchange for stock in the consolidated company.

It is evident that the "capital stock," i. e., corporate property of the consolidated corporation, now known as The Pittsburgh, Youngstown & Ashtabula Railroad Company, is not all taxed in its name in this state, for a part of the physical corporate property is located in the state of Pennsylvania and is not subject to taxation in this state. This being so, the shares of capital stock of The Pittsburgh, Youngstown & Ashtabula Railroad Company are not exempt from taxation under section 5372 of the General Code.

In the case of Hubbard v. Brush, 61 O. S. 252, the supreme court, in construing section 2746 R. S., and which was identical as to provisions with section 5372 General Code above quoted, in its opinion say :

"The phrase 'capital stock,' within the meaning of that term, as employed in that section, should be held to embrace the entire corporate property. If any part of the corporate property is not taxed within this state, the owners of shares of its stock who are residents of this state are not exempt by virtue of the provisions of that section from listing those shares for taxation in this state and paying taxes thereon, the exemption applying only in cases where the 'capital stock,' i. e., all the corporate property, has been taxed within this state."

Lander v. Burke, 65 O. S. 632.
Lee v. Sturges; Insurance Co. v. Ratterman, 46 O. S. 174.

There remains to be determined whether the shares of stock of this corporation are exempt from taxation under section 192 of the General Code. The first sentence of this section is as follows:

"No person shall be required to list for taxation a share of the capital stock of an Ohio corporation; * * *"

The articles of agreement of the consolidation referred to in your communication show that the corporation at that time and thereafter known as The Pittsburgh, Youngstown & Ashtabula Railroad Company was a corporation formed by consolidation under the laws of Ohio and Pennsylvania of a number of Ohio and Pennsylvania railroad corporations, and the question presented on the consideration of the above quoted language of Section 192 of the General Code is whether the corporation formed by consolidation in 1906 of said The Pittsburgh, Youngstown & Ashtabula Railroad Company with The New Castle & Beaver Valley Railroad Company, a Pennsylvania corporation, and which consolidated company is now known as The Pittsburgh, Youngstown & Ashtabula Railroad Company, is an Ohio corporation within the meaning of said section. An Ohio corporation, I take it, is one created under the laws of the said state.

Section 2 of Article XIII of the constitution provides:

"Corporations may be formed under general laws; but all such laws may, from time to time, be altered or repealed."

A railroad corporation may be created by filing articles of incorporation and by organization under the general corporation statutes of this state. (Secs. 3235 et seq. Revised Statutes; Secs. 8623 et seq. General Code). And if the corporation now known as The Pittsburgh, Youngstown & Ashtabula Railroad had been so created and had thereafter, by purchase or merger, acquired the properties of The New Castle & Beaver Valley Railroad Company located in the state of Pennsylvania, I do not apprehend that The Pittsburgh, Youngstown & Ashtabula Railroad Company would for that reason be considered any the less an Ohio corporation within the meaning of section 192 of the General Code or otherwise. Nor do I apprehend that a railroad company formed by the consolidation under the laws of two or more existing railroad companies incorporated under the laws of this state would be considered any the less an Ohio corporation than if it had filed articles of incorporation and had organized pursuant to the general incorporation statutes.

The question, however, is as to the status of the corporation formed by the consolidation mentioned in your communication. That the railroad company at that time known as The Pittsburgh, Youngstown & Ashtabula Railroad Company was a corporation organized under the laws of Ohio seems to have been an accepted fact although such company, as before noted, had been formed by the consolidation of

a number of smaller Ohio and Pennsylvania Railroad companies; otherwise there would have been no lawful authority for the consolidation of this company with the New Castle & Beaver Valley Railroad Company, which was wholly a Pennsylvania corporation, for the laws of this state have never provided for the consolidation of railroad companies, except where at least one of the companies to be consolidated is an Ohio corporation. (Section 3380 Revised Statutes; 9026 General Code.)

In the case of Ashley v. Ryan, 49 O. S. 504, 528, the supreme court of this state speaking of consolidation under the laws of this state of the Toledo & Western Railway Company, an Ohio corporation, with a number of railroad companies organized under the laws of other states and together known as the Wabash System, says:

> "The further claim is made that, by filing the articles of agreement of consolidation of the companies composing the Wabash system, no 'new corporation' is created; and, therefore, the provisions of section 148a, as amended February 12, 1889, do not apply to them; that this section only applies where all the companies entering into the consolidation are Ohio companies. If this were so, then the plaintiffs should not have presented their articles to the secretary of state to be filed and recorded. But we are of the opinion that it is not so, and that a new company is formed in the one case as well as in the other. Referring to the Revised Statutes on the subject of 'consolidation,' it will be observed that section 3379 authorizes the consolidation of Ohio companies and that the next authorizes the consolidation of a company in this state with a company in an adjoining state. The next section, 3381, provides how the consolidation is to be effected, and applies without distinction to either case. It is then provided by section 3382 that when the agreement is made and perfected, and the same, or a copy thereof, is filed with the secretary of state, 'the several companies parties thereto shall be deemed and taken to be one company, possessing within this state all the rights, privileges and franchises, of a railroad company.' And by section 3384 it is provided that, upon the election of the directors of the consolidated company, all and singular the rights, privileges, franchises and property of the companies who are parties to the agreement shall be transferred to and vested in the 'new company without further act or deed.' The result is that by consolidation, whether between Ohio companies or between an Ohio company and companies of another state, a new company is formed by the extinguishment of the old ones. And it has been so determined in a number of cases. Shields v. Ohio, 95 U. S., 324; Compton v. Railway Co., 45 Ohio St., 592, 615; Lee v. Sturges, 46 Ohio St., 163, 169."

In the case of Shields v. Ohio, 95 U. S., 319, 323, the supreme court of the United States having for consideration and determination the question of the status of the Lake Shore & Michigan Southern Railway Company, a corporation formed in 1869 by the consolidation of an Ohio railway company with a number of railway companies organized under the laws of other states, with respect to the effect of such consolidation, says:

> "When the consolidation was completed the old corporations were destroyed, a new one was created, and its powers were 'granted' to it, in all respects, in the view of the law, as if the old companies had never existed, and neither of them had ever enjoyed the franchises so conferred. The same legislative will created and endowed the new corporation. It did one as much as the other. In this respect there is no ground for any distinction.
>
> "These views are sustained by several well considered cases exactly in point. One of them embodies the unanimous judgment of this court. Clear-

water v. Meredith, 1 Wall., 25; McMahan v. Morrison, 16 Ind., 172; the State of Ohio v. Sherman, 22 Ohio St., 411; Shields v. the State of Ohio, 26 Ohio St., 86."

In the case of the State of Ohio ex rel. v. Sherman, above cited, it was held that where a corporation in the pursuance of an act of the legislature transfers or conveys its franchise to be a corporation to others the transaction in legal effect is a surrender or abandonment of its charter by the corporation and a grant by the legislature of a similar charter to the transferees or purchasers.

In the case of Shields v. State of Ohio, 25 O. S., 86, the court having under consideration the question of the status of the Lake Shore & Michigan Southern Railway Company formed by the consolidation above referred to in the discussion of the case of Shields v. Ohio, 95 U. S., 324, says:

"The consolidation took place in 1869, and was effected in all respects in pursuance of the act of April 10, 1856 (4 Curwen, 2791; S. & C. 327); and the claim is that a consolidation under that act is to be regarded in law as a surrender or relinquishment of the several individual charters of the companies so uniting, and the acceptance of a charter *de novo* from the state. If such be the law, it cannot well be denied that the consolidated company, organized, as it was, after the taking effect of the present constitution, is bound by and subject to all its provisions. Is such the legal effect of the consolidation? Are the old companies dissolved, and their charters extinguished, and is the consolidated company a new corporation, receiving all its rights and powers directly from the legislature?

"In the light of the decision by this court in the case of The State of Ohio v. Sherman et al. (22 Ohio St., 411), we do not see how an affirmative answer to these questions can be avoided. In the case referred to, the court held, substantially, that a transfer of all its franchises by a corporation, in pursuance of an act of the legislature authorizing the same, is in legal effect a grant by the legislature of similar franchises to the transferees, and constitutes them a new corporation. * * * This statute plainly contemplates and expressly provides for the formation of a 'new corporation.' The old stock is to be surrendered or extinguished; a new amount of capital stock is to be agreed upon and distributed to parties who voluntarily take the same; and a certificate is to be filed with the secretary of state, which, it is declared, 'shall be evidence of the existence of such corporation.' Section 3 of the act declares that the companies thus uniting 'shall be taken and deemed to be one corporation.' Section 5 provides for the election of a board of directors of the new corporation, which it denominates a 'corporation created by' the consolidation, 'and by the provisions of' that act, and vests in 'such new corporation,' all and singular 'the rights, privileges, and franchises' of the '*former* corporations.' Nothing could be much plainer, it seems to us, than that a consolidated company, organized under such a statute, is a corporation 'formed under a general law,' within the meaning of article 13, section 2, of the present constitution, and as such, liable to all the limitations and restrictions therein, equally as corporations organized under the general corporation laws of the state, enacted under the present constitution. The fact that it is formed out of old defunct corporations does not make it any the less a corporation created by the legislature. It is not the material out of which it is formed, but the plastic hand which formed it, that we are to look to for its character and *status* under the constitution.

"In general, it may be said that a company created by the consolidation of foreign corporations, remains a domestic corporation of each of the con-

curring states, the peculiar legislation of neither state becoming operative within the limits of the other. Its property within the particular state is subject to taxation, or vested with immunity from it, according to its laws, or to the provisions of the original charter of the constituent company, these privileges not being destroyed by the consolidation, unless otherwise provided by the constitution or by the statute. (Purdy's Beach on Private Corporations, vol. 3, section 1278.)

"The consolidation of two or more corporations pursuant to the laws of different states results in the formation of one corporation which is regarded as a domestic corporation in each of the states whose laws are followed in effecting such consolidation. (Smith v. Cleveland, etc., R. Co., 170 Ind., 382, 394; Ohio & Mississippi Railway Co. v. People ex rel., 123, Ill., 467.)"

In the case of Ashley v. Ryan, supra, the court in its opinion further says:

"There has been some diversity of opinion as to the status of a corporation formed by the consolidation of companies under the laws of different states. But it seems pretty well settled, upon principle at least, that where formed under co-operative legislation of the different states, it becomes a corporation in each state where its road is located. It is a legal entity residing and doing business in different states, with a status in each, derived from and determined by the laws of the state."

In the case of Muller v. Dows, 94 U. S. 444, it was held that a corporation created by the laws of the state of Iowa, although consolidated with another of the same name in the state of Missouri under the authority of the statutes of each state was, nevertheless, in Iowa a corporation existing there under the laws of that state alone.

The court in this case had under consideration the question whether the Chicago & Southwestern Railway Company was a corporation created by the laws of Iowa so as to confer jurisdiction on the circuit court of the United States for the district of Iowa of an action therein instituted against said railway company by certain plaintiffs, one of whom was a citizen of Missouri. The court in its opinion says.

"* * * it is argued on behalf of the appellants that the Chicago & Southwestern Railway Company cannot claim to be a corporation created by the laws of Iowa, because it was formed by a consolidation of the Iowa company with another of the same name, chartered by the laws of Missouri, the consolidation having been allowed by the statutes of each state. Hence, it is argued the corporation was created by the laws of Iowa and of Missouri; and as Burns, one of the plaintiffs, is a citizen of Missouri, it is inferred that the circuit court had no jurisdiction. We cannot assent to this inference. It is true the provisions of the statutes of Iowa, respecting railroad consolidation of roads within the state with others outside of the state, were that any railroad company, organized under the laws of the state, or that might thus be organized, should have power to intersect, join, and unite their railroads constructed or to be constructed in the state, or in any adjoining state, at such point on the state line, or at any other point, as might be mutually agreed upon by said companies; and such railroads were authorized to 'merge and consolidate the stock of the respective companies, making one joint-stock company of the railroads thus connected.' The Missouri statutes contained similar provisions; and with these laws in force the consoldation of the Chicago and Southwestern railways was effected. The two companies became one. But in the state of Iowa that was an Iowa corporation, existing under the laws of that state alone. * * *"

The foregoing authorities quite clearly indicate the view that a railroad company formed by authorized consolidation under the laws of this state is an Ohio corporation even though one of the constituent companies be a corporation of another state and this view tends to the conclusion that The Pittsburgh, Youngstown & Ashtabula Railroad Company formed by the consolidation mentioned in your communication is an Ohio corporation within the meaning of section 192 of the General Code.

Some doubt as to the correctness of the view indicated in the above authorities with respect to a consolidation of this kind is created by the language used in the opinion of the court in the case of Lee, Treasurer, v. Sturges, supra. Judge Spear, in this case, speaking of the Lake Shore & Michigan Southern Railway Company, which company, as before noted herein, was formed by consolidation under the laws of this state, with respect to the question as to exemption from taxation of the shares of stock of this company under sections 3 and 59 of the act of April 5, 1859, carried into the Revised Statutes as section 2746 and later into the General Code as section 5372, above quoted, expressed the view that The Lake Shore & Michigan Southern Railway Company, as to matters of taxation, was essentially a foreign corporation.

The considerations presented in the argument in said opinion preliminary to the statement just noted, however, are more immediately pertinent to the obvious conclusion reached in said opinion, that the question whether the shares of stock of The Lake Shore & Michigan Southern Railway Company held in Ohio are taxable here is not to be answered in the negative merely because it may be ascertained that the company was incorporated under the laws of Ohio; and it is clear from the opinion in this case that the decision of the court on the question presented would have been the same had the view been therein expressed that this company was to all intents and purposes an Ohio corporation, and this for the obvious reason there appearing that the larger part of the property of said company was not taxable in this state.

Though the question is inherently one of some difficulty, I am inclined to the view that any corporation formed under the general laws of this state as required by section 2 of article XIII of the State Constitution is an Ohio corporation, and in as much as it has been expressly held in the case of Shields v. State of Ohio, 26 O. S. 86, before noted, that a consolidated company organized under the statutes of this state providing for the consolidation of railroad companies is a corporation formed under the general laws within the meaning of said section 2 of article XIII of the State Constitution, I am of the opirion that the company formed by the consolidation mentioned in your communication is an Ohio corporation, and admitting, for the purposes of this opinion, the constitutionality of section 192 of the General Code in so far as it pertains to the question at hand, I am of the opinion that the shares of stock of The Pittsburgh, Youngstown & Ashtabula Railroad Company are exempt from taxation in this state.

Very truly yours,
JOSEPH McGHEE.
Attorney-General.

212.

APPROVAL—TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE OF THE BOARD OF EDUCATION OF NILES CITY SCHOOL DISTRICT.

COLUMBUS, OHIO, April 24, 1917.

Industrial Commission of Ohio.

GENTLEMEN:

"RE:—Bonds of Niles city school district in the sum of $9,000.00, issued for the purpose of improving the high school property and obtaining additional school property, being 18 bonds of $500.00 each."

I have examined the transcript of the proceedings of the board of education and other officers of the Niles city school district in connection with the above bond issue, and I find the same in accordance with the provisions of the General Code. I have also examined the bond and coupon form attached and have approved the same with the suggestion that the constitutional provision relative to the redemption of the bonds be inserted.

I am of the opinion that said bonds drawn in accordance with the form suggested and executed by the proper officers will, upon delivery, constitute valid and binding obligations of the said city school district.

Very truly yours,
JOSEPH McGHEE,
Attorney-General.

213.

ROAD IMPROVEMENT—BONDS FOR SAME UNDER AGREEMENT BETWEEN TOWNSHIP TRUSTEES AND COUNTY COMMISSIONERS—FOR TOWNSHIP'S SHARE OF COST—SHOULD BE ISSUED UNDER SECTION 6929 G. C. AND NOT UNDER SECTION 3295 G. C.

Section 6929 General Code governs in the matter of issuing bonds to cover a township's share of the cost and expense of a road improvement under an agreement as to the division of the cost and expense of such improvement made by the trustees of said township with the board of county commissioners under section 6921 General Code, and such bonds should be issued under said section 6929 and not under section 3295 General Code.

COLUMBUS, OHIO, April 24, 1917.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I am herewith returning to you transcript of the proceedings of the trustees of Middleburgh township, Cuyahoga county, relating to the issue of bonds by the said trustees in the sum of ten thousand dollars for the purpose of paying the township's share of the improvement of East Bagley road in said township on an agreement made by and between the said trustees and the county commissioners of Cuyahoga county.

The issue of these bonds has been provided for by the trustees on the assumed authority of section 3295 of the General Code, as amended, 106 O. L., 536. This section as amended provides generally that the trustees in the township may issue bonds for any of the purposes for which municipal corporations may issue bonds, and for the purpose of providing funds to pay the township's share of the cost and expense of any improvement made under an agreement with the county commissioners.

The transcript indicates that the East Bagley road improvement, to which this bond issue relates, is an improvement projected and conducted, or to be conducted, by the county commissioners of Cuyahoga county.

The transcript shows that on the second day of September, 1916, an agreement was entered into between the county commissioners and the township trustees with respect to the division of the cost and expense of improving that part of the road in Middleburgh township, and it was thereby agreed that the township trustees should pay the sum of $9,665.00 as the township's share of the cost and expense, which agreement was later on, on September 4, 1916, incorporated in the record of the township trustees by resolution duly adopted. The improvement of this road is projected

and conducted by the county commissioners under chapter 6 of the Cass Road Law, which chapter has been carried into the General Code as sections 6906 to 6956, inclusive.

Section 6921 of the General Code authorizes the county commissioners to enter into an agreement with the trustees of a township in which said improvement is in whole or in part situated, whereby the county and the township may pay such proportion or amount of the total cost and expense of the improvement as may be agreed upon between them.

Section 6926 of the General Code provides for a levy by the county commissioners of a tax upon all taxable property of the county for the purpose of paying the county's share of the cost and expense of an improvement under this chapter; while section 6927 of the General Code provides for a levy by the county commissioners upon all the taxable property of the township to pay the township's share of the cost and expense of such improvement.

Section 6929 General Code provides for an issue of bonds by the county commissioners in anticipation of the collection of such taxes, which bonds cover not only the share of the cost and expense of such improvement to be borne by the county, but that to be borne by the township as well. It is likewise clear that the county commissioners may, under the provissions of section 6929 issue bonds covering the share of the cost and expense apportioned to a township under some plan provided for in section 6919 General Code, and likewise the share apportioned to the township by agreement provided in section 6921. It is manifest that the scheme provided by section 6929 with respect to the issue of bonds covering the township's share of the cost and expense of a road improvement projected by the county commissioners under chapter 6 of the Cass Road law, is altogether different, if not entirely inconsistent with that provided by section 3295 General Code. In one way, the bonds to meet the township's share of the improvement are issued by the county commissioners, in the other, by the township trustees; in one way the bonds are subject only to the fifteen mill limitation of the Smith one per cent. law, in the other way the bonds are subject to the interior limitation of two mills for township purposes and the limitation of ten mills for all purposes.

Looking to legislative history with reference to the act in which section 3295 was amended and the act enacting the Cass road law, I note that the Cass law was enacted May 17, 1915, approved by the governor on June 2, 1915, and filed in the office of the secretary of state on June 5, 1915, while the act amending section 3295 was passed on May 27, 1915, approved by the governor on June 4, 1915, and filed in the office of the secretary of state on une 5, 1915, so that it appears the Cass law was both enacted and approved before the act amending section 3295, but the Cass law went into effect as of a later date for the reason that the act amending section 3295 went into effect after the expiration of the ninety day referendum period, while the Cass law went into effect, by its own terms, on September 6, 1915.

On the opinion of the court in the case of State v. Lathrop, 93 O. S. 79, 86, it might be argued that in so far as section 6929 is in conflict with section 3295 as to operation with respect to the transaction here under consideration effect should be given to the provisions of section 6929 as the later statute.

I do not deem it necessary, however, to decide whether or not there is any conflict in the application of the provisions of section 3295 and of those of section 6929, nor as to how such conflict, if any, should be decided.

Section 3295 seems to be a general statute providing authority in the township trustees to issue bonds for the various purposes, including that of providing funds to pay the township's share of the cost of an improvement made under an agreement between the township trustees and the county commissioners. The authority granted to the township trustees by this section to borrow money for this purpose by the issue of bonds does not on familiar principles authorize the township trustees to make

an agreement with the county commissioners with respect to the division of the cost and expense of road improvements, and to get this independent power upon the part of the township trustees we must find it, if at all, in other statutory provisions. We find such power granted to the township trustees by the provisions of section 6921 General Code, but this section, as before noted, is a part of chapter 6 of the Cass road law relating to the matter of road construction and improvement by county commissioners, and with respect to the matter of issuing bonds to cover the township's share of the cost and expense of the road improvement under the agreement provided for in section 6921. We find full provision therefor in section 6929, and on familiar principles of construction this is the section which should govern in the matter of issuing said bonds rather than section 3295.

In opinion 1327 addressed by my predecessor, Mr. E. C. Turner, to Honorable Irving Carpenter, prosecuting attorney, Norwalk, Ohio, under date of March 6, 1916, it was held that where a road is improved under an agreement between the county commissioners and the township trustees by the terms of which the cost is to be divided between the county and the township and it is necessary to issue bonds to cover the township's share of the cost and expense of such improvement the same should be issued by the county commissioners under authority of section 6929 General Code. In this opinion Mr. Turner did not expressly hold that the township trustees did not have authority under section 3295 General Code to issue bonds to cover the township's share of the cost and expense of such improvement, but did hold specifically that in such case the bonds should be issued by the county commissioners under section 6929.

Again, in opinion 1520 addressed to you under date of April 27, 1916, Mr. Turner held in an opinion disapproving bonds of Norwich township, Huron county, Ohio, in the sum of $17,000.00, to improve roads in said township, that the only authority possessed by the township trustees to borrow money for improvement of roads was that prescribed by sections 3298-8 and 3298-9 General Code, the same being a part of the Cass road law. This opinion is not exactly in point upon the question here presented, but I am in full accord with the opinion of Mr. Turner first above noted, and feel that, on account of the great uncertainty existing with respect to the authority of township trustees to issue bonds under section 3295 General Code, until the question is determined by our highest court the bonds covering cases of this kind should be issued by the county commissioners; and for all of the above reasons I would respectfully recommend that the resolution heretofore adopted by your board purchasing these bonds be rescinded, but that such recision be general and not on the specific ground of the illegality of the issue so that the township trustees may, if they care to do so, sell these bonds upon the open market without the embarrassment which an express finding by your board as to the illegality of the issue might occassion.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

214.

HOUSE BILL 584—MONEYS APPROPRIATED THEREIN FOR CONSTRUCTION, ETC., OF ROADS—CANNOT BE CONTRACTED AGAINST UNTIL JULY 1, 1917.

The moneys appropriated under house bill No. 584 for the construction, improvement, maintenance and repair of inter-county highways and main market roads cannot be contracted against by the state highway department before July 1, 1917, with a view of paying the obligations incurred under said contracts out of the moneys so appropriated. This for the reason that said act provides that it shall not become effective until July 1, 1917, and for the reason that section 2 provides that the sums appropriated shall not be used to pay liabilities existing prior to July 1, 1917.

COLUMBUS, OHIO, April 26, 1917.

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

DEAR SIR:—I have your communication of April 7, 1917, in which you ask my opinion in reference to a certain matter therein set out. Your communication reads as follows:

> "I respectfully direct your attention to an opinion rendered me by Hon. Edward C. Turner, former attorney-general of Ohio on June 21, 1915, in response to my question as to whether or not this department might legally enter into contracts in anticipation of moneys to come into the state treasury at the August, 1915, settlement, such sums having been appropriated by the legislature.
>
> "The following is the last paragraph of Mr. Turner's opinion:
>
> " 'Answering your question specifically, it is, therefore, my opinion that you may at the present time enter into contracts in anticipation of the moneys that will come into the state treasury at the August, 1915, settlement, the only precaution to be observed by you in the premises being to so arrange the contracts that it will not be necessary to actually make any payments to the contractors from the appropriation about which you inquire until after the funds represented by such appropriation shall have come into the state treasury.'
>
> "I further respectfully direct your attention to house bill No. 584 of the present general assembly which contains appropriations to the state highway department for the two years, commencing July 1, 1917, and ending June 30, 1919. Section 10 of this act is as follows:
>
> " 'This act shall not take effect until July 1, 1917.'
>
> "I respectfully request your opinion as to whether this department is obliged to wait until the going into effect of house bill No. 584 on July 1, 1917, before it will be proper to contract against moneys to come into the treasury at the August 1917 settlement, or whether contracts may be entered into prior to the actual taking effect of the above act involving funds to come into the state treasury at the August 1917 settlement."

In your communication you refer to an opinion rendered by my predecessor, Mr. Turner, in reference to a certain matter submitted to him by your department. This makes it necessary for me to note the opinion rendered by Mr. Turner to your department, and decide whether the facts upon which he rendered you the opinion are similar to the facts upon which you ask my opinion.

Mr. Turner's opinion was based upon house bill No. 709, which is found in 106

O. L. 452. This act was passed May 27, 1915, approved June 2, 1915, and filed in the office of the secretary of state on June 4, 1915. Mr. Turner's opinion is found in Vol. II, p. 1064 of annual report of the attorney general for 1915, being No. 521. It will be noted that his opinion was rendered on June 21, 1915; that is, it was rendered after the date of the filing of said house bill No. 709 with the secretary of state. In his opinion he says:

> "The various items carried in house bill No. 709 were available for contract purposes as soon as the bill became a law, which was on June 4, 1915."

Mr. Turner evidently considered that the provisions of section 1d of article II of the Constitution did not apply to this bill, possibly for the reason that he considered the appropriations made in said house bill were for the current expenses of the state government and state institutions; that is, provided for the current expenses of the state highway department, which is one of the departments of the state. I assume that Mr. Turner must have viewed the provisions of said house bill in this light, for otherwise the said law would not have become effective on June 4, 1915. Owing to the provisions of the referendum it would not have become effective for ninety days after June 4, 1915.

I am not passing upon the question as to whether the provisions, such as are found in house bill No. 709, are subject to the referendum, but I am assuming that this was the assumption of Mr. Turner in rendering his opinion. At least he went on the theory that the bill became a law on June 4, 1915, and the only thing upon which he passed was this:

> "The state highway commissioner may at the present time enter into contracts in anticipation of the moneys that will come into the state treasury at the August, 1915, settlement, provided such contracts are so arranged that it will not be necessary to actually make any payments to contractors from the proceeds of the August settlement until the funds have come into the state treasury."

That is, that the state highway commissioner, after the bill became a law, could contract against moneys which had not yet come into the state treasury and which would not come into the treasury until the August settlement of 1915.

Mr. Turner based his opinion to some extent upon an opinion rendered by Mr. Hogan, his predecessor, which opinion was rendered May 23, 1914, to Hon. James R. Marker, state highway commissioner, and is found in volume I, page 699, of the annual report of the attorney-general for 1914. But Mr. Hogan did not hold that items carried in an appropriation bill could be contracted against before the appropriation bill became effective. He held merely that contracts could be entered into involving the expenditure of money for which a levy had been made, before the money realized from the said tax levy is actually in the treasury.

With the above in mind, let us notice specifically the facts upon which the answer to your question must be based. Your question has to do with the provisions of House Bill No. 584, passed by the present legislature in its late session. The said bill was passed March 21, 1917, approved March 31, 1917, and filed with the secretary of state March 31, 1917, and if the principles of the referendum would apply to a bill such as this, it would not become effective until June 30, 1917. Section 10 of the bill itself provides that it shall not take effect until July 1, 1917.

The question is as to whether you can contract against the items appropriated in said law for the construction, improvement, maintenance and repair of inter-county highways and main market roads, before the law itself becomes effective. It is my opinion that you can not so contract. Until July 1, 1917, the said law and all the pro-

visions thereof are held in abeyance. Until that date it has no more force or effect than if it had never been enacted.

It could hardly be said that your department could have in the year 1916 contracted against money which it anticipated would be appropriated by the legislature which would in all probability meet in 1917. Neither can you contract against moneys which in all probability will be appropriated on July 1, 1917, by virtue of the fact that the act will go into full force and effect as of that date.

Further, section 2 of said act provides as follows:

> "The following sums shall not be expended to pay liabilities or deficiencies existing prior to July 1, 1917, or incurred subsequent to June 30, 1919."

that is, the appropriations made in this act are to cover liabilities entered into after June 30, 1917, and prior to June 30, 1919. In other words, it was meant to cover a period of two years only, in order that it might comply with the provisions of the constitution that appropriations must be limited to a period of two years. If you enter into a contract before July 1, 1917, there is a liability incurred. The liability dates from the date upon which the contract is entered into, but section 2 provides that the sums appropriated in said act shall not be used to pay liabilities so entered into.

Hence, answering your question specifically, it is my opinion that your department can not contract against the appropriations made in said act before July 1, 1917, with the idea of paying the liabilities incurred under and by virtue of said contract out of the funds appropriated in said act.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

215.

HUMANE SOCIETY—NOT ENTITLED TO ANY PART OF FINES COLLECTED FOR VIOLATION OF SECTION 13378 G. C.

No part of the fines collected for violations of section 13378 of the General Code are payable to the humane society.

COLUMBUS, OHIO, April 26, 1917.

HON. LEWIS D. SLUSSER, *Probate Judge of Summit County, Akron, Ohio.*

DEAR SIR:—I have your letter of March 24, 1917, as follows:

> "Will you kindly give me your ruling as to whether or not any part of the fines collected for a violation of section 13378 of the General Code, should be turned over to the Akron humane society.
>
> "It is my opinion that none of this amount should be so paid, but I am anxious to have your ruling prior to my quarterly settlement with the county treasurer."

I take it that your question is asked with the thought in mind that possibly the provisions of section 13376 G. C., as to payment of fines to the humane society, might apply as well to section 13378, since both relate to crimes in connection with cruelty to animals.

Sections 13376 and 13378 G. C. read as follows:

"*Section* 13376. Whoever overworks, overrides, overloads, tortures, deprives of necessary sustenance, unnecessarily or cruelly beats, needlessly mutilates or kills, or impounds or confines an animal and fails to supply it during such confinement with a sufficient quantity of good, wholesome food and water, or carries or conveys it in a cruel or inhuman manner, or keeps cows or other animals in an enclosure without wholesome exercise and change of air, or feeds cows on food that produces impure or unwholesome milk, or abandons to die an old, maimed, sick, infirm or diseased animal or works it, or being a person or corporation engaged in transporting live stock, detains such stock in railroad cars or compartments longer than twenty-four hours after they are so placed without supplying them with necessary food, water and attention, or permits such stock to be so crowded as to overlie, crush, wound or kill each other, shall be fined not less than two dollars nor more than two hundred dollars for the first offense, and for each subsequent offense such person shall be fined not less than ten dollars nor more than two hundred dollars or imprisoned not more than sixty days, or both. Nothing herein shall prevent the dehorning of cattle. All fines collected for violations of this section shall be paid to the society or association for the prevention of cruelty to animals, if there be such in the county, township, village or city where such violations occurred."

"*Section* 13378. Whoever engages in or is employed at dog fighting, cock fighting, bear baiting, pitting an animal against another, or cruelty to animals, or receives money for the admission of another to a place kept for such purpose, or uses, trains or possesses a dog or other animal for seizing, detaining or maltreating a domestic animal, shall be fined not less than five dollars nor more than one hundred and fifty dollars or imprisoned not less than ten days nor more than thirty days. Whoever knowingly purchases a ticket of admission to such place, or is present thereat, or witnesses such spectacle, shall be an aider and abettor."

As these sections stand today in the General Code, the provision of section 13376, as to payments of fines to the humane society, appears to have no application to section 13378, but whether it really has such application or not is best ascertained from an investigation into the legislative history of the two sections.

On February 17, 1831, in 29 O. L. 161, the legislature passed an act entitled "An act for the prevention of certain immoral practices." Sections 11 and 12 of this act read:

(11.) "That any person or persons who shall hereafter confine, or aid or assist in confining, any bull, steer, or other domestic or domesticated animal or animals, either by tying, penning or inclosing the same, for the purpose of bull baiting, bear baiting, or other purpose of torture; or shall aid or assist in torturing the same, when so tied or penned, either by dogs, whips, spears, or other instruments; shall forfeit and pay any sum not exceeding one hundred dollars."

(12.) "That if any person or persons shall publicly exhibit, or aid and assist in exhibiting, the game commonly called cock fighting, such person or persons shall forfeit and pay a fine not exceeding twenty dollars."

Section 14 of this act provided that all fines paid on account of prosecutions under the act should be collected in the name of the state and paid over into the township treasury for the use of schools in the township.

On March 29, 1875, an act was passed in 72 O. L. p. 129, "to prevent cruelty to animals and to provide for the organization of associations or societies for the prevention of cruelty to animals and to repeal certain acts herein named." Section 1 of this act referred to cruelty to animals and made certain cruel acts misdemeanors. Section 2 provided that any neglect to supply animals with food should be a misdemeanor. Section 4 provided that carrying animals in vehicles in a cruel or inhuman manner should be a misdemeanor. Section 6 provided that abandoning animals to die should be a misdemeanor. Section 7 made dog fighting or cock fighting a misdemeanor. Section 10 made the keeping or training of dogs for purposes of catching domestic animals a misdemeanor. Section 23 of the act provided in part:

> "All the funds collected from the fines and all the cases tried under the provisions of this act shall be paid into the society or association for the prevention of cruelty to animals, if any such society or association exists in such township, city or village where the case is tried, and if no such society exists in said township, city or village then such fine or fines shall be paid to the state society for the prevention of cruelty to animals."

On May 5, 1877, 74 O. L. 240, the legislature passed an act entitled "An act to amend, revise and consolidate the statutes relating to crimes and offenses and to repeal certain acts therein named; to be known as title 1, Crimes and Offenses, part 4 of the act to revise and consolidate the general statutes of Ohio." In this act, at page 298, the legislature expressly repealed the act of February 17, 1831, first above referred to, and at page 307 they repealed sections 1, 2, 4, 5, 6, 7 and 10 of the act of March 29, 1875, above referred to, and substituted for all of these sections sections 21 and 22, at page 270, which sections read as follows:

> "*Sec.* 21. Whoever overdrives, overloads, tortures, torments, deprives of necessary sustenance, or unnecessarily or cruelly beats, or needlessly mutilates or kills any animal, or impounds or confines any animal in any place and fails to supply the same during such confinement with a sufficient quantity of good, wholesome food and water, or carries in or upon any vehicle, or otherwise, any animal in a cruel or inhuman manner, or who keeps cows or other animals in any inclosure without wholesome exercise and change of air, or feed cows on food that produces impure or unwholesome milk, or abandons to die any maimed, sick, infirm, or diseased animal, shall be fined not more than two hundred nor less than five dollars, or imprisoned not more than sixty days, or both.
>
> "*Sec.* 22. Whoever engages in or is employed at cock-fighting, dog-fighting, bear-baiting, pitting one animal against another of the same or of a different kind, or any similar cruelty to animals, or receives money for the admission of any person to any place kept for any such purpose, or uses, trains, or possesses a dog or other animal for the puspose of seizing, detaining, or maltreating, any domestic animal, shall be fined not more than one hundred and fifty nor less than five dollars, or imprisoned not more than thirty nor less than ten days. Any one who knowingly purchases a ticket of admission to any place mentioned in this section, or is present thereat, or witnesses such spectacle, shall be deemed an aider and abettor."

On June 20, 1879, the legislature repealed the remainder of the act of March 29, 1875, leaving nothing on the statute books relating to crimes in connection with cruelty to animals save the two sections adopted in the act of May 5, 1877 (74 O. L. 240-270), above quoted. These sections were carried into the Revised Statutes of 1880 as sections 6851 and 6852, and read as follows:

> "*Sec.* 6951. Whoever over-drives, over-loads, tortures, torments,

deprives of necessary sustenance, or unnecessarily or cruelly beats, or needlessly mutilates or kills, any animal, or impounds or confines any animal in any place and fails to supply the same during such confinement with a sufficient quantity of good, wholesome food and water or carries in or upon any vehicle, or otherwise, any animal in a cruel or inhuman manner, or who keeps cows or other animals in any inclosure without wholesome exercise and change of air, or feeds cows on food that produces impure or unwholesome milk, or abandons to die any maimed, sick, infirm, or diseased animal, or, being a person or corporation engaged in transporting live stock, detains such stock in railroad cars, or in compartments, for a longer continuous period than twenty-four hours after the same are so placed, either within or beyond this state, without supplying the same with necessary food, water, and attention, or permits such stock to be so crowded together as to overlie, crush, wound, or kill each other, shall be fined not more than two hundred nor less than five dollars, or imprisoned not more than sixty days, or both.

"*Sec* 6952. Whoever engages in or is employed at cock-fighting, dog-fighting, bear-baiting, pitting one animal against another of the same or of a different kind, or any similar cruelty to animals, or receives money for the admission of any person to any place kept for any such purposes, or uses, trains, or possesses a dog or other animal for the puspose of seizing, detaining, or maltreating, any domestic animal, shall be fined not more than one hundred and fifty nor less than five dollars or imprisoned not more than thirty nor less than ten days; and (any) one who knowingly purchases a ticket of admission to any place mentioned in this section, or is present thereat, or witnesses such spectacle, shall be deemed an aider and abettor."

It will be noted that at this time no provision existed in law for the payment to the Humane Society of any of the fines collected under the "cruelty to animals" prosecutions, the old law making such provision having been repealed in *toto*.

Now on April 15, 1881, the legislature passed an act (78 O. L. 134), entitled "An act to amend section 6951 of the Revised Statutes of Ohio." This act added the following provision to section 6951 R. S.:

"Provided, that all fines collected for violations of this section shall be paid to the society or association for the prevention of cruelty to animals, if any such society or association is organized in such township, village or city where such violation occurred."

This section so amended became section 13376 of the General Code and section 6952 Revised Statutes, above quoted, became section 13378 General Code in practically the same form as it was in the Revised Statutes.

From this review of the history of these sections, it is plain that the provision of section 13376 G. C., to the effect that all fines collected for violations of this section, shall be paid to the society or association for the prevention of cruelty to animals, if there be such in the county, township, village or city where such violation occurred, never has applied and does not now apply to the provisions of section 13378 of the General Code relating to dog-fights, cock-fights, bear-baiting, etc.

It is therefore my opinion, in direct answer to your question, that no part of the fine collected for a violation of section 13378 of the General Code should be paid over to the Akron Humane Society.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

216.

WHERE FUNDS APPROPRIATED FOR CONTRACT—HAVE BEEN DIVERTED TO OTHER PURPOSES—CONTRACTOR ENTITLED TO INTEREST ON FINAL ESTIMATES—FROM TIME SAME BECAME PAYABLE UNTIL PAID.

Interest should be allowed to a contractor on final estimates after the same are payable and until paid, where the funds which were appropriated for a contract have been used for other purposes without the knowledge or consent of such contractor.

COLUMBUS, OHIO, April 26, 1917.

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

DEAR SIR:—In your letter of the 10th you request my opinion on the following statement of facts:

"After the disastrous flood of 1913 which destroyed the bridge across the Scioto river in this city and washed out and destroyed the road known as the Towpath road, which is in fact the only road entering the county seat from the west, steps were duly and legally taken by the county commissioners of this county in conformity to emergency legislation passed by the general assembly of Ohio, authorizing the issuing and sale of bonds for that purpose to raise funds and rebuild the bridge and repair and reconstruct the road. Ample funds were raised by the bond issue to fully pay for the work, including all additions and extras as well as the interest hereinafter mentioned, and leave a considerable surplus in the fund. The county auditor duly issued his certificate that the funds were in the treasury to pay for this contract.

"When the work was completed a final estimate was made by the engineer and given to the contractor showing the amount of the work done and the balance due him under the contract for the same. This estimate was presented to the county commissioners for allowance and payment. It was found by them to be correct, but a voucher was not issued for it at that time because in the meantime the money in this fund, which, as above stated, had been more than ample to pay this amount and all amounts pertaining to the repair of this road, had been by a former board of county commissioners diverted and used for other purposes and there were no funds on hand at that time with which to pay the contractor. The same remained unpaid for about a year and until funds were accumulated, by taxation, in the funds to which the money for this purpose had been diverted.

"The question is: Is the contractor entitled to interest upon the amount of his final estimate from the time it was presented to the county commissioners and found by them to be correct until the date of its payment?

"The county commissioners have requested my opinion on the question.

"I am constrained to the belief that under section 8305 of the General Code of Ohio which provides: '* * * when money becomes due and payable upon any * * * settlement between parties * * * the creditor shall be entitled to interest at the rate of six per cent. per annum and no more', the contractor would be entitled to such interest.

"I am led to this conclusion from the justice of the matter, the plain reading of the above section and the authorities among which is the case of Warren Bros. v. Cincinnati, 7 O. L. R., 542, but as the interest in question amounts to a considerable sum, something like a thousand dollars, I consider the matter of such importance that I would like to have some backing

for my opinion or be convinced that I am wrong before advising the commissioners. Will you, therefore, kindly give me your official opinion upon the subject and very greatly oblige?"

When the contractor mentioned in your statement of facts entered into the contract with your board of county commissioners for the construction of the road and bridge named, the county auditor issued his certificate that the funds were in the treasury for the payment of any and all estimates under said contract as the said estimates became due and payable. An estimate becomes due and payable after the work on the contract is completed and said estimate has been made by the engineer and properly filed with and allowed by the board. The contractor has then performed his portion of the contract and the county must close the contract by performing its part, that is, by paying. If the funds have been diverted from their proper channels by the county officials, and through no fault of the contractor, the contractor cannot be made to suffer through non-payment thereof.

In the case of the Toledo Consolidated Electric Company v. Toledo, 13 O. D., 137, the ordinance provided that payment should be made for electic lighting twice each year. The payments, however, were made by the city from time to time and received by the compnay on account of the electric light furnished without reference to the dates mentioned in the ordinance and without anything being said by either party as to interest. The court held that by the great weight of authority the liability of the city for interest in its debts does not differ from that of individuals and the company was therefore allowed interest on overdue accounts.

In your case the estimate approved by the commissioners was a debt owing by the county to the contractor which was due and payable five days after the same had been approved or allowed by the commissioners. If the city in the case above referred to could be held on over due payments on its contract, how, then, can the county escape the payment of interest on an overdue payment on one of its contracts? The money was due the contractor when his contract was completed and his claim thereon allowed. The consideration, therefore, had been performed and whoever withheld same from him was liable for whatever damage was done on account of such withholding.

It is held in Gray v. Case School, 62 O. S., 1, that as a general rule interest is payable on money in the shape of damages on the ground of delay in paying the principal. That is, it is allowable by law as a compensation for a delay in payment after a maturity of an obligation.

In the case of Melanpy v. Building, etc., 13 O. D., 192-3, it was held that where default is made under an order for the payment of money, interest will run upon the amount so retained.

In Candee et al. v. Webster, 9 O. S., 452, the court, after reviewing the rule in many states, held as follows:

"In this want of uniformity in the decisions of the other states upon the subject, owing in part to the difference in the statutes of the different states, as well as to the different views taken of the subject, we have in the absence of any previously established rule in this state, regarded ourselves at liberty to have respect to our own statute and practice, and endeavor to apply to the case such a rule as may, in its general application, seem most in accordance with reason and the rights of the respective parties.

"Our statute of June 1, 1824, fixing the rate, and providing for the payment of interest in this state, provides 'that all creditors shall be entitled to receive interest on all money after the same shall become due,' * * * 'until such debt, money, or property shall be paid.' * * *

"It has already been seen that the law subjecting the debtor to the

liability of paying interest in this state, continues such liability as *an incident to the debt*, 'until such debt, money, or property is paid.' The statute makes no exception in favor of any legal proceedings. * * *

"A party seeking to avail himself of an exemption from his general liability to pay interest on his indebtedness * * * must show such a state of facts as in equity entitle him to exemption."

The statute now follows very closely the statute as quoted in the last mentioned case. General Code section 8305 provides in part:

"* * * When money becomes due and payable upon * * * any * * * settlement between the parties * * * or other transaction, the creditor shall be entitled to interest at the rate of six per cent per annum and no more."

In your case the contractor is the creditor and the money was due and payable on the settlement between the parties. The statute makes no exception of the county and the creditor is entitled to interest.

A case of interest along this line is that of Warren Bros. Company v. City of Cincinnati, and was for the failure of the city to make a final estimate on completed work or to take the necessary steps leading up to settlement of the claims of the contractors within a reasonable time. This case is first reported in 7 Ohio Law Reporter, page 542, where the court holds:

"The failure of the city to do its duty by either accepting or rejecting the work alone makes it amenable to the cause of action set out in the petition; and if liable, damages as interest on the money thus wrongfully withheld is a proper remedy."

The said case was carried to the court of appeals, which court reversed the judgment of the lower court, and was carried then to the supreme court and reported in 92 O. S. p. 514, where the judgment of the court of appeals was reversed and the judgment of the court of common pleas affirmed in the following language:

"It is ordered and adjudged by this court, that the judgment of the said court of appeals be, and the same hereby is, reversed.

"And this court coming now to render the judgment that the court of appeals should have rendered, and it appearing that the city unreasonably delayed the payment of the money due the plaintiffs in error, * * * and it further appearing that the common pleas court allowed the city substantially one year in which to approve and accept, or reject the work of the contractors, for which time it allowed the contractors no interest on the balance of the unpaid contract price.

"It is therefore ordered, adjudged and decreed by this court, that the judgment of the common pleas court be, and the same is, hereby affirmed."

The money which should have remained in the fund from which payment could be made when the contract in your case was finished, was appropriated, when the contract was let, for the use and benefit of the contract. The certificate of the county auditor informs the contractor that said money was in the fund appropriated for that purpose at the time the contract was let. It was through no fault of the contractor that said funds were misapplied. When the work was finished it was proper for the final estimate to be allowed and when examined and found correct it was proper for the same to be approved by the board of county commissioners, the money which

should have been retained in the fund for the payment of same was used for the benefit of the county and so the delay in paying the same to the contractor is such delay for which compensation by way of interest should be allowed.

I therefore advise you that interest should be allowed on said sum beginning five days after said estimate was approved by the county commissioners and the bill ordered paid, and extending up to the day of payment.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

217.

APPROVAL—TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE OF THE BOARD OF EDUCATION OF WASHINGTON TOWNSHIP RURAL SCHOOL DISTRICT.

COLUMBUS, OHIO, April 26, 1917.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bond issue by the board of education of Washington township rural school district, Franklin county, Ohio, in the sum of $50,000.00, being one hundred bonds of $500.00 each, for the purpose of purchasing a site for and erecting and equipping high and elementary grade school building for the accommodation of the schools of said district."

I have examined the transcript of the proceedings of the board of education and other officers of Washington township rural school district relative to the above bond issue, also the bond and coupon form attached, and I find the same in accordance with the provisions of the General Code.

I am of the opinion that said bonds drawn in accordance with the form submitted and executed by the proper officers will, upon delivery, constitute valid and binding obligations of the said rural school district.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

218.

APPROVAL—ARTICLES OF INCORPORATION OF THE OHIO THRESHERMAN'S MUTUAL INSURANCE ASSOCIATION.

COLUMBUS, OHIO, April 26, 1917.

HON. WILLIAM D. FULTON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I am herewith returning to you with my certificate of approval endorsed thereon the articles of association of The Ohio Threshermen's Mutual Insurance Association. I find the same to be in apparent conformity to the provisions of section 9593 et seq. General Code providing for the organization of mutual protective associations.

The risks insured are extra hazardous and of a character outside the purpose of ordinary mutual protective associations organized under the provisions of sections

9593 et seq. General Code, but in as much as the membership of this particular protective association is restricted to persons engaged in a particular trade or occupation, to wit: that of owning and operating threshing machine outfits and similar agricultural machinery, and the property to be insured is all such as is used by said members in their said trade or occupation, such members may, by the express provisions of said section 9593 associate for the purpose of protecting said risks by mutual protective insurance.

I am, therefore, approving these articles of association, and herewith return check drawn to your order in the sum of $25.00.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

219.

COUNCIL MAY FILL VACANCY BY MOTION—WHEN ONLY ONE PERSON IN NOMINATION—MAY NOT RESCIND SUCH VOTE AND ELECT ANOTHER PERSON.

The council of a municipality may elect a new member to fill a vacancy by motion, duly seconded, and passed by roll call, there being no person other than the one named in the motion in nomination.

When a completed vote has been taken which results in the giving of the necessary majority or plurality to the candidate, or one of the candidates, to fill a vacancy in its membership, the council cannot rescind its vote or reconsider its action and elect another person.

COLUMBUS, OHIO, April 26, 1917.

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

GENTLEMEN:—I am in receipt of a communication under date of April 11, 1917, from Hon. Byron A. Fouche, city solicitor of Fremont, Ohio, in which he submitted a request for an opinion on the question hereinafter stated. Inasmuch as the request submitted by Mr. Fouche is one of importance, I am addressing my opinion on same to you.

The request submitted by Mr. Fouche raises a question as to whether Mr. White or Mr. Rhodes is the duly elected councilman of the first ward of the city of Fremont, Ohio, under the following proceedings of the council of said city of Fremont, at the regular meeting of council of the city of Fremont, Ohio, on Feb. 27, 1917:

"* * * * * * *

"City Council,

"Gentlemen:—Because of my appointment as city solicitor, and my acceptance of said appointment, I herewith tender my resignation as member of the council from the first ward, Fremont, Ohio, said resignation to take effect forthwith.

"Respectfully,

"B. A. Fouche.

"Moved by Mr. Schwartz, seconded by Mr. Swedersky, that the resignation be accepted. Yeas: Bliss, Scherf, Schwartz, Swedersky, Winnes, Zimmerman. Mr. Fouche refused to vote. 6 yeas.

"Moved by Mr. Winnes, seconded by Mr. Swedersky, that council

proceed to elect a successor to Mr. Fouche of the first ward, as provided in section 4236 General Code of Ohio. Yeas: Schwartz, Swedersky, Winnes, Scherf, Zimmerman. Nay: Bliss. 5 yeas, 1 nay. Carried.

"President Lutz appointed Mr. Schwartz chairman of the finance committee, Mr. Zimmerman on the improvement committee, and Mr. Scherf chairman of the railroad committee.

"Mr. Swedersky nominated the name of R. White to fill the vacancy caused by the resignation of Mr. Fouche, seconded by Mr. Winnes.

"President Lutz asked for further nominations, and after no further nominations were made the president ordered roll call. Yeas, Scherf, Schwartz, Winnes, Zimmerman. Nay: Bliss. 5 yeas, 1 nay. Carried.

"President Lutz appointed White on the finance committee and the laws, rules and ordinance committee. (Thereupon Mr. Zimmerman said that to enliven things there ought to be a new vote and other candidates.)

"Mr. Zimmerman nominated the name of L. Rhodes, seconded by Scherf. Lutz declared five minutes recess. When council reconvened Mr. Bliss was appointed as teller.

"Moved by Mr. Zimmerman, seconded by Bliss, the nominations be closed. Yeas: Scherf, Swedersky, Schwartz, Winnes, Zimmerman. 6 yeas. Carried.

"At this point Hon. F. O'Farrell, who had been employed by council to assist the solicitor as legal advisor of the council during the illness of the city solicitor, told council that the second attempt at an election was void and futile, that on the first vote, the vote that had previously been taken on Mr. White's nomination, Mr. White was elected by five to one, which action was ratified by the president in declaring him elected and appointing Mr. White on committees, but council proceeded to ballot.

"First ballot: Mr. White 3, Mr. Rhodes 3, tie. Second ballot: Mr. White 3, Mr. Rhodes 3, tie. President Lutz cast a deciding vote in favor of Mr. Rhodes.

"President Lutz appointed Mr. Rhodes on the finance committee and laws and ordinance committee."

Section 4236 General Code provides for the filling of a vacancy in the membership of a city council and reads as follows:

"When the office of councilman becomes vacant the vacancy shall be filled by election by council for the unexpired term. If council fails within thirty days to fill such vacancy, the mayor shall fill it by appointment"

An examination of this section of the Code discloses the fact that the only provision made for the filling of a vacancy is that it shall be filled by the council by an election. No provision is made in this section, nor in any other section of the Code, for the manner in which the election is to be held. In the particular case as is disclosed by the foregoing transcript of the proceedings of council of said city the mode of election used was that of nominating Mr. White by a motion duly seconded and then a roll call was had, there being no other nominations, and the motion was carried by a five to one vote.

In the case of State ex rel. Shinnich v. Green, 37 O. S. 227, the court held in the first branch of the syllabus

"that it was competent to elect by a motion, there being no other person than the one named in the motion in nomination."

At page 230 in the opinion of the court we find the following:

> "In the case at bar, the vote was by yeas and nays, on the adoption of a motion to elect the relator clerk. It is essential to a valid election that all who are present, and are constituent members of the elective body, shall have an opportunity to vote. They all in this respect stand upon equal footing. As there was but one candidate in nomination, the vote on the motion was a vote for or against that candidate. If a majority voted for the motion it was a clear expression that the person named in the motion was the choice of a majority of those entitled to vote. As no mode of voting at such an election is prescribed by law, any mode not forbidden by law which insures to each member the right to vote, and by which the will of the majority can be fairly ascertained, may be adopted.
>
> "The mode adopted was the one prescribed by statute for the transaction of the most important business of the council. We see no reason why it is not a fair mode of ascertaining the choice of the council. Certainly this method, by placing the yeas and nays upon record, tended to a higher degree of accountability than by a ballot, though that method of voting might have been adopted."

It is clear, therefore, from the foregoing decision of the supreme court that the mode of electing selected by the council of said city of Fremont was proper and in accordance with law. It is evident, therefore, that Mr. White was the lawfully elected councilman from the first ward of said city of Fremont selected to fill the vacancy caused by the resignation of Mr. Fouche.

The next question that presents itself is whether or not, after a completed vote has been taken which resulted in the giving of the necessary majority to Mr. White as a candidate, the council could rescind its vote or reconsider its action and elect another to fill the vacancy.

A similar question has been considered by the supreme court of our state in the case of State ex rel. Calderwood v. Miller, 62 O. S. 436, and in the opinion of said court at page 445 we find the following:

> "The council was engaged in the duty of electing officers; a duty imposed on the members thereof, not on the body as a council. They were not engaged in the deliberative business which is the ordinary work of the council; but in the election of a city officer. They were not acting under parliamentary law; but were casting their votes and making their choice as required by a specific statute. They could make this choice but once. Having done so they could not reconsider it. Much less, could some of them against the protest of a plurality, under the suggestions or invitations of the presiding officer or *sua sponte* change their votes. This would give to the minority the power of defeating the choice of a plurality which had already been legally made and ascertained."

Section 1676 Revised Statutes of Ohio, which was being interpreted by the court in State ex rel. Calderwood v. Miller, supra, provided that the *members of council* should elect the officer in question, while section 4236 G. C., supra, provides that when there is a vacancy in its membership the *council* shall fill same by election. Still I do not think that this variation in the phraseology makes any difference in the effect of the statutes and believe that the election means the same thing in substance whether the law provides that the council shall do that particular thing by election, or whether the members of council shall elect.

I am sustained in this view by the supreme court of Kentucky in Wheeler v. Commonwealth, 98 Ky., 59, in which Hazelrigg, J., in rendering the opinion of the court, says at page 465:

> "The duty of electing a city attorney was imposed on the council in express terms. The members were thus constituted a definite body of electors for that purpose. * * * All the members were acting not only as councilmen, but as electors."

In volume 2 of Dillon on "Municipal Corporations" 5th Ed., section 529, it is said:

> "The weight of authority is also to the effect that when a completed vote has been taken which results in the giving of the necessary majority or plurality to one of the candidates, the council cannot rescind its vote or reconsider its action and elect another person."

This language was quoted with approval by the supreme court of Wisconsin in the recent case of

State v. Tyrrel, 158 Wis. 425, 149 N. W. 280.

Additional authorities to the same effect are:

State ex rel. Coogan v. Barber, 53 Conn. 76;
State v. Phillips, 79 Me. 506, 10 Atl. 447;
State ex rel. v. Wadhams, 64 Minn. 318, 67 N. W. 64;
People v. Stowell, 9 Abb. N. C. 456.

It would seem, therefore, in view of the above mentioned decision of our owm supreme court, and all the other authorities cited, that the council of said city, having once elected Mr. White as a member of said body by a proper vote, would have no right to reconsider its action and hold another election thereafter in an endeavor to fill the vacancy.

Such a view of the law renders unnecessary a determination of the fact as to whether or not the council of said city acted in the proper manner to reconsider the vote, or whether its action in taking a second ballot amounted to a reconsideration of the former vote.

I am, therefore, of the opinion that Mr. White is the duly elected councilman from the first ward of said city of Fremont, and should be permitted to take his seat in said body.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

220.

DISAPPROVAL—FINAL RESOLUTION FOR ROAD IMPROVEMENTS IN GEAUGA, WAYNE AND OTTAWA COUNTIES—ROAD IMPROVEMENT—STATE HIGHWAY COMMISSIONER UNDER SECTION 1218 MAY NOT ENTER IN CONTRACT FOR SAME UNTIL COUNTY COMMISSIONERS HAVE AGREED TO PAY THEIR PORTION OF COST—SUCH AGREEMENT ON PART OF COUNTY COMMISSIONERS VOID UNLESS AUDITOR FIRST FILES CERTIFICATE THAT MONEY IS IN TREASURY—A CONTRACT BY COMMISSIONERS BEFORE SUCH CERTIFICATE IS FILED CANNOT BE USED AS A BASIS FOR STATE HIGHWAY COMMISSIONERS ENTERING INTO CONTRACT UNDER SECTION 1218 G. C.

1. *Under the provisions of section* 1218 *G. C. the state highway commissioner cannot enter into a contract for a road improvement until the county commissioners have entered into an agreement to assume that part of the cost and expense over and above that which the state agrees to assume.*

2. *The agreement of the county commissioners to assume that part over and above that which the state agrees to assume is void unless the county auditor first files his certificate to the effect that the money is in the treasury to take care of the obligation.*

3. *A contract so entered into by the county commissioners, before said certificate of the county auditor is filed, cannot be used as a basis for the state highway commissioner's entering into a contract under the provisions of section* 1218 *G. C.*

COLUMBUS, OHIO, April 30, 1917.

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

DEAR SIR:—I have your communications of April 20 and 21, 1917, in which you ask my approval of certain final resolutions attached to said communications, which resolutions have to do with the construction of the following highways:

"Geauga county—Section 'K-1,' Cleveland-Meadville road, Pet. No. 2376, I. C. H. No. 15.

"Geauga county—Section 'B', Hamden-Andover road, Pet. No. 2385, I. C. H. No. 475.

"Ottawa county—Section 'H', Toldeo-Elmore road, Pet. No. 2772, I. C. H. No. 52.

"Wayne county—Section 'O', Akron-Wooster road, Pet. No. 3073, I. C. H. No. 96."

It will be noted that the final resolution adopted by the county commissioners of Ottawa county is dated April 16, 1917, while the certificate of the county auditor, to the effect that the money is in the treasury to the credit of the county road improvement fund, is dated April 18, 1917;

That the final resolution made by the county commissioners of Geauga county, in reference to the improvement of the Hamden-Andover road, inter-county highway No. 475, is dated April 9, 1917, while the certificate of the county auditor, to the effect that the money is in the treasury, is dated April 10, 1917;

That the final resolution made by the commissioners of Geauga county, in reference to the improvement of the Cleveland-Meadville road, being inter-county highway No. 15, is dated April 9, 1917, while the certificate of the county auditor, to the effect that the money is in the treasury, is dated April 10, 1917; and

That the final resolution of the county commissioners of Wayne county, in reference to the improvement of the Akron-Wooster road, inter-county highway No. 96, is dated April 18, 1917, while the certificate of the county auditor, to the effect that the money is in the treasury, is dated April 19, 1917.

In other words, all these final resolutions of the county commissioners of the different counties have been entered into on a date prior to the day upon which the county auditor certified that the money was in the county treasury, to the credit of the county highway improvement fund.

In reference to the above, I desire to call your attention to section 5660 G. C., which reads as follows:

> "The commissioners of a county, the trustees of a township and the board of education of a school district shall not enter into any contract, agreement or obligation involving the expenditure of money, or pass any resolution or order for the appropriation or expenditure of money, unless the auditor or clerk thereof, respectively, first certifies that the money required for the payment of such obligation or appropriation is in the treasury to the credit of the fund from which it is to be drawn, or has been levied and placed on the duplicate, and in process of collection and not appropriated for any other purpose; money to be derived from lawfully authorized bonds sold and in process of delivery shall, for the purpose of this section, be deemed in the treasury and in the appropriate fund. Such certificate shall be filed and forthwith recorded, and the sums so certified shall not thereafter be considered unappropriated until the county, township or board of education is fully discharged from the contract, agreement or obligation, or as long as the order or resolution is in force."

It is to be noted that said section provides:

> "The commissioners of a county * * * shall not enter into any contract, agreement or obligation involving the expenditure of money, or pass any resolution or order for the appropriation or expenditure of money, unless the auditor * * * thereof, * * * *first* certifies that the money required for the payment of such obligation is in the treasury to the credit of the fund from which it is to be drawn, etc."

It is plainly evident from the reading of said section that the county commissioners have no authority to enter into a resolution in which they agree to assume the payment of a certain amount of the cost and expense of making an improvement before the auditor certifies that the money is in the treasury to the credit of the fund from which the cost and expense must be paid.

In other words, the certificate of the county auditor must be of a date not later, to say the least, than the day upon which the county commissioners enter into said agreement, and inasmuch as all the certificates attached to the final resolutions bear a date later than the final resolutions to which they are attached, respectively, it is my opinion they do not comply with the provisions of said section 5660 G. C.

I am therefore returning these final resolutions to you, without my approval, and suggest that you have the county commissioners of the various counties adopt another final resolution as of a date later than the day upon which the county auditor certified to them that the money is in the treasury. There could be no objection whatever to both the certificate and the resolution being of the same date, provided the certificate of the auditor was really filed with the county commissioners before the time at which the resolution was made. If they bear the same date, it would possibly be presumed that the certificate of the county auditor had been made either before the entering into of the final resolution or contemporaneously therewith.

I think these matters had better be corrected now, rather than run the risk of getting into difficulty over this technical proposition later on.

Very truly yours,
JOSEPH MCGHEE,
Attorney General.

221.

APPROVAL—TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE OF THE COUNCIL OF CITY OF LAKEWOOD.

COLUMBUS, OHIO, May 1, 1917.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of the city of Lakewood, Cuyahoga county, Ohio, in the sum of $5,670.00, being ten bonds of $567.00 each, issued in anticipation of the collection of assessments for the purpose of improving Hilliard avenue, from West Madison avenue to the east line of the Indianola Park allotment by constructing a sewer main, etc."

I have examined the transcript of the proceedings of the council and other officers of the city of Lakewood in connection with the above bond issue, also the bond and coupon form attached, and I find the same drawn in accordance with the provisions of the General Code, so far as applicable thereto, and with the charter of the city of Lakewood.

I am of the opinion that said bonds drawn according to the form submitted and executed by the proper officers, will, upon delivery, constitute valid and binding obligations of the city of Lakewood.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

222.

APPROVAL—TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE OF COUNCIL OF CITY OF LAKEWOOD.

COLUMBUS, OHIO, May 1, 1917.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of the city of Lakewood, Cuyahoga county, Ohio, in the sum of $11,120.00, being ten bonds of $1,112.00 each, issued in anticipation of the collection of assessments for the purpose of improving Northwood avenue from Granger street to its westerly terminus, by paving with brick."

I have examined the transcript of the proceedings of the council and other officers of the city of Lakewood in connection with the above bond issue, also the bond and coupon form attached, and I find the same drawn in accordance with the provisions of the General Code, so far as applicable thereto, and with the charter of the city of Lakewood.

I am of the opinion that said bonds drawn according to the form submitted and executed by the proper officers will, upon delivery, constitute valid and binding obligations of the city of Lakewood.

Very truly yours,
JOSEPH McGHEE,
Attorney-General.

223.

APPROVAL—TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE OF THE COUNCIL OF THE CITY OF LAKEWOOD.

COLUMBUS, OHIO, May 1, 1917.

Industrial Commission of Ohio, Columbus, Ohio.
GENTLEMEN:—

"RE:—Bonds of the city of Lakewood, Cuyahoga county, Ohio, in the sum of $900.00, being five bonds of $180.00 each, issued in anticipation of the collection of assessments for the purpose of constructing a six-inch water main in Franklin avenue, between Content street and Hopkins avenue."

I have examined the transcript of the proceedings of the council and other officers of the city of Lakewood in connection with the above bond issue; also the bond and coupon form attached, and I find the same drawn in accordance with the provisions of the General Code, so far as applicable thereto, and with the charter of the city of Lakewood.

I am of the opinion that said bonds drawn according to the form submitted and executed by the proper officers will, upon delivery, constitute valid and binding obligations of the city of Lakewood.

Very truly yours,
JOSEPH McGHEE,
Attorney-General.

224.

APPROVAL—TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE OF THE COUNCIL OF CITY OF LAKEWOOD.

COLUMBUS, OHIO, May 1, 1917.

Industrial Commission of Ohio, Columbus, Ohio.
GENTLEMEN:—

"RE:—Bonds of the city of Lakewood, Cuyahoga county, Ohio, in the sum of $30,900.00, the same being ten bonds of $3,090.00 each, issued in an-

ticipation of the collection of assessments for the improvement of Kyle avenue from Hilliard avenue to Fisher road by paving."

I have examined the transcript of the proceedings of the council and other officers of the city of Lakewood in connection with the above bond issue; also the bond and coupon form attached, and I find the same drawn in accordance with the provisions of the General Code, so far as applicable thereto, and with the charter of the city of Lakewood.

I am of the opinion that said bonds drawn according to the form submitted and executed by the proper officers will, upon delivery, constitute valid and binding obligations of the city of Lakewood.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

225.

APPROVAL—TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE OF THE COUNCIL OF THE CITY OF LAKEWOOD.

COLUMBUS, OHIO, May 1, 1917.

Industrial Commission of Ohio, Columbus, Ohio.
GENTLEMEN:—

"RE:—Bond issue of the city of Lakewood, Cuyahoga county, Ohio, in the sum of $1,285.00, the same being five bonds in the sum of $257.00 each; issued in anticipation of the collection of assessments for the improvement of Franklin avenue, between Coutant street and Hopkins avenue, in the said city, by constructing sewer main of vitrified pipe therein."

I have examined the transcript of the proceedings of the council and other officers of the city of Lakewood in connection with the above bond issue; also the bond and coupon form attached, and I find the same drawn in accordance with the provisions of the General Code, so far as applicable thereto, and with the charter of the city of Lakewood.

I am of the opinion that said bonds drawn in accordance with the form submitted and executed by the proper officers will, upon delivery, constitute valid and binding obligations of the city of Lakewood.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

226.

RECOGNIZANCE—ENTERED INTO BY PERSON CHARGED WITH BAILABLE OFFENSE—CONDITION THEREOF COMPLIED WITH IF ACCUSED APPEARS BEFORE MAGISTRATE ON DAY NAMED—NO RECOVERY CAN BE HAD UPON SUCH RECOGNIZANCE THEREAFTER.

Upon a preliminary examination, before a magistrate of one charged with an offense which is bailable, if there be an adjournment of such examination, the accused has a right to be released upon giving a recognizance in compliance with section 13508 General Code; the condition of such recognizance is complied with by the appearance of the accused before the magistrate on the day and hour specified in the recognizance and upon his abiding the orders of the court and not departing without leave upon such adjourned examination and no recovery can be had upon such recognizance thereafter.

COLUMBUS, OHIO, May 1, 1917.

HON. JAMES F. FLYNN, *Prosecuting Attorney, Sandusky, Ohio.*

DEAR SIR:—On April 13, 1917, you addressed the following communication to this office:

> "Enclosed herewith find a bond which was given in the mayor's court of this city, August 14, 1915, by Norman Rickel.
>
> "The bond requires his appearance on September 14, 1915, at 9 a. m. Upon that date the case was continued to a later date and during the remainder of the year was continued two or three times. During the year 1916 the case was continued various times and in August, 1916, was continued to no definite date.
>
> "In January, 1917, Robert Koegle, acting mayor, was relieved of his duties and R. D. Mitchell assumed them under the title of mayor of Sandusky, whereupon he set the case for a day certain in February, and upon that date the defendant, Norman Rickel, failed to put in appearance, whereupon mayor Mitchell declared the bond forfeited and the same has been turned over to me in due course for collection.
>
> "It is my opinion that the bond is worthless for this reason: that it does not provide that the said Rickel shall appear on the 14th day of September, A. D. 1915, and from day to day thereafter until the case is finally disposed of; that under the provisions of the bond enclosed continuing the case from the 14th day of September, 1915, to any future date required the execution of a new bond, as in my opinion the bond enclosed was of no more force and effect after the 14th day of September, 1915.
>
> "Will you kindly send me your opinion of the enclosed bond or recognizance?"

The bond is on a printed blank, headed: "Recognizance of Defendant to Appear before Mayor." The condition is as follows:

> "THE CONDITION OF THIS RECOGNIZANCE IS SUCH, That, if the above bounden Norman Rickel shall personally be and appear before me, at my office in said city, on the 14th day of September, A. D., 1915, at 9 o'clock a. m., then and there to answer to a charge of burglary and larceny preferred by C. A. Weingates, and abide the judgment of the court, and not depart without leave, and in the meantime to be of good behavior, and to keep the peace toward the citizens of the state generally, and the

said C. A. Weingates especially, then this recognizance shall be void; otherwise, etc. * * *."

It is dated August 14, 1915, and executed by Norman Rickel, and also by Chas. H. Dater and Geo. C. Bies. Approved by Jacob Dietz, mayor.

Although the communication does not fully state the fact, it is undoubtedly true that Rickel was charged with burglary and larceny; that he was brought before the mayor and his case continued for a month, and that this recognizance was taken to insure his appearance at the preliminary examination to be held upon the 14th day of September, 1915.

The statute providing for such recognizance is section 13508 General Code, which is as follows:

> "When an adjournment is ordered the accused may enter into a recognizance before the magistrate, with good and sufficient surety approved by him, in such amount as he may deem reasonable, conditioned for the appearance of such person before the magistrate, at a place, day and hour specified in the recognizance, but such adjournment shall not be for longer than twenty days without the consent of the accused. * * *"

It will be assumed that the accused consented to a continuance for more than twenty days. It is not necessary, in answering your question, to determine whether or not other terms of a recognizance than those required by the above section have any binding force or effect, as it does not appear that any of the terms of the condition of the bond in question have been violated. It is assumed that Rickel did appear at the time and hour mentioned in the recognizance, that the court rendered no judgment for him to abide, unless an order for him to reappear upon another day certain, and that he did not depart without leave, and that during such continuance his behavior was all right. He, therefore, had kept the letter of his bond when he appeared again at the time set for his appearance, when the same was again continued on September 14, 1915, if, indeed, he had not fully complied with it when he appeared on September 14, and remained until he was allowed by the court to depart.

Your opinion expressed in the inquiry is, therefore, approved, and you are advised that no recovery can be had upon the recognizance in question.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

227.

MINERAL RIGHTS—ARE SUBJECT TO REVALUATION UNDER SECTION 5562—ALTHOUGH COUNTY AUDITOR, ACTING WITH COUNTY COMMISSIONERS, FINDS THAT REAL PROPERTY IN ANY ASSESSMENT DISTRICT IS ASSESSED AT ITS TRUE VALUE IN MONEY—AND HAVE DECIDED TO CARRY SAME INTO CURRENT DUPLICATE AT SAME VALUATION UNDER 5548—COUNTY AUDITOR MAY INCREASE VALUATION OF REAL PROPERTY ON ACCOUNT OF ERECTION OF NEW STRUCTURES—OR DECREASE VALUATION BECAUSE OF DESTRUCTION—REGARDLESS OF SECTION 5548.

The provisions of section 5548 General Code, as amended in senate bill 177, passed March 21, 1917, authorizing the county auditor on approval of the board of county commissioners to carry real property in any tax assessment district or subdivision into the new tax duplicate at the same valuation assessed against said real property on the existing duplicate do not affect the provisions of section 5562 G. C. authorizing an increase or reduction in the assessed value of land containing minerals or separate mineral rights therein, and the assessed value of the particular mineral land or of the separate mineral right therein may be increased or reduced even though no order for assessment of real property in the tax district wherein such mineral land is located is ordered to be made as provided for in section 5548 General Code.

Neither do the provisions of section 5548 G. C. affect the provisions of sections 5576, 5577 and 5604 G. C. (S. B. 177) authorizing an increase in the assessed valuation of the particular lots or parcels of land by reason of the construction of a new building or other structure or betterment, nor those of section 2591 G. C. authorizing a reduction in the assessed value of a particular lot or parcel of land by reason of the destruction or injury of any building or other structure thereon, and an increase or reduction in the assessed value of such particular real property may be made as provided for in this section even though no assessment of the value of real property in the tax assessment district or subdivision wherein such particular real property is located is ordered to be made under section 5548 General Code.

COLUMBUS, OHIO, May 1, 1917.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I have the honor to acknowledge receipt of your letter of March 31, 1917, in which you ask for my opinion as follows:

> "If the county auditor and the county commissioners, proceeding under section 5548 G. C. find that the real estate in any township, village, ward or assessment district is now assessed for taxation at its true value in money as the same appears on the tax duplicate, may there be any change made in the value of mineral rights which are required by section 5560 G. C. to be assessed separately from the fee of the soil? What effect, if any, is to be given to the provisions of section 5562 General Code if such a finding has been made by the county auditor and the county commissioners? In other words, may there be any change under the provisions of section 5562 G. C. in the value of mineral rights as entered upon the duplicate for the year 1916 unless the county auditor and county commissioners find that the real estate in the subdivision in which the minerals are located is not assessed at its true value in money.
>
> "If the county auditor and county commissioners find that the real estate in any subdivision is now assessed at its true value in money, may

the county auditor thereafter add to the value of any parcel of real estate the value of any new structure or improvement made thereto since April 9, 1916, or deduct therefrom the value of any structure or improvement which has been destroyed during the year ending April 8, 1917? In other words may the value of new structures be added to the value of such real estate, and the value of structures destroyed be deducted from such real estate unless the county auditor and county commissioners find that the real estate is not assessed at its true value in money in any subdivision in which the same was located?"

Section 5548 General Code, as amended in senate bill 177, passed March 21, 1917, and which went into effect on the approval of the governor the same day, provides in part as follows:

"Each county is made the unit for assessing real estate for taxation purposes. The county auditor in addition to his other duties, shall be the assessor for all the real estate in his county for purposes of taxation, provided that nothing herein shall affect the power conferred upon the tax commission of Ohio in the matter of the valuation and assessment of the property of any public utility. Upon the taking effect of this act, on or before the second Monday in April, 1917, and annually thereafter between the first day of January and the first day of February, the county auditor shall ascertain whether the real property in each township, village, ward, or assessment district, as provided in section 3349 of the General Code, is assessed for taxation at its true value in money, as the same then appears on the tax duplicate. If he finds that it is assessed at its true value in money, in any such township, village, ward, or assessment district, he shall, subject to the provisions hereinafter made, enter such valuation upon the tax list and duplicate for the current year. In such event, and unless he finds that such property is not assessed at its true value in money, in each such division, such assessments shall constitute the valuation for taxation for the current year, subject to the provisions hereinafter made. Said county auditor shall submit his findings concerning the valuation of such real estate to the board of county commissioners of his county, and said board shall, at a hearing fixed within not less than ten nor more than twenty days thereafter, confirm, modify, or set aside the same by order entered on the journal of said board. Notice of such hearing shall be given by publication in a newspaper of general circulation in the county. If by such order it is determined that the real estate in any such subdivision is not on the duplicate at its true value in money, then such county auditor shall proceed to assess such real estate in such subdivision or subdivisions. Such assessments shall also be made by him in any such subdivision upon the filing of a petition therefor with the county auditor by not less than twenty-five freeholders in such subdivision, or by the board of trustees in any such township, or by the council of any such village. Such petition may be filed at any time after January first of any year, but not later than the fourth Monday in April, 1917, and the first Monday in March annually thereafter. * * *."

Section 5560 General Code provides that where the fee of the soil of a tract, parcel or lot of land is in a person, natural or artificial, and the right to the mineral therein is in another, such property shall be valued and listed agreeably to such ownership in separate entries, specifying the interests listed, and be taxed to the parties owning different interests, respectively; while section 5562 General Code provides in respect to the question at hand that if at the time the assessor makes the list of personal prop-

erty it is found that land containing minerals or separate mineral rights therein has increased in value to the extent of $100.00 or more by reason of the discovery of minerals or by the construction or develpoment of the means of producing the same, the assessor shall increase the assessment of such land or of such separate mineral right therein, as the case may be, to its true value in money in the name of the owner thereof, and by this section it is likewise further provided that if at said time it is found that such land containing minerals or separate mineral rights therein has decreased in value during the year in consequence of the exhaustion of minerals or the failure to find or develop the same and such decrease amounts to $100.00 or more, the value of such land or mineral right shall be reduced to its true value.

Your first inquiry calls for a consideration of the effect of the provisions of section 5548 General Code as above quoted on the earlier provisions of section 5562 authorizing an increase or reduction in value of mineral land or of separate mineral rights therein.

In consideration of this question it is to be recognized that as it is the function of the legislature to express the will of the state by means of statutes enacted by it, it is essential that the legislature should know what is the existing state of the law whenever a statute is passed, and it is always presumed that the legislature possesses such knowledge. The language of every enactment must be construed as far as possible so as to be consistent with every other which it does not in express terms modify or repeal. This is but a more fundamental statement of the rule that the repeal or modification of existing statutes by implication from the provisions of later enactments is not favored in law, and that there always exists a strong presumption against the same.

In the light of these principles let us note the provisions of section 5548 and the earlier provisions of section 5562. Without here attempting any exact analysis of the provisions of section 5548 General Code, above quoted, it is sufficient to note that these provisions operate upon real property included as a whole in a township, village ward or other tax assessment district, and authorize the county auditor acting in conjunction with the county commissioners to carry the real property therein into the current tax duplicate at the previous duplicate valuation, or the real property in such tax assessment district or subdivision may be assessed by the county auditor in the manner provided by this section.

The direction taken by the action of the county auditor and the board of county commissioners with respect to the real property in such tax assessment district or subdivision is determined by the consideration whether or not such real property does or does not stand on the existing tax duplicate at its true value in money.

If on a consideration of the value of real property in such tax assessment district or subdivision as a whole it is determined that such property does stand on the existing tax duplicate at its true value in money the same is by action of the county auditor and board of county commissioners carried into the current duplicate as the proper valuation of the real property in such tax assessment district or subdivision as entered upon said current duplicate, and so far as the effect of section 5548 General Code is concerned this would be the result as to the valuation to be entered on mineral land or separate mineral right therein which might lie within such tax assessment district or subdivision.

Now looking to the provisions of section 5562 General Code, it will be noted that they do not apply generally to all real property lying within a particular tax assessment district or within any given territory, but that they relate to particular tracts or parcels of land containing minerals and to separate mineral rights therein, and the provisions of this section authorize an increase or reduction in the taxable valuation of such mineral land or of the separate mineral rights which may exist in said land on considerations affecting that property alone. In other words, comparing the provisions of section 5548 and those of 5562 General Code, it will be noted

that the former relate to a subject matter, to wit, real property lying within certain tax assessment districts or subdivisions which may perchance embrace the particular kinds of real property or property rights covered by the provisions of section 5562.

In this view of these two sections of the General Code and the respective operation of their provisions it may be noted as a settled rule of statutory construction that special statutory provision for particular cases operate as exceptions to the general provisions which might otherwise include the particular cases and such cases are governed by special provisions. Or, stated in another way, if there are two acts of which one relates especially to a particular subject matter, while the subject matter of another is more general and would, if standing alone, also include the particular matter, the statute relating to the particular matter is to be read as an exception to the more general provisions of the other.

Gas Company v. Tiffin, 59 O. S. 420, 441.
Doll v. Barr, 58 O. S. 113, 120.

Applying these principles of construction to the question first presented by you, I am of the opinion that the provisions of section 5562 General Code are in no wise affected by later provisions of section 5548 General Code, and that even though the county auditor acting in conjunction with the county commissioners under the provisions of the latter section finds that the real property in any township, village, board or assessment district is now assessed for taxation at its true value in money and in consequence such real property, so far as section 5548 General Code is concerned, is to be carried into the current duplicate at the same valuation, mineral lands or separate mineral rights therein, as the case may be, may nevertheless be subject to revaluation in the manner provided for in section 5562 General Code.

The consideration determining the answer to your first question likewise determines the second question presented by you. The statutory provision authorizing taxing officials to add to the value of any parcel of real estate the value of new structures or improvements thereon are in sections 5576, 5577 and 5604 General Code, as amended in senate bill 177.

Section 5576 General Code provides if the county auditor ascertains that a mistake has been made in the value of an improvement or betterment of real property, or that the true value of such improvement or betterment has been omitted, he shall return the correct value thereof, having first given notice to the owner or agent thereof of his intention so to do; while section 5577 General Code provides, with respect to the question at hand, that authority made by the county auditor in conformity to the provisions of section 5576 shall be listed on the grand duplicate of the county and placed in the hands of the county treasurer for collection.

Section 5604 General Code provides that when the county board of revision provided for in the act discovers or has its attention called to the fact that in a current year or in any year during the five years next preceding any taxable land, building, structure or improvement, has escaped taxation, or has been listed for taxation for less than its true value in money, the board may investigate the same and report the fact and information in its possession to the county auditor, who is required to make such correction as he is authorized and required by law to make in other cases in which personal property has escaped taxation or has been improperly listed or valued for taxation.

Section 2591 General Code makes provision for a reduction in the value of real property when a building or structure thereon has been destroyed or injured by fire, flood, tornado, or otherwise, when the damage or loss to such building or structure is $100.00 or more and is not covered by insurance. With respect to the particular kind of property affected by the provisions of the section of the General Code just noted it is obvious that such property may be included within a tax assessment dis-

trict or subdivision covered by the provisions of section 5548 General Code, but upon the reasoning applicable to the consideration of your first question, it is clear that sections 5576, 5577, 5604 and 2591 General Code relating to particular properties as the subject matter of their respective operations are to be read as exceptions to the provisions of section 5548 and that action may be taken increasing or reducing the value of real property on account of the erection of new structures thereon on the one hand, or the destruction or injury of structures or improvements thereon on the other, even though the county auditor and the county commissioners may find that the real property in a tax assessment district or subdivision, which may include such property, is assessed at its true value in money, and so far as section 5548 is concerned is therefore to be carried into the current duplicate at the old valuation.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

228.

MULCAHY HIGHWAY BILL—NOT AFFECTED BY ERRORS IN FIRST SECTION—MEANING AND INTENT CAN BE ASCERTAINED BY REFERRING TO OTHER PORTIONS OF THE ACT.

The meaning and intent of section 1 of Am. H. B. No. 300, passed by the 82d general assembly and approved by the governor, can be ascertained beyond a reasonable doubt by referring to other portions of the act, including the title. Consequently, the omissions therein, which render the section unintelligible when standing alone, do not prevent it from becoming effective according to the meaning and intent thus ascertained.

COLUMBUS, OHIO, May 1, 1917.

HON. JAMES M. COX, *Governor of Ohio, Columbus, Ohio.*

DEAR GOVERNOR:—I have your letter of April 18, 1917, which is as follows:

> "It has been reported to me that there is a printer's error in the Mulcahy highway bill, H. B. No. 300.
>
> "I respectfully ask your opinion as to whether the printer's inadvertence will effect the future legal status of this act."

There is, as you state, a manifest error in section 1 of the bill to which you refer. Said section reads as follows:

> "Section 1. That sections 2784, 2787, 2788, 6862, 6865, 6866, 6870, 6871, 6877, 6889, 3298-1 to 3298-15 inclusive, 3298-18, 3370 to 3376 inclusive, 6906 to 6913 inclusive, 6917 to 6920 inclusive, 6922, 6923, 6925 to 6936 inclusive, 6939, 6941, 6945, 6946, 6947, 6949 to 6953 inclusive, 7181, 7182, 7184, 7185, 7187 to 7192 inclusive, 7196, 7198, 7200, 7202, 7203 to 7213 inclusive, 1191, 1192, 1193, 1203, 1208, 1209, 1211, 1212, 1214, 1215, 1216, 1219, 1221, 1222, 1223, 1224, 1225, 1230-1, 1231, 7246 and 13421-17, of the General Code, to enact supplemental sections 3298-15a to 3298-15n inclusive, 3298-24, 3298-25 to 3298-53 inclusive, 3374-1, 3374-2, 6944-1, 6945-1, 6947-1, 6947-2, 6948-1, 6948-2, 7188-1, 7188-2, 1193-1, 1193-2, 1213-1, 1218-1, 1224-1, 1231-5 to 1231-11 inclusive, 7247 to 7251 inclusive and 13421-18a of the General Code; and to repeal sections 3377, 3378, 3379, 6924, 6940,

6954, 7183, 7186, 7193, 7194, 7195, 7197, 7199, 7201, 7477 and 7478 of the General Code relating to a system of highway laws for the state of Ohio."

(Here follow numerous sections evidently intended to be sections of the General Code and the numbers of which correspond with those mentioned in the first two clauses of the section down to the semicolon.)

Section 6 of the bill is as follows:

"Section 6. That said original sections 2784, 2787, 2788, 6862, 6865, 6866, 6869, 6870, 6871, 6877, 6889, 3298-1 to 3298-15 inclusive, 3298-18, 3370 to 3376 inclusive, 6906 to 6913 inclusive, 6917 to 6920 inclusive, 6922, 6923, 6925 to 6936 inclusive, 6939, 6941, 6945, 6946, 6947, 6949 to 6953 inclusive, 7181, 7182, 7184, 7185, 7187 to 7192 inclusive, 7196, 7198, 7200, 7202, 7203 to 7213 inclusive, 1191, 1192, 1193, 1203, 1208, 1209, 1211, 1212, 1214, 1215, 1216, 1219, 1221, 1222, 1223, 1224, 1225, 1230-1, 1231, 7246, and 13421-17 of the General Code and also sections 3377, 3378, 3379, 6924, 6940, 6954, 7183, 7186, 7193, 7194, 7195, 7197, 7199, 7201, 7477, and 7478 of the General Code be and the same are hereby repealed.

"This act shall succeed all acts, and parts of acts, not herein expressly repealed which are inconsistent herewith."

It will be observed that the enacting or introductory clause of section 1 does not make sense. It is not a complete sentence. Analyzed gramatically, the portion thereof which ends with the phrase "General Code", as it first occurs therein, appears to be a subject without any predicate; while the remainder thereof consists of two infinitives without any verbal support. The existence of the error is thus perfectly apparent on the face of the bill. In its essence it consists of an omission of words required to complete a sentence; and those words must be supplied in order to express accurately the legislative intent.

The case, therefore, differs from one in which the words used in an enrolled bill duly authenticated, make an intelligible sentence, but it is sought by comparison with the enrolled bill, or by reference to the journal, to show that the enrolled bill is incorrect. In such case it is held that the enrolled bill must stand as the law. Ritzman v. Campbell, 93 O. S. 246.

The principle embodied in the decision cited is simply that the journal of the house and senate and other documents, papers and records, tending to show the contents of a measure which has been enacted into law, are not competent evidence to prove such contents, the enrolled bill, when duly signed by the presiding officers of the respective houses, as required by the constitution, being the best and only competent evidence of such contents; so that it is not permissible to impeach the latter by the former, either for the purpose of showing what the true contents of the latter are or for the purpose of showing that a law, in the very words of the latter, was never enacted properly.

But here it is not necessary to resort to any document other than the enrolled and signed bill itself in order to show a mistake in it. The error is perfectly apparent and the sole question is as to the effect thereof. It is obvious that one of two possible results might follow from this situation, viz.: either (1) the bill or rather this section of it is not and never will be a law, because of fatal ambiguity, i. e., having no meaning on its face it can be given no meaning, and without any meaning it can be given no operative effect; or, (2) the bill will be given such meaning as it may be possible to give it by gathering the legislative intent from other portions of the enactment, including the title.

It will be observed that the second alternative, above stated, does no violence to the rule in Ritzman v. Campbell, because it does not resort to anything excepting the enrolled bill itself to find the legislative intent.

The rule which is to be applied here is stated in Lewis' Sutherland Statutory Construction, vol. 2, section 410, as follows:

> "Legislative enactments are not any more than any other writings to be defeated on account of mistakes, errors or omissions, provided the intention of the legislature can be collected from the whole statute; and the title and preamble may be referred to for this purpose."

Among the cases cited by the author to support this text is that of State v. Commissioners, 87 Minn., 325, 337, from which the following quotation is made in the note:

> "In cases of imperfectly drawn statutes, the courts, rather than pronounce them unconstitutional and void, will draw inferences from the evident intent of the legislature, as gathered from the law taken as a whole, supplying technical inaccuracies in expression, and obviously unintentional mistakes and omissions by implication, from the necessity of making them operative and effectual as to specific things which are included in the broad and comprehensive terms and purposes of the law; and these inferences and implications are as much a part of the law as what is distinctly expressed therein."

The author sums up his comment on the rule embodied in the case which he cites as follows:

> "This is but making the strict letter of the statute yield to the obvious intent."

With this principle in mind it becomes incumbent upon me to look elsewhere in house bill No. 300 than in section 1 to see whether or not the intent which would have been expressed by the words which are obviously omitted from said section can be found elsewhere in the bill. If such intent can be found, section 1 is to be given the meaning thus ascertained; if such intent cannot be found, section 1 must be held to be void for uncertainty.

The title of the law is as follows:

> "AN ACT.
>
> "To amend sections 2784; 2787, 2788, 6862, 6865, 6866, 6869, 6870, 6871, 6877, 6889, 3298-1 to 3298-15, inclusive, 3298-18, 3370 to 3376, inclusive, 6906 to 6913, inclusive, 6917 to 6920, inclusive, 6922, 6923, 6925 to 6936, inclusive, 6939, 6941, 6945, 6946, 6947, 6949 to 6953, inclusive, 7181, 7182, 7184, 7185, 7187 to 7192, inclusive, 7196, 7198, 7200, 7202, 7203 to 7213, inclusive, 1191, 1192, 1193, 1203, 1208, 1209, 1211, 1212, 1214, 1215, 1216, 1219, 1221, 1222, 1223, 1224, 1225, 1230-1, 1231, 7246 and 13421-17 of the General Code, to *enact* supplemental sections 3298-15a to 3298-15n, inclusive, 3298-24, 3298-25 to 3298-53, inclusive, 3374-1, 3374-2, 6944-1, 6945-1, 6947-1, 6947-2, 6948-1, 6948-2, 7188-1, 7188-2, 1193-1, 1193-2, 1213-1, 1218-1, 1224-1, 1231-5 to 1231-11, inclusive, 7247 to 7251, inclusive, and 13421-18a of the General Code; and to *repeal* sections 3377, 3378, 3379, 6924, 6940, 6954, 7183, 7186, 7193, 7194, 7195, 7197, 7199, 7201, 7477 and 7478 of the General Code, relating to a system of highway laws for the state of Ohio."

By comparing the code sections which follow the general language above quoted from section 1 in the bill with the sections of the General Code as they now exist and

will continue to exist at least until the act in question becomes effective, if at all, I find that the sections therein set forth are obviously intended to be either amendatory of such existing sections or supplementary thereto.

Sections 2, 3 and 5 of the act provide as follows:

> "*Section* 2: This act shall not affect pending actions or proceedings, civil or criminal, pertaining to the construction, reconstruction, improvement, maintenance, repair, supervision or control of highways, bridges or culverts, brought in any court at any time prior to the taking effect of this act, under or involving the provisions of any statute hereby *amended* or *repealed* but the same may be prosecuted or defended to final determination in like manner as if such statute had not been *amended* or *repealed.*"
>
> "*Section* 3: This act shall not affect or impair any contract entered into, any act done, any right acquired or any obligation incurred prior to the time when this act takes effect, under or by virtue of any statute hereby *amended* or *repealed* but the same may be completed, asserted or enforced as fully and to the same extent as if such statute had not been *amended* or *repealed* * * *."
>
> "*Section* 5. The words 'county highway superintendent' found in any section of the General Code of Ohio not herein *amended* or *repealed* shall after the taking effect of this act be read 'county surveyor.'"

Section 6 has been quoted. I call attention to the use of the phrase "said original sections" therein. In my opinion the title of the act and the other passages therein just referred to offer clear and convincing evidence of the legislative intention. In fact, the title itself expresses the intention without any ambiguity whatsoever and while it is no part of the act, still it may be looked to to supply errors and omissions in the body of the act. But even without the title, the legislative intent to amend and repeal is clearly enough expressed in the other sections referred to, and in addition to all this the legislature has employed in the body of section 1 itself the form of legislation which it is its custom invariably to employ when it is amending statutes and enacting supplementary sections. Nay more, the legislature has framed the body of section 1 simply in accordance with the requirement of article 2, section 16, of the Constitution, which provides that:

> "No law shall be * * * amended unless the new act contains the * * * section or sections amended and he section or sections so amended shall be repealed."

There can be no reasonable doubt as to what the legislature intended to do after the act itself is examined and without regard to any other record or document.

For the foregoing reasons I am of the opinion that the second alternative, above suggested, must be applied, the conditions thereof being satisfied, and that amended house bill No. 300 is in all respects a valid measure, subject to the referendum; and that finally the true meaning and application of the incomplete language in section 1 thereof is to be determined by consulting the title, where that intent and application is most clearly expressed. In other words, section 1 has and must be given the effect of amending the sections of the General Code first mentioned in the title of the act and enacting the supplemental sections therein referred to. The last clause of section 1, wherein repeals are mentioned, is, of course, mere surplusage, being incomplete in itself and the subject matter thereof being completely covered by section 6.

Very truly yours,
JOSEPH MCGHEE,
Attorney General.

229.

APPROVAL—FINAL RESOLUTION FOR ROAD IMPROVEMENT IN BUTLER, CLINTON, GALLIA, FAYETTE, HOLMES AND WAYNE COUNTIES.

COLUMBUS, OHIO, May 1, 1917.

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

DEAR SIR:—I received your communication of April 27, 1917, enclosing a number of final resolutions, upon which you ask my approval. The resolutions enclosed are as follows:

"Butler county—Sec. 'A' Carthage-Hamilton road, Pet. No. 2129, I. C. H. No. 43.

"Butler county—Sec. 'A' Carthage-Hamilton road, Pet. No. 2129, I. C. H. No. 43.

"Clinton county—Sec. 'B' Wilmington-Xenia road, Pet. No. 1571, I. C. H. No. 248.

"Gallia county—Sec. 'F-1' Gallipolis-Jackson road, I. C. H. No. 399, Pet. No. 2370.

"Gallia county—Sec. 'B-1' Gallipolis-McArthur road, I. C. H. No. 398, Pet. No. 2371.

"Gallia county—Sec. 'A-1' Ohio River road, Pet. No. 2369, I. C. H. No. 7, type 'A.'

"Gallia county—Sec. 'A-1' Ohio River road, Pet. No. 2369, I. C. H. No. 7, type 'B.'

"Gallia county—Sec. 'E-1' Gallipolis-Ironton road, Pet. No. 2367, I. C. H. No. 405.

"Fayette county—Sec. 'J' Springfield-Washington road, Pet. No. 2332, I. C. H. No. 197.

"Holmes county—Sec. 'K' Mansfield-Millersburg road, Pet. No. 2505, I. C. H. No. 145.

"Holmes county—Sec. 'I' Columbus-Millersburg road, Pet. No. 2507, I. C. H. No. 23.

"Holmes county—Sec. 'C-1' Navarre-Berlin road, Pet. No. 2509, I. C. H. No. 79, type 'A.'

"Holmes county—Sec. 'C-1' Navarre-Berlin road, Pet. No. 2509, I. C. H. No. 79, type 'B.'

"Wayne county—Sec. 'O' Akron-Wooster road, Pet. No. 3073, I. C. H. No. 96."

I have carefully examined the different final resolutions adopted by the county commissioners of the different counties, and find said resolutions to be in all respects legal and correct in form. I am therefore returning the same to you with my approval endorsed thereon.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

230.

APPROVAL—LEASES OF CANAL LANDS TO H. L. SCHULER, CUYAHOGA COUNTY, OSCAR J. MAEHLMAN, MERCER COUNTY, CLARENCE E. AND H. J. ORTT, NEWCOMERSTOWN, OHIO, FRANK P. AND NORA B. CORBETT, GROVEPORT, OHIO.

COLUMBUS, OHIO, May 2, 1917.

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

DEAR SIR:—I have your communication of April 13, 1917, in which you enclose leases of canal lands and ask my approval of the same, said leases being as follows:

	Valuation.
"To H. L. Schuler, Cleveland, Ohio, 5.68 miles of the berme embankment of the Ohio canal in Newburgh township, Cuyahoga county, Ohio	$30,000 00
"To Oscar J. Maehlman, Celina, Ohio, one-half acre of land adjacent to the Mercer county reservoir	200 00
"To Clarence E. & H. J. Ortt, Newcomerstown, Ohio, a portion of the Ohio Canal property in Newcomerstown, Ohio, 40 ft. in width and 49½ ft. in depth	500 00
"To Frank P. and Nora B. Corbett, Columbus, Ohio, a portion of the Ohio Canal, being half the width thereof, containing 3.5 acres, near Groveport, Ohio	166 66"

I have examined carefully the different leases herein set out, which are in triplicate, and find them correct in form and legal. I have, therefore, endorsed my approval thereon and have this day forwarded the said leases to Hon. James M. Cox, governor, for his consideration.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

231.

APPROVAL—FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN SANDUSKY AND RICHLAND COUNTIES—DISAPPROVAL—RESOLUTIONS—FOR WARREN AND HANCOCK COUNTIES.

COLUMBUS, OHIO, May 2, 1917.

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

DEAR SIR:—I have your communication of April 30, 1917, in which you enclose certain final resolutions and request that I approve the same. The final resolutions enclosed by you have to do with the following described highways:

Sandusky County—Sec. "B-1" Fremont-Bowling Green road, Pet. No. 2893, I. C. H. No. 278.
Sandusky County—Sec. "L" Fremont-Bellevue road, Pet. No. 2886, I. C. H. No. 274.
Warren County—Sec. "b" Morrow-Lebanon road, Pet. No. 3054-T, I. C. H. No. 252.
Richland County—Sec. "E" Ganges-Plymouth road, Pet. No. 2871, I. C. H. No. 478.
Hancock County—Sec. "G" Lima-Sandusky road, Pet. No. 2426, I. C. H. No. 22. (Also copy.)

I have examined these final resolutions carefully and find those which have to do with I. C. H. No. 278 and I. C. H. No. 274, in Sandusky county, and I. C. H. No. 478 in Richland county, are correct in form and legal. I am therefore returning the same to you with my approval endorsed thereon.

I am returning to you the final resolution having to do with I. C. H. No. 252, in Warren county, and the one having to do with I. C. H. No. 22 (together with copy), in Hancock county, without my approval endorsed thereon.

It will be noticed that the final resolution having to do with I. C. H. No. 252, in Warren county, is of date April 26, 1917, but the certificate of the township clerk certifies that the resolution was entered into on the 26th day of August, 1916. Further, his certificate to the effect that the money required for the payment of the township's portion of the improvement is in the township treasury, to the credit of the township road fund, is of date April 28, 1917. As stated in a former opinion rendered to you, the certificate of the clerk or auditor must be of date not later than the date upon which the final resolution of the township trustees or county commissioners is adopted. It will be noted that this final resolution does not comply with said conditions.

For the same reason I am returning to you the final resolution having to do with I. C. H. No. 22, Hancock county, with copy of same. This resolution or agreement was entered into on April 14, 1917, while the certificate of the county auditor is of date April 20, 1917. As said in my former opinion to you in reference to this matter, the courts are very strict in the construction they place upon this matter of the certificate of the county auditor, holding that unless it is filed as of a date earlier than the entering into of the agreement for expenditure of money, the agreement is void. For a fuller discussion of this proposition, I refer you to my former opinion.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

232.

CHILDREN'S HOME—WHEN COST OF ERECTION OF SAME TO COST MORE THAN $15,000.00—QUESTION OF POLICY OF EXPENDITURE MUST BE SUBMITTED TO VOTERS—COUNTY BUILDINGS—WHEN COST OF ERECTION MORE THAN $25,000.00—MUST FOLLOW PROVISIONS OF SECTION 2333 G. C.

1. *In the erection of a county children's home to cost in excess of* $15,000.00, *it is necessary to submit the question, as to the policy of making such an expenditure, to the voters of the county, under the provisions of section* 5638 *et seq. G. C.*

2. *In the erection of a county building to cost in excess of* $25,000.00, *it is necessary to follow the provisions of section* 2333 *G. C., as well as the sections that follow. This would include a county children's home.*

COLUMBUS, OHIO, May 2, 1917.

HON. FRANK B. GROVE, *Prosecuting Attorney, Cadiz, Ohio.*

DEAR SIR:—I have your communication of April 9, 1917, in which you ask my opinion about certain matters therein set out. Your communication reads as follows:

> "I wish your opinion in regard to the following matter:
>
> "The department of inspection of the industrial commission has issued orders for extensive changes and repairs in the Harrison County Children's Home. The trustees of said home have had an estimate made by an architect and same shows that to make said changes and repairs as so ordered will cost about $15,000.00. Said trustees, and also the board of county commissioners, think it unwise to expend $15,000.00 on changes and repairs which will still leave the building in an undesirable condition; hence they have had an estimate as to the cost of rebuilding and remodeling the dormitory and find same will cost at least $35,000.00.
>
> "The county commissioners have no money available with which to make the repairs covered by either of above estimates. The present county budget requires the full three mill levy. The county has at present $75,000.00 worth of outstanding bonds Our duplicate is about $29,000,000.00.
>
> "Under the provisions of Sec. 5638 et seq. General Code, will it not be necessary for the county commissioners to submit to the voters of the county the question as to the policy of making either of the expenditures above named before said commissioners can legally issue bonds to provide money for either an expenditure of $15,000.00 or of $35,000.00 as above?
>
> "In the event that said improvements are made, will it be necessary that a building commission be appointed as provided in Sec. 2333 General Code?"

There are two separate and distinct questions contained in your communication. The first question is as follows:

> "Under the provisions of Sec. 5638 et seq. General Code, will it not be necessary for the county commissioners to submit to the voters of the

county the question as to the policy of making either of the expenditures above named before said commissioners can legally issue bonds to provide money for either an expenditure of $15,000.00 or of $35,000.00 as above?"

As your first question has to do with the provisions of section 5638 G. C., I will quote said section in full, which reads as follows:

"Sec. 5638. The county commissioners shall not levy a tax, appropriate money or issue bonds for the purpose of building county buildings, purchasing sites therefor, or for land for infirmary purposes, the expenses of which will exceed $15,000.00, except in case of casualty, and as hereinafter provided; or for building a county bridge, the expense of which will exceed $18,000.00, except in case of casualty, and as hereinafter provided; or enlarge, repair, improve, or rebuild a public county building, the entire cost of which expenditure will exceed $10,000.00; without first submitting to the voters of the county, the question as to the policy of making such expenditure."

It will be noted that, under the provisions of said section 5638, whenever county buildings are built, the expense of which will exceed $15,000.00, or whenever public county buildings are repaired, improved or enlarged, the cost of which expenditure will exceed $10,000.00, the question as to the policy of making such expenditure must first be submitted to the voters of the county. There is just one exception noted in this section and that is except in case of casualty. On account of this exception it might be well for us to note briefly as to whether your proposition would come under the excepted class.

The accepted meaning of the word "casualty" would seem to prevent such a construction being placed upon the matter under consideration. The exception takes care of those cases in which a county building might be destroyed by storm, flood or fire and it would be necessary to rebuild immediately. But there is no casualty in cases in which buildings are rendered unserviceable due to decay.

In Commissioners of Defiance County v. Croweg, et al., 24 O. S. 492, the court makes a clear distinction between those cases in which the restoration of structures is made necessary due to decay, and those in which restoration is made necessary due to casualty.

Now, if your proposition does not come within the exception, the following principles must apply: If the cost of reconstruction of the building is over $15,000.00, the question as to the policy of making such expenditure must first be submitted to the voters of your county. Or if your county commissioners decide to repair the old building and the cost of repair exceeds $10,000.00, the question as to the policy of making such expenditure will likewise have to be submitted to the voters of your county.

Your second question is as follows:

"In the event that said improvements are made, will it be necessary that a building commission be appointed as provided in Sec. 2333 General Code?"

The answer to your second question is not so easily arrived at as that to your first question. In order to reach a conclusion as to the correct answer to your second question, it will be necessary for us to go into the history of legis-

lation to some extent, in reference to public buildings. Your question has to do, in brief, as to whether your county commissioners, in the event they decide to rebuild, must proceed under the provisions of sections 2333 et seq. G. C., or whether they may proceed under the provisions of sections 2343 et seq. G. C. Let us note, therefore, a little legislative history in reference to sections 2333 et seq. G. C.

In 1904 an act was passed by the general assembly, entitled:

> "An act to provide for a commission for building court houses." (97 O. L. 111.)

Section 1 of this act provided that when the county commissioners of any county determine, under and by virtue of the statutes of Ohio, to erect a *court house* which shall cost to exceed $25,000.00, they shall apply to the judge of the court of common pleas, who shall appoint four men, freeholders, who, in connection with the county commissioners, shall constitute a building commission.

In 1906 this act was amended (98 O. L. 53), but it still applied to no county building other than court houses. This act of 1906 was carried into the Revised Statutes as sections 794-1 to 794-5 inclusive.

When the General Code was enacted by the legislature in 1910, this particular act was given sectional numbers 2333 to 2342 inclusive. Further, the legislature when it adopted the General Code modified the said act to a considerable extent. It was made to include not only court houses, but also "other county buildings." Section 2342 G. C. was also amended, which will be more carefully noted later on.

At this point I desire to call attention to the fact that when this act was enacted in 1904, and when it was amended in 1906 and was placed in the Revised Statutes as sections 794-1 to 794-5 inclusive, it was a separate, distinct, complete and all-inclusive act. It provided a procedure for the erection of court houses which cost to exceed $25,000.00. It did not attempt to repeal any sections of the statutes, nor any act. It did not pretend to be supplementary to any section or to any act. It was a separate and distinct act, containing within itself all the provisions necessary to make it effective for the purpose for which it was enacted.

With this brief history in mind, it will be necessary for us to note the decisions of our courts together with the opinions rendered by this department, which have had a somewhat checkered course, but when they are considered in the light of the history above set forth, they are harmonious.

In Mackenzie v. State, 76 O. S. 369 (decided June 4, 1907); the court held in this case that:

> "'An act to provide for a commission for building court houses', passed April 18, 1904 (97 O. L. 111), and amended March 8, 1906 (98 O. L. 53), is constitutional, and Revised Statutes, sections 794 to 799, inclusive, do not apply to proceedings thereunder." (Syll.)

On p. 370 the court say in the opinion:

> "As we construe the statutes, two independent modes of erecting court houses are provided. One mode is under the supervision of the county commissioners, upon plans submitted to them, the clerk of the court, the sheriff, probate judge, and one person to be appointed by the

judge of the court of common pleas, and to be approved by a majority of them. The procedure under this scheme is defined in sections 794 to 803 of the Revised Statutes. A very different and, as we regard it, complete and independent scheme is provided for in 'An act to provide for a commission for building court houses' (97 O. L. 111) as amended (98 O. L. 53). The first mode or scheme may be applied to any building which shall cost ten thousand dollars or more; the second to court houses which shall cost to exceed twenty-five thousand dollars."

That is, the court holds that sections 794 to 799 inclusive, R. S., provide one mode of erecting public buildings which is under the jurisdiction of the county commissioners, while sections 794-1 to 794-5 inclusive, R. S., provide an additional mode of erecting court houses, which is under the jurisdiction of a building commission; that these two acts are separate and distinct, each having within itself the necessary provisions to make it an effective instrument for the purposes for which it was enacted; that when proceeding under the one act, the provisions of the other act do not apply, and that the act creating the building commission (sections 794-1 to 794-5 inc. R. S.) is neither supplementary to nor amendatory of sections 794 to 799 inc. R. S., and does not even refer to those sections, to qualify its general terms.

It will be well, in the further discussion of this question, to remember that sections 794-1 to 794-5 inc. R. S. became under the General Code sections 2333 to 2342 inc., and sections 794 to 799 inc. R. S. became sections 2343 to 2357 inc. G. C. So under the General Code sections 2333 to 2342 inc. provide for the commission plan of building county buildings, while sections 2343 to 2357 inc. provide for the building of county buildings by the county commissioners.

It must further be kept in mind that when the General Code was enacted and section 794-1 R. S. became section 2333 G. C., the provisions were made not to apply to court houses alone, but "to court houses or other county buildings costing over $25,000.00;" also the provisions of section 2338 G. C. vary materially from the provisions of section 794-1 R. S.

Section 794-1 R. S. read in part as follows :

"Said building commission shall, after adopting plans, specifications and estimates, invite bids and award contracts for said court house, and for furnishing, heating, lighting, ventilating and for sewerage of the same, and to determine all questions connected therewith until said court house shall have been completed and accepted by said building commission."

When this part of the section 794-1 R. S. was carried into the General Code as section 2338, it was made to read as follows:

"After adopting plans, specifications and estimates, the commission shall invite bids and award contracts for the building and for furnishing, heating, lighting and ventilating it, and for the sewerage thereof. Until the building is completed and accepted, by the building commission, it may determine all questions connected therewith, and shall be governed by the provisions of this chapter relating to the erection of public buildings of the county."

In other words, it will be noted that the following language was added:

"and shall be governed by the provisions of *this chapter* relating to the erection of public buildings of the county."

With this explanation in mind, let us note further the authorities. Hon. Timothy S. Hogan, one of my predecessors, rendered an opinion on April 7, 1911, found in Vol. II, p. 1142 of the Annual Report of the Attorney-General, 1911-1912, in which he held that in the erection of a county infirmary building, costing over $25,000.00, the provisions of section 2333 G. C. must be followed, and that it must be erected under the jurisdiction of a building commission, subject merely to the exceptions found in section 2436 G. C., which had to do with the matter when the county infirmary had been destroyed by fire and the rebuilding of the same. He held that sections 2333 et seq. G. C. provided the only method for erecting county buildings costing over $25,000.00. On p. 1144 of said opinion he reasoned as follows:

"I take it that all of said sections are mandatory and are to be strictly followed by the commissioners; and if there were no exception to the provisions of the above-mentioned sections, then the procedure therein contained would be the exclusive method by which such county buildings would be constructed and erected. But there is an exception, at least in respect to the building of an infirmary building when the same has been destroyed by fire, as provided in section 2436, General Code, which reads as follows:

"* * * * * * * * * * * * * * * * * *

"My final conclusion is that in the situation covered in said section 2436, General Code, the said section becomes operative and governs in so far as the exception goes, to wit: the commissioners may appropriate money, levy tax and issue and sell the bonds of such county in anticipation thereof, in an amount, etc., without first submitting to the voters thereof the question of rebuilding such infirmary, appropriating such money, etc.; for to hold otherwise would make the exception of no effect upon the original rule which it modifies, and more restricted than it really is. But with respect to the remaining provisions of said sections 2333 to 2342, General Code, I think it necessarily follows, and I am of the opinion that said remaining provisions would apply and govern and that the county commissioners would be legally required to rebuild in accordance therewith. That is to say, the only exception, as I have stated above, to the provisions contained in said sections is, that in the event the county infirmary is destroyed by fire or other casualty, then the commissioners may expend a sum to the extent of fifty thousand dollars without submitting the proposition to a vote of the people of the county; and this being the only exception, of course it follows that all the remaining provisions would govern."

In rendering this opinion, Mr. Hogan did not refer to nor comment at all upon Mackenzie v. State, supra, although the court in that case held directly opposite to the opinion rendered by Mr. Hogan.

On February 7, 1914, Mr. Hogan was again called upon to pass upon the exact question upon which he had passed before. In this opinion, found in Vol. I, p. 251, Annual Report of the Attorney-General for 1914, he refers to and com-

ments upon Mackenzie v. State, supra, but still holds to the conclusions reached in his former opinion. In the syllabus he holds as follows:

> "1. Section 2333 General Code governs and must be followed by the commissioners proceeding to construct county buildings at a cost exceeding twenty-five thousand dollars."

After distinguishing to some extent the case of Mackenzie v. State, supra, from the case upon which he had rendered an opinion theretofore, Mr. Hogan uses the following language on p. 252 of the opinion:

> "I repeat therefore that, while I acknowledge that the statements of Judge Davis in the opinion in the Mackenzie case are inconsistent with my former opinion, yet, because these statements were, strictly speaking, obiter dicta, I still am inclined to the view that it would be at least the safer policy to follow the building commission act in constructing a county building, the cost of which exceeds twenty-five thousand dollars."

In a case decided by the superior court of Cincinnati and reported in 18 O. N. P. (N. S.) 97, styled State ex rel. v. Green, the court held that in the erection of a court house, under the provisions of sections 2333 to 2342 inc. G. C., the building commission must be governed by not only the provisions of these particular sections, but also by the provisions of sections 2343 to 2357 inc. G. C., thus holding directly opposite from Mackenzie v. State, supra. The superior court held that the principle enunciated in the Mackenzie case was abrogated, due to the amendment which had been added to section 2338 G. C. at the time of the adoption of the General Code in 1910, which amendment read as follows:

> "and shall be governed by the provisions of *this chapter* relating to the erection of public buildings of the county."

The above case was affirmed by the circuit court in State ex rel. v. Green, 22 O. C. C. (N. S.) 1. The supreme court refused to order the circuit court to certify the record, holding that there was no manifest error in the finding of the court of common pleas and the circuit court.

Let us briefly recapitulate in reference to the holdings of the different courts and of this department:

The court in the Mackenzie case held that in the erection of a court house, under the provisions of sections 794-1 to 794-5 inc. R. S., the commission was controlled by no other provisions than those found within the act itself; but it must be remembered that this case was decided before the adding of the amendment to section 2338 G. C.

The superior court of Cincinnati held that in the erection of a court house, under the provisions of sections 2333 to 2342 inc. G. C., the commission must look not only to the provisions of these sections, but to the general provisions having to do with the building of county buildings, namely, sections 2343 et seq. G. C. But it must be remembered that this case was decided after the addition to section 2338 G. C.

It will be noted in these two cases that the court did not pass directly upon the question which we have under consideration, that is, whether it was obligatory, in the construction of county buildings costing over $25,000.00, to proceed under section 2333 G. C., which had to do with the creation of the building commission, or whether proceedings might be had under section 2343 G. C., which gives the county commissioners jurisdiction.

But when we come to consider the opinions rendered by Mr. Hogan, we find he holds clearly and distinctly that in the erection of county buildings costing more than $25,000.00 proceedings must be had under sections 2333 et seq. G. C., and this plan is the only one that can be followed.

In view of the history of this legislation and in view of the court decisions and the decisions of this department, what is the answer to your question?

The building commission act, as originally enacted, provided merely for plans in the erection of court houses, but, as said before, when the General Code was enacted it was made to include not only court houses, but other county buildings also. When the General Code was enacted, new matter was added to section 2338 G. C., as above set out, which states that the building commission shall be governed by the provisions of *this chapter* relating to the erection of public buildings of the county. What are the provisions of *this chapter?* Chapter 1 is headed "Building Regulations." It is divided into three parts:

> "1. 'State Buildings,' which is controlled by sections 2314 to 2332 inc. G. C.
>
> "2. 'County Buildings and Bridges,' which is controlled by sections 2333 to 2361 inc. G. C.
>
> "3. 'General Provisions,' which is controlled by sections 2362 to 2366 inc. G. C."

It is to be noted in this chapter, as it is now enacted, that the two acts, which we have above been considering, are merged in one act, under the title "County Buildings and Bridges." It is no longer two acts, but one act, the provisions of which have to do with county buildings and bridges.

In view of all the above, I am of the opinion that the opinions rendered by Hon. Timothy S. Hogan are correct, and that in the erection of county buildings, costing to exceed $25,000.00, it is necessary to follow the provisions as laid down in sections 2333 et seq. G. C.

In passing, I desire to call your attention to section 2351 G. C., which makes a special provision in reference to the building of a children's home. This you will consider as well as the provisions of sections 2333 et seq. G. C.

Hence, answering your question specifically, it is my opinion that if your county proceeds with the erection of a county children's home, it will be necessary for it to follow the provisions of section 2333 G. C., as well as the sections that follow. I have gone into this matter pretty fully, for the reason that I felt it ought to be decided definitely and specifically in view of the decisions of the courts and the opinions of this department.

It must be kept in mind, however, that the provisions of section 2333 G. C. apply only in cases where the county buildings are erected, and not where they are merely repaired or remodeled. So that if your county commissioners merely repair or remodel an old building, the provisions of this section would not apply. In the case decided by the superior court of Cincinnati, herein set out, this matter is discussed to some extent and may be of aid to you in deciding the matter.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

233.

REGISTERED BONDS—ISSUED SUBSEQUENT TO JANUARY 1, 1913—UPON DEMAND OF HOLDER—INSTEAD OF COUPON BONDS—NOT TAXABLE.

When a municipal corporation, upon the demand of the owner or holder of any of its coupon bonds issued prior to January 1, 1913, issues instead thereof registered bonds subsequent to January 1, 1913, such registered bonds are not taxable when owned by residents of Ohio.

COLUMBUS, OHIO, May 2, 1917.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I have your letter of March 9, 1917, in which you request my opinion as follows:

> "When a municipal corporation, upon the demand of the owner or holder of any of its coupon bonds issued prior to January 1, 1913, issues instead thereof registered bonds subsequent to January 1, 1913, are such registered bonds taxable when owned by residents of Ohio?"

Article 12, section 2, of the constitution now provides:

> "Laws shall be passed, taxing by a uniform rule all moneys, credits, investments in bonds, joint stock companies, or otherwise; and also all real and personal property according to its true value in money, excepting all bonds at present outstanding of the state of Ohio or of any city, village, hamlet, county, or township in this state or which have been issued in behalf of the public schools in Ohio and the means of instruction in connection therewith, which bonds so at present outstanding shall be exempt from taxation."

The phrase "at present" evidently refers, as you assume, to January 1, 1913, when this section, as adopted by the electors in 1912, took effect. The sections of the General Code, under favor of which the exchange referred to by you could have been effected, are as follows:

> "*Section* 3928: On demand of the owner or holder of any of its coupon bonds, a municipal corporation may issue instead thereof a registered bond, or bonds, of the corporation not exceeding in amount the coupon bonds offered in exchange. The registered bond or bonds shall be signed and sealed as other municipal bonds are signed and sealed, and bear the same rate of interest, be payable both principal and interest at the same time and place, as the coupon bonds for which the exchange is made, and shall be of such denomination as the holder of the coupon bonds may elect.
>
> "*Section* 3929: When due, the interest and principal of such registered bonds shall be paid only to the person, corporation, or firm appearing by the records of the municipal corporation to be the owner thereof, or order. Such registered bonds may be transferred on such record by the owner in person or by a person authorized so to do by power of attorney duly executed. The exchange and registration here required

shall be transacted by the trustees of the sinking fund at their business office where a registry shall be kept for that purpose which shall show the date, series, denomination and owner of such registered bonds and the number and series of the coupon bonds for which they were exchanged.

"*Section* 3930: No registered bonds shall be issued by a municipal corporation until the bonds and coupons offered in exchange shall have been cancelled or destroyed. The trustees of the sinking fund may demand of the holder of the coupon bonds a reasonable fee as compensation for the expense of making such exchange.

Undoubtedly the automatic exemption of article 11, section 12 is an exemption *in rem*. Specific things are hereby withdrawn from the exemption of the taxing power. In the case you put, it is clear that on January 1, 1913, there was in existence a specific thing which was then exempt from taxation by favor of the constitution itself. Since that time the form of the thing has been changed. Is it, nevertheless, the same thing which existed on January 1, 1913? This, to my mind, is the only question which need be considered. Stated in another way it amounts to this: Does the exchange by the holder thereof of a municipal coupon bond for a registered bond or bonds effect a substantial change in the *res* or thing which exists, considered as a subject of taxation?

The people in adopting the amendment to article 12, section 2, of the constitution must, I think, be presumed to have understood its application in the respect now under consideration, in the light of the long established definition of the class of things affected thereby as subject to taxation. It will be observed that the first part of article 12, section 2, requires laws to be passed taxing *inter alia* all investments in bonds; and that the part of the section now under consideration is in form and in substance an exception to this requirement.

The term "investment in bonds" has been defined for years in this state by what is now section 5323 General Code. Though several amendments have been made to that section since its original enactment, its substantial meaning has never been changed. It now provides as follows:

"The term 'investment in bonds' as so used, includes all moneys (invested) in bonds, certificates of indebtedness, or other evidences of indebtedness of whatever kind, whether issued by incorporated or unincorporated companies, towns, cities, villages, townships, counties, states, or other incorporations, or by the United States, held by persons residing in this state, whether for themselves or others."

It is not necessary for the present purpose to analyze this definition minutely. It is sufficient to observe that the subject of taxation thereby pointed out is not a tangible thing but an intangible thing evidenced by a certain form of certificate or security. It is the *investment* in the bond and not the bond itself—if any distinction is to be drawn—which is the subject of taxation.

On the other hand, however, it is equally clear that this principle does not furnish a complete answer to the question which you submit; for while the subject of taxation is the intangible investment, yet it might still be argued that the subject of the exemption is not an investment made prior to a certain date, but rather an investment evidenced by a paper writing issued prior to a certain date, regardless of when the investment was made. Indeed, I think this view must be accepted; for it is clear that if a municipal bond were issued prior to January 1, 1913, it is exempt in the hands of any person who may hold it,

whether he acquired it, i. e., made his "investment" prior to that date, or not. After all, therefore, the fact that both in substance and for the purpose of section 5323 General Code the chose in action and not the mere paper evidence of it is the real subject of taxation is not perfectly conclusive.

Nor do I think that we are helped by considering the question from the standpoint of the municipalities which have issued these bonds. From their standpoint the debt is substantially the same debt, notwithstanding the exchange of bonds; but the same argument might be made if the bonds, instead of being exchanged for registered bonds, had been refunded by the issuance of an entirely separate set of bonds.

Without passing directly upon this question, which is not before me, I am certainly not prepared to hold that such refunding bonds would be exempt from taxation merely because the original indebtedness which they were designed to extend had been created prior to January 1, 1913. While such consideration may, therefore, be helpful as influencing the point of view from which the solution of the question may be approached, they are not conclusive in themselves. In my opinion the real question to be answered is as follows:

> "Are the registered bonds issued in place of the original bonds substantially the same obligations as the original bonds?"

I put the question this way because I think that by considering it as such, attention is directed to the exact thing which is the subject of taxation, viz., the right of the holder of negotiable papers against the obligor thereof, based upon the paper which he holds. The second of the other considerations referred to would have us look at the question from the viewpoint of the obligor and inquire when his debt was created. The suggested viewpoint requires us to look at it from the standpoint of the obligee or his transferee, who must make whatever return for taxation the statutes require—who has indeed made the "investment" hereinbefore referred to.

Looking to sections 3928 G. C., et seq., above quoted, it will be observed that the registered bond corresponds with the coupon bond for which it is exchanged in rate of interest, time of payment and place of payment. It differs or may differ from the original coupon bond in denomination, though originally the amount of registered bonds issued to any one holder will, of course, correspond in the aggregate to the amount of coupon bonds offered in exchange by him. The new bond also differs from the old in that the right of the municipality with respect to the payment of interest and principal is more clearly defined and the right of the holder correspondingly limited; that is to say, the principal and interest of the registered bond can be paid only to the person appearing on the register as the owner thereof; whereas the municipality would be protected in paying an ordinary coupon bond to any one appearing upon the face thereof to be a holder in due course. Some question even exists as to whether or not registered bonds are negotiable instruments. Authorities will be found to the effect that where the payment is restricted as in section 3929 of the General Code, the bond is not negotiable.

> Scollins v. Rollins, 173 Mass., 275;
> Benwell v. Newark, 55 N. J., Equity, 260;
> Manhattan Savings Institute v. N. Y.;
> National Exchange Bank, 170 N. Y., 58.

A very valuable discussion of the different classes of municipal bonds and the negotiability of each is to be found in the New Jersey case, above cited, in

the opinion by Pitney, V. C. On the other hand, however, it has been held that registered bonds, subject to restrictions substantially the same as those found in section 3929 of the General Code, are negotiable. D'Esterre v. Brooklyn, 90 Fed., 586. I think the exact status of the bonds issued by an Ohio municipality is that which Pitney, V. C., described in Benwell v. Newark as convertible coupon bonds; that is to say, any ordinary coupon bond issued by any municipal corporation in Ohio, under the General Code of the state, may, upon the agreement of both parties, be converted into a registered bond. While Vice Chancellor Pitney speaks of a convertible coupon bond as one which is converted from a coupon bond into a registered bond by certain alterations on the face thereof, yet I do not think that the mere fact that the Ohio statutes require a formal taking up and destruction of the coupon bonds and a formal issuance of new evidences of indebtedness changes the substantial result. In effect all Ohio municipal bonds are, as I have already stated, convertible into registered bonds, though not as a matter of right if the municipal authorities are unwilling. In short, a coupon bond has the potentiality, at least, of being exchanged for registered bonds.

This fact, then, makes immaterial the differences which exist between a coupon bond and a registered bond, for while such differences do exist and have been pointed out, yet the registered bond is issued under what may be termed an implied condition or right existing by virtue of the coupon bond.

It thus becomes apparent that the holder of the coupon bond, in having it exchanged for a registered bond, is merely exercising the right which he had as a holder of the coupon bond. That being the case, it is further clear to me that the change in the form of the obligation which he holds does not make a substantial change therein for the purpose of the present inquiry. In other words, the registered bond is in substance the same bond as the original coupon bond, in that it is the outgrowth of that bond and owes its existence to rights determined by and arising from the original bond.

For this reason, then, I am of the opinion that the question which you submit is to be answered in the negative. In arriving at this conclusion I have not considered the question suggested by a brief which has been furnished to me by counsel employed by certain insurance companies and by an opinion of Hon. Robert P. Duncan, prosecuting attorney of Franklin county, to the auditor of that county, respecting the effect of article 12, section 11 of the constitution, though my impression is that this constitutional provision does not afford any trustworthy assistance in the solution of the question; nor have I considered the question made in the brief above cited respecting the change in the constitutional exemption as an impairment of the obligation of the contract, though here, too, I am not satisfied that such question is in the case. My conclusion is based wholly upon the fact that the issuance of the registered bond is a right which inheres in the holder of the original coupon bond by virtue of his ownership of that bond. So that, however, different as an obligation, the duty of the municipality to the holder of a registered bond may be, as compared with its duty to the holder of a coupon bond, that obligation is one which is derived from and is a part of the original obligation of the city under the coupon bond when first issued; hence the change in form and even the change in substance does not amount, in effect, to the issuance of a new bond for the purpose, at least, of the application of article 12, section 2, of the constitution.

Yours very truly,

JOSEPH MCGHEE,

Attorney-General

234.

APPROVAL—TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE OF THE VILLAGE OF BROOKLYN HEIGHTS, OHIO.

COLUMBUS, OHIO, May 2, 1917.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"Re:—Bond issue of the village of Brooklyn Heights, Ohio, in the sum of $20,071.35, being one bond in the sum of $71.35 and twenty bonds of $1,000.00 each, issued for the improvement of Schaaf road, commencing on the west side of Edward Orth's property and extending west to Broadview road."

I have examined the transcript of the proceedings of council and other officers of the village of Brooklyn Heights in reference to the above bond issue, also the bond and coupon form attached thereto, and I find the same to be in accordance with the provisions of the General Code so far as the same are applicable thereto.

I am of the opinion that said bonds drawn according to the form submitted and executed by the proper officers will, upon delivery, constitute valid and binding obligations of the said village.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

235.

APPROVAL—TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE OF THE VILLAGE OF BROOKLYN HEIGHTS, OHIO.

COLUMBUS, OHIO, May 2, 1917.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"Re:—Bond issue of the village of Brooklyn Heights, Ohio, in the sum of $1,263.60, being one bond in the amount of $263.60, and one bond of $1,000.00, for the improvement of Broadview road from Schaaf road to the north city limits by constructing sidewalks of stone or concrete."

I have examined the transcript of proceedings of the council and other officers of the village of Brooklyn Heights in reference to the above bond issue, also the bond and coupon form attached, and I find the same in accordance with the provisions of the General Code in so far as the same are applicable thereto.

I am of the opinion that said bonds drawn in accordance with the form submitted and executed by the proper officers will, upon delivery, constitute valid and binding obligations of the said village.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

236.

FOREIGN CORPORATION—NOT REQUIRED TO COMPLY WITH SECTIONS 178 AND 183 G. C.—WHOSE ONLY ACTIVITY IN THIS STATE IS THAT OF OWNING REAL PROPERTY.

A foreign corporation whose only activity in this state is that of owning real property here, which it leases to others, is not required to comply with the provisions of sections 178 *and* 183 *of the General Code.*

COLUMBUS, OHIO, May 3, 1917.

HONORABLE WILLIAM D. FULTON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I am in receipt of a communication under date of April 12, 1917, from Messrs. Squire, Sanders and Dempsey, attorneys at law, Cleveland, Ohio, asking my opinion whether on the facts therein stated The Rubber Goods Manufacturing Company, a New Jersey corporation, is required to comply with sections 178 and 183 General Code, and conformable to a rule of this department I am addressing my opinion with respect to the question presented to you. The facts as stated in the communication above referred to are as follows:

> "The Rubber Goods Manufacturing Company, under an agreement not made in this state, has purchased and acquired certain real estate and a manufacturing plant located therein formerly owned by the Mechanical Rubber Company, a New Jersey corporation, and the Sawyer Belting Company, a Massachusetts corporation, the deed being delivered outside of the state of Ohio. The Rubber Goods Manufacturing Company will not conduct any business on the premises, but proposes to grant a long term lease thereof to the Mechanical Rubber Company and the Sawyer Belting Company—the lease to be executed and delivered outside of this state, under which lease certain periodical rents are to be paid to the owner at its office in another state. The Mechanical Rubber Company and the Sawyer Belting Company have each duly procured licenses to do business in the state of Ohio as foreign corporations.
>
> "The Rubber Goods Manufacturing Company does not and will not maintain any office in this state nor have any representative therein; it will not manufacture, sell or deal in any products in this state, all of its officers and agents being non-residents. So far as Ohio is concerned, its sole function will be to hold title to the property above mentioned and to receive at its office the rent therefrom.
>
> "The corporate power of The Rubber Goods Manufacturing Company to do the foregoing appears from the following clause in its certificate of incorporation, included among the objects for which the corporation was formed:
>
> " 'To invest in, grant, bargain, sell, buy, rent, deal in, own, improve, lease or receive any and all kinds of property, real or personal, within or without the state of New Jersey, including the shares and evidences of indebtedness of other corporations as well as its own shares, and to deal with the same as a natural person might do, and in all ways not inconsistent with the law.' "

In this state there are two laws imposing conditions upon foreign corporations entering the state to transact business therein. First, the license fee law

provided by sections 178 to 182, inclusive, General Code, which applies to foreign corporations, except that kind specified in said section 178 General Code; and, second, the initial franchise tax law provided for in sections 183 to 192, inclusive, General Code, which, except as to the classes of foreign corporations specified in section 188, provides for a franchise tax upon the proportion of the capital stock of the corporation represented by the property and business in this state. In addition to the foregoing, an annual franchise tax is imposed on foreign corporations doing business in this state by General Code section 5503.

Section 178 General Code provides that before a foreign corporation for profit "transacts business in this state" it shall procure from the secretary of state a certificate that it has complied with the requirements of the law to authorize it to do business in this state, and that the business of such corporation to be transacted here is such as may be lawfully carried on by a corporation organized under the laws of this state for such or similar business, or if more than one kind of business, by two or more corporations so incorporated for such kind of business exclusively. This section further provides that no such foreign corporation doing business in this state without such certificate shall maintain an action on a contract made by it in this state until it has procured such certificate.

Section 180 General Code provides that for issuing the certificate required by section 178 General Code authorizing such foreign corporation to transact business in this state, the secretary of state shall be entitled to receive from such foreign corporation certain fees based upon the authorized capital stock of such corporation.

Section 183 General Code provides that "before doing business in this state," a foreign corporation organized for profit and owning or using a part or all of its capital or plant in this state shall make and file with the secretary of state in such form as he may prescribe a statement under oath of its president, secretary, treasurer, superintendent or managing agent in this state, which shall contain the following facts:

1. The number of shares of authorized capital stock of the corporation and the par value of each share.

2. Name and location of the office or offices of the corporation and the names and addresses of the officers or agents of the corporation in charge of its business in Ohio.

3. The value of the property owned and used by the corporation in Ohio, where situated, and the value of the property of the corporation owned and used outside of Ohio.

4. The proportion of capital stock of the corporation represented by the property owned and used by the business transacted in Ohio.

Section 184 General Code provides that from the facts thus reported and any other facts coming to his knowledge, the secretary of state shall determine the proportion of capital stock of the corporation represented by its property and business in this state, and shall charge and collect from such corporation for the privilege of exercising its franchise in this state, one-tenth of one per cent. upon the proportion of its authorized capital stock represented by property owned and used and business transacted in this state, but not less than ten dollars in any case.

It is a familiar principle of law that no state has the power to authorize a corporation of its creation to exercise its corporate franchise in another state except with the express or implied consent of such state. Any right or power to do business which a corporation of one state may presume to exercise in another, therefore, exists purely by virtue of the rule of comity—a rule which, it seems, in some respects has the force and effect of a rule of the common law.

It is a principle equally well settled, following what has just been said, that since a corporation has no absolute right to recognition in a state other than that of its creation, but depends for its recognition on the express or implied assent of such state, it may grant such assent and authorize a foreign corporation to do business therein on such terms and conditions as it may think proper to impose, provided, of course, such conditions do not infringe on the constitution and laws of the United States.

In pursuance of this power to prescribe conditions upon which foreign corporations may enter this state for the purpose of transacting business herein, the legislature has enacted the statutory provisions above noted. From the terms of sections 178 and 183 General Code, it is apparent that the conditions therein imposed apply only to the corporations transacting or doing business in this state or which seek to do so.

In this connection it may be noted that irrespective of statutes of this kind, a foreign corporation is only liable to state franchise taxation based on its doing business if it in fact does business in the state, and what constitutes "*doing business*" is to be determined from what it actually does. It cannot consist in the corporation's doing what it has a right to do without the consent of the state.

Judson on Taxation, section 175.

Statutes of similar import to the above, applying to foreign corporations of different kinds, have been enacted in practically all of the states, and the provisions of these statutes in respect to what constitutes "doing business" within the meaning of these terms as used in such statutes have been construed in many decisions of the courts of the several states and of the United States. In these decisions, however, the courts for the most part have refrained from formulating any general rule for determining when a foreign corporation is "doing business" within the meaning of such statutes, but have contented themselves in determining whether under the facts in the particular cases such corporations are within the statute.

With respect to mercantile and commercial corporations it may be noted that in so far as any general rule can be gathered from the decisions the phrase "doing business" within any particular state, as applied to such corporations, implies corporate continuity of conduct in respect to such business such as might be evidenced by the investment of capital, the maintenance of an office for the transaction of business and those incidental circumstances which attest the corporate intent to avail itself of the privilege of carrying on the business and activities such as appertain to the ordinary business and purpose of the corporation as distinguished from acts simply within its corporate powers.

Penn Colliers Co. v. McKeever, 183 N. Y., 98;
Simons-Burk Clothing Co. v. Linton, 90 Ark., 96;
Kilgore v. Smith, 122 Pa., 48;
Caesar v. Cappell, 83 Fed. Rep., 403-422;
Cooper Mfg. Co. v. Ferguson, 113 U. S., 727;
Toledo Commercial Co. v. Glenn Mfg. Co., 55 O. S. 217, 222, 223.

From the facts stated in the communication above referred to and quoted, it appears that with respect to this state the sole activity of The Rubber Goods Manufacturing Company consists of the owning of property situated here, the purchase and sale of which was consummated outside of the state, which property it proposes to lease by an instrument to be executed and delivered like-

wise outside of the state of Ohio. Under this state of facts I am inclined to the view that The Rubber Goods Manufacturing Company is not required to comply with the provisions of sections 178 or 183 General Code.

As before noted both of said sections by their terms are predicated upon the condition that the foreign corporation is transacting or doing business in this state, and it has been uniformly held that the ownership by a foreign corporation of property within the jurisdiction of a particular state cannot of itself constitute "doing business" by the corporation therein.

Judson on Taxation, section 176;
Missouri Coal and Mining Co. v. Ladd, 160 Mo., 435;
Sullivan v. Southern Timber Co., 103 Ala., 371.

In the case of Wilson v. Peace, 85 S. W., Reporter, 31 (Tex.), it was held that the mere fact that a foreign corporation owned land and leased it to a farmer, the rent to be paid in grain, does not show that the company was *doing business* in the state within the foreign corporation statutes.

In the case of Zonne v. Minneapolis Syndicate, 220 U. S., 187, it was held that a corporation which merely holds title to the land subject to lease and received the rental thereon is not engaged in business within the federal corporation excise tax law of 1909, which provides that every corporation organized for profit and having a capital stock represented by shares, organized under the laws of the United States or of any state or territory of the United States, or under the acts of congress applicable to Alaska or the District of Columbia, or organized under the laws of any foreign country and engaged in business in any state or territory of the United States or in Alaska or in the District of Columbia, shall be required to pay annually an excise tax with respect to the carrying on or "doing business" of such corporation.

In the case of the Louisville Property Company v. the Mayor and City Council of the City of Nashville, 114 Tenn., 213, which was an action brought by a foreign corporation against the city of Nashville for damages to its property, the defense was made that the company had not complied with the statutes of the state of Tennessee, requiring a foreign corporation, as a condition to the right of carrying on business in the state, to file with the secretary of state a copy of its charter. The court held that regardless of the qualifications under this statute of the state the company's title was good against anyone other than the state; and also held that it was not necessary for the corporation to procure a license inasmuch as the statute made a distinction between the acquisition of property and the "doing of business," and that the lawmakers evidently contemplated that a foreign corporation might enter the state to engage in business, and yet not seek to acquire property, or might buy property, and still not do business.

A case of interest in the consideration of the question here presented is that of the People of the State of New York ex rel. The Singer Manufacturing Company v. Wemple, 150 N. Y., 46. The case was one arising under the franchise tax law of the state of New York, and the opinion of the court, so far as the same touches the question at hand, is as follows:—

"The relator is a foreign corporation carrying on a portion of its business in this state. The comptroller of the state of New York imposed a tax on the corporation for the year ending November 1st, 1890, of $2,-569.99, under chapter 542, Laws of 1880, and the acts amendatory thereof. The general term of the third department ordered a reduction of the tax to $1,163.74, and the comptroller appeals from that order.

"The facts are undisputed; the report of the relator to the comptroller fixes the amount of capital stock employed in this state at $372,397.10; the relator also advised the comptroller that about $900,000 of its surplus earnings were invested in real estate in the city of New York, then under lease and not occupied by it, but the intention was to erect a new building when the existing leases expired, and to use a small portion of it for the offices of the company and lease the remainder to tenants.

"The comptroller insists that the amount so invested in real estate must be added to the capital stock reported as employed in this state and the tax computed on the total sum, while the relator contends that the real estate constitutes no part of the capital stock enployed within this state.

"We are of opinion that the amount represented by the real estate was no portion of the capital stock employed within this state even if the $900,000 was a part of the capital stock of the company; it was an independent investment, and was in no sense employed within this state in the transaction of the ordinary business of the relator. (People ex rel. The Southern Cotton Oil Company v. Wemple, 131 N. Y., 64.) If at any time the whole or any portion of this real estate should be used by the relator in carrying on its business in this state a different question would be presented, which need not now be considered."

Although, as appears from the facts stated in the communication above referred to, the acquisition of this property in Ohio and the subsequent leasing of the same to the other corporation mentioned therein are by acts which have been consummated, or will be consummated, outside of the state, yet even if the whole transaction were conducted in this state it would not, in my opinion, constitute the transaction or doing of business under the statutory provisions above noted, and this for the reason that the transaction would be an isolated one not connected with any continuous corporate activity pertaining to the ordinary business and purpose of the corporation.

In this connection it seems to be the concensus of opinion that a corporation to come within the purview of the statutes of this kind prescribing conditions on the right of foreign corporations to do business within the state must transact therein some substantial part of its ordinary business which must be continuous in the sense at least that it is distinguished from mere casual or occasional transactions, and it may be laid down as a general rule that the act of a foreign corporation in entering into a single contract or transacting or performing an isolated business act in the state does not ordinarily constitute the carrying on or doing business therein.

Cooper Mfg. Co. v. Ferguson, 113 U. S., 727;
Delaware, etc., Canal Co., v. Mahlenbrock, 63 N. J., Law, 281;
Penn Colliers Co. v. McKeever, supra;
Booth v. Weigand, 30 Utah, 135.

In keeping with this principle numerous authorities may be cited to the point that when a foreign corporation receives a mortgage on land in the domestic state such corporation is not "doing business" within the meaning of the foreign corporation statute.

Caesar v. Cappell, supra;
Floorshine Bros. Dry Goods Co. v. Lester, 60 Ark., 120;
Keene Guaranty Savings Co. v. Lawrence, 32 Wash., 572.

In the case of Lakeview Land Co. v. Traction Co., 95 Tex. 252, 257, it was held that a purchase, outside of the state by a foreign corporation, of land in the state did not constitute the doing of business within the state in the purview of a statute of this kind.

On the considerations noted herein, I am of the opinion, therefore, that if, as stated in the communication received by me from the law firm of Squire, Sanders & Dempsey, the activities of The Rubber Goods Manufacturing Co. are to be limited to the acts stated therein, they will not be required to comply with either the provisions of section 178 or 183 of the General Code.

In arriving at this conclusion I find that I am in substantial accord with an opinion of my predecessor, Mr. Turner, addressed by him to the Tax Commission of Ohio, June 12, 1916, (Opinions of the Attorney-General, 1916 Vol. II, p. 995). The conclusions herein reached are likewise in substantial accord with the opinions of my predecessor, Mr. Hogan, found in the Annual Report of the Attorney-General for the years 1912 and 1913, at pages 526 and 86 respectively.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

237.

APPROVAL—FINAL RESOLUTIONS FOR ROAD IMPROVEMENTS IN FAIRFIELD, CHAMPAIGN, PUTNAM AND CLARK COUNTIES.

COLUMBUS, OHIO, May 3, 1917.

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

DEAR SIR:—I have your communications of May 2, 1917, enclosing certain final resolutions in reference to the construction of highways, on which you ask my approval. The final resolutions cover the following highways:

"Fairfield County—Sec. 'M-2' Cincinnati-Zanesville road, Pet. No. 2318, I. C. H. No. 10.

"Champaign County—Sec. 'q' Urbana-West Jefferson road, Pet. No. 2146, I. C. H. No. 188.

"Putnam County—Sec. 'h' Kalida-Lima road, Pet. No. 2853-T, I. C. H. No. 134.

"Clark County—Sec. 'A-1' Springfield-Jamestown road, Pet. No. 2166, I. C. H. No. 472."

I have examined carefully the different final resolutions and find them correct in form and legal. I am, therefore, returning the same to you with my approval endorsed thereon.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

238.

APPROVAL—TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE OF THE COUNTY COMMISSIONERS OF LOGAN COUNTY.

COLUMBUS, OHIO, May 4, 1917.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"In re: Bond issue in sum of $8,000.00 by board of county commissioners of Logan county, Ohio, in anticipation of collection of assessment for improvement of Ansley Road No. 20."

I have examined the transcript of the proceedings of the board of county commissioners and other officers relating to the above bond issue, and as corrected in certain particulars to conform with the request of this department, I find the same to be in conformity with the provisions of the General Code of Ohio, relating to county road improvements of this kind; and I am of the opinion that proper bonds executed by the proper officers will constitute valid and binding obligations of Logan county.

No bond or coupon form was furnished with the transcript, as requested by me, but I am this day instructing the county auditor to forward to me the printer's form copy of the same before the bond and coupons are printed, to the end that this department may know that the same are in proper legal form.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

239.

APPROVAL—TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE OF THE COUNTY COMMISSIONERS OF LOGAN COUNTY.

COLUMBUS, OHIO, May 4, 1917.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"In re: Bond issue by the board of county commissioners of Logan county, Ohio, in the sum of $9,500.00 in anticipation of collections for Pugh Road Improvement No. 118."

I have examined the corrected transcript of the proceedings of the board of county commissioners and other officers of Logan county, Ohio, relating to the above bond issue, and find same to be in all respects regular and in conformity with the sections of the General Code of Ohio relating to road improvements of this kind.

No bond or coupon form was furnished with the transcript, as requested by

this department, but I am this day instructing the county auditor to send to me printer's form copy of same before such bonds and coupons are printed, to the end that this department may know same are in proper legal form.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

240.

EIGHT HOUR LAW—DOES NOT APPLY TO WORKMEN ENGAGED IN OPERATION OF MUNICIPAL POWER—HEAT—LIGHT AND WATER PLANTS—WORKMEN WORKING FOR PUBLIC AND WORKMEN ENGAGED ON PUBLIC WORK DISTINGUISHED.

The provisions of section 17-1 G. C. and of section 37 of article II of the constitution do not apply to workmen engaged in the operation of municipal power, heat, light and water plants, for the reason that these men are workmen working for the public and not workmen engaged on a public work.

COLUMBUS, OHIO, May 4, 1917.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Your communication of April 26, 1917, in which you ask for certain information, was duly received. Your communication reads as follows:

> "Section 17-1 of 103 Ohio Laws, page 854, reads as follows:
>
> " 'Except in cases of extraordinary emergency, not to exceed eight hours shall constitute a day's work and not to exceed forty-eight hours a week's work, for workmen engaged on any public work carried on or aided by the state, or any political subdivision thereof, whether done by contract or otherwise; and it shall be unlawful for any person, corporation or association, whose duty it shall be to employ or to direct and control the services of such workmen to require or permit any of them to labor more than eight hours in any calendar day or more than forty-eight hours in any week, except in cases of extraordinary emergency. This section shall not be construed to include policemen or firemen.'
>
> "Former Attorney-General Hogan rendered an opinion, ruling that engineers, firemen and other workmen in municipal heat, water and power plants, did not come within the terms of the statute, and that such employes were exempt from its operation.
>
> "Mr. Hogan's opinion was reversed by his successor, Mr. Turner, who, in Opinion No. 814, rendered September 10, 1915, ruled that all municipal power, heat, light and water plants came within the definition of public works, and all persons engaged in the construction, repair, replacement, alteration, maintenance, or operation thereof, were subject to the provisions of the above law.
>
> "In accordance with Mr. Turner's opinion, this department on August 18, 1916, issued Factory Order No. 7108 to Harry E. Rock, director of public service, Urbana, Ohio, ordering the city of Urbana to adopt a

working schedule for engineers, firemen, and other workmen in and about the city waterworks plant, on a basis of not more than eight hours per day, or more than forty-eight hours in any one week.

"Service Director Rock and Mayor Talbert of Urbana, have questioned the legality of our order, and up to the present time have refused to comply with the same. Therefore, before instituting legal proceedings to compel compliance, I believe it would be advisable to secure an opinion from the present attorney-general involving the construction of the law referred to, making particular inquiry as to its application to employes engaged in the maintenance and operation of municipal waterworks, heat, power and light plants.

"We will await your decision in the matter before taking any action."

In your communication you ask for a construction of section 17-1 G. C., and inasmuch as you have quoted this section in full in your communication, I will not requote the same in my opinion. As said section 17-1 G. C. was enacted in view of the constitutional provision found in section 37 of article II, I desire to quote said constitutional provision, which reads as follows:

"Except in cases of extraordinary emergencies, not to exceed eight hours shall constitute a day's work, and not to exceed forty-eight hours a week's work, for workmen engaged on any public work carried on or aided by the state, or any political subdivision thereof, whether done by contract, or otherwise."

Since the adoption of said section 37 of article II as a part of our constitution, constructions have been placed upon the same a number of times by this department, and, as you suggest in your communication, these constructions have not always been harmonious. In order to have in mind just what has been decided by this department, I will set out briefly the different opinions rendered in reference to the application of this particular section.

On February 13, 1914, Hon. Timothy S. Hogan rendered an opinion in which he held that the provisions of this section do not apply to educational institutions. This opinion is found in Vol. I of the Annual Report of the Attorney-General for 1914, p. 283. Mr. Hogan held:

"Such an institution is not a public work in the sense intended by the statute."

On April 29, 1914, Mr. Hogan rendered another opinion, found in Vol. I of the Annual Report of the Attorney-General for 1914, p. 595, in which he held that the provisions of said section do not apply to engineers, firemen and other employes of the waterworks department of a city.

On April 30, 1915, Hon. Edward C. Turner, my predecessor in office, rendered an opinion, found in Vol. I of the Opinions of the Attorney-General for 1915, p. 598, in which he held that the provisions of said section do not apply to employes engaged in the work of the agricultural experiment station at Wooster, Ohio. In this opinion he affirmed the findings of Hon. Timothy S. Hogan made in the two opinions above set forth. He used the following language in rendering his opinion (p. 599):

"The answer to your question depends necessarily upon the meaning and scope of the words, 'public work carried on or aided by the state.'

The meaning of this language has been considered and construed by my predecessor, the Hon. Timothy S. Hogan, in two opinions—one of the date of March 11, 1914, addressed to Hon. R. H. Hughes, acting president of Miami university, and the other of date April 29, 1914, addressed to Hon. C. E. Van Dusen, city solicitor of Lorain, Ohio.

"Without going into or repeating the process of reasoning and argument contained in these two opinions, suffice it to say that I agree with the conclusions reached by Attorney-General Hogan, and I am of the opinion that the language referred to in section 37 of article II of the constitution and in section 17-1 of the General Code, applies only to public work of a constructive, improvement or betterment character, and not to the general routine performed under or in various departments of the state. As stated in the opinion of April 29, 1914, above referred to, there is a wide distinction between 'workmen engaged in public work' and 'workmen working for the public'.

"I am, therefore, of the opinion that general routine experiment station work does not come within the purview of sections 17-1 and 17-2 of the General Code."

While Mr. Turner in the above opinion agreed with Mr. Hogan that the employes of a municipal waterworks department do not come under the provisions of said section, yet in an opinion rendered by him on September 10, 1915, found in Vol. II of the Opinions of the Attorney-General for 1915, p. 1713, he held that employes engaged in the operation of municipal power, heat, light and water plants are within the provisions of said section, thus apparently reversing himself and Mr. Hogan.

On March 29, 1917, I rendered an opinion (No. 151), in which I held that the provisions of said section do not apply to employes of the state hospital located at Massillon, Ohio. In this opinion I commented upon the opinions heretofore rendered, and concurred in the two opinions of Mr. Hogan and the first opinion rendered by Mr. Turner. So that in passing upon the question now before me, I feel that it would not be advisable to again go into the matter of reviewing the former opinions rendered by this department, or in any way try to harmonize the same. Further, I feel that the law which might be applied to the matter in question has been thoroughly discussed in the former opinions, and therefore I shall not attempt to discuss the law in its application to this section. I desire, however, to note carefully the reading of said provision and draw my conclusion from this alone.

Let us note the wording of the provision itself. The only part of it necessary to be considered particularly is:

"Except in cases of extraordinary emergency, not to exceed eight hourse shall constitute a day's work and not to exceed forty-eight hours a week's work, for workmen engaged on any public work carried on or aided by the state, or any political subdivision thereof, whether done by contract or otherwise;".

1. It will be noted that the language is:

"for workmen engaged *on* any public work",

and not for workmen engaged *in* any public work. The word "on" has a distinctive meaning. This meaning is radically different from the word "in". The

word "on" immediately brings to one's mind the idea of a building, structure, improvement. It involves the idea of something being erected, constructed, made. It brings to one's imagination something that is growing, expanding, developing. It, too, compels one to consider that some time the thing being constructed, erected, developed, will reach a finished state. In other words, the thing will be completed at some time in the future.

It is impossible for one to think of a workman working on something without at the same time instinctively thinking that day after day the thing on which the man is working is nearing completion, and nearing completion because of the efforts of the workman. It would be an impossibility to conceive of a workman's working on something and yet never getting the thing upon which he works any nearer to a completion.

A man might be engaged *in* the work which would run on from day to day with no change; in other words, a mere routine; a business, a profession, a vocation. But one cannot conceive of the word "on" being used in connection with mere routine; a business, a profession, a vocation. There is a vast difference between:

A man's working *on* a building;
A man's working *in* a building;
A man's working *on* the state house;
A man's working *in* the state house;
A man's working *on* a municipal water plant;
A man's working *in* a municipal water plant.

In other words, there is a great difference between working *on* a public work and working *in* a public work.

2. The word used in the said section is on a "work". The word "work" signifies something definite, an object, something with form and shape and existence. A carpenter, stone mason, bricklayer, a road builder, may be engaged in working upon a "work"; but it is a terrific straining of the English language to say that a person working as a fireman, engineer, meter reader, etc., in the matter of operating any business, could be said to be a workman engaged on a "work". He is engaged in a vocation, an occupation, a business, just as the lawyer, the office man, the preacher, the school teacher. The school teacher is engaged in a most important public work. But what a straining of the English language it would be to say that he is engaged on a public work, under the terms of the section of the statute now under consideration. Yet he is engaged in work for the public just as is the man engaged in the operation of a municipal power, heat, light and water plant.

3. It will aid us materially, in construing this provision, to note this language, "carried on or aided by the state". The very term "aided by the state" shows clearly what was in the mind of the convention and of the legislature in adopting the provisions above set forth. There is some definite specific work to do, which is to cost a certain sum of money to complete, which the state is going to pay for itself, or it is going to aid some political subdivision in paying for the same, or it is a work carried on by some political subdivision, without any assistance from the state. This language plainly evidences that the convention and the legislature, in adopting the above provision, had in mind some particular piece of work which either the state could do itself, or could aid in doing, or some political subdivision could do itself.

Further, the provision states the same principle shall apply "whether done by contract or otherwise". These words throw a flood of light upon the meaning of the whole provision. Where there is a public work to be done by the state or a political subdivision of the same, they can do the work in one of two ways, either by contract with some one to perform the work, or do the work themselves. That is, they could let the job to some contractor, who would do the work for a certain stipulated sum and employ the necessary labor therefor, or the state or political subdivision can employ the necessary material and labor and do the work under their own supervision.

Whether the work is let to a contractor and he employs labor, or whether the state or political subdivision employs the labor directly, the eight hour per day rule applies. It would be impractical and inconsistent to talk about letting a contract for doing the work in the matter of operating a municipal power, heat, light and water plant. There is nothing in connection with this which at all contemplates the letting of a contract. The municipality might let the contract for the construction of a municipal power, heat, light and water plant, or it might employ the labor and oversee the work itself. In such a case the provisions of the statute under consideration would undoubtedly apply. But such a construction cannot be placed upon said provisions when it comes to applying it to men engaged in running the said plant.

4. The language, "except in cases of extraordinary emergency", throws much light on the language which follows. There might be extraordinary emergencies in cases where bridges are washed out by a flood, or public works are destroyed by the elements, in which it might be absolutely necessary to employ workmen in the erection of the same, due to certain circumstances, for more than eight hours per day and forty-eight hours per week; but it could hardly be said that these words could be used in reference to men working in their daily vocation and business of operating a municipal power, heat, light and water plant.

In a careful reading of the entire provision, we do not find a single word, phrase or clause which would seem to indicate that its terms were meant to apply to employes engaged in running municipal power, heat, light and water plants. The men there employed are not engaged *on* a public work, nor engaged in repairing or maintaining a public work. The distinction between the occupation or vocation of men working in a municipal power, heat, light and water plant, and the occupation or vocation of those working on a public work, cannot be better stated than as stated by Mr. Hogan, to this effect: In the former, they are workmen working for the public; in the latter they are workmen engaged on a public work.

Moreover, in placing a construction upon this statute, it must be kept in mind that we are considering a criminal statute; that the courts always place a strict construction upon the language used therein; and that nothing is included in the terms of the statute other than that which is included in the plain meaning of the language used therein.

On account of all the above, I am of the opinion that workmen engaged in the operation of municipal power, heat, light and water plants do not come within the provisions of section 17-1 G. C., nor within the provisions of section 37 of article II of the constitution.

I affirm the opinions above set out, rendered by Hon. Timothy S. Hogan, and the opinion of Mr. Turner rendered on April 30, 1915, found in Vol. I of the Opinions of the Attorney-General for 1915, p. 598.

In passing, I suggest that this is a matter which might with propriety be

passed upon by the courts, owing to the fact that opinions rendered by this department are so varying and confusing that they are of but little assistance to public officials in the matter of performing their duties.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

241.

MUNICIPAL COUNCIL—BEFORE ENACTING ASSESSING ORDINANCE FOR AN IMPROVEMENT—SHOULD ENACT RESOLUTION SETTING FORTH METHOD OF ASSESSMENT AND PART OF COST TO BE ASSESSED AGAINST ABUTTING PROPERTY OWNERS.

In cases in which the council of a municipality decides to assess against abutting property owners the cost and expense, or any part thereof, of an improvement, under the provisions of section 3952 G. C., the council should, before enacting the assessing ordinance, enact a resolution setting forth the method of making the assessment and the part of the cost to be assessed against the abutting property owners.

COLUMBUS, OHIO, May 4, 1917.

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

GENTLEMEN:—I have a communication of recent date in which Ralph Levinson, solicitor of the village of Bergholz, asks for certain information set out in his communication. His communication reads as follows:

"The village of Bergholz of Jefferson county, Ohio, of which the undersigned is solicitor, has entered into an agreement with the county commissioners of Jefferson county under the Cass highway law, being sections 6949 to 6954, and also in Year Book 106, pages 608 to 610.

"The agreement provides that of the portion of the road to be improved which runs through the village, the commissioners and the village will assume one-half of the costs and expenses. A notice of the road improvement has been published by the commissioners in the same manner as it does in all county roads, a copy of which I am herewith enclosing.

"The village desires to assess the one-half which it has assumed on the abutting property owners. As yet there has been no ordinance or resolution passed in council providing for such assessments. An ordinance of council consenting to the extension of the road through the village, the resolution authorizing mayor and clerk to enter into the agreement with the commissioners and for the village to assume the one-half and the agreement itself are the only things as yet done by council. However, the last two sentences of section 6952 read as follows:

" 'The council of said municipality may assess against abutting property owners all or any part of the cost and expense of said improvement to be paid by it under agreement with the county commissioners.

Said assessments shall be made in one of the methods provided for in the case of street improvements wholly within the municipality, and under the exclusive control of the council.'

"The question which confronts me and which I am not satisfactorily able to understand from this law, is whether or not council may accomplish this by merely passing an 'assessing ordinance' after the work has been completed and in that ordinance set forth that it has chosen to so assess its part in that manner by virtue of this 'Cass law'. And if assessment so made would be binding on the property owners and collectible the same as other assessments and taxes.

"Or on the other hand whether council would have to proceed in this case the same as in street improvements made exclusively by the municipality and pass the usual resolution declaring the necessity for the improvement and then follow this up with the 'ordinance determining to proceed with the improvement.'

"The village in this instance as well as the commissioners desire to proceed with this improvement in order that it might be completed this summer as soon as possible. For that reason we prefer not to be obliged to wait all this time, for such legislation and the notices to mature, unless it be absolutely essential towards making the assessments of the village on the abutting property owners legal and collectible.

"I realize that strictly speaking your department does not give opinions to solicitors, but inasmuch as this law is not yet settled and there are no court decisions, that I find on this point, I sincerely hope that in this instance you will grant me sufficient consideration to enlighten me on this point. By reason of this law being primarily the county road proposition, I am inclined to think that some of these questions at least have been before your department already."

While the communication does not state whether the improvement in the village of Bergholz is to be of a greater width than that contemplated by the county commissioners, yet from the language used I am assuming that the improvement in the village is to be of the width contemplated by the county commissioners, and that it is not the intention of the village council to provide for a greater width than that contemplated by the county commissioners.

Further, it must be kept in mind that the provisions of sections 6949 to 6954 inc. G. C. map out the course to be pursued and the steps to be taken when the county commissioners extend a road improvement into a municipality, whether the road in the municipality is of the width contemplated by the county commissioners, or whether the village council decides to improve the portion in the village to a greater width than that contemplated by the county commissioners.

While the language in sections 6951 and 6952 G. C. is a little misleading, yet there is no question in my mind that the legislature intended the provisions of these sections to apply to both cases. Under my assumption of fact section 6950 G. C. is not material in answering your question.

To make sure that the solicitor and this department have a correct understanding as to all matters connected with the proposed improvement, I am going to suggest a few matters that are not directly involved in the request made by the solicitor.

In order to understand this matter thoroughly, it will be necessary to quote sections 6949, 6951 and 6952 G. C., which are as follows:

"Sec. 6949. The board of county commissioners may extend a proposed road improvement into or through a municipality when the consent of the council of said municipality has been first obtained, and such consent shall be evidenced by the proper legislation of the council of said municipality entered upon its records, and said council may assume and pay such proportion of the cost and expense of that part of the proposed improvement within said municipality as may be agreed upon between said board of county commissioners and said council.

"Sec. 6951. If the board of county commissioners approve the same, said board shall have prepared the necessary plans, profiles, cross-sections, specifications and estimates for the improvement of such portion of said road, to the width indicated in said resolution of such municipality. The estimates therefor shall set forth in detail the probable cost and expense of so much of said improvement as is made necessary by reason of the same being improved to said increased width. After the plans, specifications, profiles, cross-sections and estimates have been returned to the county commissioners by the county surveyor, and by them approved, the county commissioners shall cause a copy thereof to be filed with the clerk of said municipality. Said plans, profiles, specifications and estimates shall also state what proportion of said increased cost is made necessary by improving street intersections.

"Sec. 6952. Upon receipt of such copy the council of such municipality may approve such plans, specifications, profiles, cross-sections and estimates, and such council may enter into an agreement with the board of county commissioners of such county as to the part of the estimated cost and expense of said improvement that is to be paid by said municipality on account of the increased width of the said improvement.

"After such plans and specifications have been approved and the agreement has been entered into by the said council with the county commissioners determining what part of the estimated cost and expense of said improvement is to be paid by said municipality, council shall cause notice to be given that said plans have been approved and said agreement entered into, by one publication in some newspaper of general circulation in the municipality, and said notice shall fix a time when claims for compensation and damages on account of the proposed improvement shall be filed. If any claims for compensation or damages are filed and the council is not able to agree upon the amount of the same with the persons filing such claims, they shall order proceedings to be instituted in a court of competent jurisdiction, to inquire into such claims for compensation and damages in the manner provided for in the case of street improvements wholly under the control and jurisdiction of the municipality. All compensation and damages on account of said improvement shall be paid by the municipality. The council of said municipality may assess against abutting property owners all or any part of the cost and expense of said improvement to be paid by it under agreement with the county commissioners. Said assessments shall be made in one of the methods provided for in the case of street improvements wholly within the municipality, and under the exclusive control of the council."

In looking over the provisions of these three sections, it is fairly evident that the course which ought to be followed by the village council and the county commissioners, in the improvement of the kind set out in the communication, is as follows, and that the steps taken should be in the following order:

1. Consent of the village council given to the county commissioners to extend the improvement into or through the village (Sec. 6949 G. C.).

2. Preparation of plans, profiles, cross-sections, specifications and estimates for the improvement of a portion of the road lying within the municipality (Sec. 6951 G. C.).

3. The return of said plans, profiles, cross-sections, specifications and estimates by the county surveyor to the county commissioners (Sec. 6951 G. C.).

4. The approval of said plans, etc., by the county commissioners (Sec. 6951 G. C.).

5. A copy of the plans, profiles, cross-sections, specifications and estimates to be filed with the clerk of the municipality (Sec. 6951 G. C.).

6. The approval by the village council of said plans, profiles, cross-sections, specifications and estimates (Sec. 6952 G. C.).

7. Agreement of the council of the municipality with the county commissioners as to the part of the cost and expense of the improvement within the municipality to be borne by each (Sec. 6952 G. C.).

8. Notice to be given that the said plans, specifications, profiles, cross-sections and estimates have been approved by the village council and that the agreement has been entered into between the village council and the county commissioners as to the part of the cost and expense each is to bear (Sec. 6952 G. C.).

This I believe is the natural and logical order which ought to be pursued in the matter of such an improvement. The agreement upon the part of the village council and the county commissioners, as to the portion of the cost and expense of the part of the improvement within the village that each is to bear, might be made before the approval of the plans, specifications, profiles, cross-sections and estimates, but the parties would be acting somewhat in the dark before they knew what the estimated cost and expense of the improvement would be.

The approval of the plans, profiles, etc., ought to be done by resolution or ordinance. Further, I believe that the notice to be given ought to be done by resolution or ordinance providing that a notice should be given in accordance with the provisions of section 6952 G. C.

After the above steps have been taken, all jurisdictional matters will have been performed and the county commissioners may proceed with the improvement. In fact, after the approval of the plans, profiles, etc., and after the agreement is entered into as to the division of the cost and expense of said improvement, the county commissioners might proceed with the improvement, inasmuch as the provisions in step number 8 have nothing whatever to do with the county commissioners, but merely with the question of compensation and damages to be granted on account of the proposed improvement.

Now, we come directly to the question which is contained in the following two paragraphs:

> "The question which confronts me and which I am not satisfactorily able to understand from this law, is whether or not council may accomplish this by merely passing an 'assessing ordinance' after the work has been completed, and in that ordinance set forth that it has chosen to so assess its part in that manner by virtue of this 'Cass law'. And if assessment so made would be binding on the property owners and collectible the same as other assessments and taxes.
>
> "Or on the other hand whether council would have to proceed in this case the same as in street improvements made exclusively by the munici-

pality and pass the usual resolution declaring the necessity for improvement and then follow this up with the 'ordinance determining to proceed with the improvement'."

It is my opinion that the procedure first stated is correct; that is, the village council would need only to pass an assessing ordinance. As you suggest, section 6952 G. C. provides in part:

> "The council of said municipality may assess against abutting property owners all or any part of the cost and expense of said improvement to be paid by it under agreement with the county commissioners. Said assessment shall be made in one of the methods provided for in the case of street improvements wholly within the municipality and under the exclusive control of the council."

This section refers to section 3812 G. C., which provides that the assessment may be made by any of the following methods:

> "1. By a percentage of the tax value of the property assessed.
>
> "2. In proportion to the benefits which may result from the improvement, or
>
> "3. By the foot front of the property bounding and abutting upon the improvement."

So that the provisions of section 6952 G. C. have to do merely with the assessment. Every other step has been taken. It would be of no avail or purpose to take the other steps provided for in the case of street improvements. When the village council agrees with the county commissioners to assume a certain part of the cost and expense of the improvement in the municipality, the matter is settled so far as the village is concerned. The obligation is fixed. The die is cast. This amount agreed upon may be assessed against abutting property owners as provided in section 3812 G. C. This would require simply the assessing ordinance. Under the ruling of our courts this ordinance may be passed during the progress of the work, or at the completion thereof. See:

> Morgan v. City of Cleveland, 4 Dec. Rep. 113.

But it is my opinion that it would be preferable to pass this ordinance at the completion of the work. This for the reason that the exact cost and expense of the improvement would then be known.

Our courts have held that the ordinance of necessity provided for in section 3814 G. C. was provided for both to fix a time within which claims for damages must be presented, and also to prevent hasty and inconsiderate action on the part of the municipal corporation. But such an ordinance would be useless in the present case, due to the fact that section 6949 G. C. takes care of the one part of the question and section 6952 G. C. takes care of the matter of fixing a time when claims for compensation and damages should be presented.

The question now is as to whether anything ought to be done by the village council before they enact the assessing ordinance, or whether the assessing ordinance is the only thing that remains to be done. The resolution of necessity, as said, is not necessary. But section 3815 G. C. provides that this resolution shall also determine the method of assessment, the mode of payment, etc.

Hence, I am of the opinion that your council should adopt a resolution deter-

mining the method of assessment, the proportion of the total cost and expense of the improvement assumed by the village and the fraction of the cost and expense of the improvement assumed by the village, to be assessed against the abutting property owners, and the number of installments in which the assessments will be paid. In doing this, council will be guided by sections 3814 and 3818 G. C.

The adoption of this resolution need not delay the progress of the work, as the county commissioners have jurisdiction over this matter. Your council can proceed with the enacting of this resolution even after the county commissioners have commenced the work upon said improvement Then not earlier than twenty days after notice is completed, as provided in section 3818 G. C., your council can proceed with the assessing ordinance. But, as said before, this assessing ordinance comes more logically at the completion of the work.

Hence, answering your question specifically, it is my opinion that your council should adopt a resolution determining the method of assessment and setting forth the part of the total cost and expense of the improvement to be borne by the village, and the fraction of said part to be assessed against the abutting property owners, together with the number of installments in which the assessments will be paid, and this before they enact the assessing ordinance.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

242.

CONSTRUCTION OF SECTION 1008 G. C.—RELATING TO THE HOURS OF LABOR FOR WOMEN—AS AMENDED MARCH 20, 1917.

The exemption of Saturday in section 1008 *G. C., as amended in the act passed March* 20, 1917, *applies only to mercantile establishments.*

The words "located in any city," as found in said act, apply only to mercantile establishments.

COLUMBUS, OHIO, May 4, 1917.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I have your communication of April 10, 1917, which reads as follows:

> "House Bill No. 327, by Mr. Reynolds, contains the following:
>
> " 'Females over eighteen years of age shall not be employed or permitted or suffered to work in or in connection with any factory, workshop, telephone or telegraph office, millinery, or dressmaking establishment, restaurant or in the distributing or transmission of messages or in any mercantile establishment located in any city, more than nine hours in any one day, except Saturday, when the hours of labor in mercantile establishments may be ten hours, or more than six days, or more than fifty hours in any one week, but meal time shall not be included as a part of the work hours of the week or day, provided, however, that no restriction

as to hours of labor shall apply to canneries or establishments engaged in preparing for use perishable goods, during the season they are engaged in canning their products.'

"Will you please advise this commission whether or not in your opinion the exemption for Saturdays is to apply to mercantile establishments only, or whether or not it may apply to factories, workshops, restaurants, etc., as enumerated above?"

I also have your subsequent letter of April 19, 1917, which reads as follows:

"On April 10 I wrote to you in reference to H. B. No. 327.

"In making up this opinion, I wish you would consider whether the words 'located in any city' modify the phrase 'in any mercantile establishment' only, or whether they apply to all of the industries specifically mentioned in the act."

House Bill No. 327, passed March 20, 1917, and filed in the office of secretary of state March 29, 1917, reads as follows (omitting formal parts):

"* * Sec. 1008. Every person, partnership or corporation employing females in any factory, workshop, business office, telephone or telegraph office, restaurant, bakery, millinery or dressmaking establishment, mercantile or other establishments shall provide a suitable seat for the use of each female so employed and shall permit the use of such seats when such female employes are not necessarily engaged in the active duties for which they are employed and when the use thereof will not actually and necessarily interfere with the proper discharge of the duties of such employes, such seat to be constructed, when practicable, with an automatic back support and so adjusted as to be a fixture but not obstruct employes in the performance of duty, and shall further provide a suitable lunch room, separate and apart from the work room, and in establishments where lunch rooms are provided, female employes shall be entitled to no less than thirty minutes for meal time; provided, that in any establishment aforesaid in which it is found impracticable to provide a suitable lunch room, as aforesaid, female employes shall be entitled to not less than one hour for meal time during which hour they shall be permitted to leave the establishment. Females over eighteen years of age shall not be employed or permitted or suffered to work in or in connection with any factory, workshop, telephone or telegraph office, millinery or dressmaking establishment, restaurant or in the distributing or transmission of messages or in any mercantile establishment located in any city, more than *nine* hours in any one day, *except Saturday, when the hours of labor in mercantile establishments may be ten hours,* or more than six days, or more than fifty hours in any one week, but meal time shall not be included as a part of the work hours of the week or day, provided, however, that no restriction as to hours of labor shall apply to canneries or establishments engaged in preparing for use perishable goods, during the season they are engaged in canning their products.

"Section 2. That said original section 1008 of the General Code be, and the same is hereby repealed."

"* * ".

Section 1008 G. C., before the last amendment, 103 O. L. 555, read as follows:

> "Every person, partnership or corporation employing females in any factory, workshop, business office, telephone or telegraph office, restaurant, bakery, millinery or dressmaking establishment, mercantile or other establishments shall provide a suitable seat for the use of each female so employed and shall permit the use of such seats when such female employes are not necessarily engaged in the active duties for which they are employed and when the use thereof will not actually and necessarily interfere with the proper discharge of the duties of such employes, such seat to be constructed, where practicable, with an automatic back support and so adjusted as to be a fixture but not obstruct employes in the performance of duty, and shall further provide a suitable lunch room, separate and apart from the work room, and in establishments where lunch rooms are provided, female employes shall be entitled to no less than thirty minutes for meal time; provided, that in any establishment aforesaid in which it is found impracticable to provide a suitable lunch room, as aforesaid, female employes shall be entitled to not less than one hour for meal time during which hour they shall be permitted to leave the establishment. Females over eighteen years of age shall not be employed or permitted or suffered to work in or in connection with any factory, workshop, telephone or telegraph office, millinery, or dressmaking establishment, restaurant or in the distributing or transmission of messages or in any mercantile establishment located in any city, more than ten hours in any one day, or more than fifty-four hours in any one week, but meal time shall not be included as a part of the work hours of the week or day, provided, however, that no restriction as to the hours of labor shall apply to canneries or establishments engaged in preparing for use perishable goods."

It will be noted that the amendment of March 20, 1917, in addition to changing the hours of labor from ten to nine, consists of the words:

> "except Saturday, when the hours of labor in mercantile establishments may be ten hours."

It is axiomatic that when the language used by the legislative body is plain and unmistakable, there is no need of applying rules of construction. The amendment made by the last legislature is so plain, that "he who runs may read." They merely sought to grant the option of extending the hours of labor in mercantile establishments on Saturday to ten hours, while they reduced the hours in any one day from the *ten* hours that applied to all the establishments enumerated in that part of the section, to *nine* hours.

In order to answer the question raised by your supplemental letter of April 19, 1917, it is necessary to consider the said section 1008 prior to its amendment, as found in 103 O. L. 555.

In 102 O. L. 488, will be found the act as passed May 31, 1911. This section reads in part as follows:

> "Sec. 1008. * * Females over eighteen years of age shall not be employed or permitted or suffered to work in or in connection with any

factory, workshop, telephone or telegraph office, millinery, or dressmaking establishment, restaurant or in the distributing or transmission of messages more than ten hours in any one day, or more than fifty-four hours in any one week, but meal time shall not be included as a part of the work hours of the week or day, provided, however, that no restriction as to the hours of labor shall apply to canneries or establishments engaged in preparing for use perishable goods."

It will be noted that section 1008 as passed May 31, 1911, was amended by the act found in 103 O. L. 555, by the insertion of the phrase,

"or in any mercantile establishment located in any city."

The sole purpose of that amendment was to make that portion of the section apply to mercantile establishments located in cities. It will be recalled that at the time this amendment was sought to be made it was insisted very strongly that the reasons calling for such a law did not exist to the same extent in villages where the volume of business transacted was not so great nor as continuous as in cities. It was urged that in villages more hours would be needed and that since less labor would be required, the same evils that would result from the long hours of labor could not ensue.

It is my view that the words "located in any city" modify and apply to the term "in any mercantile establishment." I think that the above history of this legislation and the plain words used in the slight amendments made in the acts passed by the three preceding legislatures clear up the question of any ambiguities.

Answering your question specifically, I am of the opinion that the exemption of Saturday, as found in the amendment of March 20, 1917, applies only to mercantile establishments, and further that the words "located in any city" apply only to mercantile establishments.

In answering the above, I am assuming but not passing upon the constitutionality of the statute.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

243.

COUNTY COMMISSIONERS—OF MIAMI COUNTY—HAD NO LEGAL AUTHORITY TO ENTER INTO CONTRACT WITH AN ENGINEER—TO MAKE MAPS, ETC., OF CONSERVANCY DISTRICT—AND TESTIFY BEFORE COMMISSIONERS—BECAUSE OF AUDITOR'S FAILURE TO FILE CERTIFICATE UNDER 5660.

The county commissioners of Miami county entered into a contract with an engineer to make certain surveys and collect certain data in connection with the proposed plan of the Miami conservancy district for flood prevention, especially as to the effect of such plan if adopted in Miami county. The contract also provided that this engineer was to receive an additional sum for testifying before the conservancy board in connection with objections entered by the county commissioners. However, the county auditor failed to file a certificate under section 5660 *G. C. HELD: That the county commissioners, because of the auditor's failure to file such certificate, had no legal authority to enter into this contract.*

COLUMBUS, OHIO, May 4, 1917.

HON. R. A. KERR, *Prosecuting Attorney, Troy Ohio.*

DEAR SIR:—I have your letter of March 2, 1917, as follows:

"Enclosed I hand you resolution passed by the board of county commissioners of this city, relative to the employment of an assistant engineer to work in connection with the county surveyor, in furnishing a hydrographic survey, etc., all of which is set up in the resolution. I also enclose copy of contract entered into by the commissioners and John W. Hill by virtue of such resolution.

"You will note that the resolution says that the assistance is asked by virtue of General Code No. 2411. In my opinion it is quite doubtful whether section No. 2411 is broad enough to cover employment of this kind. All of the work covered by the contract has been paid for excepting the $545.00 mentioned as payable in the event said John W. Hill is called upon to testify, which he was. As stated before, I do not think the section 2411 mentioned covers the case at hand. The only other section that I find that might apply is section 10 of the flood emergency act of 1913, providing for additional engineers where their services were rendered necessary by reason of the flood of 1913. This section, however, provides that payment may be made from money borrowed under the provisions of this act. I cannot see, however, how it would cover the case in question.

"The previous bills paid under this contract were paid by the commissioners after they had been approved as follows: 'Approved: L. P. Knopp, at request of prosecuting attorney'. L. P. Knopp is the county engineer.

"Mr. Hill has done this work, and I feel he should be paid, but at the same time I do not see how the bill can be allowed according to law.

"I would appreciate it very much if you would let me have your opinion at an early date concerning this matter, as it has been in my hands since shortly after my taking office on January 1st, but has not received immediate attention because of the pressure of criminal work."

The agreement referred to provides:

"AGREEMENT.

"This agreement made this 13th day of March, A. D. 1916, by and between the boards of county commissioners of Miami county, Ohio, party of the first part, and John W. Hill, party of the second part.

"WITNESSETH. Party of the first part does hereby employ John W. Hill as an assistant engineer to work in connection with the county surveyor to make, furnish and provide for said county a hydrographic survey of the Miami river valley and the Stillwater river valley, through Miami county, Ohio, within the flood lines of March 25, 1913; said survey to be sufficient in the judgment of the said John W. Hill to furnish him the necessary data upon which to testify in court, if necessary, in regard to flood protection in said county without the building of dams in said Miami river and said Stillwater river, and to make an estimate of the cost for the improvement of the channel of the said Miami and Stillwater rivers in said county, so as to control future floods without the building of dams in the said Miami and Stillwater rivers, and to do all things necessary or required to make such survey, report and maps, hereinbefore referred to. And to make an estimate of the cost of the construction of the dam or dams, proposed to be constructed by the Morgan Engineering Company of said county; to make an estimate of the number of acres that would be flooded if said proposed dam or dams were built; to make an estimate of the cost of the dam proposed to be built in the Miami conservancy district (provided the said Hill can procure a set of plans showing said proposed dam or dams, or can obtain access to the same when filed as an official plan in the office of the board of directors of said conservancy district, or in the court of common pleas of Montgomery county, Ohio, on objection to the same), and the said Hill shall also make to the said board of county commissioners, or to an attorney by it designated, a written report, if required, of all the facts and information he has obtained by reason of this contract, and the said party of the first part agrees to pay to the said John W. Hill as compensation, as such assistant engineer, the sum of five thousand four hundred fifty dollars ($5,450.00) payable as follows: Sixteen hundred thirty-five dollars ($1,635.00) to be paid within thirty (30) days after the said Hill begins work, and sixteen hundred thirty-five dollars ($1,635.00) to be paid within sixty (60) days after the said Hill begins work, sixteen hundred thirty-five dollars ($1,635.00) to be paid when work is completed, and five hundred forty-five dollars ($545.00) to be payable in the event the said John W. Hill is called upon to testify in any proceeding involving the question of flood prevention in said county, it being agreed and understood that the last mentioned amount is to be payable only in case the said Hill is called upon to testify, and shall be payable upon the conclusion of the testimony of the said Hill.

"The said part of the second part in consideration of the said amount

hereinbefore mentioned does agree with the party of the first part to perform all the things in this contract required of him.

(Signed) *"C. M. HUNT,*
"B. S. LEVERING,
"CHAS. H. JACKSON,

"Board of county commissioners of Miami county, Ohio, party of the first part.

(Signed) *"JOHN W. HILL,*
"Party of the second part."

Since requesting my opinion in this matter you have given me the additional information that no certificate was filed by the county auditor under section 5660 G. C. This section was formerly section 2834b R. S., and it has frequently been held that it is mandatory, and that unless it is complied with, the county commissioners cannot make a valid contract.

In the case of State v. Commissioners, 19 O. C. C., p. 27, it was held:

"(1) Sec. 2834b R. S. is mandatory, and is made condition precedent to be complied with before the board of county commissioners can make a lawful contract, and the certificate is as much a condition precedent as is the fact that the funds are provided.

"(2) A failure of the petition in a suit on such a contract, to aver that the proper certificate was first obtained, is fatal to the action."

See North v. Commissioners, 10 O. C. C., (n. s.), 462;
Stolz v. Selz, 12 O. D., N. P., 665;
Stone Company v. Trustees, 18 O. D., N. P., 136;
Buchanan Bridge Co. v. Campbell, 60 O. S., 406;
Lancaster v. Miller, 58 O. S., 558.

From these authorities it is clear that inasmuch as the county auditor did not file a certificate under section 5660 General Code at the time the commissioners entered into this contract with Mr. Hill, they (the county commissioners) did not enter into a legal agreement and the balance of $545.00 cannot, therefore, be legally paid Mr. Hill.

The above being true, discussion of whether or not the county commissioners might have had the power to enter into such a contract, as set out herein, is unnecessary.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

244.

VILLAGE SCHOOL DISTRICT—MAY BE ESTABLISHED AS SEPARATE DISTRICT—UNDER DIRECT SUPERVISION OF COUNTY SUPERINTENDENT WHEN APPLICATION IS MADE BEFORE JUNE 1ST OF ANY YEAR.

A village school district which makes application to the county board of education before June 1st of any year may be established as a separate district under the direct supervision of the county superintendent.

COLUMBUS, OHIO, May 5, 1917.

HON. BENTON G. HAY, *Prosecuting Attorney, Wooster, Ohio.*

DEAR SIR:—In your letter of March 22, 1917, you ask my opinion on the following statement of facts:

> "The village of Rittman maintains a first grade high school, and in March, 1917, the board of education of said village made application to the county board of education to be continued as a separate district under the direct supervision of the county superintendent, the object of the application being to dispense with the services of the district superintendent. The district superintendent maintains that said village board of education cannot make such application and that the county board cannot make it a separate district under the direct supervision of the county superintendent and thus dispense with the services of the district superintendent, the district superintendent maintaining that such application could not be made after September 10, 1915."

Your inquiry calls for a consideration of the matter of supervision of village school districts.

Prior to the time the new school code was enacted, supervision of village schools was provided for by Revised Statutes section 4017-a, as follows :

> "The board of education of each village * * * may appoint a suitable person to act as superintendent * * * for a term not longer than three school years, the term to begin within four months of the day of appointment; but nothing herein shall be construed as preventing two or more districts uniting and appointing the same person as superintendent. * * * The superintendent shall, upon his acceptance of the appointment, become empowered to visit the schools under his charge, direct and assist teachers in the performance of their duties, classify and control the promotion of pupils, and perform such other duties as the board may determine. He shall report to the board of education, annually, and oftener if required, as to all matters under his *supervision*, and may be required by the board to attend any or all of its meetings and may take part in its deliberations, but shall not vote; * * *"

The above part section quoted from the Revised Statutes was carried into the General Code under section numbers 7705 and 7706 and read in part as follows:

> "*Section* 7705: The board of education of each village, township and special school district may appoint a suitable person to act as

superintendent * * * for a term not longer than three school years, to begin within four months of the date of appointment. But nothing herein shall prevent two or more districts uniting and appointing the same person as superintendent.

"*Section* 7706: Upon his acceptance of the appointment, such superintendent may visit the schools under his charge, direct and assist teachers in the performance of their duties, classify and control the promotion of pupils, and perform such other duties as the board determines. He shall report to the board of education annually, and oftener if required, as to all matters under his *supervision*, and may be required by it to attend any and all of its meetings. He may take part in its deliberations, but shall not vote. * * *"

It will be noted, then, that supervision was not a new proposition as far as village schools were concerned when the provisions in relation thereto were enacted in the new school code. Many villages, perhaps most of them, employed superintendents to supervise the schools. Sometimes such superintendents spent all of their time so supervising and sometimes they spent a part of their time teaching. Many villages, too, united with some other district and employed a superintendent to supervise the schools of several districts so united for that purpose, so that at the time of the enactment of the new school code there were outstanding many contracts of employment between boards of education of village school districts and superintendents or between boards of education of such united school districts and superintendents, which contracts may or may not have extended beyond the time when it was the duty of the county board of education to arrange the county school districts into supervision districts, as provided by section 4738 G. C., when first enacted. Whatever contracts there were then outstanding carried with them vested rights which could not be affected by legislation.

General Code section 4740 as found in 104 O. L., 141, reads as follows:

"*Section* 4740: Any village or rural district or union of school districts for supervision purposes which already employs a superintendent and which officially certifies by the clerk or clerks of the board of education on or before July 20th, 1914, that it will employ a superintendent who gives at least one-half of his time in supervision, shall upon application to the county board of education be *continued* as a separate supervision district so long as the superintendent receives a salary of at least one thousand dollars and continues to give one-half of this time to supervision work. Such districts shall receive such portion of state aid for the payment of the salary of the district superintendent as is based on the ratio of the number of teachers employed to forty, multiplied by the fraction which represents that fraction of the regular school day which the superintendent gives to supervision. The county superintendent shall make no nomination of a district superintendent in such district until a vacancy in such superintendency occurs. After the first vacancy occurs in the superintendency of such a district all appointments shall be made on the nomination of the county superintendent in the manner provided in section 4739. A vacancy shall occur only when such superintendent resigns, dies or fails of re-election.

"Any school district or districts, having less than twenty teachers, isolated from the remainder of the county school district by supervision districts provided for in this section shall be joined, for supervision

purposes, to one or more of such supervision districts, but the superintendent or superintendents already employed in such supervision district or districts shall be in charge of the enlarged supervision district or districts until a vacancy occurs."

The above section provided that three classes of districts might remain or continue as separate supervision districts and not be affected by the provisions of the new school code in relation to district supervision. The three classes were *village, rural* and *union of school districts for supervision purposes.* The districts, however, of the three classes which "already employs a superintendent" and which officially certified on or before July 20, 1914, and complied with the other provisions of said section were the only districts of the classes mentioned which might "be *continued* as a separate supervision district." That is to say, when the supervision plan of the new school code became effective, all schools of the county school district, except city schools and village schools, specially exempted, were to be a part of a supervision district of a county school district unless such school could qualify under the provisions of General Code section 4740 as a separate supervision district and the separate supervision districts were limited to the three classes above named and to those in said classes which *already employed a superintendent* and which followed the other provisions in said section contained. The above section was construed in Attorney-General's Reports for 1914, page 980, on an inquiry as to whether or not a rural school district might join a village school district which already employed a superintendent and the two districts thus joined be a separate supervision district, but it was held:

"Under section 4740 General Code, as amended, a village district already employing a superintendent cannot join with a rural school district which never employed a superintendent and which districts were never heretofore joined together for supervisory purposes, by employing a superintendent in common upon application to the county board of education to be joined and continued as separate districts, as authorized in said section."

In other words, it was held that section 4740 applied only to such districts as had theretofore employed a superintendent and which were so employing such superintendent at the date of such amendment, and that a district which had not already theretofore employed a superintendent could not qualify as a separate supervision district. In fact, said decision held that separate supervision districts which had not existed theretofore, could not under the provisions of said amendment be created or established as such.

In 1915 said section 4740 G. C. was twice amended by the same legislature, first in Senate Bill No. 282, found in 106 O. L., 398, as follows:

"Any village or rural school district or union of school districts for high school purposes which maintain a first grade high school, and which employs a principal shall upon application to the county board of education before June 1st of any year, be continued as a separate district under the direct supervision of the county superintendent. Such district shall continue to be under the direct supervision of the county superintendent until the board of education of such district by resolution shall petition to become a part of a supervision district of the county school district. Such principals shall perform all the duties

prescribed by law for a district superintendent, but shall teach such part of each day as the board of education of the district or districts may direct. Such districts shall receive no state aid for the payment of the salaries of their principals and the salaries shall be paid by the board employing such principals."

Said section, however, never became effective, for on the same day was passed by the legislature Senate Bill No. 323, found in 106 O. L., 439, which again amended said section 4740 to read as follows:

"Any village or rural school district or union of school districts for high school purposes which maintains a first grade high school and which employes a superintendent shall upon application to the county board of education before September 10, 1915, or before June 1st of any year thereafter, be continued as a separate district under the direct supervision of the county superintendent. Such district shall continue to be under the direct supervision of the county superintendent until the board of education of such district by resolution shall petition to become a part of a supervision district of the county school district. Such superintendents shall perform all the duties prescribed by law for a district superintendent, but shall teach such part of each day as the board of education of the district or districts may direct. Such districts shall receive no state aid for the payment of the salaries of their superintendents, and the salaries shall be paid by the boards employing such superintendents."

Only the last above quoted section, then, will be considered as the amendment of 1915. It would seem that from the use of the word "continued" in said section that the legislature intended separate supervision districts to exist only where such districts had theretofore been in existence and that if any district which maintained a first grade high school had not theretofore existed as a separate supervision district, it would be impossible to have the same become a supervision district because of the use of said words "be continued as a separate district." The language, however, is in direct conflict with certain other language of said section and the intent of the legislature can only be gathered from a careful consideration of all the language of said section.

When section 4740 G. C. was first enacted, it was necessary for a certificate of the clerk to be filed with the county board of education as to the matters therein required on or before July 20, 1914. In 1915 said section was amended so that instead of filing a certificate, as required in the original section, it was only necessary for a board of education to file an *application* and in the year 1915 said application could be filed on or before September 10th thereof. In any year thereafter said application could be filed "before June 1st." It was not the intention that the filing was to be an annual affair, for said section continues:

"Such district shall continue to be under the direct supervision of the county superintendent until the board of education of such district, by resolution, shall petition to become a part of a supervision district of a county school district."

So that something else outside of an annual filing of such application, where separate supervision districts already existed, was meant. Only one thing

could be meant, that is, that any district which maintains a first grade high school and which employs a superintendent might, in any year, before June 1st thereof, file with the county board of education an application and thus be established or created as a separate supervision district.

The same view seems to have been taken of this matter by my predecessor, Hon. Edward C. Turner, for in Opinions of the Attorney-General for the year 1915, volume I, page 948, the following language is used:

> "Therefore, what seems to be the controlling intention of the section, as amended by Senate Bill No. 323, is that the districts therein referred to may be not only 'continued' as separate supervision districts, but also *established* as such upon application prior to the specified dates."

Answering your question, then, I advise you that the village school district board of education which made such application before June 1st may be established as a separate supervision district as provided by section 4740 G. C.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

245.

A DOMESTIC INSURANCE COMPANY—NOT DOING BUSINESS IN THIS STATE—NOT LIABLE FOR PAYMENT OF FRANCHISE TAX—ALTHOUGH NOT REQUIRED TO FILE REPORTS WITH SUPERINTENDENT OF INSURANCE.

Though a domestic insurance company is not "doing business in this state" within the meaning of section 9590 *General Code and is not therefore "required by law to file reports with the superintendent of insurance" as provided for in said section, said company is exempted by the provisions of section* 5518 *General Code from the requirement of making reports to the tax commission as a domestic corporation for profit and paying the franchise taxes provided for by sections* 5495 *et seq. General Code.*

COLUMBUS, OHIO, May 7, 1917.

HONORABLE WILLIAM D. FULTON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I have the honor to acknowledge receipt of your favor of March 19, 1917, requesting my opinion, in which you say:

> "The Globe Insurance Company, a corporation organized under the laws of this state, has tendered to this office a certificate of dissolution, with the proper fee.
>
> "We desire to be advised whether the same can be received and filed without a certificate from the tax commission, certifying that all Willis taxes have been paid.
>
> "As we are advised, this corporation has not been transacting business for a number of years, and all the data and information in regard to this corporation is in your office."

This company, which is a domestic corporation for profit, prior to the year 1893 transacted business in the state of Ohio as an insurance company. On April

28 of said year it reinsured all of its outstanding risks, and has not been in business since that date. The only business of any kind that was transacted by the company since it reinsured its outstanding business. has been to take care of certain real estate which it owned and held pending the sale thereof and the sale of some securities it had on hand at that time for the purpose of paying its obligations and distributing the balance to its stockholders. During this time the company has not filed report with either the superintendent of insurance or with the tax commission of Ohio, and has not paid either the franchise tax provided for in the Willis law, and the later amendments of the said law or the tax imposed by law upon the gross premiums collected by insurance companies.

Specifically, your question is whether or not you are authorized to accept a certificate of dissolution of this corporation without a certificate from the tax commission showing that all the Willis law taxes have been paid by the company.

Section 5495 of the General Code, originally enacted in 1902 as a part of section 1 of the Willis franchise tax law (95 O. L., 124), and as since amended and carried into the General Code, provides that annually during the month of May each corporation for profit organized under the laws of this state shall make a report to the tax commission, which report is to be signed and verified in the manner provided by section 5496 of the General Code, and is to contain the information prescribed by section 5497, which section, together with section 5496 G. C. was likewise originally enacted as a part of the Willis franchise tax law of 1902.

Section 5498 of the General Code provides that upon the filing of the report provided for in the preceding section of the General Code above mentioned, the tax commission shall determine the amount of the subscribed or issued and outstanding capital stock of the corporation and certify such amount to the auditor of state, who is required to charge and collect from said company a fee of 3/20ths of one per cent upon its subscribed or issued and outstanding stock, which fee shall not be less than ten dollars in any case.

Section 5520 of the General Code provides that the mere retirement from business or voluntary dissolution of a corporation shall not exempt it from the requirements to make report and pay the fee or tax in accordance with the provisions of the sections before mentioned; while section 5521 of the General Code provides that in case of dissolution or revocation of its charter on the part of a domestic corporation or of the retirement from business in this state on the part of a foreign corporation, the secretary of state shall not permit a certificate of such action to be filed with him until the commission has certified that all reports, etc., are filed, and that all taxes, fees and penalties thereon due from such corporation have been paid.

Section 5518 of the General Code provides as follows:

> "An incorporated company, whether foreign or domestic, owning or operating a public utility in this state, and as such required by law to file reports with the tax commission and to pay an excise tax upon its gross receipts or gross earnings as provided in this act, and insurance, fraternal beneficial, building and loan, bond investment and other corporations, required by law to file annual reports with the superintendent of insurance, shall not be subject to the provisions of sections one hundred and six to one hundred and fifteen (Secs. 5495 to 5504 G. C.) inclusive of this act."

Giving application to the provisions of section 5518 of the General Code just quoted, I note the provisions of section 9590, of the General Code, which require that the president or vice-president and secretary of each insurance company organized under the laws of this or any other state and *doing business in this state* annually on the first day of January, or within thirty days thereafter, to prepare under oath and deposit in the office of the superintendent of insurance a statement of the condition of such company on the 31st day of December next preceding, said statement or report to contain in detail the information further prescribed in the said section.

Referring to the statement required of insurance companies under the provisions of section 9590 of the General Code just noted, section 5432 of the General Code provides that in such annual statement to the superintendent of insurance every insurance company shall set forth the gross amount of premiums received from it by policies covering risks within the state during the preceding calendar year without deductions for remissions, return premiums, etc.

Section 5433 of the General Code provides that if the superintendent of insurance finds such report to be correct, he shall compute an amount of 2½% on the balance of the gross amount of premiums and considerations received for reinsurance, which amount so computed shall be paid by the company as a tax to be covered into the general revenue fund of the state.

Section 5518 of the General Code was originally enacted as section 7 of the Willis franchise tax law of 1902, which section provided as follows (95 O. L., 127):

> "Provided that electric light, gas, natural gas, waterworks, pipe line, street railroad, electric interurban railroad, steam railroad, messenger, union depot, express, freight line, sleeping car, telegraph, telephone and other corporations, required by law to file annual reports with the auditor of state, and insurance, fraternal, beneficial, building and loan, bond investment, and other corporations required by law to file annual reports with the superintendent of insurance, shall not be subject to the provisions of the preceding sections of this act. Provided, further, that a corporation shall not be required to file its first annual report under this act until the proper month hereinbefore provided for the filing of such report, next following the expiration of six months from the date of its incorporation or admission to do business in this state."

The court of appeals of Cuyahoga county was called upon to construe this section as to some of its provisions in the case of The Cleveland and Pittsburgh Railroad Company v. the State of Ohio, 2 Ohio App. 228 (20 C. C. N. S., 61). The court in this case had under consideration the question of whether The Cleveland and Pittsburgh Railroad Company, a corporation organized for profit under the laws of this state, was liable for the franchise tax provided by the Willis law from the year 1902 to 1908, inclusive.

It appears that this railroad company previous to the year 1871 owned and operated a railroad within this state. On October 25, 1871, The Cleveland and Pittsburgh Railroad Company leased all its property to The Pennsylvania Railroad Company and surrendered possession of all its railroad and all property and equipment connected therewith to The Pennsylvania Railroad Company; The Cleveland and Pittsburgh Railroad Company, however, retaining its corporate existence for the purpose of collecting its rents under the lease and distributing the same as dividends to its stockholders with an agreement to pay for the extensions, renewals, betterments and increased facilities for its railroad

property; The Pennsylvania Railroad Company to operate the road and pay all taxes lawfully assessed against it. In April, 1873, all rights under this lease were assigned to The Pennsylvania Company, which company, it seems, has ever since been in possession of the property of The Cleveland and Pittsburgh Railroad Company, and has paid all taxes assessed on the real and personal property of The Cleveland and Pittsburgh Railroad Company. After leasing its property, The Cleveland and Pittsburgh Railroad Company did not at any time pay franchise taxes under the Willis law, neither did it pay any excise taxes under the Cole law, which law, among other things, defined a railroad company within the meaning and purpose of the act as a corporation engaged in operating a railroad wholly or partially in this state, and provided further that railroad companies should file an annual report or statement with the auditor of state in the form as therein prescribed and pay an annual excise tax based on the gross earnings of the company.

In the case above cited counsel for the state construing section 7, of the Willis law, as originally enacted, maintained that the phrase

"required by law to file annual reports with the auditor of state",

qualified and limited the term steam railroads, and that inasmuch as The Cleveland and Pittsburgh Railroad Company as a non-operating company was not required to file reports with the auditor of state, the railroad company was not within the exemption of section 7, of the Willis law, and was therefore liable for the franchise tax provided by the said law. The court, however, held that the designation of "*steam railroads*" in section 7, of the Willis law in itself gave steam railroad corporations the exemption provided for in said section, and that the phrase,

"required by law to file annual reports with the auditor of state",

limited and qualified only the term "other corporations" immediately preceding, and that together the only purpose of these terms was to complete the enumeration of the exempted corporations, and not to limit and qualify the enumeration of the exempted corporations already made.

The court, in its opinion in this case, at pages 65 and 66, says:

> "Clearly the intention was to exempt steam railroad corporations, and the other fourteen mentioned corporations, from the operation of the act, and also to exempt therefrom such other corporations, if any, then existing, or which might thereafter be authorized by law to file annual reports with the auditor of state.
>
> "The use of the words 'other corporations required,' etc., was to complete the enumeration of exempt corporations and not, as claimed by the state, to limit and qualify the enumeration already made.
>
> "At least two good reasons appear for this conclusion: There was then in existence at least one kind of corporation (equipment company) not enumerated, which was required to file annual reports with the auditor of state, and other like companies might afterwards be authorized by law, in which event section 7 of the Willis act, with its enumeration of exempt companies, but without the general words, 'other companies', etc., would have to be amended every time such new companies might be authorized.

"We think the legislature meant something by its enumeration of exempt companies in section 7, and that the courts are not at liberty to disregard this enumeration and rewrite the statute as suggested by the attorney-general. That is for the legislature to do, and it is significant that the legislature has not done it, though more than ten years have elapsed and subsequent legislation has wholly revampt the laws upon the subject here involved.

"We conclude that the statute is unambiguous and plain, requiring nothing to be added to or taken from its words so that it may be understood and applied by the taxing officers of the state, and that by its plain terms The Cleveland and Pittsburgh Railroad Company, being a steam railroad corporation, is exempt from the provisions of the Willis act.

"This conclusion makes it unnecessary to examine other statutes claimed to be in *pari materia*, or to go beyond the words of section 7 itself, to determine the *intention* of the legislature in enacting said section. The section intends what it says."

Section 7 of the Willis franchise tax law of 1902 was carried into the General Code, as adopted by enactment, in 1910 as section 5541, and was later amended by the Hollinger law (102 O. L., 224) and carried into the General Code as section 5518 thereof. In its present form this section, as will be noted, does not enumerate the particular public utility corporations exempted from the payment of franchise taxes, but the provisions of said section with reference to such corporations are general in their terms and provide that an incorporated company, whether foreign or domestic, owning or operating a public utility in this state *and as such* required by law to file reports with the tax commission and pay an excise tax on its gross receipts or gross earnings, shall be exempt from the payment of this franchise tax required of other corporations.

By comparison of the provisions of section 5518 of the General Code with the provisions of section 7 of the Willis law as originally enacted, it will be noted that no change whatever has been made in the language of the original section with respect to the exemptions therein granted to insurance, fraternal, beneficial, building and loan, bond investment and other corporations required by law to file annual reports with the superintendent of insurance.

In section 5518 as in original section 7 of the Willis law of 1902, there is a specific enumeration of the particular classes of corporations required by law to file annual reports with the superintendent of insurance which enumeration, as in the original act, is followed by the phrase,

"and other corporations required by law to file annual reports with the superintendent of insurance."

Giving effect to the decision of the court of appeals of Cuyahoga county in the case of The Cleveland and Pittsburgh Railroad Company v. the State of Ohio, it follows that the phrase just above quoted following the specific enumeration made in both of these sections does not qualify or limit the specific kinds of corporations enumerated, but that the specific enumeration of corporations named in said section in itself imports a legislative intent to exempt such corporations from the payment of the franchise taxes; and inasmuch as insurance companies are so specifically enumerated as exempt in both section 7 of the Willis law as originally enacted, and in section 129 of the Hollinger law, which is now section 5518 of the General Code, I am quite clearly of the opinion that The Globe Insurance Company is exempt from liability for the payment of fran-

chise taxes, though as a company not "doing business in this state" it does not make the annual report provided for by section 9590, and is not required to do so.

Answering your question specifically, therefore, I am of the opinion that you are authorized to accept a certificate of dissolution of this company without a certificate from the tax commission of Ohio showing a payment by this company of franchise taxes.

The conclusion reached by me in this matter is directly opposed to that reached by my predecessor, Honorable Edward C. Turner, in an opinion affecting this precise question and the same insurance company, directed to the tax commission of Ohio, under date of December 29, 1916, being Opinion No. 2131, found on page 1945, Vol. II, Opinions of the Attorney-General for 1916.

The conclusion of Mr. Turner in the opinion above referred to, that The Globe Insurance Company was required to make payment of franchise taxes, is based wholly upon the consideration that the said company as an insurance company "not doing business in this state" was not required to make annual reports to the superintendent of insurance, an argument based on a construction of section 5518 General Code, which, as we have seen, was specifically denied by the court in the case of The Cleveland and Pittsburgh Railroad Company v. State of Ohio, supra. The decision of the court in this case, to my mind, is squarely in point on the question here presented and inasmuch as the said decision was practically affirmed by the supreme court of this state in an order made by such court overruling a motion to direct the court of appeals to certify its record for the specific reason that it did not appear from the record that error had probably intervened, I feel that the decision is binding upon me as to the proper construction of the statutory provisions involved in the consideration of the question presented by you.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

246.

VERIFY—AS USED IN GENERAL CODE WITH REFERENCE TO EXPENSE ACCOUNTS—MEANS BY AFFIDAVIT.

The word "verify" as used in section 4734 and other sections of the General Code in reference to expense accounts, means verified by affidavit, that is, sworn to before some officer duly authorized to administer oaths.

COLUMBUS, OHIO, May 7, 1917.

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

GENTLEMEN:—In your letter of April 6, 1917, you request my opinion upon the following statement of facts:

> "Section 4734 G. C. provides for the payment of the actual and necessary expenses of the members of the county board of education. Said section provides further that 'such expenses, and the expenses of the county superintendent, itemized and verified, shall be paid from the county board of education fund upon voucher signed by the president of the board'.
>
> "What is the meaning of the word 'verified' as used in this section, and other sections of the General Code, as to expense accounts? Does

it mean that the account must be sworn to, or that a mere certificate as to its correctness is sufficient?"

"Verification" is defined by Bouvier's Law Dictionary as:

> "The certificate that the writing is true",

and by Black's Law Dictionary as:

> "A confirmation of the correctness, truth or authenticity of a pleading, *account* or other paper by an affidavit, oath or deposition",

and by Words and Phrases, as:

> "Applied to pleadings and *statements of claims* filed with municipal officers, has a settled meaning, and refers to an affidavit attached to such statement of claim, as to the truth of the matters therein set forth."

In Bader v. State, 176 Ind., 268, the plaintiff was prosecuted for making out and filing with the county auditor a claim which was alleged to be false and fraudulent. The statute of Indiana required the claim to be verified. The court held that verification means to be sworn to and that the verification is separate and apart from the claim itself, and cites in support of said proposition the case of Patterson v. City of Brooklyn, 40 N. Y. Supp., 581, where the following language is used:

> "The term 'verified', as applied to pleadings and statements of this character, has a settled meaning in our statutory law, and it refers to an affidavit attached to the statement as to the truth of the matters therein set forth."

The above was in all probability the clear intent of the legislature when it provided that such expenses shall be *itemized* and *verified*, thus meaning that the statement of account shall be furnished showing each item and that the account as a whole shall be verified, that is, sworn to.

In the case of State v. Trook, 172 Ind., 560, the defendant was being prosecuted on an indictment for subornation of perjury. The statute of Indiana provided that every private bank doing business under the state banking laws shall make a report, which report shall be verified. Defendant made the report and made affidavit thereto. In defending against the indictment, however, he claimed that an affidavit was not necessary in order that the account be verified and that the prosecution for perjury could not properly lie. But the court held that the word "verified" imports that the report *shall be sworn to.*

In McCormick v. Tuolumne County, 37 Calif., 257, the plaintiff filed claims against the county which were certified to, but not verified under oath. The statute provided that such claims should be verified, nothing being said, however, as to being verified by affidavit. The court said:

> "The verification contemplated by statute involved in this case is a verification by oath annexed to the account."

Several cases, however, seem to indicate that the rule of the California and Indiana courts is not always followed. In Summerfield v. Phoenix Insurance

Company, 65 Fed., 299, the insured was required by the terms of the policy to procure and attach to the preliminary proofs of loss a *duly verified* estimate of a builder, setting forth his opinion as to the actual cash value of the building immediately before the fire.

A careful consideration of said case discloses a complete distinction between same and the other cases above cited.

On page 295 the court says:

> "The question presented is whether the 'estimate' of Graham & Bro., dated on the 24th of April, and signed by them professionally, giving an itemized account of what the cost of rebuilding anew would be, and furnished the defendant on April 26th, fulfilled the requirements of the policy as set out in paragraph numbered 2 in the above statement of facts. The defendant contends that this paper was not such a certificate as the policy required * * *. The policy in the clause set out * * * indicates that the cash value of the premises before the fire may be established by estimating the cost of rebuilding anew, and deducting from the estimate the probable deterioration suffered by the premises from previous use. Such a paper, suggested probably by this provision of the policy, prepared by Graham & Bro., as architects and builders, and signed by them professionally, was furnished by the plaintiff on the 26th of April, and was then made a part of her preliminary proofs of loss. The relation of that paper to the present litigation is this: It was furnished by the plaintiff as her statement of the amount of her loss, and it was verified by the signature of Graham & Bro. as builders, and upon their professional responsibility and reputation. I do not think the phrase 'duly verified', as used in the policy, necessarily requires an attestation by affidavit. In the clause next preceding that in which this certificate is required, papers there mentioned are required to be sworn to, but an express requirement is omitted in regard to this paper. *It is true that the term 'verify' applied to legal papers generally means, or implies, an oath;* but it is equally true that it does not always, or necessarily, do so. *Affidavits are usually made to facts, not to opinions; to actual expenditures, not to estimates of them.*"

In Tugart Valley Brewing Company v. Vilter Mfg. Co., 184 Fed., 845, the statute provided that the account set forth under the mechanics' lien law should be duly verified, and the court held that to verify "is an oath or affirmation taken and administered by and before an officer having authority by law to administer and certify oaths and affirmations."

Reasoning, then, from the above cited authorities, the intention of the legislature is somewhat clarified. It would have been much better when the word "verified" was used if the draughtsman had added thereto "by affidavit", for something more than a mere setting down of figures or correcting of items was apparently meant. If that alone was intended, then the use of the word "itemized" would have been sufficient, but when the word "verified" is used in connection with the word "itemized," something in addition to the account was clearly intended. The account was to be submitted to the board of education and, upon vouchers signed by the president, was to be paid from public funds. The knowledge of the items of such accounts is generally with the person only who makes it and files the account. That is to say, being items of personal expenditure, it would be almost an impossibility for the board or the county

auditor to ascertain the correctness or incorrectness of such accounts, and for that reason it is altogether possible and quite probable that the verification intended was one which carried such weight or strength with it as to make the person who received the money liable to be prosecuted in case the account was wilfully misrepresented.

From the above, then, I conclude that the word "verify", as used in section 4734 G. C. means verified by affidavit; that is sworn to before an officer duly authorized to administer oaths.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

247.

STATE FIRE MARSHAL—HAS NO AUTHORITY TO APPOINT OR EMPLOY LEGAL COUNSEL—NOTWITHSTANDING APPROPRIATION FOR SAME.

Despite the provisions of the 1915 *appropriation bill, the state fire marshal has no authority to appoint or employ legal counsel or attorneys at law (Sec.* 333 *G. C.); and a person appointed or employed by him to render legal service, as such, may not be paid out of such appropriation, though the services actually rendered be such as might lawfully have been rendered by an assistant fire marshal.*

COLUMBUS, OHIO, May 8, 1917.

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

DEAR SIR:—I acknowledge receipt of your letter of April 3, 1917, enclosing voucher No. 1179, of the department of state fire marshal, and in connection therewith submitting the following questions for my opinion:

> "1. Has the department of state fire marshal a legal right to employ counsel other than the attorney-general's office?
> "2. Is the enclosed voucher a legal claim against the state of Ohio?"

I have carefully examined the statutes relative to the office of state fire marshal and the organization of his department and find therein no express authority to employ legal counsel. It is true that the fire marshal discharges such duties and exercises such powers under the law as would make it extremely convenient, if not absolutely necessary, for him to employ legal services. In fact, were it not for the express provision of statute which I am about to quote, I am satisfied that the state fire marshal would have the implied power to employ legal counsel to assist him and his deputies and assistants in the discharge of their several duties, provided, of course, there were at a given time moneys appropriated for the uses and purposes of his department under such provisions as to be available for expenditure for such purpose.

In spite of these considerations, however, the power to employ legal counsel does not, in my opinion, exist in the state fire marshal. Section 333 of the General Code provides in part as follows:

> "The attorney-general shall be the chief law officer for the state and all its departments. No state officer, board, or the head of a department

or institution of the state shall employ, or be represented by, other counsel or attorneys-at-law. * * *."

Whatever might be the result if there were an express provision authorizing the state fire marshal to employ legal counsel, in the face of the general prohibition of the section last above quoted, I am clearly of the opinion that in the absence of such express provision no state officer—and the state fire marshal is a state officer—has any claim or color of authority to employ legal counsel.

In this connection, however, I observe that the voucher is drawn upon appropriation account designated as "A-3", and upon consulting the general budget appropriation bill passed by the 81st general assembly and covering the fiscal biennium ending on June 30, 1917, I find that "A-3", unclassified personal service, as applied to the state fire marshal's department, was an account expressly authorized to be expended for the following purposes:

"Fees, mileage and maintenance of witnesses, township clerks, special attorneys and stenographers".

The question naturally suggests itself as to whether or not the general assembly, in passing this appropriation, intended to set aside, during the biennium and as to this department, the provisions of the general law. Certainly such an intention is to be presumed against, especially in the case of appropriations for the current expenses of state departments.

The casual insertion of the phrase "special attorneys" in the above quoted context should not, in my opinion, be regarded as equivalent to a formal authorization to the state fire marshal to employ special attorneys, in the teeth of the prohibition contained in the general law, unless such conclusion is inevitable.

This is but another way of saying that the appropriation is prima facie for a purpose consistent with the permanent law and whatever may be the power of the general assembly to disregard the permanent law and confer independent authority upon an administrative officer to act in defiance of the permanent law in the expenditure of an appropriation, the assembly will be presumed not to have intended any such violent result in a given case.

I feel that it is my first duty, therefore, to determine whether the appropriation can be given some effect consistent with the permanent law and not to raise the more fundamental question as to the power of the legislature to suspend the permanent law through the medium of an appropriation, unless it is necessary to do so.

In my opinion the appropriation and the law may stand together. It is only by inference that an appropriation to *pay* "special attorneys" carries with it power to appoint or employ such attorneys. This inference may be contradicted by clear expression to the contrary. The statute contains such a clear expression. Therefore, if the appropriation for the fees of special attorneys can be interpreted as applicable to the payment of special attorneys employed for work in connection with the state fire marshal's office, *but not employed by the state fire marshal*, the statute and the appropriation may be harmonized.

The general statutes authorize the attorney-general to appoint certain statutory subordinates, and in addition to appoint special counsel when in his opinion the interests of the state require it,

"to represent the state in civil actions, criminal prosecutions or other proceedings in which the state is a party or directly interested".

(Sec 336 G. C.).

The section goes on to state that:

> "Such special counsel shall be paid for their services from funds appropriated by the general assembly for that purpose".

This statute does not in terms require that the sum appropriated to pay special counsel appointed by the attorney-general under this section shall be appropriated to the department of the attorney-general. The legislature has it within its power, without violating this section, to apportion the appropriations as it sees fit, among the several departments.

In other words, however impractical such a scheme might be, it is conceivable that the legislature might wish to have special counsel, appointed by the attorney-general and assigned to a particular department, paid out of an appropriation account charged against that department, instead of against the attorney-general's office, and yet to preserve the attorney-general's statutory power to appoint and not do violence to the prohibition against the employment of attorneys-at-law by other state officers and departments.

On this hypothesis, then, the statute and the appropriation may be reconciled. The state fire marshal may not employ legal counsel. The attorney-general must do that. But the attorney-general may appoint special counsel and assign him or them to the work of the state fire marshal's department, and his fees may be paid from the appropriation account above referred to. Such an interpretation does violence to no provision of law, nor to the appropriation. Any other interpretation of the two provisions would either permanently or temporarily abrogate some express language of one or the other of them.

I do not find that the gentleman to whom the voucher is made payable was appointed as special counsel by the attorney-general. The bill and voucher presented are for legal services. In my opinion the voucher may not be paid.

I am informed that the rule of law which I have laid down has been apparently evaded in the past by employing persons with the qualifications of attorneys-at-law as assistant fire marshals. The nature of the duties of assistant fire marshals is such that it might be highly expedient to employ persons trained in the law in such positions. Nor would it in my opinion be violative of the law for a member of the bar to be appointed as assistant fire marshal, provided he should confine himself in that capacity to the discharge of the duties pertaining to such a position, some of which, as for example, taking testimony, determining whether or not evidence is sufficient to charge a person with arson or similar crime, assisting a prosecuting attorney, etc., are of a legal character.

Most of the detailed services for which the voucher is drawn are of such character as they might have been rendered by an assistant fire marshal. Apparently, however, the gentleman who presents the bill and in whose favor the voucher is drawn, was not employed as an assistant fire marshal, but as an attorney-at-law or legal counsel. Accordingly, the claim as presented cannot be paid.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

248.

DRIVEWAYS—RIGHTS OF ABUTTING PROPERTY OWNERS IN SAME—GOVERNED BY SECTION 7212—EXPENSE OF RECONSTRUCTING SAME DEVOLVES UPON COUNTY COMMISSIONERS AND TOWNSHIP TRUSTEES—SUPPLEMENTAL TO OPINION NO. 203.

1. *So far as the rights of abutting property owners in driveways or approaches leading from the public highway are concerned, the provisions of section 7212 G. C. control, the contract for the road improvement having been entered into on August* 19, 1915.

2. *Under the provisions of section 7212 G. C. the state bears no part of the expense of reconstructing driveways or approaches leading from the public highway to abutting property, this expense devolving upon the county commissioners or township trustees.*

COLUMBUS, OHIO, May 8, 1917.

HON. S. L. GREGORY, *Prosecuting Attorney, Wilmington, Ohio.*

DEAR SIR:—I have your communication of April 26, 1917, which letter is supplemental to a letter I received from you dated March 15, 1917, and upon which I gave you my opinion, being Opinion No. 203, as of date April 19, 1917. While I gave you my opinion as to the law, basing it upon your first communication, yet you ask me to be a little more specific along the lines suggested in your last communication. This I am very glad to do.

Your communication of April 26, 1917, reads as follows:

> "Your Opinion No. 203 received. Your decision has made clear to us of whatever of doubt we may have had as to the construction of Sec. 7212 G. C., but the specific question we desired answered you passed over. On August 19, 1915, a contract was let by the state highway commissioner to improve an inter-county road in this county. At the date of the letting of this contract Sec. 1192-1 G. C. was in effect which provided that the owners and occupants of land abutting such improvements should build and maintain all farm approaches. On the first Monday of September following the letting of this contract Sec. 7212 became a law, thereby repealing Sec. 1192-1. Now what we wish to know is whether the law in effect when the contract was let controls or whether the new law to wit, Sec. 7212, controls. If Sec. 7212 controls, then what part of the expense of rebuilding the road approaches should the state bear?"

Inasmuch as I shall be compelled to use to some extent your letter of March 15, 1917, I will quote it, which reads as follows:

> "I write you for an opinion at request of the county commissioners of this Clinton county in a matter in which both the state and county are interested. On August 19, 1915, a contract was let to improve an inter-county road. No mention was made in the specifications as to farm approaches (old Sec. 1192-1, new Sec. 7212 G. C.). Now is there any legal obligation on the county or the state to build the farm ap-

proaches in this case under either of the sections mentioned or under any other sections of the statute?

"Also please define farm approaches as to kind and number."

I stated in my former opinion that the provisions of section 1192-1 G. C., now repealed, had nothing to do with the matters about which you inquired, and that the provisions of section 7212 G. C. controlled. I used the following language in said opinion:

"While you mention in your communication section 1192-1 G. C., yet, inasmuch as this section has been repealed, and inasmuch as the provisions of said section, in my opinion, have nothing to do with the construction to be placed upon section 7212 G. C., which you also mention in your communication, I shall not quote nor comment upon said section 1192-1 G. C., now repealed."

I am still of the opinion that the provisions of section 1192-1 G. C., having nothing whatever to do with the matters contained in your two communications, but inasmuch as you particularly raise the question as to the provisions of section 1192-1 G. C. in your second communication, I will place a construction upon said section in connection with section 7212 G. C.

Section 1192-1 G. C. now repealed, reads as follows:

"The construction and drainage of public road approaches necessary for the protection of a state highway may be included as a part of the improvement of said highway. Upon the completion of said highway, the owners or occupants of adjoining lands shall construct and keep in repair all private approaches or driveways from such highway, under the direction of the county commissioners, but no such approaches or driveways shall be constructed in such manner as to obstruct or interfere with said highway or with any drain or ditch which has been constructed as a part of said highway. Whoever fills up or places any material in a ditch along a state highway so as to interfere with the drainage or the purposes of its construction, or constructs an approach or driveway from a state highway, except as provided by law, shall be fined not less than five dollars nor more than twenty-five dollars."

Section 7212 G. C. reads as follows:

"The owners or occupants of land shall construct and keep in repair all approaches or driveways from the public roads under the direction of the county highway superintendent, provided, however, that if, in the construction or improvement, maintenance and repair of any road, the approach or driveway of an abutting property owner is destroyed, the county commissioners or township trustees, shall compensate such abutting property owner or occupant of said lands for the destruction of such approach or driveway, or in lieu thereof, authorize the county highway superintendent to reconstruct the same."

In your first communication you state that no mention was made in the specifications as to farm approaches. In my former opinion I stated that this

matter should not be included in the specifications, on account of the provisions of section 7212 G. C. Neither should such a matter be included in the specifications, under the provisions of section 1192-1 G. C.

It will be noted that section 1192-1 G. C. provides:

> "The construction and drainage of *public road approaches* necessary for the protection of a state highway may be included as a part of the improvement of said highway."

This part of the section provides that *public road* approaches might be included in the specifications and in the estimate of the cost and expense of the highway improvement. But it will be noted that section 1192-1 G. C, provides that upon the completion of said highway, the owners or occupants of adjoining lands shall construct and keep in repair all private approaches or driveways from such highway. Hence, it is quite evident that the specifications and estimates would not include the cost and expense of private approaches or driveways of owners or occupants of adjoining lands.

As stated in my former opinion, the cost of the construction of private approaches or driveways ought not to be included in the specifications and estimates of the cost and expense of the road improvement, under the provisions of section 7212 G. C., for the reason that under its provisions the county commissioners or township trustees must either rebuild the approaches or pay damages to the owner or occupant of adjoining land. So that under either section, the cost and expense of constructing private driveways or approaches should not be included in the specifications and estimates of the cost and expense of the road improvement.

Your direct question is as to whether the provisions of section 1192-1 G. C., or the provisions of section 7212 G. C., shall apply in reference to the construction of farm approaches or driveways after the completion of a road improvement. If the provisions of section 1192-1 G. C. control, then the owners or occupants of adjoining land would be compelled to construct and keep in repair private approaches or driveways from such highway. If the provisions of section 7212 G. C. control, then the county commissioners or township trustees must reconstruct any approaches or driveways destroyed in the improvement of the highway.

So it is readily seen that it is important to decide which one of these sections would control in the contract under consideration. As said in my former opinion, I am of the opinion that the provisions of section 7212 G. C. control. It is true the contract for the road improvement was let on August 19, 1915, while the provisions of section 1192-1 G. C. were in force and effect. But the provisions of section 7212 G. C. became effective on the first Monday in September, 1915, just eighteen days after the entering into of the contract. While you do not so state in either of your communications, yet I am assuming that the said road improvement was not completed, indeed, scarcely begun, until after the provisions of section 7212 G. C. became effective.

The contract between the state highway commissioner for the state and the road contractor was entered into on August 19, 1915. Hence their rights under the contract were fixed in general by the provisions of said section. But the rights of abutting property owners in the matter of private approaches or driveways were not fixed or determined at that time. They had nothing to do with the terms of the contract. Their rights would be determined when the

highway was completed. This is the provision of both sections. Section 1192-1 G. C. says:

> "Upon the *completion* of said highway, the owners or occupants of adjoining lands shall construct", etc.,

while section 7212 G. C. states:

> "That if, in the construction or improvement, maintenance and repair of any road, the approach or driveway of an abutting property owner is destroyed, the county commissioners or township trustees shall * * authorize the county highway superintendent to reconstruct the same",

which would not be until the highway was completed.

Under both of these sections the rights of the abutting property owners were fixed at the completion of the work. Their remedy, if any, dates from that time. Hence, their rights are determined by the provisions of section 7212 G. C. This might be different if the estimate of the cost and expense of the building of the approaches were to be included in the estimate of the cost and expense of the road improvement and paid for out of the special fund provided for said purposes; but, as said before, such is not the case.

Answering your question specifically, I am of the opinion that the provisions of section 7212 G. C. will control in the matter of constructing approaches and driveways leading from the said improvement to the abutting land, the matters in reference to which I have fully discussed in my former opinion.

You also ask, if the provisions of section 7212 G. C. control, then what part of the expense of rebuilding the road approaches should the state bear? None whatever. The provisions of section 7212 G. C. state this is a matter for the county commissioners or township trustees to attend to, the cost of which must be borne either by the county or township. I discussed the matter fully in my former opinion as to when the county commissioners would act and when the township trustees would act.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

249.

COMMON PLEAS JUDGE—UNDER PROVISIONS OF ARTICLE IV, SECTIONS 12 AND 14—CANNOT ENLIST IN UNITED STATES ARMY AND RETAIN OFFICE OF COMMON PLEAS JUDGE.

1. *Under the provisions of section* 12, *article IV of the constitution, requiring the judges of the court of common pleas "to reside in the county while in office", the word "reside" means an actual, personal residence and not merely a legal, constructive residence. Hence, a person holding said office could not enlist in the army of the United States and still retain the office of common pleas judge.*

2. *The provisions of section* 14, *article IV of the constitution, requiring that judges of the court of common pleas "shall not hold any other office of profit or trust, under the authority of this state, or the United States", apply to office in the army of the United States, as well as to office in the civil service. Hence, a person holding said office could not accept a commission in the army of the United States and still retain the office of common pleas judge.*

COLUMBUS, OHIO, May 9, 1917.

HON. W. P. BARNUM, *Judge of Court of Common Pleas, Youngstown, Ohio.*

DEAR SIR:—I have your letter of May 2, 1917, which you addressed to Honorable James M. Cox, governor of Ohio, in which you ask for certain information therein set out. Your communication reads as follows:

> "As probably you know, I have been common pleas judge here for the last eight years, and was re-elected last November for another six years.
>
> "The probabilities are that today or tomorrow I shall enlist in the officers' reserve corps and go to training camp at Fort Benjamin Harrison near Indianapolis for the ninety days' training course, and if I make good there and receive a commission, will probably continue on until the issues of the day are settled.
>
> "As I take it, there is no legal inhibition to me continuing as a judge during the ninety days' course I shall take at Indianapolis, but the question I want to put to you, or rather ask you to put to the attorney-general, if you will be kind enough to do so, is this: If I finish my training course at Indianapolis and am accepted, would it be necessary for me to resign as judge, in the event I take a commission in the army?"

1. In order to answer the question embodied in your communication to the governor, it will be necessary to note two provisions of the constitution of the state of Ohio. I will first note and comment upon section 12, of article IV, of the constitution, which reads as follows:

> "The judges of the courts of common pleas shall, while in office, reside in the county for which they are elected; and their term of office shall be for six years."

As will be immediately noticed, in so far as the question you ask is concerned, the important word in this section is "reside." In the first place it will

be noted that it does not say, "be a resident of the county", or, "maintain a residence in the county", but it states:

> "The judges of the courts of common pleas shall, while in office, *reside* in the county."

Does the word have reference merely to a legal residence such as would entitle the judges of the court of common pleas to return to the county, if temporarily absent, and exercise their functions as citizens and voters; or, does it mean that they must actually and personally reside in the county? From a reading of the section, it would seem to me more than the former. This is the question that must be decided.

In Shattuck v. Maynard, 3 Md. 123, 124, the court distinguishes this word in reference to its two meanings, as follows:

> "The word 'reside' is used in two senses: The one constructive, technical, legal; the other denoting the personal, actual habitation of individuals. When a person has a fixed abode where he dwells with his family, there can be no doubt as to the place where he resides. The place of his personal and legal residence is the same. So, when a person has no permanent habitation or family, but dwells in different places as he happens to find employment, there can be no doubt as to the place where he resides. He must be considered as residing where he actually or personally resides. But some individuals have permanent habitations, where their families constantly dwell, yet pass a great portion of their time in other places. Such persons have a legal residence with their families and a personal residence in other places; and the word 'reside' may, with respect to them, be used to denote either their personal or their legal residence."

To substantiate this language used by the court, many cases are cited by the court.

To illustrate further how this word "reside" is used in the two above senses, I desire to note language used by the court in Wheat v. Smith, 50 Ark. 266, 281:

> "It is well settled that when an ambassador or consul is sent by one government to represent his state in a foreign country, his continued residence in a foreign land, if referable to his official duties, does not work a change of his domicile. There is no inference of domicile or of *animus manendi* to be drawn from such residence. The domicile of origin, as the home domicile is termed, is presumed to prevail until another is acquired, 'the presumption of law being that the domicile of origin subsists until a change of domicile is proved, the onus of proving the same is on the party asserting it'. The residence of Smith in the foreign country is referable, so far as the testimony here goes, solely to his official station as consul. The citizenship and residence, which he formerly possessed in Lafayette county, are presumed to have continued in the absence of proof to the contrary, and we cannot pronounce the action of the court erroneous."

It is readily seen in the above language that the court speaks of the actual residence of Smith, which was for the time being in a foreign country, and the

legal, constructive residence of Smith, which he continued to hold in his own state.

In this case Smith returned from the foreign country, as consul or ambassador, and desired to make the race for a county office soon after his return, without waiting for the one year's residence in the county, required before he could be a candidate for said office. The court held that he had a legal and constructive residence in his own state, although he had been an actual resident of the foreign country.

The above cases show clearly that the important thing to decide is whether the word "reside", as used in said section of the constitution, means an actual residence, or merely a legal or constructive residence.

In State ex rel. v. Allen, 21 Ind. 516, the court was passing upon a question similar to the one under consideration. In the syllabus the court say:

> "A county auditor is required, both by the constitution and the laws of Indiana, not only to be a resident of, but actually to reside in the county and keep his office in the auditor's office to be provided by the county, and personally discharge, or superintend the discharge of the duties imposed upon him by law."

On p. 522 the court, in rendering its opinion, used the following line of argument:

> "Now, whenever the auditor voluntarily permanently disables himself to perform the duties of his office he, by that act, constructively resigns the office by abandonment of it. A temporary disability to discharge the duties of the office might not, of itself, create a vacancy. In an office, capable of being served by deputy, the deputy of the principal might, doubtless, continue to act during the temporary disability of the principal; and, if no deputy had been appointed, perhaps the sureties of the principal might appoint. See The State v. Pidgeon, 8 Blackf. 132. But a disability designed to continue for the whole term of office must vacate the office. And the question now arises, did the auditor, in this case, by enlisting as a private soldier, in the army of the United States for three years, or during the existing war, thus disable himself? Of this we have no doubt. What did he undertake, what did he agree to do, by that enlistment? In what situation did he place himself. He placed himself in the service of the government of the United States, and agreed, yes, legally bound himself, to leave, not only the county of Vigo, but the state of Indiana, and remain absent, if required, for three years, devoting his entire time to the service of the United States in parts remote from the state of Indiana. This, we judicially know, because we know that the government was not enlisting soldiers to serve in Vigo county, nor in the state of Indiana; for there was no rebellion existing within those limits to be put down by an army. Allen not only undertook to leave the state, and did leave it, but he further deprived himself of the power to return, of his own volition, for a period of three years. The soldiers, as we judicially know, were enlisted for the war which was being carried on in the southern states; and while we concede the nobleness and patriotism of the spirit which prompted the defendant to enlist, still we cannot allow such considerations to control in the decision of a question of law. Legal decisions should not rest upon the impulses of the hour, but upon principles

of perpetual application. The proper way to test the decision in this case is to turn ourselves back to a period prior to this war, and to suppose an officer to be recruiting for the regular army; to suppose further, that Allen, then the auditor of Vigo county, enlists for three or five years in that army and is marched off to a frontier military post of the United States; would anybody say, in that case, that he had not abandoned the office of county auditor? Such, in law, is this case. See Kerr v. Jones, 19 Ind. 351. It could make no difference that Allen should afterwards, and before the expiration of the term of his enlistment, get released therefrom, that fact being a mere accident; the vacancy having once become complete by abandonment, could not be refilled by an accidental, voluntary or forcible reoccupancy."

While the wording of the constitution, upon which the court was placing a construction in the above cause, was not exactly in the language of our constitution, yet I believe that the principle enunciated by the court therein would apply to the matter under consideration.

In People v. Owers, 29 Colo. 535, the court placed a construction upon a constitutional provision very similar, if not entirely similar, to the one under consideration. The court in the fourth and fifth branches of the syllabus lays down the law as follows:

"Section 29, article VI of the constitution, which provides that all judicial officers excepting judges of the supreme court shall reside in the district, county, precinct, city or town for which they are elected or appointed, requires that a district judge shall maintain his actual residence in his district as distinguished from a legal or constructive residence or domicile. But where a district judge for eight months after the beginning of his term on account of his health and on the advice of physicians has lived out of his district as much of the time as his actual presence was not needed in the district, and it is his *bona fide* intention to return and maintain his actual residence in the district as soon as his health will permit, although the time when he will be able to return is not definite, it is held not sufficient to work a forfeiture of his office.

"The naked declaration of a district judge of his intention to maintain his actual residence in his district would not be conclusive of the question."

On p. 546 the court, in rendering its opinion, used the following reasoning:

"A more difficult question arises out of the alleged violation by defendant of section 29 of article VI, which says that all (judicial) officers provided for in the article, excepting judges of the supreme court, shall respectively reside in the district, county, precinct, city or town for which they may be elected or appointed. The word 'reside' may, and sometimes does, have different meanings in the same or different articles or sections of a constitution or statute, but the direction here, that a district judge shall reside within his district, manifestly was not intended for his convenience, but for the benefit of the people, whose servant he is. Doubtless one, if not the only, object of the section was to compel the officer to maintain his residence where litigants might expeditiously and with as little expense as possible, have access to him

for the transaction of official business. Bearing this in mind, it is quite clear that 'residence' here means an actual, as distinguished from a legal or constructive, residence, or, its equivalent, domicile; and it is equally certain that, thus far in defendant's second term, he has not complied with this mandatory provision by residing where it commands. This section, however, should be given a reasonable and not a purely technical or literal interpretation. For instance, no one would say that it was necessary for a district judge actually to reside and be physically present in his judicial district every hour, or day, or week, or month, continuously every year during his term of office. If, however, he has removed his actual residence from his district, and does not purpose to return, or intends to maintain his actual residence outside his district indefinitely, or for any considerable portion of his term, the section would be ignored, the office become vacant, and the incumbent might be ousted because of such misconduct."

The holding of the court in this case seems to be that if the judge were outside his district merely for the time during which his actual presence was not needed in the district, with the intention of returning as soon as his health would permit, he would still be considered as actually residing in the district; but if he intended to maintain his actual residence outside his district, indefinitely or for any considerable portion of his term, he could not be held to be actually residing within the district.

It will be noticed that the above case is very similar to the one under consideration, and the law as enunciated therein would apply to this matter.

2. I note from your communication that you are enlisting in the officers' reserve corps and expect to go to the training camp at Fort Benjamin Harrison for the ninety-day training course, and if you make good there you expect to receive a commission in the army of the United States. This will make it necessary for us to note another section of the constitution of the state of Ohio, namely, section 14 of article IV, which reads as follows:

"The judges of the supreme court, and of the court of common pleas, shall, at stated times, receive, for their services, such compensation as may be provided by law, which shall not be diminished, or increased, during their term of office; but they shall receive no fees or perquisites, nor hold any other office of profit or trust, under the authority of this state, or the United States. All votes for either of them, for any elective office, except a judicial office, under the authority of this state, given by the general assembly, or the people, shall be void."

If you receive a commission in the United States army, you will be holding an office therein, and, so far as I am able to learn, the courts make no distinction between an office in the army and one in the civil affairs of the state or nation.

In Kerr v. Jones 19 Ind. 351, the court was passing upon a question similar to the one which I am now considering. In the syllabus it stated the law as follows:

"The office of colonel of volunteers, as now existing, and the office of reporter of the decisions of the supreme court of Indiana, within the meaning of the ninth section of the second article of the constitution of said state, are lucrative offices.

"The office of colonel of volunteers in the military service of the United States, is not an office in the militia.

"The acceptance, therefore, of the latter office, by the incumbent of another lucrative office, under the laws of Indiana, would vacate the former."

On p. 353, the court in the opinion say:

"Our constitution provides, that no person shall 'hold more than one lucrative office at the same time', with some exceptions, not embracing the case at bar; and it specifies two classes of offices that shall not be regarded as lucrative, namely, offices in the militia to which no salary is attached, and the office of deputy postmaster, where the compensation does not exceed ninety dollars per year. On general principles, the office of colonel of volunteers, as now existing, is lucrative, and so is that of reporter of the supreme court. Mr. Harrison cannot hold them both, therefore, unless the office of colonel of volunteers is an office in the militia, within the meaning of the constitution, and if he cannot hold them both, his acceptance of the colonelcy, being the later office, vacated that of reporter."

The court held that he was a colonel in the United States army and not a colonel of the militia, and hence could not hold both offices.

The only apparent distinction between the above case and the one under consideration here, is that the constitution of Indiana provided that no person could hold two lucrative offices, while our constitution holds that no judge of the court of common pleas shall hold any other office of profit or trust, under the authority of this state or the United States. While there is some little difference in the wording of the constitutions of the two states, yet the principle to be applied in reference to the matter under consideration would be the same under both constitutions.

In Mohringer et al. v. State ex rel., 20 Ind. 103, the court set forth the following principle of law in the syllabus:

"The acceptance of the office of major of volunteers in the military service of the United States, by the incumbent of the office of auditor of a county, vacates the latter office."

In view of the natural and logical construction of which the two above constitutional provisions are susceptible, and in view of the authorities cited in support of each of these constitutional provisions, to what conclusion must we come?

1. It is my opinion that the enlisting in the officers' reserve corps, which will require your being out of the county for ninety days, would not be in violation of either of said constitutional provisions. While you would not be strictly residing in your county during the time you are at Fort Benjamin Harrison, yet it would be an absence merely for temporary purposes; and, of course, it would not be in violation of the second constitutional provision cited herein, because you would neither be holding office nor drawing a salary.

2. But suppose you accept a commission in the United States army and thus leave your county for an indefinite period of time, and so place yourself that it will be impossible for you to return at any given time, even though you

should desire to do so. In view of said constitutional provisions and the decisions cited above, what will be the result?

You will no longer actually and personally be residing within the district. It is true you will maintain a legal and constructive residence therein, but in view of all the above this would not be sufficient. You would not be complying with the provisions of section 12 of article IV of the constitution, by accepting a commission in the United States army. Further, you would, by accepting a commission in the United States army, be holding an office of profit and trust in the army of the United States. Therefore, you would not be complying with the provisions of section 14 of article IV of the constitution of the state of Ohio.

In view of all the above, it is my opinion that you cannot hold the position of common pleas judge in your county, and at the same time hold a commission in the army of the United States.

It would seem that the hard and fast principles of law might be released in cases of this kind; that a person, desiring to leave the peaceful pursuits of a judicial officer, to assume the burdens and dangers incident to army life, ought not to be in any way discouraged. Yet, much as I might desire to look at this question from such a viewpoint, I find no ruling or precedent warranting my so doing. There seems to be no exception made for cases of this kind. The provisions of the constitution fall upon all alike, whether they are leaving their county and the duties of their office for some pleasure trip abroad for an indefinite period, or whether they are leaving at the call of their country, to fight on the battle fields of a foreign nation until they shall have been honorably discharged by the country that called them.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

250.

NATIONAL GUARD—NOT MUSTERED OUT OR DISBANDED—WHEN MUSTERED INTO FEDERAL SERVICE.

When various organizations of the national guard were mustered into federal service, same were not mustered out of national guard or disbanded.

COLUMBUS, OHIO, May 9, 1917.

HON. GEORGE H. WOOD, *Adjutant General, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter of April 24th wherein you state as follows:

> "I am herewith forwarding to you claim made by the Hon. George S. Marshall, Columbus, Ohio, on behalf of Mrs. Minnie D. Curtis, of this city.
>
> "The facts stated in this communication are said to make a claim against the state. Upon receipt of an opinion from you I will take the matter up further with Mr. Marshall.
>
> "If you want any records of the armory board in this matter, I would be very glad to furnish same, upon request."

The enclosure to which you refer is as follows:

"Claim for rent and for damages by Minnie D. Curtis against the State of Ohio

"To the Adjutant General of Ohio.

"SIR:—I hereby present the following claims on behalf of Mrs. Minnie D. Curtis, of 18 W. Frambes avenue, Columbus, Ohio:

"First. The state of Ohio, through the adjutant general of Ohio and the commanding officer of Company 'G,' O. N. G., leased a house known as number 18 W. Frambes avenue, Columbus, Ohio, of Mrs. Minnie D. Curtis, for the term of one year for the sum of $400.00, payable in quarterly installments. Said Company 'G,' O. N. G., vacated the armory and the state paid the rent to September 30, 1916.

"The state has refused to pay the balance due to March 1, 1917, of $166.67, claiming that the state is no longer obligated to pay the balance for the reason that the company was mustered into the federal service and thereby said lease became null and void. The question involves the proper construction of the following language:

" 'It is understood and agreed that in the event of the muster out or disbanding of the military organization occupying the premises herein described, under the terms and conditions of this lease, this lease and agreement shall then and there terminate and be void.'

"On behalf of Mrs. Curtis we contend that Company 'G,' O. N. G., has never been mustered out or disbanded. Said company at all times during the times covered by this lease has been one of the units of the Ohio National Guard, and it so appears on the records of the state of Ohio, in the adjutant general's department. Under the federal law this unit of the Ohio National Guard took orders from and was under the command of the federal army. In the federal service this unit was always known as Company 'G,' O. N. G. We invite an opinion on this question by the attorney general of Ohio, if your department or the state armory board are not satisfied with our construction of the lease.

"Second. Mrs. Curtis also presents the following claim for injury to property known as 18 W. Frambes avenue, by the tenants.

"One provision of said lease was that:

" 'At the end of said term it would deliver up said premises in as good order and condition as they now are, or may be put by said lessor, reasonable use and ordinary wear and tear thereof, and damage by fire and other unavoidable casualty excepted.'

"One lamp and one table taken from house	$10 00
Globe from porch lamp	1 00
Window ropes broken	5 00
Window glass broken	1 00
Papering necessitated by marking on walls	50 00
Bowl in bathroom broken	8 50
Knobs off of doors	2 00
Damage to doors by cutting the same	10 00

Window blinds destroyed	10 00
Damage to plumbing	30 00
Paint and varnish necessitated by scratching and marring woodwork	50 00
	$177 50

"The foregoing conditions we submit did not result from ordinary wear and tear, and Mrs. Curtis should be paid $177.50 as damages and for property taken away.

"First claim	$166 67
Second claim	177 50
Total	$344 17"

I have carefully examined the lease on file in your office and find that the provision thereof set out in the above statement by Hon. George S. Marshall is accurate.

If I understand the facts correctly, the contention made by Mr. Marshall is sound to the effect that when the Ohio National Guard was mustered into federal service, it did not lose its separate identity as units of the Ohio National Guard, nor was it in any way mustered out or disbanded. My opinion is that when the troops were mustered out of federal service, it was not necessary to again muster them into the national guard. Such being the facts, I agree with Mr. Marshall's contention that under the strict terms of the lease the rent is still payable after the organizaion referred to was mustered into federal service.

So far as the second contention is concerned, to wit: In regard to paying for certain damage, that is a matter more of fact than of law. If all or any part of the damages claimed were occasioned by ordinary wear and tear, the claim, or so much thereof as was due to that effect, should be disallowed, but as to that part of the claim for damages which was not due to ordinary wear and tear, the same should be allowed.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

251.

DISAPPROVAL—TRANSCRIPT OF PROCEEDING FOR BOND ISSUE BY BOARD OF EDUCATION OF BRILLIANT VILLAGE SCHOOL DISTRICT, JEFFERSON COUNTY—PROCEEDINGS OF BOARD OF EDUCATION AT SPECIAL MEETING—FOR BOND ISSUE—INVALID WHEN NOTICE NOT GIVEN AS REQUIRED BY SECTION 4751, G. C.

Where action pertaining to bond issue by board of education is taken at special meeting where one of the members is absent and no notice of the meeting served in accordance with section 4751, *proceeding invalid.*

COLUMBUS, OHIO, May 9, 1917.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"Re:—Bonds of Brilliant village school district in the sum of $9,000.00 for the purpose of purchasing a site for and the erection of school buildings in said *school district*—18 *bonds of* $500 *each.*"

I am herewith enclosing, without approval, transcript of the proceedings of the board of education and other officers of Brilliant village school district, Jefferson county, Ohio, relating to the above bond issue. The issue of these bonds is provided for by the board of education under the assumed authority of sections 7625 et seq. of the General Code, which provide for the issue of bonds by the board of education of a school district on a vote of the electors thereof.

From the transcript it appears that the meeting of the board of education under date of November 20, 1916, at which the resolution was adopted providing for the submission of the question of issuing these bonds to the electors, was a special meeting called by the secertary "on request." There is nothing in the transcript, however, to show that in calling this meeting the secretary complied with the provisions of section 4751 General Code, which prescribes the manner in which special meetings of a board of education must be called. On the contrary, inasmuch as the members and officers of the board have failed to comply with a request of this department that a statement be made in the transcript as to the particular manner in which this meeting was called, I am convinced that the provisions of this section were not as a matter of fact complied with.

Relating to this question sections 4750 and 4751 General Code provide as follows:

"Sec. 4750. The board of education shall make such rules and regulations as it deems necessary for its government and the government of its employes and the pupils of the schools. No meeting of a board of education, not provided for by its rules or by law, shall be legal, unless all the members thereof have been notified, as provided in the next section.

"Sec. 4751. A special meeting of a board of education may be called by the president or clerk thereof or by any two members, by serving a written notice of the time and place of such meeting upon each member of the board, either personally or at his residence or usual place of business. Such notice must be signed by the official or members calling the meeting."

The transcript shows that one of the members of the board was absent from this meeting, and this being so I am compelled to hold that this meeting of the board of education was illegal, and the proceedings taken by the board at such meeting are wholly unauthorized so far as this issue of bonds is concerned. The case of Kattman v. Board of Education of New Knoxville, 15 C. C. N. S., 232, is exactly in point. In this case it was held by the court in sustaining an injunction against the issue of bonds by a board of education that proceedings of a school board providing for an issue of bonds are invalid where the action pertaining thereto was taken at a special meeting where one of the members was absent and no written notice of the meeting had been served on each member of the board, either personally or at his residence or usual place of business.

It is with some regret that I have reached the conclusion as to the invalidity of this proposed bond issue, and this for the reason that I am convinced that the board of education could, and, indeed, would meet the payment of principal and interest on these bonds if the same were issued and sold. However, inasmuch as this proposed issue was purchased by your board conditional on their issue being in accordance with the laws of the state of Ohio governing the issue of the same, I have no discretion other than to advise you that these bonds have not been issued in accordance with such laws.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

252.

ADJUTANT GENERAL—ASSISTANT ADJUTANT GENERAL—ASSISTANT QUARTERMASTER GENERAL—ENTITLED TO COMPENSATION UNDER SECTION 5190 IN LIEU OF SALARY UNDER 2249—UPON DECLARATION OF STATE OF WAR BETWEEN UNITED STATES AND GERMANY.

By virtue of the declaration that the United States was in a state of war with Germany, the adjutant general, assistant adjutant general and assistant quartermaster general are entitled to compensation under section 5190 *in lieu of salary under section* 2249, *said section* 5190 *being in full force and effect at the time the said officers were appointed.*

COLUMBUS, OHIO, May 9, 1917.

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

DEAR SIR:—We are in receipt of your letter of May 4th wherein you inquire as follows:

> "I desire an early opinion on the following question:
> "Section 5190 (O. L. 105-106) provides as follows:
> " 'In time of war or insurrection each of said officers (adjutant general, assistant adjutant general and assistant quartermaster general) shall receive the pay and allowance of their rank according to those at the time prescribed for the armies of the United States, which said pay and allowance shall be in lieu of the salary of each of said officers

provided in section two thousand two hundred and forty-nine of the General Code, until the conclusion of peace or the repression of the insurrection.'

"The adjutant general, assistant adjutant general and quartermaster general are presenting vouchers to this department for the compensation provided in section 5190, of the General Code, in lieu of their regular salary provided in the appropriation act. So far as we know they are performing only their regular duties, payment for which is provided in the appropriation bill. Are they entitled to such allowance at this time? If you desire any further information we will be glad to talk to you concerning this matter."

Section 79 G. C. (106 O. L. 470) provides that the staff of the governor shall consist of an adjutant general, upon whom shall devolve the duties of quartermaster general, an assistant adjutant general and twelve aides-de-camp, who shall hold office during the pleasure of the governor or for the term for which he was elected.

Section 81 G. C. provides that the commissions of the staff officers shall expire with the term of office for which the governor was elected.

Section 84 G. C. provides that the adjutant general shall have an assistant quartermaster general, appointed and commissioned by the governor.

Section 5190 G. C. referred to in your letter, was passed on May 27, 1915, approved June 2, 1915, and filed in the office of the secretary of state on June 4, 1915.

It will, therefore, be seen that all the above legislation was passed and in full force and effect before the 8th day of January, 1917, being the date on which the present adjutant general, assistant adjutant general and assistant quartermaster general were appointed.

Section 2249 G. C. (106 O. L. 28) provides the annual salaries of the adjutant general, assistant adjutant general and assistant quartermaster general. Said act was passed March 8, 1915, approved March 8, 1915, and filed in the office of the secretary of state March 9, 1915.

Section 5190, referred to in your letter, provides that in time of war the said officers mentioned shall receive pay and allowance according to rank "which said pay and allowance shall be in lieu of the salary of each of said officers," until the conclusion of peace.

The United States formally declared on the 6th day of April, 1917, that a state of war with Germany existed, and since that time the United States has been in a state of war with Germany.

Article II, section 20, provides :

"The general assembly in cases not provided for in this constitution shall fix the term of office and compensation of all officers; and no change therein shall affect the salary of any officer during his existing term, unless the office be abolished."

Whether or not the above provision of the constitution would apply to other than civil officers, it is not necessary in this matter to decide for the reason that when the officers mentioned assumed their duties both section 2249 and section 5190 were in full force and effect, and while the compensation of the officers mentioned would by reason of the declaration of a state of war with Germany increase, it was solely because of the fact that the compensation was by reason of such declaration to be paid under a different provision of the statutes than

during times of peace. It is not a question as to whether or not there was an increase in the duties pertaining to the office, but whether or not a status of peace or war was in existence.

I would therefore advise you that the adjutant general, the assistant adjutant general and the assistant quartermaster general are, since the 6th day of April, 1917, and will until the conclusion of peace, be entitled to receive compensation under the provisions of section 5190.

This case is different from the case of State ex rel. Bryant v. Dohaney, Auditor, for the reason that, first, as we view the matter the United States was not at war with Mexico; and, secondly, section 5190 was amended by the legislature to read in its present form after Colonel Bryant had assumed office as assistant adjutant general.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

253.

INMATES OF PRIVATE CHILDREN'S HOME—BETWEEN AGE OF SIX AND TWENTY-ONE—ENTITLED TO BE ADMITTED TO SCHOOLS FREE—IN DISTRICT IN WHICH HOME LOCATED—REGARDLESS OF WHETHER OR NOT PARENTS RESIDE IN SAID DISTRICT—SECTIONS 7676 AND 7678 DO NOT APPLY.

Children between the age of six and twenty-one years, inmates of a private children's home, are entitled to be admitted free to the schools of the district in which such home is located, under the provisions of section 7681, G. C.

The fact that the parents or guardian of such children are not actual residents of such district does not change the rule.

The provisions of General Code, sections 7676 and 7678, apply to only children's homes which are provided by law.

COLUMBUS, OHIO, May 9, 1917.

HON. ROY R. CARPENTER, *Prosecuting Attorney, Steubenville, Ohio.*

DEAR SIR:—Your letter of March 7, 1917, is as follows:

> "Located in the Smithfield rural school district in Smithfield township, Jefferson county, there is a private children's home known as the 'Smithfield Bethel', supported and maintained by private contributions. In this Bethel there are seventy-seven pupils of school age. Most of them are from without Smithfield rural school district, coming from different parts of the county; different parts of the state and even from outside of the state. Very few of these children have parents or guardians actual residents of this district.
>
> "First: Would section 7678 apply to this particular children's home, or does this statute exclude an institution of this kind, which is in no way maintained by public funds?
>
> "Second: Would the matter of providing schools for this institution be governed by section 7681 G. C.? If so, would only those children, inmates of this institution, whose parents or guardians were actual residents of the district, have the right to free tuition in the schools of the

district? Would the county commissioners be required to pay the tuition of all the pupils of this home whose parents or guardians were not actual residents of the district?

"If the public schools, as now located in this district, are not reasonably accessible to the pupils in this home, what board or body should make provision for the school facilities of the pupils living in this home and how?"

The answer to your several inquiries involves the consideration of those sections of the General Code which refer to the inmates of private children's homes who are between six and twenty-one years of age.

General Code, section 7681, provides in part:

> "The schools of each district shall be free to all youth between six and twenty-one years of age, who are children, wards or apprentices of actual residents of the district, including children of proper age who are inmates of a county or district *or of any* public or *private children's home* or orphans' asylum *located in such a school district.* * * * * * The board of education in any district in which * * * private children's home * * * is located, when requested by the governing body thereof, shall admit the children of school age of such home * * * to the public schools of the school district. The county commissioners shall pay the tuition of such pupils to the school or schools maintained by the board of education at a per capita rate which shall be ascertained by dividing the total expenses of conducting the *elementary* schools of the district attended, exclusive of permanent improvement and repairs, by the total enrollment in the elementary schools of the district, such amount to be computed by the month. * * * * The distributive share of school funds from the state for the children of such home or asylum shall then be paid to the county commissioners. But all youth of school age living apart from their parents or guardians and who work to support themselves by their own labor, shall be entitled to attend school free in the district in which they are employed."

It is noted that by the provisions of the above section all youth between six and twenty-one years of age, who are inmates of a private children's home, are entitled to attend the schools of the district in which such private children's home is located.

This department held on February 14, 1917, in Opinion No. 33, and in a matter very similar to that mentioned in your statement of facts, that the children who live in private children's homes are entitled to the advantages permitted under section 7681 of the General Code, above quoted, and that the governing body of said home may request the board of education of a school district to admit the children of school age who live in such home into the schools of the district in which such home is located.

But just how far do the rights of such pupils go? That is, what does the language of section 7681, which says the schools shall be free to the youth, mean? Does it mean that all provisions for school facilities shall be made, or does it simply mean that the tuition shall be paid?

It would be necessary to look not only to section 7681, G. C., if all provisions for school facilities shall be made, for in said section 7681 it is provided that the county commissioners shall pay the tuition of such pupils, thus indicating that it is not that all provisions for such facilities shall be made, but only that the tuition shall be paid. So that, when section 7681 provides that

the schools shall be free to all youth of private children's homes, it is meant that the tuition to such schools shall be paid.

General Code, section 7676, provides in part:

> "The board of education in any district in which a children's home * * * *is established by law*, when requested by the board of trustees of such children's home * * * when no public school is situated reasonably near such home * * * shall establish a separate school in such home * * * so as to afford to the children therein, as far as practicable, the advantages and privileges of a common school education. * * *"

This section clearly applies to only those children of school age who are inmates of a children's home, which home is "established by law"; that is, which home is established under part first, title 10, division 4, chapter 3, of the General Code, headed "children's homes". So that the "Smithfield Bethel" not having been established, as provided by law, that is, by the law of this state, the board of education of the district in which it is located is not required to establish a separate school in such institution. The fact, however, that the board of education is not required to establish a school in such institution will not prevent the children of such institution from receiving the advantages provided for by the above noted section 7681, as above referred to.

Looking also to the provisions of section 7678 G. C.,

> "In the establishment of *such* schools the commissioners of the county in which such children's home * * * is established shall provide the necessary school room or rooms, furniture, fuel, apparatus and books, the cost of which for such schools must be paid out of the funds provided for such institution. The board of education shall incur no expense in supporting such schools."

just to what class of schools did the legislature refer when it used the words "such schools" in the above quoted section? Manifestly, only to those schools which are established in homes, which homes in turn are established as provided by law, and clearly said language does not refer to homes established other than as provided by law; that is, does not refer to private homes. If, then, the advantages provided by the provisions of sections 7676 and 7678 are limited only to homes established as provided by law, the advantages provided by section 7681 are those only which can be claimed by children of private children's homes; that is to say, the tuition only of pupils from such private children's homes can be made a matter of public charge, to wit, a charge against the commissioners of the county in which such private children's home is located.

Answering your questions, then, I advise you:

First: Section 7676 G. C. applies only to children's homes established by law, and the provisions thereof would not apply to the Smithfield Bethel private children's home.

Second: The matter of providing schools for the Smithfield Bethel institution would be limited to the provisions of section 7681 G. C., that is, to the tuition of the pupils and such tuition would be paid for the children of school age therein, whether the parents or guardians are actual residents of the district or not.

Third: If the public schools, as now located in the district, are not reasonably accessible, no provision of law seems to have been made for school facili-

ties except that the pupils have a right to attend the public schools of the district under the tuition arrangement above noted. Very truly yours,

JOSEPH MCGHEE,
Attorney-General.

254.

APPROVAL—LEASE OF CANAL LANDS IN CITY OF HAMILTON, BUTLER COUNTY, TO CLAUDE E. FREEMAN AND ETHYL WELLER.

COLUMBUS, OHIO, May 10, 1917.

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

DEAR SIR:—I received your communication of March 22d in which you ask my approval of a certain lease of canal lands located in the city of Hamilton, Butler county, Ohio, to Claude E. Freeman and Mrs. Ethyl Weller.

I have examined the said lease carefully and find that the provisions of the same are in harmony with our statutes upon the subject, and that the same is correct in form.

I am therefore sending the same this day with my approval endorsed thereon to the governor for his approval. Very truly yours,

JOSEPH MCGHEE,
Attorney-General.

255.

ACCEPTANCE BY PUBLISHER OF MAXIMUM PRICE FIXED BY SCHOOL BOOK COMMISSION—CONSTITUTES CONTRACT FOR PERIOD OF FIVE YEARS—CONTRACT MAY BE MODIFIED WITH CONSENT OF BOTH PARTIES — SUBJECT TO RESTRICTION THAT PRICE CANNOT BE RAISED—REVISED EDITION OF TEXT BOOK DEFINED.

After a maximum price has been fixed for a text book by the school book commission, under the provisions of section 7710 General Code, it is not illegal to file such book again within five years. The fixing of such maximum price by the commission and acceptance by the publisher constitute a contract for five years. This may be abandoned or modified within said period but subject to the restriction that such price cannot be raised during such period.

A revised edition of a text book is a new edition containing any substantial change in the text.

COLUMBUS, OHIO, May 10, 1917.

HONORABLE F. B. PEARSON, *Superintendent of Public Instruction, Columbus, Ohio.*

DEAR SIR:—Your communication to this office of April 12th, 1917, is as follows:

"One of the book companies wrote the following letter:

" 'We have this day received the opinion of the attorney-general in regard to the five-year period. In accordance with this opinion we note that we are not allowed to file books except for the five-year period. Consequently, all the books which were originally filed between the years 1910 and 1915 were illegally refiled in 1915. Therefore, that filing no longer has any standing in the law. We should suppose, also, that all books filed between 1905 and 1910, which were refiled in 1910, also lost their standing, and consequently there could be at the present time no legal filing in the state except for books filed during the year 1916. A book published in 1911 and filed at that time, which was refiled in 1915 clearly has no standing, for the 1915 filing was illegal, according to the

attorney-general's opinion, and as it was not refiled in 1916, it has been sold illegally this year and will be until it is refiled.

"'We note that a very large proportion and probably all of the books on the list which we have asked you to file come under this list of illegal filings, or else are new books or are revised editions. We are going to ask you, therefore, to take immediate action on this list, in connection with the new interpretation of the law. As our list was filed in January, more than three months ago, we think that we are entitled to the benefit of the law requiring immediate action.

"'As the first filing under this law was in 1896 or 1897, is it not true that all subsequent filings have been illegal, as the even five-year period from that time would be filed in 1916 or 1917?'

"What shall we do with this?

"What is a revised edition of a text book?"

Your two questions are stated above. The first thing to note in reference to both of them is that neither of them presents any question of law either directly or by inference, but both may be answered with no inconvenience.

As to your first inquiry: "What shall we do with this?" It is sufficient to say that the consternation expressed by your correspondent in the communication you quote finds no warrant in the opinion referred to. There is no statement in the said opinion that any filing of books is illegal, but what is plainly expressed is that when the publishing house accepts the price fixed by the school book commission, the action of the said commission, together with such acceptance, constitutes a contract for the period of five years. The terms of this contract are that the books will be furnished for five years at that price to all boards of education who may desire to adopt or use the same.

Being a contract, however, it is liable to change, but only by mutual consent of the parties and in so far as such change may not be illegal or against public policy. From this it follows that the parties might abandon it at any time and make a new contract of the same kind and in the same manner. That, however, would be subject to this important restriction—that the school book commission could not in that manner in any five-year period permit the price of any such book to be raised.

From this it follows that any filing and adoption of such book in accordance with the section quoted in said opinion, which does not so raise the price of any text book is not illegal, but just as valid and binding as though no prior filing had ever taken place. This would seem to be sufficient indication of what you might do in reference to the communication you quoted.

Your second question is: "What is a revised edition of a text book?" This, as stated, is not a question of law, at least not purely so. As applied to the matter in hand the question is purely academic, as you will never be in any situation in which you have any doubt. A satisfactory definition, however, in reference to the situation under this statute, might be:

A revised edition of a text book is a new edition containing a change of text.

The statistician from your office has inquired verbally, with reference to this question, whether a change of a single word would constitute a revised edition. There appears to be no necessity for answering this question, but it may with safety be asserted that there would have to be some substantial change of the text. A very little change might constitute such revision. The change, however, to accomplish the practical purpose in the contemplation of this statute, would be a change of text, not a mere change in the appearance of the book.

Very truly yours,

JOSEPH MCGHEE,
Attorney-General.

256.

APPROVAL — FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN GEAUGA, HANCOCK, VINTON, WARREN AND WAYNE COUNTIES.

COLUMBUS, OHIO, May 10, 1917.

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

DEAR SIR:—I have your communication of May 4, 1917, enclosing certain final resolutions in reference to which you ask my approval. The resolutions enclosed have to do with the improvement of the following inter-county highways:

Geauga County—Hambden-Andover, I. C. H. No. 475, Sec. "B".

Geauga County—Cleveland-Meadville, I. C. H. No. 15, Sec. "K-1".

Hancock County—Lima-Sandusky, I. C. H. No. 22, Sec. "G" (in duplicate).

Vinton County—McArthur-Logan, I. C. H. No. 397, Sec. "H".

Warren County—Morrow-Lebanon, I. C. H. No. 252, Sec. "b" (Twp. road).

Wayne County—Akron-Wooster, I. C. H. No. 96, Sec. "O".

I have examined said final resolutions carefully and find them correct in form and legal with one exception, namely, I. C. H. No. 397, Vinton county, which has not been signed by the chief clerk of the highway department. But I am returning all these final resolutions with my endorsement placed thereon, with the request that the chief clerk sign the one final resolution upon its return to your department.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

257.

APPROVAL — FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN GUERNSEY, MADISON AND GALLIA COUNTIES.

COLUMBUS, OHIO, May 11, 1917.

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

DEAR SIR:—I have your communications of May 7 and 8, 1917, in which you enclose certain final resolutions and ask my approval of the same. The final resolutions enclosed in your communications are as follows:

Guernsey County—Sec. "A" Cambridge-Barnesville road, Pet. No. 1550, I. C. H. No. 107.

Madison County—Sec. "E" Urbana-London road, Pet. No. 2635, I. C. H. No. 194.

Gallia County—Sec. "E" Gallipolis-Jackson road, Pet. No. 2370, I. C. H. No. 399.

I have carefully examined said final resolutions and find them correct in form and legal. I am therefore returning the same to you with my approval endorsed thereon.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

258.

CONTRACT—BY COUNTY COMMISSIONERS INVOLVING EXPENDITURE OF MONEY—VOID UNLESS COUNTY AUDITOR FIRST FILES CERTIFICATE STATING THAT MONEY IS IN TREASURY TO THE CREDIT OF FUND FROM WHICH OBLIGATION IS TO BE PAID—STATE HIGHWAY COMMISSIONER CANNOT ENTER INTO VALID CONTRACT FOR ROAD IMPROVEMENT UNTIL COUNTY COMMISSIONERS HAVE ENTERED INTO CONTRACT TO PAY THEIR PORTION OF THE COST—IF CONTRACT BETWEEN HIGHWAY COMMISSIONERS AND BIDDER IS NOT VALID—CONTRACTOR CANNOT BE HELD TO TERMS OF HIS CONTRACT.

1. *Under the provisions of section* 5660 *G. C., a contract or agreement entered into by the county commissioners, involving the expenditure of money, is void, unless, before the contract or agreement is entered into, the county auditor files his certificate with the county commissioners, stating that the money required to carry out the terms of the contract is in the treasury to the credit of the fund from which the obligation must be paid.*

2. *Under the provisions of section* 1218 *G. C., the state highway commissioner cannot enter into a valid contract for the improvement of a highway, until the county commissioners have entered into a valid contract with him, that they will pay the part of the cost and expense of the improvement over and above that part to be borne by the state.*

3. *In the event that the contract entered into by and between the state highway commissioner and the lowest and best bidder, for the improvement of the highway, is not valid, then the contractor cannot be held to the performance of the terms of the contract.*

COLUMBUS, OHIO, May 11, 1917.

State Highway Department, Columbus, Ohio.

GENTLEMEN:—This department has a communication dated March 19, 1917, received through the state highway department, from Rinehart Brothers, in which communication certain information is requested, which communication from the department and from Rinehart Brothers reads as follows:

> "I quote below a letter received by me from Messrs. Rinehart Brothers with whom this department has an agreement for the construction and completion of section 'Q' of the Cleveland-East Liverpool road, intercounty highway No. 12, main market road No. 3, in Columbiana county.
>
> " 'Hon. Clinton Cowen, State Highway Commissioner, Columbus, Ohio.
>
> " 'Dear Sir:—Referring to the matter of the improvement of section 'Q' of the Cleveland-East Liverpool road, I. C. H. No. 12, petition No. 2193, in St. Clair township, Columbiana county, I desire to call your attention to the following considerations:
>
> " '1. The date of the letting on this road was April 7, 1916. We were the low bidders, and not receiving any notice that we had been awarded the contract, we wrote you on April 19, 1916, inquiring whether we were to receive the contract. You stated, under date of April 21, 1916, that the bonds of the county had not been sold, and the date for the sale of the same had not been definitely fixed, and that the contract could not be officially awarded until the auditor's certificate of funds was on file with

you. On April 29, 1916, we wrote you that we were anxious to begin work immediately, that the county commissioners would not be able to finance their portion of the improvement before June 1, and asking that we be given the contract and allowed to start the work and be paid out of the state funds, until the county had sold its bonds. You replied under date of May 1, 1916, that this could not be done. At the time we bid on this work we were in shape to, and desired to begin work promptly and push same to completion.

"'2. On July 31, 1916, you wrote us that we had been awarded the contract and sent us a copy of the same, your letter and copy of the contract being received on August 1, 1916, the very day set for the completion of the work.

"'3. We were required to sign a contract and bond at the time we filed our bid, and to file the contract and bond with your department, although there was no assurance at that time that we would be awarded the contract. We were not willing on August 1, 1916, to undertake the construction of this road for the sum bid on the 7th day of April of that year. This position on our part was due to labor conditions, and to the great increase, in the meantime, in the cost of labor and some materials. We think that both legally and morally our bid on April 7th, was conditioned on our being allowed to start the work within a reasonable time thereafter, and that our bid or offer, to be binding on us, should have been accepted within a reasonable time after April 7th, and was not a valid and subsisting bid which you could accept on July 31, 1916. We have no desire to escape from any legal liability, but cannot see our way to build a road under changed conditions, and several months after the date of our bid, when to do so would involve us in a loss of several thousands of dollars.

"'We wish to make it particularly clear that we are not in any way criticising you or your department, either for the way this matter was originally handled, or for your present attitude in the matter. We understand fully that the delay was due to the inability of the county authorities to finance their portion of the work, and was not due in any way to your department. We also understand fully that, under circumstances such as these, you may not care to take the responsibility of doing what we think to be the only fair thing to do, to wit: Cancel the entire arrangement and readvertise the work.

"'There are legal questions involved which we have not assumed to pass on, but which we have referred to our counsel, and while, of course, we would be very glad if you could see your way clear to take the initiative in this matter and cancel the entire arrangement to date, yet if, as we apprehend, you do not care to take this responsibility, we do desire to request of you that you submit the entire matter to the attorney-general of the state, who—as we were informed by you—is your legal adviser, with a request that he give you an opinion as to the right to hold us upon any alleged contract for the construction of this road.

"'We regret the situation which this matter has reached, but cannot see where we are in fault. We are quite sure you will not criticise us for taking such steps as we deem necessary to protect our own interests, and we would be very grateful to you, and would feel that you had treated us with every possible consideration, if you would comply with the request contained in this communication, and refer the entire matter to your legal adviser for an opinion, as to whether we are liable on the alleged contract and can be held either to do this work, or to pay the

difference between the contract price and the cost of completing the work by you—either on another contract or on force account arrangement.

"'Our Columbus counsel is Mr. C. H. Duncan, and if you can see your way clear to submit this matter to the attorney-general, Mr. Duncan desires to submit a brief to that official covering the legal questions involved. Very truly yours,

"'(Signed) RINEHART BROS.,

"'Per Jas. S. Rinehart.'

"You will note the contractors have not commenced work upon the above improvement and question their liability under the above contract. I am desirous of commencing work on the above improvement as soon as possible and would, therefore, appreciate your advising me as to whether or not our agreement with the above named firm constitutes a binding obligation on them.

"Our files in regard to this entire matter are available for your examination at any time."

In considering the communication addressed to this department and in looking over the files in your office, I find the following to be the facts in reference to the matter upon which you ask my opinion:

On April 7, 1916, you opened the bids filed with you for the construction of the highway in question.

At the same time that bids were filed for the construction of this work, Rinehart Brothers, together with other bidders, filed their contract, duly signed on their part, together with a bond for the faithful performance of their duties under the contract.

On April 24, 1916, the county commissioners of Columbiana county adopted a resolution in which they agreed to assume their share of the cost and expense of the improvement of the said highway.

On July 14, 1916, the county auditor certified to the county commissioners that the money to take care of the county's share of the cost and expense of the improvement was in the treasury, to the credit of the fund from which the county's share of the cost and expense must be paid.

Shortly after this date, you signed the contract on behalf of the state and forwarded the same, completely executed, to Rinehart Brothers. They received the contract on July 31, 1916, just one day before the work provided for in the contract should be completed, the contract providing that the work should be completed by August 1, 1916.

No work has been done by Rinehart Brothers under said contract, and they refuse to proceed with the same.

In view of all the above, your question is as to whether said Rinehart Brothers can be held to the terms of the contract entered into by them, or whether they should be released from the contract.

First, I desire to consider a purely legal proposition based upon the following facts:

The resolution of the county commissioners, agreeing to assume their share of the cost and expense of the improvement, was adopted April 24, 1916. The certificate of the county auditor, to the effect that the money to take care of the county's share of the cost and expense of said improvement was in the treasury, to the credit of the proper fund, was not filed with the county commissioners until July 14, 1916, almost three months after the county commissioners entered into the contract with the state highway department. This delay was due to the fact that the necessary steps had not been taken by the county commissioners, enabling the county auditor to make said certificate. The contract was not fully

entered into between Rinehart Brothers and the state until some time after July 14, 1916, as you did not sign for the state until after the certificate had been made by the county auditor. Let us consider these facts in the light of the law.

Section 5660 G. C. reads as follows:

> "The commissioners of a county, the trustees of a township and the board of education of a school district, shall not enter into any contract, agreement or obligation involving the expenditure of money, or pass any resolution or order for the appropriation or expenditure of money, unless the auditor or clerk thereof, respectively, first certifies that the money required for the payment of such obligation or appropriation is in the treasury to the credit of the fund from which it is to be drawn, or has been levied and placed on the duplicate, and in process of collection and not appropriated for any other purpose; money to be derived from lawfully authorized bonds sold and in process of delivery shall, for the purpose of this section, be deemed in the treasury and in the appropriate fund. Such certificate shall be filed and forthwith recorded, and the sums so certified shall not thereafter be considered unappropriated until the county, township or board of education, is fully discharged from the contract, agreement or obligation, or as long as the order or resolution is in force."

It will be noted by the provisions of this section that the commissioners of a county cannot enter into any contract, agreement or obligation involving the expenditure of money unless the auditor *first* certifies that the money required for the payment of such obligation is in the treasury, to the credit of the fund from which it is to be drawn.

What conclusion must we necessarily draw from the facts as above set forth, in view of the provisions of this section? The agreement of the county commissioners was entered into on April 24, 1916, and the certificate of the county auditor was not filed until July 14, 1916. The courts of our state are practically unanimous to the effect that the failure to comply with the provisions of sections such as section 5660 G. C., renders contracts entered into by officials void. From some of these decisions I shall quote later on.

Let us go one step further in reference to this matter. Section 1218 G. C. provides as follows:

> "* * * No contract shall be let by the state highway commissioner in a case where the county commissioners * * * are to contribute a part of the cost of said improvement, unless the county commissioners of the county in which the improvement is located shall have made a written agreement to assume in the first instance that part of the cost and expense of said improvement over and above the amount to be paid by the state. * * *."

From this provision it is readily seen that the state highway commissioner cannot enter into a contract for the improvement of highways until the county commissioners of the county in which the improvement is located shall first enter into a written agreement to assume their share of the cost and expense of the improvement.

In the case under consideration, the county commissioners entered into a contract in form, but in reality the contract was void, due to the failure of the county auditor first to certify that the money was in the treasury, necessary to enable the county commissioners to carry out the contract.

Could it be said that the state highway commissioner would have jurisdiction

to proceed under the provisions of section 1218 G. C., under such conditions? If the contract of the county commissioners is void, the fact that the state highway commissioner acted upon it and entered into the contract with Rinehart Brothers could not make it valid.

It is plainly evident that the provisions of section 5660 G. C. were enacted by the legislature for the protection of the taxpayer; were enacted that the taxpayer might have a remedy against the careless and sometimes corrupt tax spender, and that he might have the right to ask the courts to protect his rights by way of enjoining the indiscriminate and profligate expenditure of money. That this was the purpose of the legislature in enacting said section, is quite evident from a careful consideration of the same. The courts are unanimous in holding that this was the evident intention and purpose of the legislature in enacting the above section.

In view of this intention of the legislature, suppose we should hold that if the state highway commissioner proceeds to enter into a contract for the improvement of a highway, based upon a void contract of the county commissioners, the void contract is rendered valid and the proceedings from there on are legal and regular, how could the taxpayer assert his rights under the provisions of section 5660? He could not so do, for if the contract entered into with Rinehart Brothers is a legal one, the county commissioners would be compelled to pay their share of the cost and expense of the improvement, and the taxpayer would have no right to an injunction to prevent the payment of the county's share.

Supposing, however, we should hold that a taxpayer would have the right, under the contract entered into by Rinehart Brothers, to enjoin the county officials from paying the county's share of the cost and expense of the improvement. What would be the result? We would first hold that Rinehart Brothers are compelled to proceed with the work to be performed under and by virtue of the contract, and then run the risk that some taxpayer of Columbiana county might enjoin the county officials from paying them for the work done, in so far as that part of the pay that is to come from said county is concerned.

Hence, looking at the question from any angle we may, we are driven to the same conclusion, namely, that not only is the contract between the county commissioners and the state highway department void, on account of the failure of the county auditor to first file the said certificate, but also the action of the state highway commissioner, in entering into the contract with Rinehart Brothers, based upon this void contract, is also void and illegal. If it be void and illegal, neither Rinehart Brothers nor the state can be held to the terms and provisions of the same. As said before, the courts of our state are fairly unanimous in reference to the proposition that a certificate must first be filed.

In the case of Caldwell, a taxpayer, v. Marvin et al., 8 N. P. (N. S.) 387, it is stated in the syllabus:

> "But where no certificate of the clerk, that the funds requisite for the payment of such a claim were in the treasury and unappropriated, was filed prior to the adoption of the resolution authorizing payment, as required by section 2834b, the resolution is without effect and an injunction will lie against such payment."

In the opinion the court say (p. 390):

> "It has been repeatedly decided, and defendants admit, that the absence of the prior certificate as to funds when required by the above section or similar sections invalidates the resolution so that in an action at law no recovery could be had against the board upon such resolution; nor could

an action in *quantum meruit* be maintained for the value of any services rendered under any such resolution. (Citing cases reported in 58 O. S. 558; 60 O. S. 406; 65 O. S. 219; 79 O. S. 323-346)."

The court further says (p. 392):

"Nevertheless, in making such payments it must proceed in the manner prescribed by law, and before the present clerk could draw an order for the payment of money and before the treasurer could pay such order, a resolution by the board of education was necessary. Before such resolution had any force and effect under section 2834b, a certificate of the clerk was necessary as to funds being in the treasury. There was no such certificate made or filed prior to the resolution of April 22, 1909, and no reason is given for such omission. The payment of any money, therefore, under such resolution should be enjoined."

In Guy S. North v. Commissioners of Huron County, 10 O. C. C. (N. S.) 462, it is stated in the syllabus:

"A contract between county commissioners and one who undertakes to pike a county highway is invalid, where no record of the meeting of the commissioners was made, and no auditor's certificate was filed or recorded as required by section 2834b, Revised Statutes; such a contract cannot be enforced against the county; nor can an equitable accounting be granted for the labor and materials expended in improving the road."

In State of Ohio ex rel. M. A. Fanning v. The Board of County Commissioners, etc., 19 O. C. C. 627, the syllabus reads as follows:

"Sec. 2834b R. S. is mandatory and is made condition precedent to be complied with before the board of county commissioners can make a lawful contract, and the certificate is as much a condition precedent as is the fact that the funds are provided.

"A failure of the petition in a suit on such a contract, to aver that the proper certificate was first obtained, is fatal to the action."

In City of Lancaster v. Miller, 58 O. S. 558, the second and third branches of the syllabus read as follows:

"2. Nor will such contract impose on the corporation a valid obligagation even if bids were advertised for pursuant to said section 2303, unless the auditor, or clerk, of the corporation, as the case may be, 'shall first certify that the money required for' that purpose 'is in the treasury to the credit of the fund from which it is to be drawn,' etc., as required by section 2702, Revised Statutes.

"3. Where either of such requirements has been omitted the municipality will not by the act of its officers be estopped to set up such omission as a defense to an action brought against it on such contract."

I desire also, in this connection, to call attention to an opinion rendered by my predecessor, Hon. Edward C. Turner, on April 3, 1916, to Hon. Clinton Cowen, state highway commissioner, Vol. I, p. 602, Opinions of the Attorney-General for 1916. While the facts in the case upon which Mr. Turner rendered his opinion are somewhat different from the facts upon which I am basing this opinion, yet

the reasoning of Mr. Turner and the conclusion to which he comes throw some light upon the case before me, and I approve the conclusion arrived at in said opinion.

While the above is decisive of the case, yet I mention one other matter in passing. When you accepted the bids to be opened on April 7, 1916, those who bid upon the work had the right to assume that, within a reasonable time thereafter, taking into consideration the time at which the work was to be completed as well as other matters incident to the letting of the contract, the contract would be fully entered into. It could hardly be said that July 31, 1916, would be a reasonable date for the complete execution of the contract, when the contract itself provided that the work under the contract was to be completed on August 1, 1916.

The cost of labor and material varies so much from time to time that a contractor has the right to assume he will be able to enter upon the performance of the work within a reasonable time after he is adjudged to be the lowest and best bidder; but, as said before, it is not necessary to decide the case submitted by you upon this question, inasmuch as you have not jurisdiction to proceed under the provision of section 1218 G. C., due to the fact that the county commissioners had not entered into a valid contract with the state, to bear their share of the cost and expense of the improvement.

Hence, answering your question specifically, it is my opinion that Rinehart Brothers cannot be held under their bid and the contract entered into by and between them and the state of Ohio, and therefore they should be released from the contract.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

259.

LOANS—ON SECURITIES ENUMERATED IN PARAGRAPHS b, c and d OF SECTION 9758 G. C.—SUBJECT TO RESTRICTIONS AND LIMITATIONS UNDER SECTION 9754 G. C.

Loans made on securities enumerated in paragraphs b, c and d of section 9758 G. C., are subject to the limitations and restrictions prescribed by section 9754 G. C.

COLUMBUS, OHIO, May 12, 1917.

HON. PHILLIP C. BERG, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—On April 24, 1917, you made the following request for my opinion:

> "Please advise as to whether or not loans made on the securities enumerated in paragraphs b, c and d of section No. 9758 are subject to the limitations and restrictions prescribed by section No. 9754."

I refer you to an opinion rendered by Hon. T. S. Hogan, attorney-general, to H. F. C. Baxter, superintendent of banks, on October 31, 1911 (Opinions of Attorney-General, 1911-1912, Vol. I, page 788). This opinion is upon the same question now asked by you and I fully concur in it.

I may add, in addition, that section 9754 is so clear upon the question of limitations on loans, as to need no interpretation. This section is as follows:

"A bank doing business as a commercial bank, shall not lend, including overdrafts, to any one person, firm or corporation, more than twenty per cent. of its paid in capital and surplus, unless such loan be secured by first mortgage upon improved farm property in a sum not to exceed sixty per cent. of its value. The total liabilities, including overdrafts, of a person, company, corporation, or firm to any bank, either as principal debtor or as security or indorser for others, for money borrowed, at no time shall exceed twenty per cent. of its paid-in capital stock and surplus. But the discount of bills of exchange drawn against actually existing values, and the discount of commercial or business paper actually owned by the person, company, corporation or firm negotiating it, shall not be considered as money borrowed."

You will note that the section is general and covers all transactions of commercial banks; that it makes one exception as to loans, which may be made in excess of 20% of the paid-in capital and surplus of the bank, that exception is a loan secured by first mortgage upon improved farm property, in a sum not to exceed 60% of its value. There is no other exception as to loans. The section not only forbids a loan of more than 20% of its paid-in capital and surplus by a commercial bank to any one person, firm or corporation, but also prohibits a bank from allowing any person, company, corporation or firm to become liable to it in an amount in excess of 20% of its paid-in capital stock and surplus, by direct loan, by overdrafts, or as security or indorser for others, for money borrowed.

There is no question but that as to loans, section 9758 is governed by section 9754. Section 9758 specifies certain securities in which commercial banks may invest their capital and surplus, or upon which they may loan the same; it has no bearing whatever, upon the limitation of the amount of the loan, that is governed by section 9754.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

260.

WHERE ADJOINING SCHOOL DISTRICTS MAINTAIN SAME GRADE HIGH SCHOOLS—A PUPIL ATTENDS IN DISTRICT OTHER THAN RESIDENCE DISTRICT—ALTHOUGH SCHOOL IN HIS OWN DISTRICT NEARER TO HIS HOME—HIS RESIDENCE DISTRICT NOT LIABLE FOR TUITION—TUITION MAY BE COLLECTED FROM PUPIL OR PARENT—WHEN NECESSARY TO ASCERTAIN DISTANCE PUPIL LIVES FROM HIGH SCHOOL—DISTANCE SHOULD BE MEASURED BY MOST DIRECT PUBLIC HIGHWAY FROM SCHOOL TO PUPIL'S HOME.

Adjoining school districts "A" and "B" each maintain third grade high schools. A high school pupil resides in district "A," more than four miles from school, although nearer to it than to the school he attends in district "B." District "A" is not liable for the tuition of said pupil to district "B."

Where any question arises as to the distance a pupil lives from a high school and it is necessary to ascertain same, such distance is measured "by the most direct public highway from the school to the nearest part of the curtilage surrounding the home of the pupil."

Where a high school pupil attends school in a district other than in the district of his residence and where his district is not legally bound to pay his tuition, such tuition may be recovered from the parent or guardian of the pupil, or the pupil, depending on the circumstances.

COLUMBUS, OHIO, May 12, 1917.

HON. CHARLES H. JONES, *Prosecuting Attorney, Jackson, Ohio.*

DEAR SIR:—Complying with your request of March 24, 1917, I hereby submit my opinion on the following proposition.

"Township A is this year maintaining a third grade high school, as is also a neighboring township B. 'X,' a Boxwell graduate of township A, who resides more than four miles away from the high school maintained by his board of education, but nearer to it than to the high school maintained by township B, has been attending the high school in township B, and the latter has presented a claim to the board of education of township A for his tuition.

"QUERY: Is the board of education of township A liable for the tuition? If not, can township B recover from 'X?'

"Also 'Y,' a resident of township A, about whose distance from the school so maintained there is some question, has been attending a first grade high school in a neighboring township C.

"QUERY: Is the board of education of township A liable for the tuition of 'Y?' If not, can township C recover same from 'Y?'

"Township A has made the maximum levy permitted by law, and all the funds so raised are necessary for the support of its schools. In fact, the amount so raised is and has been insufficient, so that township A has been meeting the deficit through state aid.

"In the foregoing statement the term 'township' is to be understood as meaning 'township rural school district.'"

Your inquiry calls for a consideration of the language of section 7748 G. C., which said section reads in part as follows:

> "A board of education providing a third grade high school, as defined by law, shall be required to pay the tuition of graduates from such school residing in the district at any first grade high school for two years, or at a second grade high school for one year. Should pupils residing in the district prefer not to attend such third grade high school, the board of education of such district shall be required to pay the tuition of such pupils at any first grade high school for four years, or at any second grade high school for three years, and a first grade high school for one year * * *, except that, a board maintaining a * * * third grade high school is not required to pay such tuition when the maximum levy permitted by law for such district has been reached and all the funds so raised are necessary for the support of the schools of such district. No board of education is required to pay the tuition of any pupil for more than four school years; except that it must pay the tuition of all successful applicants who have complied with the further provisions thereof residing more than four miles by the most direct route of public travel from the high school provided by the board when such applicants attend a nearer high school, or in lieu of paying such tuition the board of education maintaining a high school may pay for the transportation of the pupils living more than four miles from the said high school maintained by said board of education to said high school * * *"

Two portions of the above quoted part section seem to be in their terms contradictory, and it is to those two portions that my attention will be particularly directed.

The first portion reads as follows:

> "A board maintaining * * * a third grade high school is not required to pay such tuition when the maximum levy permitted by law for such district has been reached and all the funds so raised are necessary for the support of the schools of such district."

The second portion reads:

> "Except that it must pay the tuition of all successful applicants, who have complied with the further provisions thereof, residing more than four miles by the most direct route of public travel, from the high school provided by the board, when such applicants *attend a nearer high school.*"

In order to determine the legislative intent some light will be found by noting the history of said legislation. Tuition was first provided for high school pupils in 1892 when section 3 of house bill No. 14 was passed March 22, 1892, and found in 89 Ohio Laws 124. Said section read as follows:

> "The tuition of such graduates as may attend any village or city high school of the county may be *paid* by the board of education of the special or township district in which such pupils reside."

The said house bill was an act to provide for the graduation of pupils from the common schools of subdistricts and led up to what was later termed the

Boxwell and the Boxwell-Patterson laws. Said above mentioned section 3 of house bill No. 14 was amended on March 28, 1902, 95 O. L. 72. The portion of said amended section necessary for our purpose reads as follows:

> "The tuition of pupils holding diplomas and residing in township special or joint districts, in which no high school is maintained, shall be paid by the board of education of the district in which they have legal school residence, such tuition to be computed by the month and an attendance any part of the month shall create a liability for the entire month; but a board of education maintaining a high school shall charge no more tuition than it charges for other non-resident pupils, and no board of education shall be required to pay the tuition of any pupil for more than four school years; *provided the board of education shall be required to pay the tuition of all successful applicants who have complied with the provisions of this act, residing more than three miles from the high school provided by said board, when said applicants attend a nearer high school.*"

A marked change is noted between the original and the amended section last quoted. Only the tuition of pupils who hold diplomas and reside in school districts in which no high school was maintained was permitted to be paid by the board and because it will be referred to later it is noticeable here that the provisions with reference to distance from school first appears and the distance fixed at three miles beyond which all pupils resident thereof shall be entitled to tuition provided such pupils attend a nearer high school. Said section was again amended March 23, 1909, as found in 100 O. L. 74. It reads in part as follows:

> "The tuition of pupils holding diplomas and residing in township, special, or joint subdistricts, in which no high school is maintained, shall be paid by the board of education of the school district in which they have legal school residence, such tuition to be computed by the month and an attendance any part of the month shall create a liability for the entire month; but a board of education maintaining a high school shall charge no more tuition than it charges for other non-resident pupils. A board of education providing a third grade high school as defined by law shall be required to pay the tuition of graduates from said school residing in the district at any first grade high school for two years, or at a second grade high school for one year and a first grade high school for one year. * * * provided, however, any such board of education maintaining a * * * third grade high school shall not be required to pay any such tuition after the rate of taxation permitted by law for such district shall have been reached and all the funds so raised are required for the support of the schools of said district. No board of education shall be required to pay the tuition of any pupil for more than four school years; provided the board of education shall be required to pay the tuition of all successful applicants, who have complied with the provisions of this act, residing more than three miles from the high school provided by said board, when said applicants attend a nearer high school. * * *"

For the first time in the above quoted portion of said amended section appears the language of General Code section 7748 with reference to a board of education, which provides only a third grade high school, being required to pay the tuition of pupils who attend a second or first grade high school. That is to say, if a board of education of a district provides only a third grade high school and instead of

attending such third grade high school such pupils, resident thereof, desire the schooling provided in the advanced high schools, to wit, a second or first grade high school, then the board of education which maintained only a third grade high school shall be required to pay the tuition of pupils who attended the first grade high school for a period of two years, or was required to pay the tuition of such pupils at a second grade high school for one year and a first grade high school for one year, and it is further noted that the distance of three miles residence provided for is by said last amended section changed to *four*. That is to say, a high school pupil who lived more than *four* miles from the high school provided by the board and who attended a nearer high school, was entitled to have the tuition at such nearer high school paid by the board of the district of the residence of such pupils. Said section was again amended in 101 O. L. 296, to read in part as follows:

> "A board of education providing a third grade high school, as defined by law, shall be required to pay the tuition of graduates from such school residing in the district at any first grade high school for two years or at a second grade high school for one year, and a first grade high school for one year. * * * Except that a board maintaining a * * * third grade high school is not required to pay such tuition when a levy of twelve mills permitted by law for such district has been reached and all the funds so raised are necessary for the support of the schools of such district. No board of education is required to pay the tuition of any pupil for more than four years; except that it must pay the tuition of all successful applicants, who have complied with the further provisions thereof, residing more than four miles by the most direct route of public travel from the high school provided by the board, when such applicants attend a nearer high school or in lieu of paying such tuition the board of education maintaining a high school may pay for the transportation of the pupils living more than four miles from said high school maintained by said board of education to said high school. * * *"

The same provisions with reference to the tuition of pupils who have graduated from the primary schools in a district in which a third grade high school is maintained are imposed in the last quoted amendment and also the same provision with reference to a board not being required to pay when the maximum levy is reached, which in the last quoted amendment is designated as twelve mills, and the same provision with reference to the four mile limitation as was provided by the former legislation and an added provision that the board of education might pay for the transportation of the pupils living more than four miles from the high school to the high school maintained by the board in lieu of paying tuition to any nearer high school which might be attended by the pupils. Said section, as above quoted, was carried into the new school code, 104 O. L. 126, to read as is now provided in General Code section 7748 G. C., above noted.

The above history, then, reveals that the latter portion of said section 7748 G. C., referred to at the outset as being in apparent contradiction to a former portion, was the first to be enacted as a portion of the school laws of this state and said provision has remained a part of the school laws ever since its original enactment, the only change therein being that of distance, from three to four miles; and when the provision was enacted with reference to the paying of tuition at first and second grade high schools by a board which maintained only a third grade high school, it was enacted in said section which contained the provision

with reference to distance above mentioned and was placed in the former part of said section, thus permitting the provision with reference to distance to stand in the section and to stand as a latter provision therein.

Several reasons then occur to me why both of said seemingly contradictory statements shall be given effect. In the first place when the maximum levy permitted by law has been reached and all of the funds so raised are necessary for the support of the schools of the district, the law provides that the board is not required to pay *such* tuition. That is, a particular tuition, the tuition to the first grade high school for two years or the first grade high school for one year and the second grade high school for one year. Another reason is that the language with reference to distance was permitted to remain as a part of said section, in its original mandatory form, and refers to a different class of tuition, i. e., tuition in lieu of transportation, and the third reason is the fact that said language with reference to distance was contained in the latter portion of the section, thereby controlling whatever might precede.

It is also worthy of being mentioned that an *exception* is made to the general provisions for the payment of tuition in favor of those pupils who reside more than four miles from such high school and who attend a nearer high school. Exceptions in statutes have the effect of modifying the general rule.

It is held in Lewis' Sutherland Statutory Construction, volume 2, section 352, that:

> "The exception of a particular thing from the operation of the general words of a statute shows that in the opinion of the law maker the thing excepted would be within the general words had not the exception been made."

Consequently, then, the general rule that the board was not required to pay the tuition when the limits of taxation had been reached and the funds so raised were necessary for the support of the schools was modified by the exception that said general rule should not prevail if the pupil resided more than four miles from the high school provided by the board and could attend a nearer high school. The above section No. 7748 G. C. was formerly Revised Statutes 4029-3 and construction was placed thereon by Allread, J., in New Madison School District Board of Education v. Harrison Township Board of Education, 14 O. D. 62, as follows:

> "Does section 3 of that act, section 4029-3 Rev. Stat., require a township board of education maintaining a high school within the township to pay the tuition of resident pupils within the township but more than three miles from the township high school and who attend a nearer high school? * * * It was the purpose, undoubtedly, of this act to give every pupil of a township having the necessary diploma the benefit of a high school at the expense of the township. This diploma admits the pupil to any high school in the state, but before the tuition can be charged to the township the case must be brought within the scope of section 3 of the act, section 4029-3 Rev. Stat. * * *
>
> "Where a high school is maintained by the township board of education * * * no liability can be created against such township board of education by any resident pupil attending another high school in the state, except where such pupil resides more than three (now four) miles from such township high school * * * and nearer another high school. * * *
>
> "Where a high school is maintained by the township board of education in a township * * * any high school pupil residing more than three miles from such township high school * * * *may attend a nearer high school,*

*and in such case the township board of education of the district in which the pupil resides is required to pay the tuition of such pupil in such nearer high school * * *."*

From all the above, then, I must conclude and advise you that the high school pupil who resides more than four miles from the high school of his district must attend a nearer high school before the board of education of the district in which he resides is required to pay his tuition, and since this was not done in your case, township "A" is not liable to township "B" for said tuition.

Coming now to your second question, that is, "Y," a resident of township "A," about whose distance from the school so maintained there is some question, has been attending a first grade high school in a neighboring township "C"; is the board of education of township "A" liable for the tuition of "Y?" From my answer to your first question you will note it is impossible to answer your second without being advised definitely as to the distance the pupil "Y" lives from school. The rule for measuring distance in the transportation of pupils is as follows:

> "By the most direct public highway from the school to the nearest part of the curtilage of its residence. (58 O. S. 390.)"

Not knowing how far the pupil lives from his own school, it is impossible for me to determine whether or not he is entitled to either class of tuition, i. e., whether or not he is entitled to tuition in lieu of transportation or tuition at a first grade high school when he lives in a district which maintains only a third grade high school.

In answer to your third question, I advise you that if the board of education of the district of the residence of a pupil is not liable for such pupil's tuition, the parent or guardian of the pupil, or the pupil, depending on circumstances, would be liable therefor.

Yours very truly,
JOSEPH MCGHEE,
Attorney-General.

261.

APPRAISEMENT—WHEN SAME BECOMES NECESSARY—IN EXAMINATION OF A BANK—TO DETERMINE AMOUNT OF REAL ESTATE OWNED BY BANK—EXPENSE SHOULD BE PAID BY BANKING DEPARTMENT—EXPENSE OF SPECIAL EXAMINATION—AT REQUEST OF BANK—SHOULD BE PAID BY BANK.

1. *When, in the course of a regular examination of a bank, it becomes necessary to have an appraisement in order to determine the value of real estate owned by a bank, the expense of such appraisement should be paid by the banking department.*

2. *When a special examination is made of a bank, at the request of the bank, all the expense of such examination is to be paid by the bank.*

COLUMBUS, OHIO, May 14, 1917.

HON. PHIL. C. BERG, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—On March 19, 1917, you made the following request for my opinion:

> "In making an examination of a bank, a wide difference of opinion

exists between one examiner and the owners of the bank as to the value of the real estate owned by the bank. The existence and continued operation of the bank depended upon the value of the real estate.

"This department chose an appraiser, the bank chose one; the two thus chosen selected a third and the property was appraised by them.

"Should the bank or should this department pay for the services thus rendered?"

There is no provision of law authorizing this method of determining the value of real estate owned by a bank when there is a difference of opinion between the bank and the examiner as to the value of such real estate, but I suppose that the examiner is justified in following the method which will enable him to place a proper valuation upon such real estate, and if in the instance you give an appraisement of this character was necessary in order that the examiner, and yourself, might be certain as to the value of the real estate, then it seems to me the expense was properly incurred in the examination of the bank.

Under section 736 of the General Code, the banks of Ohio subject to inspection and examination by the superintendent of banks, are compelled to pay fees for the purpose of maintaining the department of banks and the payment of all expenses incident thereto, including the expenses of inspection and examination; so that the banks themselves pay all the expenses of that department and the same is maintained without any assistance from the state.

The first paragraph of section 736 G. C., which shows the purpose for which these fees are assessed, is as follows:

"That for the purpose of maintaining the department of the superintendent of banks and the payment of expenses incident thereto, and especially the expenses of inspection and examination, the following fees shall be paid to the superintendent of banks of Ohio: * * *"

It would seem, therefore, that if you or your examiner considered an appraisement of this character necessary, in arriving at the value of the real estate of the bank being examined, then such expense should be paid by your department.

When special examinations are made at the request of a bank, by virtue of sections 720, 721 and 735, General Code, the expenses are to be paid by the bank, but I presume the question which you submit arose during the regular examination of the bank; therefore, it seems to me that the expense of the same should be paid by your department.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

262.

BANK—MAY NOT OPERATE A BRANCH BANK OUTSIDE THE LIMITS OF THE CITY, VILLAGE OR TOWNSHIP—NAMED IN ARTICLES OF INCORPORATION.

A bank may not operate a branch bank outside the limits of the particular city, village or township named in its articles of incorporation. A bank, located in one village, may not operate as a branch a bank located in another village, although both villages are in the same township.

COLUMBUS, OHIO, May 14, 1917.

HON. PHIL. C. BERG, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—On April 24, 1917, you made the following request for my opinion:

> "Please advise whether or not a person owning two banks in different villages of the same township, and desiring to incorporate both, it will be necessary to incorporate each or can one be established as the principal institution and the other as a branch."

There is no authority under the laws of Ohio for a bank establishing a branch outside the limits of the particular city, village or township, named in the articles of incorporation. Therefore, one of the banks to which you refer could not operate the other as a branch, but being located in different villages they should incorporate separately.

Upon the subject of branch banks under the Ohio law I refer you to the opinion of Hon. Timothy S. Hogan, attorney-general, rendered to Hon. Emory Lattanner, superintendent of banks, on May 28, 1914. (See Opinions of the Attorney-General, 1914, Vol. I, page 727.) The reference in said opinion of May 28th to a former opinion of June 16, 1913, is erroneous. The reference should be to an opinion rendered May 13, 1913. (See Opinions of the Attorney-General, 1913, Vol. I, page 806.)

I concur in this opinion and suggest that you be guided by it whenever application is made to you for your consent to the establishment of branch banks; and also that the same be applied to banks which are now operating branches, that is, the branch must be operated as an integral part of the corporation, and the books of the corporation must at all times show its financial condition in such manner as to make it unnecessary for an examiner to make a separate examination of the branch or branches.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

263.

APPROVAL—TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE OF THE CITY OF CLEVELAND, OHIO.

COLUMBUS, OHIO, May 15, 1917.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds issued by the city of Cleveland, Ohio, and purchased by

the Industrial Commission, in the sum of $684,000.00, the same being bonds issued by said city in anticipation of the collection of assessments for improvement by paving of certain streets in said city."

This department has carefully examined the transcript of the proceedings of the council and other officers of the city of Cleveland relating to the above bond issue, and supplementing the examination of the transcript furnished to this department by the director of finance of said city, this department caused a personal investigation to be made into the legislation and other proceedings relating to the issue of the said bonds.

As a result of said examination I advise you that said proceedings have been taken with respect to each improvement covered by this bond issue in strict conformity to the provisions of the charter of the city of Cleveland relating to the matter of local improvements and the assessments therefor. The charter of the city of Cleveland does not cover the matter of issuing bonds in anticipation of the collection of assessments for the improvement of streets provided for in the charter and the issue of the above bonds has been provided for according to the sections of the General Code of Ohio relating to the subject matter, and such proceedings with respect to this bond issue have been in all respects as required by law.

I am, therefore, of the opinion that the bonds of the city of Cleveland provided for in said proceedings according to the bond form submitted will, when signed by the proper officers of the said city and delivered to you, be valid and subsisting obligations of the city of Cleveland.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

264.

APPROVAL—TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE OF THE CITY OF CLEVELAND, OHIO.

COLUMBUS, OHIO, May 15, 1917.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds issued by the city of Cleveland, and purchased by the Industrial Commission in the sum of $90,000.00, the same being bonds issued by the said city in anticipation of special assessments for the improvement of certain streets therein by laying sewers."

This department has carefully examined the transcript of the proceedings of the council and other officers of the city of Cleveland relating to the above bond issue, and supplements the examination of the transcript furnished to this department by the director of finance of said city, this department caused a personal investigation to be made into the legislation and other proceedings relating to the issue of the said bonds.

As a result of said examination I advise you that said proceedings have been taken with respect to each improvement covered by this bond issue in strict conformity to the provisions of the charter of the city of Cleveland relating to the

matter of local improvements and the assessments therefor. The charter of the city of Cleveland does not cover the matter of issuing bonds in anticipation of the collection of assessments for the improvement of streets provided for in the charter, and the issue of the above bonds has been provided for according to the sections of the General Code of Ohio relating to the subject matter, and such proceedings with respect to this bond issue have been in all respects as required by law.

I am, therefore, of the opinion that the bonds of the city of Cleveland provided for in said proceedings according to the bond form submitted will, when signed by the proper officers of the said city and delivered to you, be valid and subsisting obligations of the city of Cleveland.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

265.

OFFICIAL COURT STENOGRAPHER—ENTITLED TO COMPENSATION —FOR TRANSCRIPT OF TESTIMONY OF WITNESSES BEFORE GRAND JURY—PAID FROM COUNTY TREASURY.

The official stenographer is entitled, under section 1553 *G. C., to compensation for transcript of testimony of witnesses taken before the grand jury, to be paid from the county treasury.*

COLUMBUS, OHIO, May 16, 1917.

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

GENTLEMEN:—You have called our attention to the syllabus prepared by this department on opinion No. 105 rendered to Hon. Dean E. Stanley, prosecuting attorney of Warren county, under date of March 13, 1917, which syllabus is to the effect that the prosecuting attorney is not authorized to expend the funds received by him under section 3004 G. C. for the payment of compensation to an official stenographer for services in transcribing testimony taken before a grand jury.

The syllabus stated that the work so done was included in the official duties of the stenographer. The conclusion stated in opinion No. 105, hereinbefore referred to, is as follows:

> "* * * in direct answer to your two inquiries it is my opinion that county commissioners are not authorized to pay for services rendered by a stenographer in taking testimony at a coroner's inquest, and that the prosecuting attorney is not authorized to expend a part of the money drawn by him under section 3004 G. C. for the payment of extra compensation to the official stenographer for services rendered in transcribing testimony taken by him before the grand jury."

The syllabus prepared for such opinion went beyond the holding of the opinion, and consequently the confusion has arisen.

Coming now to determine whether or not the official stenographer is entitled to receive compensation, not for the taking of notes, but for the transcribing of the testimony taken before the grand jury, I would call your attention to the provisions of section 3004 G. C.

Section 3004 allows annually to the prosecuting attorney, in addition to his

salary, an amount equal to one-half the official salary "to provide for expenses which may be incurred by him in the performance of his official duties, and in the furtherance of justice, *not otherwise provided for.*"

Section 1553 of the General Code, referring to the official stenographer, provides at the end thereof:

> "When the testimony of witnesses is taken before the grand jury by such stenographers, as provided by law, they shall receive *for such transcript as may be ordered by* the prosecuting attorney, the same compensation per folio and be paid therefor in the manner herein provided."

It is apparent, therefore, that it was the intention of the legislature in the enactment of section 1553 G. C. to provide for compensation for the official stenographer for transcripts of testimony before the grand jury. Consequently, it is otherwise provided for and cannot be paid under section 3004 G. C.

In the request for opinion No. 105, hereinbefore referred to, it was asked whether there was any provision of law by which such stenographer's services may be paid. I assume by the form of the question that the prosecuting attorney was asking whether or not the transcript of the testimony taken before the grand jury could be paid for, if not paid under section 3004 G. C.

Section 1553 G. C., providing for compensation, was included in an act passed in 97 O. L., page 178, being a part of section 5 thereof. Section 1552 was likewise a part of said section 5, and provides in part:—

> "* * * The compensation for transcripts made in criminal cases, by request of the prosecuting attorney or the defendant, and transcripts ordered by the court in either civil or criminal cases, shall be paid from the county treasury, and taxed and collected as other costs."

It appears, therefore, that there is a provision for transcripts in criminal cases to be paid from the county treasury, and in view of the provisions of section 1553, hereinbefore quoted, I am of the opinion that the court stenographer is entitled to payment for transcripts of the testimony of witnesses taken before the grand jury, when ordered by the prosecuting attorney, from the county treasury, but is not entitled to pay therefor from the fund created by section 3004 G. C.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

266.

CONTRACTOR—WHO HAS BEEN AWARDED CONTRACT FOR CONSTRUCTION OF HIGHWAY—CANNOT BE HELD TO THE PROVISIONS OF HIS CONTRACT—WHERE THERE HAS BEEN UNREASONABLE DELAY IN BEGINNING WORK—DUE TO NO FAULT OF HIS.

A contractor who bids for the construction of highways has a right to assume that, if awarded the contract under his bid, he will within a reasonable time be permitted to begin the work and to carry it to a completion, without undue delays and hindrances over which he has no control. A delay of two years, due to no fault of the contractor, is unreasonable.

COLUMBUS, OHIO, May 16, 1917.

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

DEAR SIR:—Your communication of April 6, 1917, was duly received, in which you ask my advice as to certain matters therein contained. Your communication reads as follows:

> "On September 26, 1914, the state highway commissioner awarded to A. W. McDonald & Co. of Steubenville, Ohio, the contract for improveing section "F" of the Ohio river road, I. C. H. No. 7, in Jefferson county. Contract price, $20,500.00. The improvement was to be made of brick. Length 0.97 miles. Width 16 feet.
>
> "A signed copy of the contract for this work was delivered to A. W. McDonald & Co. on November 28, 1914. Within a very few days thereafter, work was begun by Mr. McDonald.
>
> "Work of excavating, building bridges and culverts continued until about July 1, 1915, at which time the contractor was forced to abandon the work on account of not having the proper right of way. From this date to the present time no work has been done on the improvement and now A. W. McDonald & Co. ask to be released from all obligations under their contract and that the state and county pay to them certain claims, which you will find itemized in this communication.
>
> "The state highway commissioner desires your opinion in this matter, as to whether the state shall hold A. W. McDonald & Co. to the terms of their contract or shall release this company and settle upon some agreed basis."

To your communication you attach certain lengthy correspondence had between you and the contractors, in reference to the matters set out in your communication. This correspondence has helped me materially in arriving at the advice herein given, but it is too lengthy to set out in full, so that I shall merely give the substance of the different communications which passed between your department and A. W. McDonald & Company in reference to the matter in question.

On September 26, 1914, the contract was awarded to A. W. McDonald & Co.

On November 28, 1914, a copy of the contract duly executed by your department was delivered to said contractors. Work was begun by the contractors on December 1, 1914, and continued until July 1, 1915, the work then ceasing, due to the fact that a right of way had not been secured by the county commissioners.

On April 27, 1915, a supplemental contract was let to A. W. McDonald & Co., in reference to the construction of the same work.

On May 25, 1915, the contractor wrote your department, protesting on account of the delay in the completion of the work, due to the fact that the extra right of way had not been secured. In this communication he stated that he would demand extra compensation, due to said delay, over which he had no control.

On June 3, 1915, you answered the letter of May 25, 1915, admitting that the right of way had not been secured, and stated that it was the duty of the county commissioners to secure the additional right of way.

On June 25, 1915, the contractors wrote they were compelled to quit the work under the contract and move their plant to another piece of work, although they did not desire it to be considered that they were abandoning work to be performed under said contract with your department.

On April 25, 1916, the contractors wrote you, urging that matters be so arranged that they might proceed with the work, stating they were ready at all times to go ahead and complete the work, and further stating that conditions had materially changed in reference to the cost of labor and material, over which they had no control.

On April 27, 1916, your department replied to this communication, stating that you were doing your best to enable the contractors to proceed, and that you understood the county commissioners were about ready with the matter of securing the right of way to enable them to proceed.

On July 18, 1916, the county commissioners notified you that the right of way had been finally secured and that they had notified the contractors to proceed with the work.

On July 25, 1916, you wrote to the contractors, advising and urging them to proceed with the work, in view of the fact that the right of way had been secured.

On August 5, 1916, the contractors wrote your department, denying that the right of way had been secured so as to enable them to proceed with the work.

You then state that your Mr. Richards investigated the matter as to the right of way and found that the statement of the contractors was true, and that the necessary right of way had not been secured, and your department asked the county commissioners to proceed in the matter of securing the necessary right of way.

On August 12, 1916, the county auditor wrote you that the necessary right of way had been secured.

On August 22, 1916, your department wrote the county commissioners, stating that as soon as you received a written statement from them that the necessary right of way had been secured, you would order the contractors to proceed with the construction of said highway, the right of way not yet having been fully secured.

On March 12, 1917, the county commissioners wrote you that the necessary right of way had been finally secured and that matters were in such a condition that the contractors could proceed with the work.

On March 15, 1917, you wrote the contractors to this effect and asked them to proceed with the work.

On March 22, 1917, the contractors wrote your department that they would begin the completion of the work as soon as an agreement could be entered into between your department and them, satisfactorily adjusting the differences due to the fact that material and labor had greatly increased in price since the time of letting the contract, and that the delay was not due to any fault or negligence upon the part of the contractor.

You state in your communication, after all this lengthy correspondence, that:

> "The highway department has every reason to believe that A. W. McDonald & Co. was ready at all times with sufficient force and equipment

to proceed with the work according to the provisions of the contract after July 1, 1915, providing that obstructions were removed and right of way secured."

On December 26, 1916, the contractors wrote to your department, stating that they "are still on the job and ready to proceed with the work of the above contract," but that they were unable to do so on account of the condition of affairs in reference to right of way, etc. In this communication they sent you a statement showing the amounts due them under and by virtue of the contract, and for which they made a claim against the highway department, the amount of the claims being $3,756.19.

After some negotiations in reference to the matter of adjusting the differences, the contractors sent an itemized statement, agreeing to take $1,846.75 in full of their claims against the state, agreeing to accept this amount and give up the contract, and allow your department to proceed with the same in whatever manner you might decide.

Under all the above, the question is as to whether it would be legal for you to adjust these differences with A. W. McDonald & Co. and release them from their contract, or whether you should attempt to hold said contractors to the contract and either compel them to finish the contract or you take it over and complete it under force account and hold the contractors and their bondsmen for the difference between the contract price and the amount that will be expended by you in completing the same under force account.

It will be seen that there is no contention as to the facts; your department and the contractors agreeing as to the facts. Even the amount suggested by the contractors as a basis of settlement seems fair and just to you.

The question is, what ought to be done? It is hardly necessary to say that there are no statutory provisions controlling in matters of this kind. Hence we look to the principles of the common law in order to ascertain what ought to be done. The question immediately arises in my mind as to what would be right between man and man, under similar circumstances. If we were to apply the rule of all rules which ought to lie at the basis of all our dealings, namely, "Do unto others as you would have them do unto you," to what conclusion ought we to come in this matter? It is my opinion that the state ought to deal as fairly with its citizens as it expects its citizens to deal with each other. It ought not to take advantage of the fact that it is sovereign.

In the case under consideration it is admitted that the contractors entered in good faith upon the work almost immediately upon being awarded the contract; that they continued the work until forced to quit because the right of way had not been secured by the county commissioners; that they have been prevented from prosecuting the work to a finish for many months, due to no fault of theirs; that at all times the contractors have been ready, willing and able to proceed with the work and complete the same according to contract; that they gave notice time after time of the damage they were suffering, due to increase in price of labor and material, and that during the time said work has been delayed the price of labor and material has greatly increased.

Now, applying the fundamental principles above set out, which ought to control in dealings between man and man, to the admitted state of facts in this matter, to what conclusion ought we to come? Yes, to what conclusion must we come? In good conscience and morals these contractors ought not to be held to the provisions of their contract with the state. Not only ought they not to be held, but it is my opinion that they cannot be held under the law, if they should decide to assert their rights under it. And it follows, if your department decides to complete the

work under force account, that you could not hold the contractors, nor their bondsmen, for the difference between the contract price and the price at which you would be able to complete the work.

So answering your question specifically, it is my opinion that if the contractors will settle on a basis which is fair to the state, you ought to settle the differences and release them from their contract. So far as the law controlling in the case is concerned, I advise you that you have authority to settle. The terms upon which you settle is a matter for you to decide. To be sure, you will be careful that the rights of the state are conserved, if settlement be made.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

267.

PROVISION—IN PROPOSAL FOR HIGHWAY CONSTRUCTION—THAT NO PART OF BID WILL BE BINDING—UNLESS TOTAL BID IS ACCEPTED—IS PROPER AND LEGAL.

A provision in a proposal for the construction of highways, in which separate bids are made upon different items of labor and material, to the effect that no part of the bid will be binding unless the total bid is accepted, is proper and legal.

COLUMBUS, OHIO, May 16, 1917.

HON. HARRY CORE, *Prosecuting Attorney, Ottawa, Ohio.*

DEAR SIR:—In an oral communication of recent date you asked my opinion as to the legality of proposal for construction of highways used in your county, a copy of which proposal you then submitted to me. This proposal reads as follows:

"PROPOSAL FOR CONSTRUCTION OF

---

located in_____township, Putnam county, Ohio.

"TO THE BOARD OF COUNTY COMMISSIONERS AND ENGINEER OF THE COUNTY OF PUTNAM, STATE OF OHIO:

"Gentlemen:—The undersigned hereby declare that he has carefully examined the specifications and drawings in connection with this improvement, and will provide all necessary machinery, tools, apparatus and other means of construction, and do all the work and furnish all the material called for by said specifications for this improvement, and to the acceptance of the county commissioners and engineer of said county, for the following prices, to wit:

"

"Estimated Quantities.	Price of Labor	Price of Material	Total.	Total in Words.
"Cubic yards excavation_____				
"Cubic yards crushed stone in place_____				
"Square yards rolling and flushing_____				
"Lineal feet 4-inch tile-sewer_____				
"Lineal feet 5-inch tile-sewer_____				
"Lineal feet 6-inch tile-sewer_____				

"Lineal feet 7-inch tile-sewer_____
"Lineal feet 8-inch tile-sewer_____
"Lineal feet 10-inch tile-sewer_____
"Lineal feet 12-inch tile-sewer_____

"Catch basin complete_____
"Cubic yards 1-2-4 concrete_____
"Cubic yards 1-1-2-3 concrete_____
"Cubic yards 1-3-5 concrete_____
"Lbs. reinforcing steel_____
"Lineal feet, __ inch pipe railing in place_____
"Lineal feet __ inch C. L. P. in place_____
"Brick per M_____
"Feet in oak plank_____
"Total bid $_____
"The above bid to be binding only on condition that total bid be accepted.
* * *"

The question in the minds of your county commissioners is as to whether the following stipulation attached to the bid is a legal one, or not:

> "The above bid to be binding only on condition that total bid be accepted."

The effect of this stipulation is to require that but one contract be let for any given piece of road and that contracts cannot be let for different items entering into the improvement, such as labor, material, etc. That is, a bidder upon a certain piece of work cannot ask that he be given the contract for furnishing the labor, because his bid upon this item is lowest, and another bidder ask that he be given the contract for furnishing the material, or certain parts of it, because his bid upon this item is lowest. But the contract must be let upon the basis of the total bid. This, I think, is what the statutes contemplate, and seems evident from a construction of the statutes providing for the receiving of bids by county commissioners.

Section 6945 G. C. provides for the advertising for bids for the improvement of highways, and the latter part of said section reads as follows:

> "The county commissioners may let the work as a whole or in convenient sections as may be determined. They shall award the contract to the lowest and best bidder."

From this language it will be seen that, while the work may be divided up into different sections and a contract let for the work upon each section, yet there is no provision made for the letting of the contract for different items entering into the work or any section of the same. Further, the contract shall be awarded to the lowest and best bidder; that is, the lowest and best bidder for the work as a whole.

Section 6946 G. C. provides that if no bids are made within the estimate, the county commissioners may amend the estimate and again proceed to advertise for bids. The language here also infers that the bids must be made within the total estimate, and not within estimates placed upon different items entering into the work.

The same conclusion must be drawn also from the provisions of section 6947 G. C., which section provides for the bond to be given by the contractor.

So that it is my opinion that the said clause attached to the bid is entirely legal and is in conformity to the evident meaning of the statutes in reference to bids.

We might with more propriety ask the question as to whether it is legal for the county commissioners to compel bidders to bid separately on different items entering into the work as set out in the form of bid submitted; but I can see nothing whatever improper or illegal in such a requirement. It might be of assistance to the county commissioners in arriving at the conclusion as to who is the lowest and best bidder.

On May 13, 1915, my predecessor, Hon. Edward C. Turner, passed upon a question similar to this, which opinion is found in Vol. I of the Opinions of the Attorney-General for 1915, p. 724. In discussing the proposition he used the following language:

> "I learn by inquiry that certain regulations have been adopted by your department, and among these regulations are provisions to the effect that contractors in bidding upon intercounty highway improvements must use a blank form of proposal prescribed by the highway department; that the highway commissioner may, when in his judgment it is proper, require separate bids on separate items; and that the amount of a contractor's bid must be written out in the bid in words and also set forth in figures, and that this must be done in ink. The requirement that ink must be used is printed upon the blank form of proposal furnished by the highway department. I am unable to say that any of these requirements are unreasonable or that under the provision of section 1202 G. C. above quoted, the highway commissioner is without authority to make any of the regulations in question."

I am of the opinion that the reasoning of Mr. Turner is correct.

I am aware that section 1202 G. C., which Mr. Turner was construing, provides that the bids

> "shall conform to such other regulations as the state highway commissioner may direct;"

while the section controlling the county commissioners in this matter has no such a provision; but the general powers given to the county commissioners under these sections would give them the implied power to provide such a form for bidders.

Hence, answering your question specifically, it is my opinion that a provision in a proposal, for the construction of any highway, in which separate bids are made upon different items of labor and material, to the effect that no part of the bid will be binding unless the total bid is accepted, is proper and legal.

The form submitted also contains certain provisions in reference to the matter of extras furnished in the completion of the improvement. I am not asked to pass upon this part of the proposal and hence am not expressing any opinion in reference to its legality.

In rendering the within opinion I am not unmindful of the provisions of section 2362 which reads as follows:

> "An officer, board or other authority of the state, a county, township, city, village, school or road district or of any public institution belonging thereto, authorized to contract for the erection, repair, alteration or rebuilding of a public building, institution, bridge, culvert, or improvement and required by law to advertise and receive proposals for furnishing of

materials and doing the work necessary for the erection thereof, shall require separate and distinct proposals to be made for furnishing such materials or doing such work or both, in their discretion, for each separate and distinct trade or kind of mechanical labor, employment or business entering into the improvement."

I do not believe, however, that the provisions of this section were meant to apply to the matter of repairing, improving or constructing highways, and this for three reasons:

1. It will be noted that this section is found in title IX, the subject of which is "Building Regulations." This title is subdivided into (a) State Buildings; (b) County Buildings and Bridges; (c) General Provisions. Thus the whole title deals with buildings and bridges which would not properly include public highways.

2. A careful reading of the section will disclose that it was not likely intended to apply to public highways. The language is "authorized to contract for the erection, repair, alteration or rebuilding." None of these terms could apply to public highways, other than the word "repair." The language further is "of a public building, institution, bridge, culvert or improvement." None of these terms could apply to a public highway with the possible exception of "improvement." But as it is a general term used in connection with specific terms, it would include only matters similar to those expressed in the specific terms. The language further is "for the erection thereof." "Erection thereof" applies to all matters enumerated herein, but these words could not, with propriety, be made to apply to public highways.

3. The Cass highway act is a full, complete and comprehensive act, embodying within itself every provision necessary to do the work it was intended to provide for. It is not in any wise dependent upon other acts to give it force and vitality.

From all of the above it is my opinion that the provisions of section 2362 G. C. do not apply to the question submitted by you.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

268.

BANK—MAY NOT INVEST MORE THAN SIXTY PER CENT. OF ITS PAID-IN CAPITAL STOCK AND SURPLUS IN BANKING BUILDING AND REAL ESTATE ON WHICH SAME IS SITUATED—WHERE INVESTMENT IN EXCESS OF LIMITATION AND COMPANY TAKES OVER BUILDING AND REAL ESTATE—BANK MAY NOT INVEST IN STOCK—UNTIL SAME HAS PAID DIVIDENDS FOR FIVE CONSECUTIVE YEARS—MAY PURCHASE BONDS OF SAID COMPANY—SUBJECT TO APPROVAL OF SUPERINTENDENT OF BANKS—SUCH INVESTMENT LIMITED TO TWENTY PER CENT OF CAPITAL AND SURPLUS.

A bank, possessing the powers of a commercial bank, savings bank, trust company and safe deposit company, may not invest more than 60 *per cent. of its paid-in capital stock and surplus in a banking building and real estate whereon the same is located. In case such limitation is exceeded and a building company is formed to take over the building and real estate of the bank; held:*

(1) *The bank cannot invest in the stock of such building company until such company has paid dividends for five years next prior to the investment.*

(2) *If such building company legally issues bonds, the bank may invest in such bonds if authorized by the affirmative vote of the majority of the board of directors or by the executive committee. Such investment would be limited to* 20 *per cent. of the capital and surplus of the bank. It would also be subject to the approval of the superintendent of banks and he could at any time order such bonds sold within six months.*

(3) *The bank could lease the building on said real estate subject to the provisions of section* 10210 *G. C.*

COLUMBUS, OHIO, May 16, 1917.

HON. PHIL. C. BERG, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—On February 10, 1917, you asked my opinion upon the following facts:

> A certain bank, under your supervisioon, had for about twelve years owned a lot upon which was situated an old two-story brick building in which the bank transacted its business until last April. At that time the bank finding that it needed better quarters decided to wreck the old building and erect a new one for the use of the bank; the new building to have offices for rental purposes in addition to the space to be occupied by the bank.
>
> The estmiate on the cost of the new building, made in 1915, was approximately $150,000.00. The bank entered into contracts on this basis providing for the wrecking of the old building and the construction of the new. It moved out of the old building and turned the same over to the contractors who immediately wrecked the old building and began the construction of the new.
>
> In May, 1916, the contractors informed the bank that owing to the increased cost of labor and material the cost of the new building would be much higher than the estimate. At that time the foundations were laid and much of the material was on the ground. The building is now nearing completion, and the quarters of the bank will probably be completed by June 1st.
>
> The cost of the building will be over $200,000.00. The capital of the

bank is $125,000.00, and the surplus $140,000.00. The amount of the investment will, therefore, be over the maximum allowed by statute. The superintendent of banks has suggested that in order for the bank to keep within the law a new company should be formed to take over the building when it is completed. The bank desires, in case such a company is formed, that it may take and hold such an amount of stock in the new company as will be within the percentage limit provided by statute, and your request is as to whether this can be done.

The bank possesses commercial, savings, trust and safe deposit powers, and the limit which it may invest in real estate, together with the buildings thereon, for banking purposes is 60 per cent. Section 9753 of the General Code is as follows:

"A commercial bank may purchase, lease, hold and convey real estate only as follows:

"(a) Real estate whereon is erected or may be erected a building or buildings useful for the convenient transaction of its business, and from portions of which, not required for its use, a revenue may be derived; but the cost of such building or buildings and the real estate whereon they are erected, in no case shall exceed sixty per cent. of its paid-in capital and surplus;

"(b) Such as is mortgaged or conveyed to it in good faith by way of security for loans made by or money due to such corporation;

"(c) Such as has been purchased by it at sales upon the foreclosure of mortgages owned by it, or on judgments or decrees obtained or rendered for debts due to it, or in settlements effected to secure such debts. All real property referred to in this paragraph shall be sold by such corporation within five years after it vested therein, unless upon application by the board of directors, the superintendent of banks extend the time within which such sales shall be made;

"(d) Such corporation also shall have power by lease to acquire a suitable building for the convenient transaction of its business, and from portions of which, not needed for its own use, a revenue may be derived."

This limitation of 60 per cent. fixed for commercial banks applies also to savings banks and trust companies. The limitation for safe deposit companies is 50 per cent., but I take it the provision as to commercial banks would undoubtedly govern.

As the capital of the bank is $125,000.00 and its surplus $140,000.00, the limit which it could invest in such real estate would be $159,000.00; and as the cost of the building which it is now erecting will be more than $200,000.00, this investment is prohibited by statute.

As to the suggestion that a "new holding company be formed to take over the building when it is completed," I presume such a company could be formed, and could acquire the real estate of the bank by virtue of section 10210 G. C., which is as follows:

"A corporation organized for the purpose of constructing and maintaining buildings to be used for hotels, storerooms, offices, warehouses, and factories, may acquire by purchase or lease, and hold, use, mortgage and lease all such real estate or personal property as is necessary, for such purpose. But no such corporation shall acquire or mortgage any real or lease-hold estate, or lease it for a period exceeding, with all privileges of

renewal, the term of five years, without the consent of the holders of two-thirds of the stock, obtained at a meeting called for that purpose, written notice of which was given to each stockholder, either personally, or deposited in the postoffice, properly addressed and duly stamped, not less than ten days before the day fixed for such meeting. Nothing herein shall authorize corporations to buy and sell, or to deal in real estate for profit."

In case such a building company is formed to take over the real estate of the bank, including the building when completed, the bank could not take stock in such company for the reason that the only authority for the investment by a bank in stocks of a corporation is found in section 9765 G. C., relating to savings banks, and section 9781, relating to trust companies, and in both cases the investment is limited to "stocks which have paid dividends for five consecutive years next prior to the investment."

The stock of this building company would not be a proper investment for the bank until it paid dividends for the prescribed time.

Under paragraph (b) of section 9765, if the new company issued bonds, in the manner provided by law, then the bank could properly invest in such bonds, if such investment were authorized by the affirmative vote of the majority of the board of directors or by the executive committee. This investment would be subject to the approval of the superintendent of banks and he could order any such bonds sold within six months. This investment in bonds, in case it were made, would also be subject to the 20 per cent. limitation provided by section 9790 G. C., which is as follows:

"Not more than twenty per cent. of the capital and surplus of a corporation doing business under this chapter shall be invested in any one stock security or loan unless it be in bonds or other interest bearing obligations enumerated in paragraphs b, c and d of section ninety-seven hundred and fifty-eight, or in a building and vaults."

The 60 per cent. limitation provided by section 9753 for direct investment in real estate would not apply.

In case the building company is formed to take over the building the bank could lease the same under paragraph (d) of section 9753 G. C.

To summarize:—Upon the facts as stated by you the investment by the bank in this real estate and building located thereon exceeds the limitation provided by statute and should not be allowed. In case a new building company is formed to take over the building and real estate, the bank cannot invest in any of such stock.

If the new building company issues bonds the bank may invest in the same subject to the 20 per cent. limitation, and also subject to the approval of the superintendent of banks.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

269.

NEWSPAPER—PUBLISHING DELINQUENT TAX LIST—SHOULD BE PAID FOR LIST AS IT IS FIRST PUBLISHED—ALTHOUGH PART STRICKEN OUT BETWEEN FIRST AND SECOND PUBLICATION—NOT ENTITLED TO PAY FOR SETTING UP DESCRIPTIONS STRICKEN OUT BEFORE FIRST PUBLICATION.

1. *When delinquent tax list is published under section* 5704 *of the General Code, and the newspaper, upon the request of the county auditor, strikes out certain names from the list between the first and second publication, the newspaper should be paid for the publication of the list upon the basis of the first publication.*

2. *The newspaper is not entitled to pay for setting up descriptions of tracts, etc., in connection with names of delinquents stricken out from the list before the first publication.*

COLUMBUS, OHIO, May 16, 1917.

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

GENTLEMEN:—I have your letter of March 3, 1917, as follows:

"Section 5704 G. C. provides for the publication of the list of delinquent lands weekly for two weeks between the twentieth day of December and the second Tuesday of February, next ensuing, etc.

"Section 5706 G. C. provides for the fees of publication of the delinquent land list.

"In most counties of the state, between the first and second publication of this notice, many people pay their taxes and have their names removed from the published list.

"Question 1. In paying for the publication of this list, should the county auditor make his calculation upon the first or the last issue of this publication?

"Question 2. Is the county, in paying for the publication of delinquent lists, required to pay for descriptions set up by the printer but removed before the first publication of the list because of the payment of the tax?"

Sections 5704, 5705 and 5706 General Code read:

"Sec. 5704. Each county auditor shall cause the lists of delinquent lands in his county to be published weekly for two weeks between the twentieth day of December, and the second Tuesday in February next ensuing in one newspaper in the English language, printed and of general circulation in the county, and one newspaper of the German language if there is such newspaper printed, published and of general circulation therein. There shall be attached to the list a notice that the delinquent lands will be sold by the county treasurer, as provided by law.

"Sec. 5705: Such notice shall be in substance as follows:

"DELINQUENT TAX SALE.

"The lands, lots and parts of lots returned delinquent by the treasurer of ---------- county, with the taxes and penalty charged thereon, agreeably to law, are contained and described in the following list, viz.: (here insert the list with the name or names of the owner or

owners of the said respective tracts of land, or town lots, as designated on the duplicate.) And notice is hereby given that the whole of such several tracts, lots or parts of lots, or so much thereof as may be necessary to pay the taxes and penalty charged thereon, will be sold by the county treasurer at the court house in such county on the second Tuesday of February, _____, unless the taxes and penalty are paid before that time, and that the sale will be continued from day to day, until the several tracts, lots and parts of lots, have been sold or offered for sale.

"Sec. 5706. The publishers of newspapers, for advertising the delinquent and forfeited list of the several counties, and the notice of sale shall be entitled to receive a sum not exceeding the following rates: For the notice of sale, ten dollars; for designating the several school districts, townships, villages and cities, and the several wards in a city, fifty cents each; and for each tract of land, city or town lot, or part of lot, contained in each of such lists, thirty cents. A greater sum than one-half of the taxes and penalties, due on any tract, lot, or part of lot shall not be allowed for advertising such tract, lot, or part of lot. Such property shall not be published in a list, as delinquent, if the taxes and penalty thereon had been paid on or before the twentieth day of December."

These sections contemplate that the county auditor will furnish to the newspapers a list of the delinquent tax lands and owners of the same sometime shortly after the 20th day of December, and that this list shall be "published weekly for two weeks between the 20th day of December and the 2nd Tuesday of February next ensuing." The fees fixed by section 5706 General Code are for "advertising the delinquent and forfeited list of the several counties and the notice of sale." This means that the fees enumerated in that section are to be paid to the newspaper when it has published the list according to law, viz., weekly for two weeks. The law in fixing the rate assumes that the entire list, as first published, will be published a second time, and the fees allowed a newspaper are for publishing the list twice. It is not possible, under the statute, to allow half of these fees for the first publication and half for the second. The statute simply allows the payment of the fee to the newspaper when the lists are published, according to law, which means after the list has appeared in such paper the second time.

The fact that some of the taxes listed have been paid does not make it necessary to strike them from the list after the first publication, for the law recognizes that many of the lands listed may be redeemed before the day of the sale.

Section 5705 provides in part that the notice of sale shall state that the lands listed will be sold on a certain day "unless the taxes and penalty are paid before that time." Section 5706 G. C. lays down but one prohibition in regard to the publication of tracts and names, and that is "that such property shall not be published in a list as delinquent if the taxes and penalty thereon had been paid on or before the 20th day of December."

From these provisions it is clear that the legislature recognized the fact that many delinquent in the list published might redeem their properties before the day of sale. I do not believe, therefore, that the county auditor has any authority in law to order the newspaper to strike out the names and property descriptions relating to taxes paid since the first publication. However, the question is, if he does so and the newspaper strikes these names out before the second publication, is it to receive its pay for the publishing of this list according to the first or second publication. Ordinarily the newspaper could receive money for only the names and tracts published twice, since this is the only complete publication. In that event they would receive their pay according to the second publication, this being the only list twice published. It seems to me, however, in the case referred

to, this strict application of the law would be both improper and unjust. The only reason the newspaper does not publish some of the names a second time is that the first publication has accomplished the purpose of the advertisement. The taxes have been paid into the county treasury and the county auditor, as a favor to these parties paying, asks the newspaper to strike out their names in the second publication. There is no warrant in law for the auditor doing this. He simply makes the request as a matter of accommodation to the taxpayers affected who wish to be relieved of further embarrassment. The newspaper is not compelled to heed the auditor's request since it has already entered into the contract and proceeded with it to the extent of publishing the list the first time. However, the newspaper, as a matter of accommodation to the auditor, and to the parties who have paid their taxes since the first publication, strikes these names from the list before the second publication. Under these circumstances it seems to me that the county would be estopped from claiming that the names stricken out of the list before the second publication were not legally published, and it is my opinion that the newspaper should be paid for the publication of the delinquent list on the basis of the first advertisement.

Answering your second question: After the county auditor has furnished the newspaper with the delinquent tax list and the newspaper has begun preparation for the publication of the same, I do not believe the county auditor has any right to order it to strike out any names. The contract is already entered into, and it is my belief that if the newspapers should refuse to strike out the names and publish the entire list as given to it by the county auditor originally, it would be entitled to receive pay for the entire publication. However, in the case you refer to the newspaper saw fit to accede to the request of the county auditor and strike out certain names prior to the first publication. Inasmuch as the newspaper accepted this revised list from the county auditor and did not, in fact, publish the names and tracts stricken out by the auditor before the first publication, it is my opinion that such newspaper cannot receive pay for any descriptions set up by the printer or any work done in connection with any of the names or tracts stricken out by the auditor and not in fact published by the paper.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

270.

PRISONER—SENTENCED FOR LIFE FOR FIRST DEGREE MURDER—SHOULD BE CONVEYED TO PENITENTIARY WITHIN FIVE DAYS AFTER SENTENCE—SECTION 13695 G. C. DOES NOT APPLY.

When the court sentences a prisoner to a life term in the Ohio penitentiary for murder in the first degree, such prisoner should be conveyed to the penitentiary within five days after such sentence, according to the provisions of section 13720 *General Code.*

The one hundred day provision of section 13695 *General Code has no application to such cases.*

COLUMBUS, OHIO, May 16, 1917.

HON. HECTOR S. YOUNG, *Prosecuting Attorney, Marion, Ohio.*

DEAR SIR:—I have your letter of May 11, 1917, as follows:

"I beg leave to submit to your office for an opinion thereon the following inquiry:

"(a) A party is convicted of murder in the first degree, with a recommendation of mercy. What period of time must intervene between the day of sentence and the day appointed for the execution thereof?

"Permit me to call your attention to sections 12399 and 13695 of the General Code of Ohio. You will note that section 12399 reads in part as follows:

"'Murder in the first degree, as defined in this chapter, shall continue to be a capital offense within the meaning of the constitution * * *.'

"Section 13695 reads in part as follows:

"'In conviction of a capital offense, at least one hundred days shall intervene between the day of sentence, and the day appointed for the execution thereof.'

"I will say to you that on May 7th last, a prisoner was sentenced in Marion county, under conviction of murder in the first degree, with a recommendation of mercy, and I will greatly appreciate an early reply to this inquiry."

Section 12399 General Code, to which you refer, reads:

"Murder in the first degree, as defined in this chapter, shall continue to be a capital offense within the meaning of the constitution, and no person convicted thereof shall be recommended for pardon by the board of pardons or for parole by the board of managers of the penitentiary, except upon proof of innocence established beyond a reasonable doubt."

Sections 12400, 13695 and 13720 G. C. read:

"Sec. 12400. Whoever purposely, and either of deliberate and premeditated malice, or by means of poison, or in perpetrating or attempting to perpetrate rape, arson, robbery, or burglary, kills another is guilty of murder in the first degree and shall be punished by death unless the jury trying the accused recommend mercy, in which case the punishment shall be imprisonment in the penitentiary during life."

"Sec. 13695. If the defendant has nothing to say, or if he shows no sufficient cause why judgment should not be pronounced, the court shall pronounce the judgment provided by law. In convictions of a capital offense at least one hundred days shall intervene between the day of sentence and the day appointed for the execution thereof."

"Sec. 13720. A person sentenced to the penitentiary, or Ohio state reformatory, unless the execution thereof is suspended, shall be conveyed to the penitentiary or Ohio state reformatory by the sheriff of the county in which the conviction was had, within five days after such sentence, and delivered into the custody of the warden of the penitentiary, or superintendent of the Ohio state reformatory, with a copy of such sentence there to be kept until the term of his imprisonment expires, or he is pardoned. If the execution of such sentence is suspended, and the judgment be afterward affirmed, he shall be conveyed to the penitentiary or Ohio state reformatory within five days after the court directs the execution of sentence; provided, however, that the trial judge, or any judge of said court in said subdivision may, in his discretion, and for good cause shown, extend the time of such conveyance."

I take it from your request what you have in mind is that the provision of section 12399 General Code that "murder in the first degree, as defined in this

chapter, shall continue to be a capital offense within the meaning of the constitution," makes this crime a "capital offense" within the meaning of section 13695 G. C., which provides in part that:

> "In convictions of a capital offense at least one hundred days shall intervene between the day of sentence and the day appointed for the execution thereof,"

and that therefore the execution of the sentence in a first degree murder case, even when the jury has recommended mercy, and punishment is life imprisonment, must be postponed for one hundred days.

Section 12399 General Code, quoted above, provides that murder in the first degree, as defined in that chapter, shall continue to be a capital offense within the meaning of the constitution. The only constitutional provision of which I am aware in regard to a capital offense is article I, section 9 of the Constitution, which provides:

> "All persons shall be bailable by sufficient sureties, except for capital offenses where the proof is evident, or the presumption great. Excessive bail shall not be required; nor excessive fines imposed; nor cruel and unusual punishment inflicted."

The evident intent of section 12399 General Code is to bring all persons convicted of the statutory crime of murder in the first degree within the provisions of article I, section 9 of the Constitution relating to bail, since without this specific provision in section 12399 General Code it might be argued that the constitutional provision applies only to murder in the first degree, as known to and defined by the common law.

Section 13695 General Code provides in part:

> "In convictions of a capital offense at least one hundred days shall intervene between the day of sentence and the day appointed for the execution thereof."

It might be contended that since the crime of murder in the first degree is a capital offense, section 13695 applies to prisoners convicted of murder in the first degree, even when the jury recommends mercy and the court sentences the defendant to life imprisonment. However, I do not think this argument could long be maintained.

It will be noted from a reading of the statute that it provides "one hundred days shall intervene between the day of sentence and the day appointed for the execution thereof." Now when the court imposes upon a prisoner a sentence for life there is no day "appointed for the execution thereof." The execution of this sentence continues during the remainder of the prisoner's life, unless the sentence is terminated sooner by pardon or otherwise. The words "the day appointed for the execution thereof" clearly show that the legislature had in mind the execution of such sentence for a capital offense as could be executed on a day appointed, which could only refer to the execution of the sentence of death. That this view is correct is made clear from a glimpse of section 13695. This section was originally section 172 of an act passed January 5, 1871, volume 88, page 3, and entitled "An act to amend an act entitled 'an act to establish a code of criminal procedure for the state of Ohio,' passed May 6, 1869 (O. L., Vol. 66, p. 287)." Section 172 of this act read:

"When a person shall be convicted of an offense, and shall give notice to the court of his intention to apply for a writ of error, the court may, in its discretion, on application of the person so convicted, suspend the execution of the sentence or judgment against him until the next term of the court, or for such period, not beyond the session of the court, as will give the person so convicted a reasonable time to apply for such writ; provided, when any such conviction is of an offense the punishment whereof is capital, at least one hundred days shall intervene between the date of such sentence and judgment, and the day appointed for the execution thereof."

The words "when any such conviction is of an offense *the punishment whereof is capital,*" clearly demonstrates that the one hundred day provision of the act applied only to the death sentence. For this reason it is my view that the one hundred day provision of section 13695 has no application to a sentence for murder in the first degree when the jury has recommended mercy and the sentence of the court is life imprisonment.

Section 13720 General Code, referring to the time in which a prisoner sentenced to the penitentiary or reformatory must be conveyed to such institution, and set out in full above, operates upon all prisoners sentenced to the Ohio penitentiary and Ohio state reformatory, regardless of the crime for which they are sentenced.

In the case you refer to the prisoner has been sentenced to the Ohio penitentiary for life for the crime of murder in the first degree, and because of the above considerations it is my opinion that this prisoner should have been conveyed to the penitentiary within five days after his sentence. This five day period having expired on May 12th, the sheriff should immediately convey this prisoner to the Ohio penitentiary.

Yours very truly,
JOSEPH MCGHEE,
Attorney-General.

271.

BOARD OF EDUCATION—AFTER BIDS RECEIVED—CANNOT CHANGE SPECIFICATIONS, ETC.—BY ELIMINATING PART OF THE WORK—WITHOUT POWER TO ACCEPT BID ON REMAINDER—CONTRACT CANNOT BE AWARDED WHERE BID IN EXCESS OF AMOUNT APPROPRIATED FOR THAT PURPOSE—NONE BUT LOWEST BID CAN BE ACCEPTED—ALL BIDS MAY BE REJECTED.

A board of education is without power to change the plans and specifications for a school house after bids have been received by striking out the lathing, plastering, blackboards, painting, finishing work, roofing, sheet metal work and electrical wiring and without power to accept the bid on only the remainder of such plans and specifications.

A contract cannot be awarded where the total amount of the lowest bid is in excess of the amount of money in the treasury appropriated for that purpose.

None but the lowest bid shall be accepted but the board may reject all bids.

COLUMBUS, OHIO, May 16, 1917.

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

GENTLEMEN:—On April 24, 1917, I received a letter from Mr. G. W. Adams,

city solicitor at Wellsville, Ohio, and the proposition he submits for my opinion seems to me to be of such general interest that I am therefore directing my answer to you. The question reads as follows:

> "The board of education of the Wellsville school district in 1916 issued bonds in the amount of $95,000.00 for the purpose of purchasing a site and erecting and constructing thereon a school house and furnishing the same, and after proper advertisement for bids for the erection of said school house, the lowest bid for general construction (copy of which is herewith enclosed) was $86,980.00. The fund after purchase of site and payment to architect was $76,122.68. The board awarded to the lowest bidder the general construction, eliminating lathing and plastering, blackboards, painting and finishing work, roofing and sheet metal work and electrical wiring at the price of $69,760.00. The contractor refused to accept the part of the contract awarded to him under the proposal for the reason he bid on the contract in an entirety.
>
> "The question now arises can the board accept the next lowest bid under said proposal for that portion of the work awarded to the lowest bidder and by him refused.
>
> "As the board of education has not sufficient money to complete the erecting and furnishing of said school house in accordance with the plans and specifications adopted and under which proposals for bids were asked, it is their intention to erect so much of said building as can be done with the funds in their hands, that is, complete said building to the second story and place thereon a temporary roof. This will give the board of education sixteen additional class rooms which are greatly needed. Can this be done without first advertising in accordance with the statute proposals for bids for just such work as the board intends to complete?"

The above inquiry involves the consideration of General Code section 7623, which reads as follows:

> "When a board of education determines to build, repair, enlarge or furnish a school house or school houses, or make any improvement or repair provided for in this chapter, the cost of which will exceed in city districts, fifteen hundred dollars, and in other districts five hundred dollars, except in cases of urgent necessity, or for the security and protection of school property, it must proceed as follows:
>
> "1. For the period of four weeks, the board shall advertise for bids in some newspaper of general circulation in the district and two such papers, if there are so many. If no newspaper has a general circulation therein, then by posting such advertisement in three public places therein. Such advertisement shall be entered in full by the clerk, on the record of the proceedings of the board.
>
> "2. The bids, duly sealed up, must be filed with the clerk by twelve o'clock, noon, of the last day stated in the advertisement.
>
> "3. The bids shall be opened at the next meeting of the board, be publicly read by the clerk, and entered in full on the records of the board.
>
> "4. Each bid must contain the name of every person interested therein, and shall be accompanied by a sufficient guarantee of some disinterested person, that if the bid be accepted, a contract will be entered into, and the performance of it properly secured.
>
> "5. When both labor and materials are embraced in the work bid for, each must be separately stated in the bid, with the price thereof.

"6. *None but the lowest bid shall be accepted.* The board in its discretion may reject all the bids, or accept any bid for both labor and material for such improvement or repair, which is the lowest in the aggregate.

"7. Any part of a bid which is lower than the same part of any other bid, shall be accepted, whether the residue of the bid is higher or not; and if it is higher, such residue must be rejected.

"8. The contract must be between the board of education and the bidder. The board shall pay the contract price for the work, when it is completed, in cash, and may pay monthly estimates as the work progresses.

"9. When two or more bids are equal, in the whole, or in any part thereof, and are lower than any others, either may be accepted, but in no case shall the work be divided between such bidders.

"10. When there is reason to believe that there is collusion or combination among the bidders, or any number of them, the bids of those concerned therein shall be rejected."

That none but the lowest responsible bid can be accepted is clear.

In State ex rel. Ross v. Board of Education, 42 O. S., 374, the relator brought suit in mandamus to compel the board of education to award him a contract for the construction and completion of a high school building. Relator demanded "all or none" of the contract. The court held that the board could let the contract only to the lowest responsible bidder unless all bids were rejected as a whole, at which time subdivision 7 of said section 7623 would attach. In your case, however, the board of education attempted to change the bid and only allow a portion of the work. This, surely, the board had no right to do. The contractors who bid upon contracts have a right to know the extent of the contract to be let. To say that bids would be received on an entire contract and accepted on a part would be manifestly unfair to any bidder. If the very parts which your board excluded from the lowest bid had been excluded from the proposition to be let or advertised to be let, the bids upon what remained of the contract to be let might have been decidedly different. This question was considered in McAlexander et al., v. Haviland Village School District et al., 7 O. N. P. (n. s.) 590, in which the court held that a contract for the building of a school house awarded to a contractor who has been permitted to change his bid by omitting various items and thus reducing the aggregate cost to the amount realized from the sale of bonds is a contract made without notice or competition and is illegal and void under section 7623 G. C. Nor can a bid be amended after it is once in the hands of the board.

In McGreevy v. Board of Education, 20 O. C. C., 114, in an action brought to recover the balance upon a contract for the excavation for a high school building, wherein the defense was that the contract entered into was illegal, null and void, for the reason that it was not made according to the statutes of this state covering contracts of that kind, in that the plaintiff was permitted after he made his bid for the work to change the amount of his bid, and it being claimed that that was done without authority of law and that the contract which the board of education entered into under such amended bid was void and no recovery could be had upon the contract, the court held:

"A contract between the board of education and the lowest bidder for the excavation for a school house, based upon a bid which the contractor was allowed to amend on account of an alleged mistake which did not appear on the face of the original bid, is void under section 3988 of the Revised Statutes (7623 G. C.) providing the manner in which such

contracts shall be awarded, although the bid as amended was still the lowest bid received. Such contract being void there can be no recovery thereon for the value of the work and labor performed thereunder."

My predecessor, Hon. Timothy S. Hogan, in Opinion No. 268, Annual Report of the Attorney-General for the year 1912, page 1249, held:

"It is not lawful for a board of education to permit a bidder, though he be the lowest responsible bidder on the entire work, to change his bid in any way after its submission, nor to change the plans and specifications after opening bids so as to eliminate some feature of the work or add new ones. In case the plans or specifications are changed so as to eliminate a part of the work, no bid can be accepted, but new bids must be invited."

So that I must conclude that the board had no right to change the plans after the bids were received and eliminate certain portions of the contract upon which its bid had been filed.

There is another and stronger reason why in your case the board could not accept either of the bids received. Your entire fund was $76,122.68, and whatever contract was let must be let within that amount. The provisions of section 5660 apply specifically to a matter of this kind. Said section reads, in part:

"* * * The board of education of a school district shall not enter into any contract, agreement or obligation involving the expenditure of money, or pass any resolution or order for the appropriation or expenditure of money unless the * * * clerk thereof * * * first certifies that the money required for the payment of such obligation or appropriation is in the treasury to the credit of the fund from which it is to be drawn, or has been levied and placed on the duplicate and in process of collection and not appropriated for any other purpose. Money to be derived from lawfully authorized bonds sold and in process of delivery shall, for the purpose of this section, be redeemed in the treasury and in the appropriate fund. Such certificate shall be filed and forthwith recorded, and the sum so certified shall not thereafter be considered unappropriated until the * * * board of education is fully discharged from the contract, agreement or obligation, or as long as the order or resolution is in force."

The decisions holding the language of the above section to be mandatory are numerous and have held without exception that before a building contract can be let by a board of education the money from which payment is to be made covering said contract must be in the treasury and certificate of the clerk must be on file before said contract is let.

If, then, the bids were more than the amount of money in the treasury, and if the board of education or the bidder has no power to change such bids after the same have been opened, then the board of education was entirely without authority to award said contract to said Charles A. Vorhes and the bids should all be rejected by the board, and the only way the statute provides for the board to proceed further is by advertising for new bids.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

272.

DISAPPROVAL—TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE OF THE BOARD OF EDUCATION OF BLADENSBURG RURAL SCHOOL DISTRICT, KNOX COUNTY, OHIO—BOND ISSUE—INVALID WHEN RESOLUTION SUBMITTED AT SPECIAL MEETING—WITHOUT WRITTEN NOTICE HAVING BEEN SERVED ON MEMBERS.

Under sections 4750 and 4751 G. C. a bond issue is invalid when the resolution for same was submitted at a special meeting of the board, without written notice having been served on the members.

COLUMBUS, OHIO, May 16, 1917.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:

"RE:—Bond issue by the board of education of Bladensburg rural school district, Knox county, Ohio, in the sum of $10,000.00 for the purpose of building and equipping a new school building in said school district."

I am herewith returning to you, without approval, transcript of the proceedings of the board of education and other officers of Bladensburg rural school district relating to the above bond issue.

The issue of these bonds has been provided for under the assumed authority of sections 7625 et seq. General Code, which provides for the issue of bonds for said purpose on a vote of the electors of the school district.

The meeting of February 16, 1917, at which the resolution submitting the proposition of this bond issue to the vote of the electors of the school district was a special meeting from which one member of the board was absent, and there is nothing in the transcript to show that this meeting was called in such manner as to make the same a legal meeting in the manner provided by section 4751 General Code.

In response to a request of this department for additional information as to the manner in which this meeting and the special meeting of January 9, 1917, were called, the clerk of the board of education, in letter under date of May 10, 1917, says:

"In reply to yours of the 7th in regard to our special meetings of January 9, and February 16; by our rules and by-laws the president notifies each member in person orally if possible, if not then by writing. The two meetings in which you referred to, each member was seen in person and notified when and where the meetings would be held."

It is obvious that this procedure was not in compliance with the provisions of section 4751 with reference to the manner in which special meetings are called.

Section 4750 of the General Code provides that no meeting of a board of education not provided by its rules or by-laws shall be legal unless all the members thereof have been notified as provided in section 4751. Section 4751 G. C. provides as follows:

"A special meeting of a board of education may be called by the president or clerk thereof or by any two members by serving a *written notice*

of the time and place of such meeting upon each member of the board either personally or at his residence or usual place of business. Such notice must be signed by the official or members calling the meeting."

Under section 4750 the board of education may, by rule carried into its record, provide for regular meetings to be held at stated periods, but I am clearly of the opinion that a rule or by-law of the board providing for the calling of meetings by the president of the board at his discretion by either written or oral notice to the members or both does not make such meetings regular meetings or a meeting provided for by rule under section 4750 of the General Code. The meeting was a special meeting in every sense of the word, and inasmuch as in the matter of calling this meeting section 4751 was not complied with, it follows that such meeting was not one of a legal nature, and the business transacted at such meeting was unauthorized.

It is always a matter of regret to be compelled to report adversely upon a bond issue where the ground of the invalidity is such as is here mentioned and where it is obvious that the meeting was one called in good faith and where the action of the board was such as would have been taken by the board had the meeting been called in strict conformity to law. However, as has been decided by the court in the case of Kattman v. Board of Education, 15 C. C. N. S., 232, the provisions of this section are mandatory. In that case it was specifically held that the proceedings of a board of education providing for an issue of bonds are invalid where the action pertaining thereto was taken at a special meeting from which one member was absent and no written notice of the meeting had been served on each member of the board either personally or at his residence or usual place of business.

Inasmuch as your purchase of these bonds was conditional upon the proceedings relating to this bond issue being in conformity to the laws of this state relating to the subject matter, and finding, as I am compelled to do, that the meeting at which the question of this bond issue was submitted to the electors of the school district was not a legal meeting, I have no discretion but to hold the bond issue invalid and to advise you not to purchase the same.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

273.

FINES—NO AUTHORITY TO PAY SAME INTO FIRE MARSHAL'S DEPARTMENT—FOR VIOLATION OF RULES OF SAID DEPARTMENT.

There is no authority in law for the payment into the fire marshal's department of fines collected in prosecutions under section 837 of the General Code for violations of the rules of the fire marshal's department.

COLUMBUS, OHIO, May 16, 1917.

HON. T. ALFRED FLEMING, *State Fire Marshal, Columbus, Ohio.*

DEAR SIR:—I have your letter of April 17, 1917, as follows:

"The department of state fire marshal prosecuted G. V. Kern, of Adamsville, Ohio, before Justice of the Peace J. B. Carson, Zanesville, for non-compliance of an order of the department issued under the Ohio

Fire Marshal Law. An affidavit was filed by J. C. Brister, assistant fire marshal, and the case heard on March 15, 1917. Mr. Kern was fined ten dollars.

"On the 22nd we received a check for $10 from Justice Carson, with accompanying note reading as follows:

"'Enclosed find check for ten dollars, fine imposed and collected, "The State of Ohio v. G. V. Kern of Adamsville, Ohio."'

"Under date of March 27th Hon. Bert B. Buckley, my predecessor in this office, addressed the bureau of inspection and supervision of public offices, asking whether or not this fine should have been turned in to our department and whether we should treat the same as a revenue voucher.

"The bureau replied, directing that this matter be taken up with your office. Kindly refer to section 837 General Code, and give us a ruling on this point at your convenience."

Section 837 of the General Code, to which you refer, reads:

"Any person or persons, being the owner, occupant, lessee or agent of buildings or premises who wilfully fails, neglects or refuses to comply with any order of any officer named in the last four preceding sections, shall be guilty of a misdemeanor and shall be fined not more than fifty dollars nor less than ten dollars for each day's neglect."

No provision is made here as to where the fines should be paid and to secure this information you must look to other sections of the General Code.

Section 12378 General Code reads:

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

General Code section 13429 reads

"Fines collected by a justice of the peace shall be paid into the general fund of the county where the offense was committed within thirty days after collection unless otherwise provided by law."

A careful examination of the statutes discloses that the legislature has, in a number of instances, made provision for the payment of fines in a manner different from that laid down in section 12378. For instance, section 977 General Code, a part of the mine inspection act, provides:

"All fines collected by reason of prosecutions begun under the provisions of this act, shall be paid to the chief inspector of mines, and by him paid into the state treasury."

Section 1460 General Code provides for the payment of fines imposed under the fish and game laws into the state treasury. Similar provisions are found concerning fines imposed under laws relating to the practice of medicine, pharmacy, etc. Many other instances could be cited wherein the law provides that the fines imposed should be disposed of in a manner different than that laid down in section

12378 General Code, but as to fines imposed for violations of the rules of the fire marshal's department, no such special provision has been made. This being so, they should be paid into the county treasury.

Cleveland v. Jewett, 39 O. S., 27.
Mt. Vernon v. Mochart, 75 O. S., 529.

From these considerations I am of the opinion that the fine of $10.00 imposed under section 837 General Code should not have been turned over to your department and that the check for the same should now be returned to the justice of the peace referred to so that he may dispose of it according to law.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

274.

APPROVAL—TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE OF THE COUNCIL OF THE VILLAGE OF BAY, CUYAHOGA COUNTY, OHIO.

COLUMBUS, OHIO, May 16, 1917.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds in the sum of $5,000.00 issued by the village of Bay, Cuyahoga county, Ohio, covering the village's share of the cost and expense of improving Dover Center road through said village upon agreement with the county commissioners of Cuyahoga county."

I have carefully examined the transcript of proceedings of the council and other officers of the village of Bay, Ohio, relating to the above issue of bonds, said proceedings and transcript thereof having heretofore been corrected to meet the requirements of this department.

As a result of my examination of these proceedings I find the same to be in accordance with the provisions of the General Code relating to the subject matter, and I am of the opinion that when properly prepared the bonds of said village will, when signed by the proper officers thereof, be valid and binding obligations of said municipality.

The officials of the village, acting under the assumption that you would prepare and print the bonds at their expense, did not comply with the request of this department to furnish bond and coupon form. I am, however, this day directing the clerk of the village to forward to me printer's proof copy of said bond and coupon form to the end that if necessary I may be able to correct the same so as to comply with legal requirements before said bonds go to print.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

275.

FIRE MARSHAL—INVESTIGATIONS BY SAID OFFICIAL MAY BE KEPT PRIVATE—DISCRETIONARY WHETHER HE WILL PERMIT AFFIDAVIT ON FILE IN HIS OFFICE TO BE SEEN.

Since under section 832 G. C. investigation by fire marshal may in his discretion be private, and under section 838 G. C. testimony given upon investigation is not public record, it is discretionary with fire marshal whether he will permit affidavit on file in his office to be seen.

COLUMBUS, OHIO, May 17, 1917.

HON. T. A. FLEMING, *State Fire Marshal, Columbus, Ohio.*

DEAR SIR:—Under date of May 14th Hon. John A. Alburn, one of the investigating committee of the bar association of Cleveland, wrote me a letter advising that said committee was to present charges against a Cleveland attorney before the trial committee of said bar association at a private hearing, beginning on Monday, May 14th. He further advised me that you have informed said committee that you are willing to present before the trial committee an affidavit and other papers relating to the Haas-McClure case, which you have among your files, if this department will approve your legal right to present such data from the fire marshal's office.

Section 832 of the General Code provides as follows:

> "Investigation by or under the direction of the state fire marshal may in his discretion be private. He may exclude from the place where such investigation is held all persons other than those required to be present, and witnesses may be kept separate from each other and not allowed to communicate with each other until they have been examined."

Section 838 of the General Code provides as follows:

> "The state fire marshal shall keep in his office a record of all fires occurring in the state, the origin of such fires and all facts, statistics and circumstances relating thereto which have been determined by investigations under the provisions of this chapter. Except the testimony given upon an investigation, such record shall be open at all times to public inspection and such portions thereof as the superintendent of insurance deems necessary shall be transcribed and forwarded to him within fifteen days from the first of January each year."

Under the provisions of section 838 it is your duty to keep a record of all fires occurring in the state and other statistics relating thereto, as the same have been determined by investigation. Such records "except the testimony given upon an investigation" shall be public documents, open to inspection. However, under the provisions of section 832, the testimony taken upon an investigation may be kept private if the state fire marshal in his discretion deems that such should be kept private. An affidavit taken during an investigation would undoubtedly be testimony, although ex parte.

I can only inform you therefore in regard to the matter contained in Mr. Alburn's letter that it is entirely within your discretion as to whether or not the affidavits on file in the case in question should be kept private.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

276.

ELECTIONS—JUDGES AND CLERKS SHOULD FOLLOW SECTIONS 5081 AND 5088 IN MAKING RETURNS—BLANK AND UNINTELLIGIBLE BALLOTS NOT TO BE CONSIDERED IN DETERMINING WHETHER TWO-THIRDS OF VOTERS VOTING AT MUNICIPAL ELECTION FOR BOND ISSUE VOTED IN FAVOR THEREOF.

1. *In all elections, judges and clerks should follow the provisions of sections* 5081 *and* 5088 *G. C. in making up the returns of said election.*

2. *Where the question of issuing bonds by a municipality under sections* 3939 *et seq. is submitted to the electors at a special or general election, in ascertaining whether two-thirds of the voters voting at such election upon the question of issuing bonds have voted in favor thereof, blank ballots or unintelligible ballots are not to be considered.*

COLUMBUS, OHIO, May 18, 1917.

HON. W. D. FULTON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—You have submitted, with request for an opinion upon same, a letter from the board of deputy state supervisors of elections for Clinton county, which reads in part as follows:

> "In a municipal election for the issue of bonds, held under section 3947 of the election laws, should the judges and clerks of the election return as the total vote cast the number of names of voters voting as shown by the poll books, or should the number of votes returned as cast be calculated from the number of ballots counted exclusive of those improperly marked or the county of which was not agreed upon by the judges of election? In other words, in the meaning of the statute has a voter voted if his ballot is not properly marked?"

Section 3947 G. C. provides:

> "If two-thirds of the voters voting at such election upon the question of issuing the bonds vote in favor thereof, the bonds shall be issued. Those who vote in favor of the proposition shall have written or printed on their ballots, 'For the issue of bonds;' and those who vote against it shall have written or printed on their ballots, 'Against the issue of bonds.'"

Section 3945 G. C. provides:

> "The election shall be held at the regular place or places of voting in the municipality, and be conducted, canvassed and certified in like manner, except as otherwise provided by law, as regular elections in the municipal corporation for the election of officers thereof."

Section 5081 G. C. provides:

> "Immediately upon the close of the polls, the number of electors entered and shown on the poll books as having voted shall be first certified therein and signed by the board of judges and clerks. Before any other or further proceedings, the president or chairman of the board shall make proclamation in a loud voice outside of the polling room, stating the num-

ber of voters so shown and certified on the poll books. Thereupon the judges, in the presence of the clerks and inspectors above provided for, shall destroy the ballots remaining unvoted."

Section 5088 G. C. provides :

"The clerks shall enter in separate columns by tallies under or opposite the names of the persons voted for, and the answers to the questions that may have been submitted as provided in the form of tally sheets, all votes thus read by the judges. After the examination of the ballots has been completed, the number of votes for each person and for the respective answers to each question submitted, shall be enumerated under the inspection of the judges and set down, as provided in the form of the tally sheets."

Section 5093 G. C. provides for the making and transmission of returns.

Section 5114 G. C. provides for the abstract of vote for municipal officers and which would govern an election for the issue of bonds in a municipality.

From a reading of the above sections of the election laws it is apparent that the election for the issue of bonds is conducted in all respects in the same manner as an election for municipal officers. It is not the function of the election officers to decide questions that might possibly be pertinent in a contest. Their duties are laid down specifically in the election sections above quoted.

Under section 5081 supra, immediately after the close of the polls the number of electors entered and shown on the poll books as having voted shall be first certified therein and signed by the board of judges and clerks.

Under section 5088 supra, the clerks shall enter in separate columns by tallies under or opposite the names of the persons voted for, and the answers to the questions that may have been submitted as provided in the form of tally sheets, all votes thus read by the judges. After the examination of the ballots has been completed, the number of votes for each person and for the respective answers to each question submitted, shall be enumerated under the inspection of the judges and set down, as provided in the form of the tally sheets.

It is the poll book and the tally sheet that under section 5093 G. C. are deposited with the clerk or auditor of a municipal corporation. There is no provision of law for the judges and clerks of the election making any other or different returns than the statute specifically prescribes. The question assumes that the judges and clerks make some sort of a calculation, determinative upon whether they count or exclude certain ballots. The sole duty of the judges in reference to the ballots is to count them as the law provides. For the same reason their sole duty in reference to determining the number of votes is to follow the directions of the statutes as found in section 5081 G. C.

From the question submitted it would look as if the board of election was concerned in having the election officers interpret that part of section 3947 G. C. which provides:

"If two-thirds of the voters voting at such election upon the question of issuing the bonds vote in favor thereof, etc."

The meaning of these words is of no concern to the election officers as such. Their duties are purely statutory and are fully performed when they follow the specific provisions of the statute.

But it is further asked:

"In the meaning of the statute, has a voter voted if his ballot is not properly marked?"

Section 5075 G. C. provides :

> "When a person has received an official ballot from one of the election officers, and has delivered it to the election officer having charge of the ballot box at the time, and when such ballot has been deposited in the ballot box, such person shall be deemed to have voted."

This section is plain and needs no construction. When the ballot has been deposited in the ballot box, the person shall be deemed to have voted. Under the law, just prior or contemporaneous with the depositing of the ballot in the ballot box, the clerk transcribes the name of the voter upon the poll book.

So answering specifically the inquiry of April 27, 1917, it makes no difference whether the ballot is marked properly, intelligently, or not at all. When the ballot is deposited in the ballot box, the person is deemed to have voted.

Since writing the above, I am in receipt of a further communication under date of May 5, 1917, in reference to the same matter as inquired about under date of April 27. The communication states that a difference of opinion has arisen between the authorities as to what constitutes "two-thirds of the voters voting at such election" under the provision of section 3947 G. C. The inquiry probably refers to a construction of that part of section 3947 G. C. which reads:

> "If two-thirds of the voters voting at such election upon the question of issuing the bonds vote in favor thereof, etc."

This very question was presented to the supreme court in the case of the City of Wellsville et al. v. Connor, 91 O. S. 28, and the court distinguishes sections 5122 and 3947 G. C. Under section 5122, or any other section which requires that a majority or any certain proportion of the "votes cast at the election" should be in favor of a proposition, in order that it should carry, all the votes cast at the election, including blank and unintelligent votes, must be considered. But in an election under the provisions of section 3947 G. C., the language is not "voters voting at such election," but it is "voters voting at such election *upon the question,*" etc.

The decision of the court, as found in the first syllabus of the City of Wellsville et al. v. Connor, supra, reads as follows:

> "1. Where the question of issuing bonds by a municipality pursuant to section 3939 et seq., General Code, is submitted to the electors at a special or general election, in ascertaining whether two-thirds of the voters voting at such election upon the question of issuing the bonds have voted in favor thereof, as required by section 3947, blank ballots or unintelligible ballots are not to be considered."

It appears, therefore, that in the election of which you speak, while this case has no control over the character of return or abstract that should be made by the election officers, which should follow the statute as hereinbefore set out, the question submitted is to be decided according to the number of voters voting on the proposition.

Trusting this answers your inquiry, I am,

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

277.

SECTION 3660—REFERRED TO IN S. B. No. 232, EIGHTY-SECOND GENERAL ASSEMBLY—SHOULD BE READ 5660.

In S. B. 232, Eighty-Second General Assembly, the reference to section 3660 in section 6, paragraph 1 should be read 5660.

COLUMBUS, OHIO, May 18, 1917.

HON. SUMNER E. WALTERS, *Prosecuting Attorney, Van Wert, Ohio.*

DEAR SIR:—I am in receipt of your letter of May 3, 1917, to the following effect:

> "Having examined Senate Bill No. 232, passed by the last legislature, with a view of acting under its provisions for the benefit of some municipalities in this county, I cannot reconcile section 6, paragraph 1, in this respect:
>
> "'Whether in contracting such obligations the provisions of section 3806 or 3660 of the General Code were complied with or not,' as it appears to me that 3660 mentioned is not applicable and is evidently a mistake in print.
>
> "If that be true, would you advise what section was intended by the legislature instead of 3660?"

The paragraph quoted in your letter refers to sections 3806 and 3660 of the General Code. Section 3806 G. C. reads as follows

> "No contract, agreement or other obligation involving the expenditure of money shall be entered into, nor shall any ordinance, resolution or order for the expenditure of money, be passed by the council or by any board or officer of a municipal corporation, unless the auditor or clerk thereof, first certifies to council or to the proper board, as the case may be, that the money required for such contract, agreement or other obligation, or to pay such appropriation or expenditure, is in the treasury to the credit of the fund from which it is to be drawn, and not appropriated for any other purpose, which certificate shall be filed and immediately recorded. The sum so certified shall not thereafter be considered unappropriated until the corporation is discharged from the contract, agreement or obligation, or so long as the ordinance, resolution or order is in force."

Section 3660 of the General Code, reads as follows:

> "To suppress and restrain disorderly houses and houses of ill-fame, and to provide for the punishment of all lewd and lascivious behavior in the streets and other public places."

It is evident that these sections have no relation one to the other and that the latter section, 3660, has no relation whatever to the subject matter of the act in question and that therefore the reference to section 3660 of the General Code is a mistake.

The act in which the section and paragraph are found is entitled, "An act to authorize municipal corporations and school districts to adjust their fiscal opera-

tions to the limitations on tax levies by funding existing deficiencies, and to amend section 3940 of the General Code so as to reduce to one-half of one per cent. of the tax duplicate the amount of the total indebtedness which may be created in any one fiscal year by the council of a municipal corporation under the authority of section 3939 of the General Code.

In the preamble thereof it states that in many *municipal* corporations and *school districts* in the state deficiencies exist, or will exist; that a law has been enacted which will assess the real and personal property in municipal corporations and school districts at their true value in money and that when ample duplicates exist the said municipal corporations and school districts will be able to accumulate adequate sinking funds and meet existing deficiencies, if the same be funded, to be distributed over a series of years, and the act therefore grants authority to municipal corporations and board of education to submit to the electors the question of issuing bonds for the purpose of funding existing deficiencies of municipal corporations and school districts, and proceeds to set forth the method by which such deficiencies may be taken care of.

Section 6 of said act is a definitive section and contains the language concerning which you inquire. Section 3806, hereinbefore quoted, is the section of the General Code requiring the auditor of a city or the clerk of a village to certify that there is money in the respective treasuries to pay obligations before a contract, agreement or other obligation involving the expenditure of money is entered into. Section 5660 is the corresponding section relative to counties, townships and school districts, and it is perfectly clear that the legislature intended in section 6 of the act referred to, paragraph 1, to provide

> "All obligations of the municipal corporation or school district, outstanding on July 1, 1917, and due on or before said date, or to become due thereafter during the then current fiscal year, whether in contracting such obligations the provisions of sections 3806 or *5660* of the General Code were complied with or not, for the payment of which sufficient funds are not in the treasury on July 1st, 1917."

In other words, section 3806 relative to municipal corporations, and section 5660 relative to school districts, are in *pari materia*. The question therefore arises as to whether or not a court would be justified in reading "3660" as "5660" in the paragraph in question.

The case of State ex rel. v. Archibald, Sheriff, 52 O. S. 1, was one involving the question as to the interpretation of an act establishing a court of insolvency. It was an action in mandamus to compel the sheriff to issue his proclamation for the election of a judge of said court on the first Tuesday after the first Monday in November, 1894, the sheriff claiming that the election for such judge was to be held on the first Tuesday after the second Monday. The act provided that the first election for such judge should be held on the first Tuesday after the second Monday in November, 1894. It was contended, however, that it was the intention of the legislature that the election should be held on the first Tuesday after the first Monday, as provided by general law. The court held that the language of the act prevailed.

In the opinion the court uses language which has been followed in other cases as the correct statement of the law in this state. I desire to call attention to the language of the court on page 9, which is as follows :

> "If there is no error or mistake in this statute, it must be construed and enforced according to its letter. If there is such error or mistake, and the intention of the legislature can be ascertained, the error or mistake should be corrected by the court.

"That courts have power to correct errors and mistakes in statutes, cannot be doubted; but such errors and mistakes must be manifest beyond doubt, either on the face of the act, or when read in connection with other statutes in *pari materia.*

"When it thus appears beyond doubt that a statute, when read literally as printed, is impossible of execution, or will defeat the plain object of its enactment, or is senseless, or leads to absurd results or consequences, a court is authorized to regard such defects as the result of error or mistake, and to put such construction upon the statute as will correct the error or mistake, by carrying out the clear purpose and manifest intention of the legislature. The error or mistake, as well as the proper correction, must appear beyond doubt from the face of the act, or when read in connection with other acts in *pari materia.*

"The supreme court of Pennsylvania states the rule in these words: 'The power is undoubted, but it can only be exercised when the error is so manifest, upon an inspection of the act, as to preclude all manner of doubt, and when the correction will relieve the sense of the statute from actual absurdity, and carry out the clear purpose of the legislature.' Lancaster Co. v. Frey, 128 Pa. St., 593.

"An eminent text writer states the rule thus: 'The power to make such corrections is well established, but it is exercised only where the error is so manifest as to leave no doubt of the judicial mind as to the actual intent of the legislature.' 23 Am. & Eng. Ency. of Law, 422."

The court then cites various cases.

There is no doubt in the instant matter that there is a manifest error occurring in the statute and by reference to the provisions of section 3806, and recognizing the related statute 5660, that the court would correct the error in order to carry out the manifest intention of the legislature.

There are numerous authorities which could be cited on the proposition above stated as, for example,

State ex rel. v. Board of Education, 16 O. C. C. 1;
Cohen v. Cleveland, 43 O. S., 193.

"So reference to other sections or statutes incorrectly made will be corrected where the context or other particulars identify the statutes or provisions intended and enable the court to follow the reference with certainty."

Lewis' Sutherland Statutory Construction (2nd Ed.), Sec. 410, page 796.

"Where it is manifest upon the face of the act that an error has been made in the use of words, the court may correct the error and read the statute as corrected, in order to give effect to the obvious intention of the legislature."

26 Am. & Eng. Ency. of Law (2nd Ed.), page 655 (3).

"Mere verbal inaccuracies, or clerical errors in statutes in the use of words, or numbers, or in grammar, spelling or punctuation, will be corrected by the court whenever necessary to carry out the intention of the legislature as gathered from the entire act."

36 Cyc. 1126.

Answering your question, therefore, it is clear that the legislature intended

to refer to section 5660 instead of 3660, and I am of the opinion that the courts would correct the error in proper proceedings.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

278.

PRISONERS—CONFINED IN WORKHOUSE AND PERFORMING LABOR AS INCIDENT TO THEIR IMPRISONMENT—NOT WITHIN PROVISIONS OF WORKMEN'S COMPENSATION LAW.

Prisoners confined in a city workhouse and performing service as an incident to their imprisonment, although allowed a certain portion of their earnings while employed at work by the city under the provisions of section 2227-1 et seq. are not in the service of the city under an appointment or contract of hire and hence are not within the provisions of the workmen's compensation act.

COLUMBUS, OHIO, May 18, 1917.

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

DEAR SIR:—Under date of March 30, 1917, you submitted for my opinion the following request:

> "Are prisoners confined in the workhouse of a city within the provisions of the workmen's compensation act?"

Section 14 of the workmen's compensation act (now section 1465-61 G. C.) reads as follows:

> "The terms 'employe,' 'workman' and 'operative' as used in this act, shall be construed to mean:
>
> "1. Every person in the service of the state, or of any county, city, township, incorporated village or school district therein, including regular members of lawfully constituted police and fire departments of cities and villages, under any appointment or contract of hire, express or implied, oral or written, except any official of the state, or of any county, city, township, incorporated village or school district therein. Provided that nothing in this act shall apply to policemen or firemen in cities where policemen's and firemen's pension funds are now or hereafter may be established and maintained by municipal authority under existing laws."

As a general proposition the above section provides in effect that every person in the service of the state or of one of its political subdivisions therein contained in pursuance of an appointment or of an express or implied contract of hire, excepting officials thereof and in some cases policemen and firemen, shall be within the provisions of the workmen's compensation act. The exceptions contained in said section have no application to the question in hand and hence no further consideration will be given them.

In answering your request, then, it is only necessary to consider whether or not a prisoner in a city workhouse is in the service of the city under an appoint-

ment or an express or implied contract of hire. Primarily an inmate of a municipal workhouse is not in the service of the city having same, but he is in the custody of said municipality by reason of the sentence of some court. As an incident to his imprisonment a city prisoner in its workhouse may be employed in its service under the following provisions of the General Code:

> "*Sec.* 2227-1. The labor or time of any person confined in any workhouse or jail in this state shall not hereafter be let, farmed out, given, sold or contracted to any person, firm, corporation or association.
>
> "*Sec.* 2227-2. Such persons so confined may be employed in the manufacture of articles used by any department or public institution belonging to or controlled by the political subdivision or subdivisions supporting or contributing to the support of any such workhouse or jail or to any political subdivision of the state.
>
> "*Sec.* 2227-5. The board, officer or officers, in charge of any such workhouse or jail shall place to the credit of each prisoner such amount of his earnings as the board, officer or officers deems equitable and just, taking into consideration the character of the prisoner, the nature of the crime for which he was imprisoned and his general deportment. The board, officer or officers for violation of the rules, want of propriety or other misconduct, may cancel such portion of such credit as is deemed proper.
>
> Sec. 2227-6. When any such earnings are credited to any such person as provided by the preceding section and such person has a child or children under the age of sixteen or a wife, the board, officer or officers, in control of such workhouse or jail shall pay such earnings weekly to the person having custody of such child or children or to any incorporated humane society that will serve as trustees for such child or children without compensation or to such wife as such board, officer or officers may determine; but when such person has no such child, children or wife, such earnings shall be paid to him upon his discharge."

However, I am convinced that the service or employment mentioned in the preceding sections of the General Code is not the kind of service meant when the term is used in the workmen's compensation act since the service therein referred to is voluntary in character and is rendered in pursuance of an appointment or under the terms of a contract, while the service performed by a workhouse prisoner is involuntary on his part and his employment is not under an appointment or contract of hire but is required of him as a matter of law. It is true that certain provisions are made in the above quoted sections of the General Code for a credit to be given a prisoner of some portion of his earnings. Still, I feel that this allowance to him is merely a matter of gratuity under the state law and does not change his status from one of custody to one of service under the terms of the workmen's compensation act. To my mind it was never considered by the legislature that the benefits and protection of the workmen's compensation law should be extended to those who by their own acts have violated the law and made necessary their confinement in some penal institution where service might be required of them as an incident of their imprisonment.

A similar question was considered by my predecessor, Hon. Edward C. Turner, in reference to the application of the workmen's compensation act to a convict in the Ohio penitentiary, in Opinion No. 383, found in Vol I of the Opinions of the Attorney-General of Ohio for the year 1915, page 782, in which he held that a convict was not within the provisions of said law.

Answering your question specifically, then, I am of the opinion that prisoners confined in the workhouse of a city are not within the provisions of the workmen's compensation act.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

279.

LIBRARY—EARNINGS AND FINES THEREOF—IN CITIES UNDER 30,000—SHOULD BE TURNED OVER TO TREASURER AND KEPT SEPARATE—SPENT ONLY BY TRUSTEES OF LIBRARY FOR LIBRARY PURPOSES—MONEY RAISED BY TAXATION FOR MAINTENANCE THEREOF CANNOT BE TRANSFERRED TO LIBRARY IN ANOTHER TAXING DISTRICT.

1. *In cities under 30,000 population the library earnings, fines, etc., should be turned over to the city treasurer and kept separate and apart from other money by such treasurer, to be expended only by the board of directors of the library for library purposes.*

2. *No part of the money raised by taxation for the maintenance of a library in such taxing district may be transferred to another taxing district for the purpose of maintaining a library in that taxing district, which library is altogether a different institution from the one located in the taxing district in which the money has been raised.*

COLUMBUS, OHIO, May 18, 1917.

HON. C. B. GALBREATH, *Secretary and State Librarian, Columbus, Ohio.*

DEAR SIR:—Your letter of February 21, 1917, is as follows:

"In view of the fact that numerous queries come to us relative to the following subjects, we would be pleased to have the opinion of the attorney-general regarding them:

"1. We have experienced some difficulty in regard to the library funds in the cities of Lancaster and Defiance, and would like your opinion on the following questions concerning them:

"Should not the earnings of the library be exclusively expended for library purposes? The law requires specifically, I believe, that sums of money collected by the library from fines and other sources shall be deposited with the public treasurer. Are not libraries justified, however, in demanding that these amounts be credited to the library fund and subject only to the order of the governing board of the library? In some instances libraries have deposited such sums with the treasurer, but they have been turned over to the general fund and the library receives no benefit from them.

"2. Can part of the money raised by taxation in a certain taxing district be divided and partially refunded? For instance, a village within a certain township which maintains a township library wishes to establish its own library and demand its share of the township library funds raised by taxation within its limit. A similar example is to be met with

in a case of a city within a county maintaining a county library. A certain city maintains a Carnegie free library and wishes the funds raised for county library purposes to be devoted to its own use rather than expended for general county library service."

Referring to your first question, sections 15061, 15062 and 15063 of the General Code read:

"Sec. 15061. The common council of every city not exceeding in population thirty thousand inhabitants, and of every incorporated village shall have power to establish and maintain a public library and reading room and for such purpose may annually levy and cause to be collected, as other general taxes are, a tax not exceeding one mill on each dollar of the taxable property of such city or village, to constitute the library fund, which shall be kept by the treasurer separate and apart from other money of the city or village, and be used exclusively for the purchase of books, periodicals, necessary furniture and fixtures and whatever is required for the proper maintenance of such library and reading room.

"Sec. 15062. For the government of such library and reading room there shall be a board of six directors, appointed by the council of such city or village from among the citizens thereof at large, and not more than one member of the council of such city or village shall at any one time be a member of said board. Such directors shall hold their office for three years from the date of appointment, and until their successors are appointed, but upon their first appointment they shall divide themselves at their first meeting by lot into three classes, one-third for one year, one-third for two years, and one-third for three years, and their terms shall expire accordingly. All vacancies shall be immediately reported by the directors to the proper council and be filled by appointment in like manner; and if an unexpired term, for the residue of the term only. No compensation whatever shall be paid or allowed to any director.

"Sec. 15063. Said directors shall, immediately after their appointment, meet and organize by the election of one of their number president, and by the election of such other officers as they may deem necessary. They shall make and adopt such by-laws, rules and regulations for their own guidance, and for the government of the library and reading room, as may be expedient. They shall have the exclusive control of the expenditures of all moneys collected for the library fund, and the supervision, care and custody of the rooms or buildings constructed, leased or set apart for that purpose, and such money shall be drawn from the treasury by the proper officers, upon the properly authenticated voucher of the board of directors, without otherwise being audited. They may, with the approval of the common council, lease and occupy, or purchase, or erect on purchased ground, an appropriate building, provided that no more than half the income in any one year can be set apart in said year for such purchase or building. They may appoint a librarian and assistants, and prescribe rules for their conduct."

It will be noted that the directors, under section 15063 G. C. "shall have the exclusive control of the expenditures of all moneys collected for the library fund * * * and such money shall be drawn from the treasury by the proper officers upon the proper authenticated voucher of the board of directors without otherwise being audited." From the provisions of the above sections it is clear that the city treasurer is made the custodian of all library funds, but that the ex-

penditure of such funds is a matter over which the board alone has control, and in direct answer to your first question, therefore, I am of the opinion that all moneys coming to the library board from fines, etc., and turned over to the city treasurer, are to be kept separate and apart from other money by such treasurer and expended only by the board of directors of the library for library purposes.

Answering your second question: Article 12, section 5 of the Constitution of 1851 reads:

> "No tax shall be levied except in pursuance of law; and every law imposing a tax shall state distinctly the object of the same, to which only it shall be applied."

In the case of State ex rel v. Pohling, 1 O. C. C. 486, 1 O. C. D. 271, it was held that funds which are raised by a tax for the purpose of improving county roads, cannot, by special statute, be applied to the purposes of a municipal corporation in such county. The constitutional provision, above quoted, would make it unlawful, to my mind, to use the township, village, city or county library funds, or any part of them, for any other purpose than that for which they have been raised. See Lima v. McBride, 34 O. S., 338.

In direct answer to your second question, therefore, I am of the opinion that no part of the money raised by taxation in certain taxing district for library purposes may be transferred to another taxing district for the purpose of maintaining a library in that taxing district, which library is altogether a different institution from the one located in the taxing district in which the money has been raised.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

280.

APPROVAL—TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE OF THE COUNTY COMMISSIONERS OF MUSKINGUM COUNTY, OHIO—DISAPPROVAL—BOND FORM.

COLUMBUS, OHIO, May 18, 1917.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

> "RE:—Bonds issued in thesum of $17,500 by the county commissioners of Muskingum county, Ohio, covering the shares of said county, and of Newton, Muskingum and Falls townships in said county, and the shares of abutting property owners in the improvement of certain sections of intercounty highways No. 10 and No. 344."

I have made a careful examination of the transcript of the proceedings of the county commissioners of Muskingum county, Ohio, and of the other officers, relating to said bond issue, said proceedings and the transcript thereof having been corrected to meet the requirements of this department.

As a result of said examination I find said proceedings to be in compliance with the provisions of the General Code of Ohio relating to the subject matter

under investigation, and I am of the opinion that proper bonds covering said issue will, when signed by the proper officers, be valid and binding obligations of said county.

I find myself unable to approve the bond form submitted with the transcript of proceedings, and I have this day prepared a bond form for use in the preparation of the bonds covering this issue, and have forwarded the same to the county commissioners of said county.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

281.

APPROVAL—TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE OF THE COUNCIL OF THE VILLAGE OF CHICAGO JUNCTION, OHIO.

COLUMBUS, OHIO, May 19, 1917.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of the village of Chicago Junction, Ohio, in the sum of $10,000 for the purpose of procuring funds for the improvement of the waterworks and electric light power plant of said village."

I have carefully examined the transcript of the proceedings of the council and other officers of the village of Chicago Junction, Ohio, relating to the above bond issue as said transcript has been corrected to meet the requirements of this department, and as a result of such examination I am of the opinion that bonds covering this issue, drawn in accordance with the form submitted and signed by the proper officers of the village, will constitute valid and binding obligations of said village.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

282.

APPROVAL—TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE OF THE COUNCIL OF THE VILLAGE OF CHICAGO JUNCTION, OHIO.

COLUMBUS, OHIO, May 19, 1917.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of the village of Chicago Junction, Ohio, in the sum of $11,534.75, issued by said village in anticipation of the collection of assessments for the improvement of Park street from Woodlawn avenue to Long street in said village."

I have carefully examined the transcript of the proceedings of the council and other officers of the village of Chicago Junction, Ohio, relating to the above bond issue as said transcript has been corrected to meet the requirements of this department, and as a result of such examination I am of the opinion that bonds covering this issue, drawn in accordance with the form submitted and signed by the proper officers of the village, will constitute valid and binding obligations of said village.

Very truly yours,
JOSEPH McGHEE,
Attorney-General.

283.

APPROVAL—TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE OF THE COUNCIL OF VILLAGE OF CHICAGO JUNCTION, OHIO.

COLUMBUS, OHIO, May 19, 1917.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bond issue of the village of Chicago Junction, Ohio, in the sum of $5,200.00 for the purpose of providing funds to pay the village's share of improving Park street between Woodlawn avenue and Long street in said village."

I have carefully examined the transcript of proceedings of the council and other officers of the village of Chicago Junction, Ohio, relating to the above bond issue as said transcript has been corrected to meet the requirements of this department, and as a result of such examination I am of the opinion that bonds covering this issue, drawn in accordance with the form submitted and signed by the proper officers of the village, will constitute valid and binding obligations of said village.

Very truly yours,
JOSEPH McGHEE,
Attorney-General.

284.

APPROVAL—TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE OF THE COUNTY COMMISSIONERS OF CLERMONT COUNTY, OHIO—BOND FORM NOT SUBMITTED.

COLUMBUS, OHIO, May 19, 1917.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bond issue of Clermont county, Ohio, in the sum of $14,300.00 for the purpose of paying the shares of said county, Ohio and Pearce townships, and abutting property owners in the cost and expense of improving section 1, intercounty highway No. 7."

I have carefully examined the transcript of proceedings of the county commissioners of Clermont county, Ohio, and other officers relating to the above bond issue after said proceedings and the transcript thereof had been corrected to meet the requirements of this department. As a result of such examination, I am of the opinion that bonds covering this issue, prepared in proper form and signed

by the proper officers, will be valid and binding obligations of the county of Clermont.

No bond and coupon form was submitted with the transcript, as required by this department, but we have this day requested the county commissioners of said county to request the printer of said bonds to submit printer's proof copy of the bond and coupon form to this office before said bonds go to print, to the end that we make such corrections therein as may be necessary.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

285.

MUNICIPAL COURT OF CLEVELAND—EXPENDITURES FOR MAINTENANCE UNDER DISCRETION OF CLERK AND JUDGES—COST OF PUBLICATION OF COURT CALENDAR MAY BE TAXED AS COSTS IN EACH CASE—NOTARY FEES FOR VERIFYING PLEADINGS MAY BE TAXED AS COSTS—BAILIFF—NO AUTHORITY TO PAY OVER MONEY MADE ON EXECUTION TO PERSON NOT PARTY TO SUIT —JUDGES OF CRIMINAL BRANCH MAY SENTENCE VIOLATORS OF CITY ORDINANCES TO COUNTY JAIL WHEN CITY NOT PROVIDED WITH WORKHOUSE.

1. *Expenditures for maintaining the municipal court of Cleveland are under the discretion of the clerk and judges of the municipal court, subject to appropriations to be made by council.*

2. *A charge for publication of the calendar of the municipal court, as provided in sections* 1695, 1696 *and* 1697 *G. C., may be taxed and collected as part of the costs in each case in the manner provided by said sections.*

3. *Notary fees for verifying pleadings and other papers requiring verification, may be taxed as costs in an action.*

4. *There is no authority for a bailiff of the municipal court paying over money made on execution to a person not a party to the suit. Money made on execution should be paid to the party entitled thereto, or paid into court, or held by the officer until the person entitled thereto establishes his claim as provided by law.*

5. *Judges of the criminal branch of the municipal court may commit persons who have been accused of or convicted of violation of the city ordinances, to the county jail if the city is not provided with a workhouse or other jail.*

COLUMBUS, OHIO, May 19, 1917.

HON. W. H. MCGANNON, *Chief Justice Municipal Court of Cleveland, Cleveland, Ohio.*

DEAR SIR:—You have submitted to me several questions with reference to the municipal court of Cleveland, which I will answer in the following order:

> "Question 1. Do the provisions of the charter cover the expenditures in the municipal court, or does the state law give the clerk of the court unlimited control over the expenses of the court?"

Section 1579-48 of the General Code provides as follows:

> "The council of the city of Cleveland shall provide suitable accommodations for the municipal court and its officers including a private room

for each judge and sufficient jury room. The council shall also provide for the use of the court complete sets of the reports of the supreme and inferior courts of Ohio and such other authorities as are deemed necessary, and shall provide for each court room the latest edition of the General Code of Ohio, and necessary supplies including telephone, stationery, furniture, heat and light. The expense of maintaining the court shall be paid out of the treasury of the city of Cleveland."

From this section it is clear that the expenses of the court must be paid out of the treasury of the city of Cleveland. The question, as I understand it, is whether the clerk can make purchases, direct, of supplies, etc., out of an appropriation made, or to be made by council for the maintenance of the court; or must all supplies, etc., be purchased through the city purchasing agent.

The charter of the city of Cleveland, sections 41 to 45 inclusive, provide for appropriations by council for conducting the affairs of the city. Section 41 is in part as follows

"The fiscal year of the city shall begin on the first day of January. On or before the 15th day of November in each year the mayor shall prepare an estimate of the expense of conducting the affairs of the city for the following year. This estimate shall be compiled from detailed information obtained from the various departments on uniform blanks prepared by the director of finance, and shall set forth:

"(a) An itemized estimate of the expense of conducting each department. * * *"

Section 43 is as follows:

"The council may at any time transfer money appropriated for the use of one department, division, or purpose to any other department, division or purpose; but no such transfer shall be made of revenues or earnings of any non-tax supported public utility to any other purpose."

Section 45 provides that no money shall be drawn from the treasury of the city, nor any obligation for the expenditure of money incurred, except pursuant to appropriations made by council.

Section 78 creates six different departments, with subdivisions of five of said departments so created. There is no department or division which attempts to or does in any way include the municipal court. Division "d" of the department of finance is designated as "Division of purchase and supplies."

The department of finance is under the general supervision of the director of finance.

Section 111 of the charter, as to his duties, provides in part that,

"The duties of the director of finance shall include the keeping and supervision of all accounts and the custody of all public money of the city; the purchase, storage and distribution of supplies needed by the various departments; * * *"

Sections 118 and 119 as to the "Division of Purchases and Supplies" are as follows:

"Section 118. The commissioner of purchases and supplies shall make

all purchases *for the city* in the manner provided by ordinance, and shall, under such regulations as may be provided by ordinance, and by direction of the board of control, sell all property, real and personal, of the city not needed for public use or that may have become unsuitable for use or that may have been condemned as useless by the director of a department. He shall have charge of such store rooms and warehouses of the city as the council may by ordinance provide.

"Section 119. Before making any purchase or sale, the commissioner of purchases and supplies shall give opportunity for competition, under such rules and regulations as the council shall establish. Supplies required *by any department* may be furnished upon requisition from the stores under the control of the commissioner of purchases and supplies, and whenever so furnished therewith by warrant made payable to the credit of the stores' account of the department of purchases and supplies. The commissioner of purchases and supplies shall not furnish any supplies to any department unless there be to the credit of such department an available appropriation balance in excess of all unpaid obligations sufficient to pay for such supplies."

From the above quoted provisions of the charter of the city of Cleveland, it seems clear that the commissioner of purchases and supplies is to purchase and issue supplies only to the various departments of the city. No other authority is given him by the charter. The municipal court is not a department of the city of Cleveland nor does it come under any department; in fact, the municipal court is not mentioned in the charter of the city except in section 86, which provides in one part that the director of law shall be the prosecuting attorney of the municipal court.

In the case of *State ex rel. v. Frank T. Andrews, et al.,* decided February 12, 1917, by the court of appeals of Cuyahoga county, it was directly held that the municipal court of Cleveland is a state court, the decision being based upon the well known principle that the legislature alone can establish courts in Ohio. The court in this case said:

"Being thus a state tribunal in creation, it must be equally so in all the inferior details of its organization and administration, which the legislature must be competent to prescribe, equally with its power of bringing the court into being."

Therefore, as section 1579-48, first quoted, provides for the expense of maintaining the court being paid out of the treasury of the city of Cleveland; and as pointed out, the charter of the city in no way deals with this court, nor does it come under the head of any department for which the commissioner of purchases and supplies is authorized to act, it would seem that the matter would be under the discretion of the clerk and the judges of the municipal court, subject to appropriations to be made by council.

Your second question is as follows:

"The calendar of the court and other information pertaining to cases in the civil division is published in the Legal News and a uniform charge of 15c for each case is made and the same is taxed by the clerk as a part of the cost and collected together with other costs. Is this action on the part of the clerk legal?"

Section 1579-47, as to the municipal court of Cleveland, provides as follows:

"Except as otherwise provided for in this act, in actions and proceedings wherein the said municipal court has jurisdiction concurrent with a court of a justice of the peace, the fees and costs may be the same and taxed in the same manner as is now, or may hereafter be provided for actions and proceedings heard and determined in a court of a justice of the peace. In other actions and proceedings the fees and costs may be the same, and taxed in the same manner, as is now, or may hereafter be, provided for actions and proceedings heard and determined in the court of common pleas. In criminal proceedings all fees and costs may be the same as now fixed in the police court of said city. Provided, however, that the municipal court, in lieu of the aforesaid methods of taxing costs, by rule of court may establish a schedule of fees and costs to be taxed in all actions and proceedings, in no case to exceed fees and costs provided for like actions and proceedings by general law."

Sections 1695, 1696 and 1697 G. C. are as follows:

"Section 1695 (103 O. L. 418) In the counties of Hamilton, Cuyahoga, Franklin and Lucas, the judges of the courts of record, other than court of appeals, shall jointly designate a daily law journal published in the county, wherein shall be published all calendars of the courts of record in such county, which shall contain the numbers and titles of causes, and names of attorneys appearing therein, together with the motion dockets and such particulars and notices respecting causes, as may be specified by the judges, and each notice required to be published by any of such judges

"Section 1696. In all cases, proceedings, administrations of estates, assignments and matters pending in any of the courts of record of such counties wherein legal notices or advertisements are required by law to be published, such law journal shall once a week and on the same day of the week, publish an abstract of each such legal advertisement, but the jurisdiction over, or irregularity of a proceeding, trial or judgment, shall not be affected by anything therein.

"Section 1697. For the publication of such calendars, motion dockets and notices, the fees for which are not fixed by law, the publisher of the paper shall receive a sum to be fixed by the judges, not exceeding thirty-five cents for each case brought, to be paid by the party filing the petition, or transcripts for appeal or lien, and to be taxed in the costs and collected as other costs, and for the publishing of abstracts of legal advertising, a sum to be fixed by the judges, not exceeding one dollar for each case, proceeding or matter, in which such advertising is had, to be taxed as a part of the costs thereof."

The municipal court of Cleveland is a court of record. (See section 1579-1 G. C.)

"Sec. 1579-1. That there shall be, and hereby is, established in and for the city of Cleveland, a municipal court, which shall be a court of record and shall be styled 'the municipal court of Cleveland,' hereinafter designated and referred to as the municipal court."

Therefore, under the above quoted sections, the charge for publication of the court calendar, etc., of the municipal court of Cleveland may be taxed and col-

lected as other costs, if the judges of the courts of record of Cuyahoga county have designated the daily law journal in which publication is to be made and have fixed the amount of the charge.

Your third question is as follows:

> "In many cases the notary's fee is taxed as a part of the case and collected by the clerk, and the same is paid to the notary, usually a lawyer in charge of the case or someone in his office. Is this legal?"

I suppose the notary fee referred to is the fee taxed for verifying pleadings filed by litigants. These pleadings must be verified, and the cost of doing so is a proper charge; the clerk is specifically allowed to charge for the same; and as the verification may be made before a notary, I think that if the notary has not been paid, his fee may properly be taxed and paid to him whether he be an attorney in a case or not; or if the party verifying the pleading has paid the notary, then he can recover the fee so paid as part of his costs.

Your fourth question is as follows:

> "In many instances the bailiff without order from the court pays claims of parties, other than litigants, out of moneys received on executions for alleged liens on the property incurred before the property was seized by the bailiff. In some cases he has paid out all the money received on such executions to such claimant and made no payment on the judgment. Has he authority to do this?"
>
> "Should not a person who claims a lien on chattel property which has been taken on execution, establish his lien in court before the bailiff can legally recognize it, and has the bailiff the authority to pay out any money received on executions except upon the order of the court?"

The bailiff, for the purposes of this question, must be regarded in the same manner as a constable or sheriff.

Section 3343 G. C. provides as follows:

> "Constables shall pay over to the party entitled thereto all moneys received by them in their official capacity, if demand be made by such party, his agent, or attorney, at any time before he returns the writ upon which he has received it. If not paid over by that time, he shall pay it to the justice when he returns the writ."

I take it that the words "the party entitled thereto," as used in this section, mean the party to the action who is entitled to the money made on the execution. The constable is authorized to pay the money to him at any time before the return of the writ.

Section 11686, General Code, is practically an analagous section as to sheriffs. It is as follows:

> "If the sheriff collects any part of a judgment by virtue of an execution without the sale of real estate, he shall pay it to the judgment creditor, or his attorney, upon demand made therefor at his office. If the execution be fully satisfied, he shall return it within three days after he collected the money thereon."

If the officer pays to any one else, it seems to me he does so at his peril. There is no provision that I know of that would authorize either a constable or sheriff,

or any other officer to pay money which he had made on execution, to a person not a party to the proceeding, merely upon the claim of such person. The money should either be turned over to the party entitled thereto, or paid to the justice as provided by law, or held by the officer, and any person claiming the right to the same or any part thereof should establish his claim as provided by law.

What has been said as to the duty of constables and justices would apply to bailiffs of the municipal court.

Your fifth question is as follows:

> "Have the judges in the criminal branch the right to send persons to the county jail who have been accused or convicted of the violation of city ordinances?"

Section 4564, General Code, provides as follows:

> "Imprisonment under the ordinances of a municipal corporation shall be in the workhouse or other jail thereof, if the corporation is provided with such workhouse or jail. Any corporation not provided with a workhouse, or other jail, shall be allowed, for the purpose of imprisonment, the use of the jail of the county, at the expense of the corporation, until it is provided with a prison, house of correction, or workhouse. Persons, so imprisoned in the county jail shall be under the charge of the sheriff of the county, who shall receive and hold such persons in the manner prescribed by the ordinances of the corporation, until discharged by due course of law."

It seems to me this section would undoubtedly apply to Cleveland, and that if the city does not have a workhouse or other jail, imprisonment under the ordinances of the city may be made in the county jail at the expense of the city. This statute seems to authorize commitment to the county jail under ordinances of a municipal corporation only when the corporation has no workhouse or jail; under section 4565, the commissioners, upon giving ninety days' written notice, may prohibit the use of the county jail for this purpose. If such use is prohibited, then under section 4566 the corporation may still continue the use of the jail if it immediately takes steps for the erection of a prison or workhouse. It would seem, however, from the first sentence of section 4564 that if the city has either a workhouse or jail, imprisonment under ordinances of the city must be in it.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

286.

SINKING FUND COMMISSIONERS—EXERCISE CONTROL OVER MONEY IN SINKING FUND THROUGH OFFICERS OF SCHOOL BOARD—MONEY MUST REMAIN IN CUSTODY OF BOARD AND ITS TREASURER—COMMISSIONERS MAY WITHDRAW FUNDS BY REQUISITION TO BOARD OF EDUCATION.

Money in the sinking fund of a school district must remain in the custody of the school board and its treasurer, and the sinking fund commissioners exercise control of such money only through the officers of the school board. The sinking fund commission may withdraw funds for its own purpose only by requisition directed to the board of education.

COLUMBUS, OHIO, May 19, 1917.

HON. CHARLES L. FLORY, *Prosecuting Attorney, Newark, Ohio.*

DEAR SIR:—You ask a statement of my opinion upon the following:

> "On May 14, 1913, Attorney-General Hogan rendered an opinion, Opinions of Attorney-General 1913, volume 1, page 260, to the effect that the money in the sinking fund of a school district must remain in the custody of the school board and its treasurer, and that the sinking fund commission exercises control of such money only through the officers of the school board, and that the commission of the sinking fund may withdraw for its own purpose from such funds only by requisition directed to the board of education.
>
> "I am frank to say that the various sections of the General Code, quoted in the opinion mentioned, seem to place the money in the sinking fund so completely within the control of the sinking fund commissioners, that I have the temerity to doubt the correctness of the holding. The question has now arisen in connection with the affairs of the Hanover township rural school district in Licking county."

I have considered opinion No. 288 of my predecessor, Hon. Timothy S. Hogan, found in the Annual Report of the Attorney-General for 1913, volume 1, page 260, very carefully and advise you that I agree with the conclusion reached therein, that is, that:

> "Under section 7604, General Code, and the following statutes which provide for the deposit of all moneys coming into the hands of the treasurer of the board of education of a school district and the following statutes which provide the mode of procedure for deposit of funds; and under section 4768, which provides that no money shall be withdrawn from depositories except upon an order signed by the treasurer and by the president or vice-president, and countersigned by the clerk of the board of education; and under section 7613, and related sections, which require the board of education to set aside and appropriate funds for the use of the sinking fund commission, the custody of such funds must reside with the board and its treasurer, whilst the control of the same is vested in the sinking fund commission.
>
> "The commission of the sinking fund may withdraw for its own purpose from such funds, therefore, only by requisition directed to the board."

It seems clear to me that the reasons set forth in said opinion are irresistible and for me to give my reasons upon the subject would be to simply recapitulate what is set forth in said opinion.

I am enclosing you herewith copy of said opinion with my advice to you that I agree therewith.

Yours very truly,
JOSEPH MCGHEE,
Attorney-General.

287.

COUNTY SURVEYOR'S REPORT UNDER SECTION 2787 G. C. TO COMMISSIONERS SHOULD INCLUDE ONLY SUCH ASSISTANTS WHO RECEIVE THEIR PAY FROM GENERAL COUNTY FUND—REPORT OF TOTAL COMPENSATION SHOULD NOT CONTAIN COMPENSATION NOT DRAWN FROM GENERAL COUNTY FUND.

The report made by the county surveyor to the county commissioners, under the provisions of section 2878 G. C., should not include those deputies and assistants who do not receive their pay from the general county fund. Neither should the total compensation reported to the county commissioners include compensation not drawn from the general county fund.

COLUMBUS, OHIO, May 19, 1917.

HON. HECTOR S. YOUNG, *Prosecuting Attorney, Marion, Ohio.*

DEAR SIR:—I have your communication of April 14, 1917, in which you ask my opinion in reference to certain matters therein set out. Your communication reads as follows:

> "Below is my interpretation of section 2787, concerning which I spoke to you yesterday. Please give me an opinion as to whether or not it is correct.
>
> "'Section 2787 of the Cass act provides that on or before the first Monday in June the county surveyor shall file with the county commissioners a statement of the number of assistants, draftsmen, clerks, etc., and the total amount of their compensation for the year beginning the following September.
>
> "'It is my understanding that this estimate of salary is to cover the salaries of assistants who are engaged on strictly county work such as the making of surveys and plans for construction and repair of county and township roads, county bridges, tax maps, miscellaneous surveys and maps for county purposes, general office expense, etc. Also inspection on county roads and bridges.
>
> "'BUT that the above salary estimate is not to include the compensation of employes when engaged on either state-aid road work or on ditch work. Because the engineering expense on these two kinds of work becomes a part of the cost of the work, to be paid from special funds created for these purposes and not out of the general county fund.'"

The question embodied in your communication is as to whether the report made by the county surveyor to the county commissioners, under the provisions

of section 2787 G. C., should include only those deputies and assistants who draw their compensation from the general county fund, or whether it should include also those deputies and assistants who receive their compensation from the particular fund created to take care of the cost and expense of the work in and about which such deputies and assistants may be employed.

It is your opinion that the former is correct, that is, that the report should include only those deputies and assistants who draw their compensation from the general county fund. I believe that your construction placed upon this statute is correct.

What is the object of the statute? The report of the county surveyor is to enable the county commissioners to fix a sum beyond which the county surveyor cannot go in the employment of helpers. If the county surveyor should report all deputies and assistants, irrespective as to whether they draw their compensation from the general county fund or a special fund, the report would be misleading to the county commissioners. They would fix an aggregate amount beyond which the county surveyor could not go in the employment of assistants, basing it upon the report of the county surveyor. But the report of the county surveyor would embrace deputies and assistants who do not draw their compensation from the general county fund. The result of such a proceeding would be that the county commissioners would allow a greater sum to the county surveyor than they otherwise would have allowed for deputy hire.

It must be remembered that the object of this report made by the county surveyor is not to give the county commissioners authority to fix the number and kind of helpers, neither to fix the amount which any one helper shall receive, but merely to fix the aggregate amount beyond which the county surveyor cannot go in the employment of deputies and assistants.

Hence, what the county commissioners desire to know is as to what deputies and assistants the county surveyor may be compelled to employ in his opinion during the coming year, beginning with September 1st, and the amounts which in his opinion he will be compelled to pay out of the general county fund for such deputies and assistants. The county commissioners then can use his report as a basis upon which to arrive at the amount which they feel ought to be allowed the county surveyor for deputies and assistants. Said section 2787 G. C. reads as follows:

> "On or before the first Monday of June of each year the county surveyor shall file with the commissioners of such county a statement of the number of all necessary assistants, deputies, draughtsmen, inspectors, clerks or employes in his office for the year beginning September 1st next succeeding and their aggregate compensation. The county commissioners shall examine such statement and, after making such alterations therein as are just and reasonable, fix an aggregate compensation to be expended therefor for such year."

From the above it is my opinion that you are correct in the construction you place upon this statute, and that the report of the county surveyor to the county commissioners should not include deputies and assistants, who draw their compensation from some special fund and not from the general county fund.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

288.

WHEN COUNTY HAS NO WORKHOUSE—COMMISSIONERS MAY CONTRACT WITH AUTHORITY OF ANOTHER COUNTY HAVING CONTROL OF WORKHOUSE—FOR MAINTENANCE OF PRISONERS CONVICTED OF MISDEMEANORS—WHEN PRISONERS CONVICTED OF VIOLATION OF ORDINANCE—COST OF MAINTENANCE MUST BE PAID BY CITY—WHEN COUNTY PAYS IN LATTER CASE—FINDING MAY BE MADE AGAINST CITY CONTAINING WORKHOUSE.

Under section 12384 *General Code the commissioners of a county or the council of a municipality, wherein there is no workhouse, may agree with the city council or other authority having control of the workhouse of a city in any other county, or with the board of district workhouses having a workhouse, upon what terms and conditions persons convicted of misdemeanors or of the violation of ordinances may be received into such workhouse. When such prisoners are sentenced for such violation of ordinances, the cost of maintenance must be paid by the city and not the county, and when in such cases such expenses have been paid by the county commissioners, a finding should be returned against the city containing the workhouse for the amount paid to the workhouse authorities by the county commissioners covering the expense of maintenance of prisoners in such cases.*

COLUMBUS, OHIO, May 21, 1917.

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

GENTLEMEN:—I have your letter of March 6, 1917, as follows:

"Section 12384 G. C. provides for contracts by the county commissioners and councils of municipalities for boarding prisoners at workhouses. It further provides that the county commissioners shall pay for boarding prisoners committed for the violation of state laws, and the councils of municipalities to pay for boarding prisoners committed for the violation of ordinances.

"The charter of the city of Middletown, Ohio, created a municipal court. The constitutionality of this charter was attacked on several grounds, one being the creation of a municipal court by charter and giving it jurisdiction in the state cases. The court of appeals of Butler county, Ohio, in the case of Jacob Heer v. Wendell Butterfield, touching the existence of this court, held:

"'The consideration of these several sections, especially section 15 of Art. IV, leads us to the opinion that it is beyond the power of a municipality by means of its charter to establish a court having jurisdiction in state cases of crimes or misdemeanors, and so far as that jurisdiction is included, the municipal court provided for in the charter of the city of Middletown, would appear to be unauthorized by law. There might be, however, under the broad provisions for local self-government, power in such a charter to provide a city court having only jurisdiction of all offenses under the ordinances of the city, and to that extent only it is possible that this municipal court could be upheld.'

"The examiners of this department find that the commissioners of Butler county have been paying the authorities of the workhouse of the city of Cincinnati for boarding prisoners committed to said work house by the municipal court of the city of Middletown, Ohio.

"How shall recovery of these payments be made from the Cincinnati workhouse or from the city of Middletown, Ohio, if such recovery can be made at all? And how far back shall our examiners go in making such findings, to the date of the creation of the court, or to the date of the decision of the court of appeals, which was February 2, 1915?"

I am also informed that at the time the decision of the court of appeals referred to was announced the city solicitor at Middletown arranged to have all state cases tried in the justice of the peace court instead of the municipal court and that since that time no state cases have been tried in the municipal court.

Section 12384 General Code reads:

"The commissioners of a county, or the council of a municipality, wherein there is no workhouse, may agree with the city council, or other authority having control of the workhouse of a city in any other county, or with the board of district workhouses having a workhouse, upon what terms and conditions persons convicted of misdemeanors or of the violation of an ordinance of such municipality having no workhouse, may be received into such workhouse under sentence thereto. The county commissioners, or the council of a municipality, are authorized to pay the expenses incurred under such agreement out of the general fund of the county or municipality, upon the certificate of the proper officer of such workhouse."

Since prisoners convicted of violations of state laws have not been sentenced to the Cincinnati workhouse from the municipal court of Middletown since July, 1915, it follows, of course, that the bills the county commissioners have been paying for prisoners sentenced from that court to the workhouse at Cincinnati have been for the expense of boarding prisoners sentenced for the violation of municipal ordinances.

From a reading of section 12384 General Code it is clear that the county commissioners have no authority to pay such expenses. These bills should have been paid by the city of Middletown.

Can this money so illegally expended by the county commissioners now be recovered?

Section 2921 G. C. provides:

"Upon being satisfied that funds of the county, or public moneys in the hands of the county treasurer or belonging to the county, are about to be or have been, misapplied, or that any such public moneys have been illegally drawn, or withheld from, the county treasury, or that a contract in contravention of law has been, or is about to be entered into, or has been or is being executed, or that a contract was procured by fraud or corruption, or that any property, real or personal, belonging to the county, is being illegally used or occupied, or is being used or occupied in violation of contract, or that the terms of a contract made by or on behalf of the county are being or have been violated, or that money is due the county, the prosecuting attorneys of the several counties of the state may apply, by civil action in the name of the state, to a court of competent jurisdiction, to restrain such contemplated misapplication of funds, or the completion of such illegal contract not fully completed, or to recover, for the use of the county all public moneys so misapplied or illegally drawn or withheld

from the county treasury, or to recover, for the benefit of the county damages resulting from the execution of such illegal contract, or to recover, for the benefit of the county, such real or personal property so used or occupied, or to recover, for the benefit of the county, damages resulting from the non-performance of the terms of such contract, or to otherwise enforce it, or to recover such money due the county."

This section was a part of an act of April 25, 1898, 93 O. L., 408.
In the case of Printing Company v. State, 68 O. S. 362, it was held:

"1. Where the number of publications of a sheriff's election proclamation or other public notice, is fixed by statute, there is no authority in the board of county commissioners, or other county officer, to contract for publications in excess of the number directed by statute. The board is also without authority to allow a claim for such excessive publications, and the allowance of such claim does not bind the county. Nor is authority to adjudicate and allow such claim given by the fact that with the charge for unauthorized publications there is, on the same paper, a charge for a publication which is authorized by statute. * * *

"3. The act of April 25, 1898 (93 O. L. 408), clothes the prosecuting attorney with power to recover back money so illegally drawn from the treasury on and after the date of its passage."

In this case the court, referring to the act of April 25, 1898, 93 O. L. 408, of which the above section 2921 G. C. is a part, said at page 372:

"Manifestly it is the purpose of this statute to reimburse the treasury for unauthorized payments from it not otherwise provided for. It is in one sense a remedial statute, and yet it gives a right of action which before its enactment did not exist."

This case is clearly authority for the holding that in the case referred to in your communication the money illegally paid the Cincinnati authorities may be recovered back from them by the prosecuting attorney of Butler county.

Neither is such holding in conflict with the case of State v. Fronizer, 77 O. S., p. 7. The conclusion in that case, whether right or wrong, was founded partly upon the fact that the county had acquired possession of the property and enjoyed the possession of the same. In the case you refer to the county of Butler received nothing whatever for the money expended, since the only party benefited by the boarding of the prisoners in Cincinnati was the city of Middletown, the duty of maintaining these prisoners resting solely upon it.

In view of the above it is my opinion that a finding should be made against the city of Cincinnati for the money paid the Cincinnati workhouse by the county commissioners for the expense of boarding prisoners at such workhouse, sentenced by the municipal court at Middletown for violation of municipal ordinances. The examiners in making these findings should go as far back as the illegal practice dates. Recovery can then be had under section 286 G. C.

While the court of appeals in the decision above referred to held that the municipal court at Middletown was without jurisdiction in state cases, yet inasmuch as the authorities at Middletown arranged to have these cases heard in a justice court after that date, I do not believe that any question should be raised now as to the legality of payments of the county commissioners for the expense of boarding state prisoners sentenced by the municipal court of Middletown prior to that decision.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

289.

COUNTY COMMISSIONERS—NO AUTHORITY TO VACATE INTER-COUNTY HIGHWAY OR MAIN MARKET ROAD—LEGISLATURE—ONLY BODY WITH POWER TO SURRENDER EASEMENT OF PUBLIC IN SUCH ROADS.

1. *There seems to be no provision made whereby the county commissioners have power to vacate all or any part of an inter-county highway or main market road.*

2. *The legislature is the only body which has power to grant relief in the way of giving up or surrendering the easement of the public in all or any part of an inter-county highway or main market road.*

COLUMBUS, OHIO, May 21, 1917.

HON. JAMES F. FLYNN, JR., *Prosecuting Attorney, Sandusky, Ohio.*

DEAR SIR:—I have your letter of May 5, 1917, supplementing your oral communication with a member of this department, in reference to which you ask my opinion. Your communication reads as follows:

"I am in receipt of a letter from Mr. John F. Kramer, special counsel, with reference to a matter I submitted to him regarding the vacation of a strip of land along the Main Market Road No. 13, in which he had expected to give me merely his own personal opinion, but since then it has developed that the question is one which your department feels as though an opinion in due form should be rendered. Mr. Kramer in his letter asks for certain additional information.

"The so-called upper Huron road ran parallel to and adjoining the right of way of the New York Central Railroad Company and this road was prior to January 1st, 1915, designated as Main Market Road No. 13. About this time it was decided to improve No. 13 by concreting the road and the New York Central, which was four-tracking its system between Cleveland and Sandusky and had not secured the right of way along this portion of No. 13, suggested to the commissioners that if they would shift No. 13 twenty feet from its present right of way, they would buy an additional twenty feet from the property owners abutting the highway upon the opposite side of the road and the commissioners could vacate the twenty feet adjoining the railroad right of way. This was agreed. About this time it was necessary to redesignate No. 13, as the entrance into Sandusky had been changed. Under this redesignation, the highway department prepared plats and profiles, which show the right of way of this portion of the road in question as twenty feet north of its original lines (as first designated) and away from the railroad right of way. Thereupon in the spring of 1915 the commissioners and the state highway department proceeded with the improvement of No. 13 and improved the twenty feet purchased by the railroad under its agreement. The twenty feet which were to revert to the company and not included in the redesignation, were left in the same situation they were, and the roadway as now traveled and improved does not include these twenty feet. The twenty feet that were to go to the county commissioners were purchased in the name of one of the agents of the railroad company and were to be by him deeded to the commissioners. The matter was delayed for no

accountable reason and the commissioners failed to take any action with reference to vacating the twenty feet that the railroad company desired, up until about seven weeks ago, when the railroad company brought in their deeds for the land to be given to the commissioners, and in turn requested the commissioners to pass a resolution vacating the twenty-foot strip between the present right of way and right of way as now improved of No. 13. With the additional twenty feet which was improved, the road would be eighty feet in width or twenty feet wider than the law provides for a market road. I am enclosing herewith a sketch of the situation and also a letter setting forth the position of the railroad with regard to the vacation resolution.

"Certain questions are asked in Mr. Kramer's letter as follows:

"First. The vacating of the twenty feet and the purchase of the additional twenty feet are due to a road improvement, the commissioners desiring to build a concrete road.

"Second. Said improvement has been begun and completed.

"Third. The highway was established first.

"Fourth. We have been unable to ascertain whether the railroad company has the fee to its right of way or simply an easement. But at the time of the agreement the railroad company obtained deeds of any right, title or interest from the abutting property owners who purchased the land adjoining the railroad and who would be entitled to any right in the public highway if the same was ever vacated by the commissioners, that is, they obtained a deed from the said abutting property owners to the twenty feet contemplated by the railroad company and the commissioners to be vacated and which was to revert to the railroad company.

"I believe I have fully answered your letter of May 3, and if you need any further reference, I should be glad to give the same. The Cass law having gone into effect in September, 1915, provides no vacation proceedings for county commissioners. Can the commissioners pass such a resolution as is desired by the railroad company, or is there any way whereby the twenty feet may be vacated?"

From the time you had your personal interview with a member of this department, I have given your matter considerable attention and study, and I am now compelled to write you that I find no satisfactory way out of the difficulty in which you find yourself placed. It seems that every way one turns he runs across an obstacle. While I am not able to solve the problem satisfactorily, yet I am going to make a few observations in reference to the matter under consideration.

You suggest in your letter that the railroad company has secured from property owners the fee to said twenty-foot strip of ground. Hence, the only other interest remaining is the easement which the public has in said strip for travel and matters incident thereto.

It will help us, in the consideration of this question, if we remember that section 7464 G. C. classifies the highways of the state as state roads, county roads and township roads, and defines state roads as follows:

"(a) State roads shall include such part or parts of the inter-county highways and main market roads as have been or may hereafter be constructed by the state, or which have been or may hereafter be taken over by the state as provided in this act, and such roads shall be maintained by the state highway department."

The next question that presents itself is as to the jurisdiction of the county commissioners over state highways and the improvement of the same.

Section 1201 G. C. provides that the county commissioners or township trustees must secure whatever additional right of way may be required in the improvement of an inter-county highway or main market road. This has been done by your county commissioners, inasmuch as the twenty-foot strip necessary for the change in the highway has been secured. But here the jurisdiction of the county commissioners seems to end.

Section 6860 G. C. provides as follows:

> "The county commissioners shall have power to locate, establish, alter, widen, straighten, vacate or change the direction of roads as hereinafter provided. This power extends to all roads within the county, except the inter-county and main market roads."

It is doubtful whether the provisions of this section were meant to apply to such a vacation as we have under consideration. While it might be so construed as to apply to matters such as that under consideration, yet the provisions can in no case apply to inter-county highways and main market roads. Neither can I find any other provision of the statutes giving the county commissioners any authority to vacate all or any part of an inter-county highway or main market road.

Hence we are driven to the provisions of the law having to do with state highways (sections 1178-1231-3 G. C.). Here we look in vain for a method by which any part or all of an inter-county highway or main market road may be vacated. There is no method prescribed or outlined, nor even suggested.

I know it might be held that, inasmuch as the public will not use the twenty feet lying next to the railroad company's right of way, it is at least constructively vacated. But our courts have always held that the mere fact that the public does not use a certain part of the highway cannot work a forfeiture of its rights to the same. This principle holds even though some one else might use the part not used by the public for a period of twenty-one years, unless the part thus vacated and used by some one else was necessary to a complete enjoyment of the highway. So that I do not believe that the mere fact that the public will not use said twenty feet would inure to the benefit of the railroad company.

I note that the attorneys of the railroad company interested in this matter, in a letter written to you, state they are not able to suggest a way out of the difficulty. They suggest, however, that a resolution adopted by the county commissioners, vacating the same, would not be out of place. This is true and possibly under the circumstances would be altogether proper. But under the provisions of our statutes, as they now exist, I do not believe it would avail much, so far as vacating the easement of the public in said twenty feet is concerned.

The attorneys also suggest that proceedings might be had under the law as it stood prior to the enactment of the Cass highway law; this by virtue of the saving provisions of section 302 of said act. I do not believe, however, that the provisions of this section would save such a matter as the one under consideration, and therefore that a proceeding under the law repealed by the Cass highway law would have but little effect in the matter of vacating the easement of the public in said twenty foot strip.

In view of all the above, I want to suggest this, that the railroad company for the present take possession of said strip of twenty feet, subject to the easement of the public in same, which in this case is possibly merely nominal. Then at the next session of the general assembly endeavor to bring about the passage of an

act granting to the railroad company the right of the state in and to said twenty-foot strip. And if it is thought best, the county commissioners can adopt a resolution vacating the said strip, so far as the county is concerned. If this works no good, it can work no ill.

Hence, answering your question specifically, it is my opinion that there is no provision of the statutes whereby the county commissioners may vacate all or any part of an inter-county highway or main market road.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

290.

TEACHERS—CANNOT BE PAID FOR ATTENDING MEETINGS—CALLED UNDER SECTIONS 7706-1 AND 7871 G. C.

There is no provision of law for the payment of teachers who attend teachers' meetings which are called as provided by G. C. sections 7706-1 and 7871.

COLUMBUS, OHIO, May 21, 1917.

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

GENTLEMEN:—In your letter of February 2, 1917, you request my opinion as follows:

> "Section 7870 G. C. specifically covers the compensation of teachers in attendance at the county institutes. Section 7868-1 G. C. allows compensation for teachers in rural districts for attending a recognized summer school for training of teachers in counties having no teachers' institute. We are holding that there is no authority of law for the payment of compensation to teachers attending a city institute, as provided in sections 7871 and 7872 G. C. Under the opinion of the attorney-general, Annual Report 1915, page 567, we are holding that there is no authority of law for paying teachers compensation for attending teachers' meetings as provided under authority of section 7706-1 G. C., held outside of school hours, and when such meetings are held within school hours the teachers are entitled only to their regular salary without deduction.
>
> *"Question*: Are we correct in these holdings, and is there any authority for payment of compensations to teachers attending meetings, or reimbursement for any expenses connected therewith over and above the compensation provided under sections 7870 and 7868-1 General Code?"

General Code section 7690 provides that each board of education shall have the management and control of all of the public schools of whatever name or character are located in the school district and that such a board has the power to fix the salaries of all teachers, which such salaries may be increased but not diminished during the term for which the appointment of such teachers are made, and provides also that teachers must be paid for all time lost when the schools in which they are employed are closed owing to an epidemic or other public calamity.

In the fixing of such salaries of teachers by boards of education, General Code section 7595 provides that no person shall be employed to teach in any of the

public schools of Ohio for less than forty (after July 1st, 1917, fifty) dollars a month, and under the provisions of General Code section 7691 no person shall be appointed for a term of less than one year nor for a longer term than four years, except to fill an unexpired term, and that teachers in the actual employ of the board shall be considered in the rehiring of teachers before new teachers are chosen in their stead. In rural and village districts, however, under General Code section 7750 the boards of education shall not employ teachers for a term longer than three years, and in each case the employment to begin within four months of the day of appointment. Thus the scheme of law is provided that a term certain shall exist and a minimum price named and will control unless, as decided in Layne v. Board of Education, 83 O. S., 474, it is especially waived by the teacher for whose benefit such statute was made. The salary being determined upon and fixed for the years by the board of education, although it may be payable monthly, it is only fair, it seems to me, to hold that whatever is necessary to be done under our laws or by the rules of the board by the teacher and which comes within his line of duties, must be done and performed without further compensation than that named in the contract of employment. Among the things which the statutes require to be done is, as provided by General Code section 7706-1, that the district superintendent shall, as often as advisable, assemble the teachers of his district for the purpose of conferring with them on certain matters such as the course of study, the discipline and school management, and other school work of any nature and for the promotion of the general good of all the schools of the district. It is also provided that the county superintendent shall co-operate, as much as possible, with the district superintendent in such meetings, and by General Code section 7871 that the board of education of each city school district may provide for holding an institute for the improvement of the teachers and that general meetings of the teachers of the city district held upon not less than four days may constitute such institute. Nothing is said in said sections or in the acts of which said sections are a part, nor in any other statute contained in our school code, that any pay shall be received for said service.

The conclusion that no pay outside of his regular salary shall be allowed a person who is employed in the performance of services for the public, is strengthened by the line of reasoning set forth in certain cases similar to Somerset v. Edmund, 76 O. S., 396, wherein the court held that public policy and sound morals alike forbid that a person employed by the public shall demand or receive, for services performed by him, any other or further remuneration or reward than that prescribed by law. The board of education had a right to know the exact amount of money it would be required to pay for its teachers when the contracts with such teachers were entered into, and whether with the funds on hand it would be compelled to hire at the minimum salaries and probably for the minimum term, or whether it had sufficient funds that it would be permitted to pay more than the minimum wage scale or would be permitted to have more than the minimum amount of school. It had a right also to expect that whatever was necessary for a teacher to do in the proper performance of his duty, as required by law, was taken into consideration by such teacher when the price for such employment was fixed and such board should not be compelled to face a deficit in the treasury which might be brought about by numerous meetings held or expenses incurred by superintendents and teachers. That such salary or compensation cannot be enlarged by implication beyond the terms of the statute, is settled. See 66 O. S., 113; 7 O. S., 237; 58 O. S., 107. The fact, too, that provision is particularly made for the payment of teachers at summer schools, as provided by General Code section 7868-1, and for the attendance at teachers' institutes, as provided by section 7870 G. C.,

would lead me to the conclusion that if the legislature had intended that teachers should be paid for attending teachers' meetings, as provided by sections 7871 and 7706-1 G. C., it would have said so just as it did in providing pay for institutes and summer schools, under the provisions of the sections above referred to.

Holding these views, then, I must advise you that you are right in holding that there is no authority for the payment of compensation to teachers for attending teachers' meetings which are called under the provisions of sections 7871 and 7706-1 G. C.

Yours very truly,
JOSEPH MCGHEE,
Attorney-General.

291.

STATE FIRE MARSHAL—DEPUTIES AND ASSISTANTS—MAY COMPEL ATTENDANCE OF WITNESSES AT INVESTIGATIONS—MAY ARREST A PERSON WHOM THEY BELIEVE GUILTY—CANNOT HOLD A PERSON FOR INVESTIGATION—WITHOUT OBTAINING WARRANT.

The state fire marshal, his deputies and assistants, have the right to investigate fires and in doing so may subpoena witnesses and compel their attendance. If they find a felony has been committed, they may arrest any person whom they have reasonable cause to believe is guilty of the offense and detain him until a warrant can be obtained.

It is not within the power of the state fire marshal, his deputies and assistants, to arrest and hold a person for investigation without securing a warrant therefor.

COLUMBUS, OHIO, May 21, 1917.

HON. T. ALFRED FLEMING, *State Fire Marshal, Columbus, Ohio.*

DEAR SIR:—In a letter dated May 14, 1917, Mr. Tom Doreen, our chief inspector, directed a letter to this office in which he submitted the following for my official opinion:

"The following is quoted from a handbook on Ohio Fire Marshal Law:

"HOLDING FOR INVESTIGATION.

"Where circumstances are such as to direct suspicion towards a particular person and it is likewise probable that the person may leave the vicinity or community, he may be arrested and held for investigation even though there is not sufficient evidence to warrant the filing of an affidavit.

"Authorities generally refuse to so hold a suspect longer than twenty-four hours without some kind of a charge being filed.

"HABEAS CORPUS.

"Where a person is confined without a charge of some nature being filed against him he may be released on a writ of habeas corpus, and

if the arrest and confinement be found not to have been justified, the person or persons responsible may be held liable in damages.

"Kindly advise us more definitely and also what jurisdiction we have in the matter."

The state fire marshal, or a deputy state fire marshal, or an assistant fire marshal has power to investigate and report the cause of any fire which occurs in this state.

General Code section 828 provides:

"If the state fire marshal, or a deputy or assistant fire marshal, is of the opinion that there is evidence sufficient to charge a person with arson or a similar crime, he shall arrest him or cause him to be arrested and charged with such offense. He shall furnish the prosecuting attorney such evidence, with the names of witnesses, and a copy of material testimony taken in the case."

Thus the state fire marshal or a deputy or an assistant has power under the above section to make an arrest, yet an arresting officer can make an arrest and hold an accused only until a warrant can be secured.

General Code section 13493 provides in part:

"When a felony has been committed, any person without warrant, may arrest another whom he has reasonable cause to believe is guilty of the offense, and detain him until a warrant can be obtained. * * * *"

The detention of such person without a warrant can only be for such time as is necessary to secure one. No particular time is mentioned in our statute, it being presumed that the person making the arrest will act promptly, and if he does not so act, he may become liable for false imprisonment. This does not mean that the person so arrested must have an immediate hearing, for General Code section 13507 provides:

"If it is necessary, for just cause, to adjourn the examination of the accused, the magistrate may order such adjournment and commit him to the jail of the county, until such cause of delay is removed, *but the entire time of such confinement in jail shall not exceed four days.* The officer having custody of such person, by the written order of the magistrate may detain him in custody in a secure and convenient place other than the jail, to be designated by such magistrate in his order, not exceeding four days. The officer in whose custody any person is detained shall provide for the sustenance of such prisoner while in custody."

What section 13493 does mean is that a person who is arrested has a right to know, by or through proper papers and proceedings, with what he is charged, and if he is held without a warrant or without a hearing, the officers so holding him act at their peril.

It is held in Leger et al v. Warren, 62 O. S., 500, that,

"A person who has been arrested without a warrant cannot lawfully be held in custody for any longer period than is reasonably necessary to obtain a legal warrant for his detention. Where he is held for a longer period

without such writ or other authority from a competent court, he has a right of action for false imprisonment against the officer or person who made the arrest and those by whom he has been unlawfully held in custody."

So that I advise you that when a person is arrested without a warrant, he can only be held until a warant can be obtained.

An investigation into the cause of a fire can be made and often is made to determine if the fire was the result of carelessness or of design. And if of design, then such investigation can be continued without any suspect being first arrested. In fact, the investigation is very frequently entirely completed before sufficient evidence is secured upon which to base an affidavit for arrest.

Certain language quoted from your "Handbook" is misleading when it says "he may be arrested and held for investigation," for only one of two things contained therein could be meant, that is, if he is arrested then he is held for examination and he is not held for investigation, but is simply under subpoena and is not under arrest.

Answering your inquiry, then, I advise you that the state fire marshal, his deputies and assistants, have the right to investigate fires and to subpoena witnesses and compel attendance for such investigation, and if while so doing they find that a felony has been committed, they may arrest any person whom they have reasonable cause to believe is guilty of the offense and detain him until a warrant can be obtained. But it is not within their power to arrest and hold a person for investigation without securing a warrant therefor.

Yours very truly,
JOSEPH MCGHEE,
Attorney-General.

292.

NOTICE—REQUIRED BY THE INTERSTATE COUNTY DITCH LAW—NOT REQUIRED UNTIL PROCEEDINGS HAVE BEEN DETERMINED FOR LOCATION AND CONSTRUCTION OF IMPROVEMENT—INCLUDING ENGINEER'S REPORT—SUCH NOTICE MUST BE GIVEN BY PERSONAL SERVICE—TO ALL LAND OWNERS AFFECTED.

The chapter on interstate county ditches contains no requirement for an initial notice. The first requirement of notice in said statute is found in General Code section 6586, and such notice is not required until after all proceedings have been determined for the location and construction of the improvement down to and including the engineer's report containing an apportionment of the estimated cost of the construction, and such notice is only expressly required as to such interested land owners as have been theretofore overlooked and are then brought in; but this requirement for notice must be construed as requiring notice for all affected land owners against whom any assessment is made, and is to be a notice of the fact and amount of such assessment. There is no method provided by law for giving such notice otherwise than by personal service.

COLUMBUS, OHIO, May 21, 1917.

HON. G. F. CRAWFORD, *Prosecuting Attorney, Greenville, Ohio.*

DEAR SIR:—On March 31, 1917, you addressed the following inquiry to this department:

"A petition for the deepening, widening and straightening of Mississinawa River, known as the Mississinawa River improvement, in interstate ditch, has been filed with the commissioners of Darke county and acted upon by the joint boards of county commissioners of Darke county, Ohio, and Randolph county, Indiana.

"A question has arisen in this matter before the board county commissioners and the auditor of this county, as to the proper manner of notice to be given to the land owners assessed on an interstate ditch, for the apportionment of the assessment.

"The law of interstate ditches does not provide any method of notice to the property owners before view, for the improvement. Section 6586 of the General Code, provides that after certain preliminary matters between the joint boards of the county from this state and the adjoining state have completed their work as a joint board, the proceedings of the commissioners from this county shall be in conformity with the laws for the location of a county or joint county ditch, except that the owners of said lands shall have due notice thereof. The statute does not provide the manner of notice. 105-106 O. L., on page 136, on joint county ditches, provides:

" 'If, however, the petition prays for the improvement of the channel of a river, creek or run or part thereof, in more than one county and more than two hundred free-holders will be affected, if said improvement is granted as prayed for, all persons, firms and corporations except steam railway companies having an agent located in the county, which shall be notified as hereinbefore provided, may be given notice by publication, whether they are resident or non-resident of any or all the counties through which the improvement will pass, and no other notice will be required.'

"There are about 1,500 land owners interested and the cost of personal service would be very expensive, and if legal notice can be given under the law just quoted, it would be a great saving to the property owners, but of more importance is that the notice be legal and that the improvement cannot be enjoined for want of proper service.

"As this involves a public improvement I trust you will give this matter your very earliest attention."

As you suggest one statutory method of giving notice, the consideration of your inquiry may properly first dispose of this. The provision copied in your inquiry appears in Page and Adams Supplement as section 6449 General Code, which is a part of the chapter on single county ditches. It might be thought to have application to interstate county ditches by reason of the phrase "in more than one county," and its application to cases where there are more than two hundred free-holders to be affected. That it cannot have application, however, to the chapter under which you are proceeding appears as follows: There may be only one county in Ohio involved in a proceeding under this chapter, and the language "in more than one county" cannot be held to apply to cases where there is only one county in Ohio, as our statutes have no power whatever over the subject of notice in other states. The language, "in more than one county" therefore should be considered as restricted in its application to the chapter providing inter-county ditches, as the manner of giving notice in interstate county ditch proceedings would not be held to depend upon accident as to whether more than one county in Ohio were involved. There would be no uniformity in the application of the section to proceedings under the chapter generally, but it would be haphazard as to how it would turn out as to whether one county or more than one in Ohio were concerned, whereby applying

it to the chapter on inter-county ditches you have a uniform and consistent application of it. This conclusion will also be further enforced when we come to the only section in the interstate county ditch chapter referring to notice.

Taking up, then, this last named chapter, under which you are proceeding, we find that the first twenty-two sections—6564-6585, contain provisions under which the proceeding is conducted to the point where the improvement is found for, engineers' report ordered and made. The point is arrived at where the apportionment of the cost and construction is to be made among the benefited landholders, and so far in the chapter there is no reference whatever to the subject of notice to landholders. Section 6586 General Code is as follows:

> "The further proceedings of the joint board shall be in conformity with the laws for the location of county or joint county ditches taken at this stage of the proceedings. The county commissioners, at their hearing on the apportionment made, may assess any other lands not mentioned in the first report of the engineers, which they deem to be benefited thereby. The owners of said lands shall have due notice thereof."

And here at the end of this section is the first provision for notice. It is not, however, a notice to all the parties affected, but only a notice to those left out in the first instance, or it would appear so from the reading of this and the preceding sections. The sentence is "The owners of said lands shall have due notice thereof." The land referred to is "said lands" or those mentioned above in the section, and are found in the phrase "and may assess any other lands not mentioned in the first report of the engineers, which they deem shall be benefited thereby." So that, to extend this provision for notice to all the land and the land owners affected by the proceedings is really extending the meaning of the section beyond what any construction of its language permits.

Let us now leave this question until we have considered that of the necessity of notice in such proceedings. That such notice is not necessary down to this point was held by our supreme court in 1885, in Zimmerman v. Canfield, 42 O. S., 463. It is decided in this case that the power exercised by commissioners is political and not judicial, and that therefore the law is not unconstitutional for not providing notice. The first section of the syllabus is as follows:

> "Section 4452 (Rev. Stats.) which authorizes the county commissioners to view the line of a proposed ditch, and determine, by actual view of the premises along and adjacent thereto, whether the ditch is necessary, or will be conducive to the public health, convenience or welfare, invests the commissioners with political and not judicial powers; and notice of such proceedings to the owners of lands crossed by the ditch is not essential to the validity of such enactment or of such proceedings thereunder."
>
> To the same effect—Commissioners v. Gates, 83 O. S., 20.

Since Zimmerman v. Canfield notice has been provided for in single county ditch proceedings and is found in section 6449 G. C., originally enacted in 1894. This is extended to joint county ditch proceedings by virtue of section 6536, General Code, in which it is provided that such joint county ditches may be located and constructed as provided for in single county ditches. In the opinion in the case of Zimmerman v. Canfield, supra, however, it is indicated that notice is required upon the question of taking the land of a person for the construction of a ditch. Owen, J., in the opinion, at page 471, says:

> "It is not upon the question of the appropriation of lands for public use,

but upon that of compensation for lands so appropriated, that the owner is entitled, of right, to a hearing in court and the verdict of a jury.

"What remedies the courts afford for the perversion or abuse of this power of appropriation we are not now called upon to inquire."

However, this would apply only to those persons through whose land the improvement extends and not to those whose lands are called upon to bear the proportion of the cost of the location and construction, their remedy is adequate and plain by resorting to a court of equity for an abuse of discretion.

The same year the supreme court held that a personal tax could not be imposed upon a railroad company for the construction of a ditch improvement where no notice had been given. This was in the case of Railroad Company v. Wagner, Treasurer, 43 O. S., 75, the syllabus of which is as follows:

"Where county commissioners have caused to be placed on the duplicate a personal tax to be collected against a resident owner of land as part of the cost of a county ditch affecting his land, under a proceeding of which such land owner had neither notice nor knowledge, such tax is illegal, and its collection may be perpetually enjoined. The remedial provisions of sections 4490 and 4491 (Rev. Stats.) do not apply to such a case. Miller v. Graham, 17 Ohio St., 1, distinguished."

And in the opinion a distinction is made between a proceeding *in rem* to charge land of a non-resident with constructive notice and the attempt to make a personal charge against such owner.

We have, then, down to section 6586 General Code a statutory scheme for the construction of these improvements with no provision for notifying the landholders affected, and in that connection the law is settled by the supreme court that such notice down to that point is not necessary. That section, however, in the last line thereof, as above quoted and discussed, plainly indicates the legislative intent that such notice be given, and demonstrates that it was an oversight (as it is all one act) that such notice is not provided for, and we have the requirement that if new parties are brought in they must have due notice.

If effect be given to this law as it is written we have the proceeding carried clear through with notice absolutely required as to those who are overlooked in the first place, and no notice whatever as to those who are originally included. This would be a discrimination which the legislature could not have intended, and it might be questioned whether it would not be violative of the constitution to so discriminate between different persons in the same proceeding.

The wisdom therefore of giving notice to all interested parties is apparent. One of such cases is presented where a legislative intent is indicated beyond what is expressed and where, in order to carry out that intent and to give effect to the legislation at all, it is necessary to add something to what has been enacted. The notice can safely and properly be omitted until this stage of the proceedings is arrived at. Your inquiry is as to the manner and form of such notice.

The only requirement of the statute is that due notice that lands are assessed, where notice is to be given, and no other means or method are provided. Express notice in writing is, or at least may be, required, and you will be safe if it be given in that manner.

It should be noted that you are clear past the stage of proceedings in the single county ditch and the joint county ditch cases that provide for notice. The notices in those cases is a notice in advance of the first meeting of the commissioners in viewing the site of the improvement, and the custom is for all parties who desire,

to attend and follow the commissioners about in their wanderings in making the view, as far as each individual may desire with reference to his own interest. This notice, as has been shown, is not required by the constitution, and is not provided for in the law in question. What is required by express statement as to the exceptional cases and by inference as to ordinary cases that notice be given each land owner that the assessment is placed upon his land? Unfortunately the provisions of section 6586 as to the proceedings of the commissioners are prospective and do not look back to see when notice is given in other cases, and the notice therefore can only look to the situation at the stage at which the proceeding has arrived and is a notice to each landowner that his land is assessed and the amount that is so apportioned against it.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

293.

BOARD OF CENSORS—HAS NO AUTHORITY TO MAKE EXAMINATION OF FILM EXCHANGE BOOKING SHEETS.

There is no statutory provision authorizing the board of censors to make an examination of film exchange booking sheets.

COLUMBUS, OHIO, May 21, 1917.

Industrial Commission of Ohio, Department of Film Censorship, Columbus, Ohio.

GENTLEMEN:—Under date of May 7th I received from the department of film censorship the following communication:

> "It has been brought to our notice by persons connected with the motion picture business that some of the exchanges are not submitting all of their copies or duplicates of films to this office for censorship but are showing these pictures and evading the law by cutting our stamp of approval into several parts and affixing a portion to these duplicates and putting them out as though they had been censored. It has been suggested to us that the state is possibly being defrauded out of a revenue amounting to from three to ten thousand dollars a year.
>
> "Looking at the matter from another view-point if this is taking place it is a direct violation of the law and as we have no inspectors it is quite possible that this is true. We have decided in view of the above to attempt inspection ourselves and would respectfully ask your advice as to our rights to make an examination of the film exchange booking sheets if it is your opinion that we can rightfully do so."

The statutes relative to the board of censors of picture films are found in sections 871-46 to 871-53 of the General Code.

Section 871-46 provides for the board. Section 871-47 provides for the office organization and salary. Section 871-48 provides for the submission of films to the board and the price to be charged therefor. Section 871-49 provides in part that:

> "When a film is passed and approved by the board of censors such film shall be given an approval number which shall be shown on the cer-

tificate issued by such board of censors to the party submitting the film. * * * For each film so approved there shall also be issued by the board of censors an official leader or stamp of approval of not less than five feet in length * * * Before any motion picture film shall be publicly exhibited all eliminations ordered by the board shall have been made by the person or persons loaning, renting or leasing such film or films to the exhibitor for exhibition, and there shall be projected upon the screen the design of the official leader or stamp of approval of not less than three feet in length, issued by the board for such film."

Section 871-50 provides that the board may work in conjunction with other like boards. Section 871-51 provides that no film shall be publicly exhibited, unless passed and approved, ninety days after the act takes effect.

Section 871-52 provides as follows:

"Any person, firm or corporation who shall publicly exhibit or show any motion picture within the state of Ohio unless it shall have been passed and approved by the Ohio board of censors or the congress of censors shall upon conviction thereof, be fined not less than twenty-five dollars nor more than three hundred dollars, or imprisoned not less than thirty days nor more than one year, or both, for each offense. Any person, firm or corporation who shall loan, rent or lease any film or films to any exhibitor or other person for public exhibition within the state of Ohio before such film or films shall have been passed and approved by the Ohio board of censors or congress of censors, shall upon conviction thereof, be fined not less than twenty-five dollars nor more than three hundred dollars, or imprisoned not less than thirty days nor more than one year, or both for each offense. Any person, firm or corporation who shall loan, rent or lease any film or films to any exhibitor or other person for public exhibition in the state of Ohio before the eliminations ordered by the Ohio board of censors or congress of censors have been made, shall upon conviction thereof, be fined not less than twenty-five dollars nor more than three hundred dollars, or imprisoned not less than thirty days nor more than one year, or both for each offense. Any person, firm or corporation who shall publicly exhibit or show any motion picture within the state of Ohio without having first projected upon the screen the design of the official leader or stamp of approval of not less than three feet in length, assigned to such film as shown on the certificate issued by the board of censors shall upon conviction thereof, be fined not less than twenty-five dollars nor more than three hundred dollars, or imprisoned not less than thirty days nor more than one year, or both for each offense. Any person, firm or corporation who shall publicly exhibit or show any motion picture within the state of Ohio that contains parts or sections that have been ordered eliminated by the Ohio board of censors or congress of censors, or shall add any part or parts to any motion picture after the same has been censored and approved by the Ohio board of censors or congress of censors, and shall rent or lease such motion picture for public exhibition, or shall publicly exhibit any motion picture containing any part or parts added after such motion picture has been censored and approved by the Ohio board of censors or congress of censors, shall upon conviction thereof, be fined not less than twenty-five dollars nor more than three hundred dollars, or imprisoned not less than thirty days nor more than one year, or both for each offense."

There is nothing in the act, as an examination thereof will disclose, which grants to the board of censors any authority whatever to make an examination of the film exchange booking sheets and there being no statutory authority therefor, the board is without authority so to do.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

294.

JUVENILE JUDGE—NO AUTHORITY TO CONTRACT FOR MEDICAL ATTENTION OR HOSPITAL TREATMENT—FOR PAUPER WARD OF COURT.

The juvenile judge has no authority to contract with physicians for medical attention to be rendered a pauper ward of the court nor any authority to contract with a hospital for treatment or care of such patient.

COLUMBUS, OHIO, May 21, 1917.

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

GENTLEMEN:—I have your letter of March 31, 1917, as follows:

> "We are enclosing herewith correspondence had between the auditor of Columbiana county and this bureau, touching a bill that has been presented to the board of county commissioners of Columbiana county for surgical services and care of a ward of the juvenile court of said county, and we would respectfully request your written opinion as to whether or not said bill is payable from the county treasury."

Judge Farr's letter of March 29, 1917, to the county auditor, sets out the facts in this case as follows:

> "Referring to our recent conversation concerning the case of Estella Klink, a neglected juvenile dependent, of about sixteen years of age, permit me to explain more fully.
>
> "About last September, while serving as probate judge of this county, I was notified from Leetonia that Estella was very ill of appendicitis in a home where she was temporarily placed and working. The lady who had her in charge, a Mrs. Andler, stated to me that the doctor had just informed her that the only way to save the girl's life was to take her immediately to the hospital at Salem for an operation. I, of course, gave my consent, and she was taken, I believe, on the next car, operated upon, but did not rapidly recover, so that it became necessary to keep her in the hospital for a considerable length of time. It was also necessary to perform some five or eight different operations, and she finally developed a case of double pneumonia. However, she survived it all, and a bill has been presented by the Salem hospital, where she was placed as a patient in a charity ward, but for which, I believe, they charged probably nine dollars per week. I never had any question about the right, or the authority of the juvenile court, to commit a child to a hospital under such cir-

cumstances. As you are of course aware, this county does not have such an institution, nor could she be sent to the county infirmary under such circumstances, as I understand that the law does not permit it.

"I am sure that my view of the right of the juvenile court to have a child cared for under such circumstances, is shared by other juvenile judges of the state, some of whom are quite prominent, such as Judge Addams, of Cleveland, whom I believe entertains this same view."

The physicians have now presented a bill for $125.00 for six major operations and the Salem hospital has presented a bill for $250.00 for board and care of the patient.

Section 1653 G. C. provides:

"When a minor under the age of eighteen years, or any ward of the court under this chapter, is found to be dependent or neglected, the judge may make an order committing such child to the care of the children's home if there be one in the county where such court is held, if not, to such a home in another county, if willing to receive such child, for which the county commissioners of the county in which it has a settlement, shall pay reasonable board; or he may commit such child to the board of state charities or to some suitable state or county institution, or to the care of some reputable citizen of good moral character, or to the care of some training school or an industrial school, as provided by law, or to the care of some association willing to receive it, which embraces within its objects the purposes of caring for or obtaining homes for dependent, neglected or delinquent children or any of them, and which has been approved by the board of state charities as provided by law. When the health or condition of the child shall require it the judge may cause the child to be placed in a public hospital or institution for treatment or special care, or in a private hospital or institution which will receive it for like purposes without charge. The court may make an examination regarding the income of the parents or guardian of a minor committed as provided by this section and may then order that such parent or guardian pay the institution or board to which the minor has been committed reasonable board for such minor, which order, if disobeyed, may be enforced by attachment as for contempt."

It is clear from a reading of this section that the hospital in which the judge is authorized to place the child for treatment is one which will not make a charge for such treatment. No authority is given him to contract as was done in the case referred to nor can I find any other statute allowing the juvenile judge to contract for medical services to be rendered a ward of the juvenile court.

It has been suggested that even in the absence of statutory authority, the court might have inherent power to do what it did in this case. We are foreclosed, however, from taking this view, I think, because of the language of section 1653, just quoted, which is sufficient, I think, to divest the court of any such inherent power with respect to this matter, if it did at any time possess the same.

Sections 2546, 3490 and 3480 G. C. provide:

"Sec. 2546. County commissioners may contract with one or more competent physicians, to furnish medical relief and medicines necessary for the persons of their respective townships to come under their charge, but no contract shall extend beyond one year. Such contract shall be

given to the lowest competent bidder, the county commissioners reserving the right to reject any or all bids. The physicians shall report quarterly to the county commissioners on blanks furnished by the commissioners, the names of all persons to whom they have furnished medical relief or medicines, the number of visits made in attending such persons, the character of the disease, and such other information as may be required by the commissioners. The commissioners may discharge any such physician for proper cause."

"Sec. 3490. The trustees of a township, or the proper officers of a municipal corporation in any county, may contract with one or more competent physicians to furnish medical relief and medicines necessary for the persons who come under their charge under the poor laws, but no contract shall extend beyond one year. Such physician shall report quarterly to the clerk of the township or municipality, on blanks furnished him for that purpose, the names of all persons to whom he has furnished medical relief or medicines, the number of visits made in attending such person, the character of the disease, and such other information as may be required by such trustees or officers."

"Section 3480. When a person in a township or municipal corporation requires public relief, or the services of a physician or surgeon, complaint thereof shall be forthwith made by a person having knowledge of the fact to the township trustees, or proper municipal officer. If medical services are required, and no physician or surgeon is regularly employed by contract to furnish medical attendance to such poor, the physician called or attending shall immediately notify such trustees or officer, in writing, that he is attending such person, and thereupon the township or municipal corporation shall be liable for relief and services thereafter rendered such person, in such amount as such trustees or proper officers determine to be just and reasonable. If such notice be not given within three days after such relief is afforded or services begin, the township or municipal corporation shall be liable only for relief or services rendered after notice has been given. Such trustees or officer, at any time may order the discontinuance of such services, and shall not be liable for services or relief thereafter rendered."

These are the only statutes to my knowledge authorizing the employment of physicians for medical relief of the poor.

Former Attorney-General Timothy S. Hogan, in an opinion dated June 22, 1912, volume 2, page 1384, said of these sections:

"Section 3480, supra, provides that if 'no physician or surgeon is regularly employed by contract to furnish medical attendance,' relief may be given in the manner therein provided. This section contemplates that a physician or surgeon may be employed by contract. Section 3490, General Code, authorizes a contract with a physician for medical relief. There is no other statute authorizing the township trustees to contract for the services of a physician. Section 2546, General Code, authorizes a contract with a physician for medical relief by the infirmary directors. These are the only provisions of the statute authorizing a contract with a physician for medical relief of the poor.

"The provision of section 3480, supra, as to a contract with a physician or surgeon, refers to the authority granted in said sections 3490 and 2546, General Code. It is therefore evident that the term physician as used in said sections, will include a surgeon and that the term 'medical relief' will include 'surgical relief.' * * *

"The provision of section 3480, General Code, applying when no physician or surgeon is regularly employed to furnish medical attendance to the poor, who are a public charge. * * * *

"The authority to pay for such services is prescribed by the statutes, and the provisions thereof must be complied with."

From a consideration of these statutes it is clear that when medical relief is necessary for the poor, it must be furnished in one of three ways: (1) Through physicians regularly employed under contract by the county commissioners; (2) by physicians regularly employed under contract by the trustees of a township or the proper officers of a municipal corporation; or, (3) if no such physicians are regularly employed, then through physicians temporarily employed by the township trustees or proper municipal officer under section 3480 General Code.

These provisions of the statute having been adopted by the legislature and section 1653 General Code restricting the authority of the juvenile judge to offer medical relief to pauper wards of the court, I am of the opinion that if any medical relief is to be furnished to a pauper ward of the juvenile court which will involve the employment of a physician, use of a hospital and expenditure of money, such medical relief will have to be furnished as above indicated, and that the juvenile judge is without authority in law to contract for the same.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

295.

COUNTY SCHOOL SUPERINTENDENT—IS PUBLIC OFFICER—HIS SALARY HOWEVER MAY BE CHANGED DURING HIS TERM OF OFFICE.

A county school superintendent, provided for by the "School Code" of 1914 *possesses all the indicia necessary to make the position a public office and the incumbent of the position a public officer. He is not such an officer, however, whose salary cannot be changed during his term of office.*

Where a county superintendent of school is hired for two years and his salary fixed at $1,500.00 *per year, said salary may be increased during his term to* $1,800.00 *per year, and when paid recovery cannot be had for such increase.*

COLUMBUS, OHIO, May 21, 1917.

HON. HARRY RANKIN, *Prosecuting Attorney, Washington C. H., Ohio.*

DEAR SIR:—Your statement of facts for my official opinion reads as follows:

"As shown by the minutes of April 27, 1915, Mr. Nelson was elected for a term of two years at a salary of $1,500.00 per year. On August 4, 1915, this salary was increased to $1,800.00 for the first year and on July 28, 1916, his salary was fixed at $1,800.00 for the year beginning August 1, 1916. Mr. Nelson entered upon his duties on August 1, 1915, and has continued to draw his salary at $1,800.00 per year since that time.

"It is claimed by the members present at the time this salary was increased on August 4, 1915, that since the appointment of Mr. Nelson the legislature amended section 4740 of the General Code permitting 'any village

or rural school district or union of school districts for high school purposes which maintains the first grade high school and which employes a superintendent,' to apply to the county board of education to be continued as a separate district under the direct supervision of the county superintendent, the amendments of G. C. 4740 may be found in volume 105-106 Ohio Laws at pages 398 and 439, passed May 27, 1915.

"On August 14, 1915, the board of education of Wayne township, Fayette county, Ohio, passed a resolution under section 4740 of the General Code, said resolution and the action thereon by the county board of education being found in the minutes of August 31, 1915. It is claimed by the county superintendent that the new duties required of him by reason of this resolution occasioned the increase of his salary on August 4, 1915, and on July 28, 1916; that although the resolution was not passed by the board of education of Wayne township until after the first raise in salary was made, that it was understood and agreed by both boards of education that the Wayne township schools would be placed under the direct supervision of the county superintendent as was later provided in said resolution; and that this understanding was reached some time in the month of May, 1915.

"I would like your opinion regarding the above state of facts as to whether or not the increase in salary could be legally made and whether or not the payments in excess of $1,500.00 per year can be recovered by the prosecuting attorney under section 2921 of the General Code."

Additional facts were secured in the above matter May 7, 1917, to the effect that the certificate required by section 4744-1 was filed with the county auditor of your county in August, 1915, and being filed in lieu of the one which should have been filed on or before August 1st of said year.

The county board of education of any county, at a regular meeting held not later than the 20th day of July in any year, shall appoint a county superintendent of schools for a term not exceeding three years, which term shall begin on the first day of August.

A county superintendent of schools is held in State ex rel. v. Vance et al., 18 O. N. P., (n. s.) 198, to be a public officer. The court on page 204 uses the following language:

"The position of county superintendent under the recent act of the legislature possesses all the indicia necessary to make the position a public office and the incumbent of the position a public officer.

"Counsel for the plaintiff contends that the precise question here presented has been determined favorably to him in the cases of Ward v. Board of Education, 21 C. C. 699, and State ex rel. v. Vickers, 58 O. S. 730, in both of which cases it was held that a superintendent of schools is not an officer. But these decisions are wholly inapplicable to a case of a county superintendent because of the fact that the duties of the officials mentioned are materially different, and especially because of the further fact that in the present case the duties are derived from the law and are performed independently of any other body or official; while in the cases of superintendents of schools, the superintendents were performing duties prescribed by contract and were answerable to an employer. And besides, as the law stood at the time those decisions were made, the management and control of the schools were vested absolutely in the board of education. The board, and not the superintendent, were responsible for the conduct and control of the schools, while under the present law that duty and

responsibility is shifted on to the county superintendent. Formerly the superintendent of schools was merely the agent or employe of the board through whom the board discharged their duty to the public to manage and control the schools under their jurisdiction.

"I am constrained to hold that under the school law enacted last February (1914) *the county superintendent therein provided for is a public officer."*

Being, then, a public officer, the question naturally arises: Can his salary be changed during his term of office?

Section 20 of article II of the Constitution of Ohio provides:

"The general assembly, in cases not provided for in this constitution, shall fix the term of office and the compensation of all officers; but no change therein shall affect the salary of any officer during his existing term unless the office be abolished."

If the last sentence of the above quoted section could apply to a case of this nature, then no change in said salary could be made, but no provision is found anywhere in the school laws prohibiting a change in compensation of an officer during his term of office. In fact General Code section 7690 specifically provides that salaries may be increased but not diminished during the term for which the appointment of teachers is made, and, passing upon a case of similar nature the court in State ex rel. v. Board of Education, 21 O. C. C. 785, held:

"The claim of counsel for the relator is that the board of education having, in pursuance of the requirement of the statute, fixed the compensation or salary of the members of the board of examiners, had no right during the continuance of his term to lower same and we understand that a claim (in part at least) is founded on the provisions of section 20, article 2 of the Constitution, which is as follows:

" 'The general assembly, in cases not provided for in this constitution, shall fix the term of office and the compensation of all officers, but no change therein shall effect any officer during his existing term unless the office is abolished.'

"We are of the opinion that this section does not apply to a case like his; that the office and officers spoken of therein do not refer to such officers as a member of a board of examiners or to the officers of a municipal corporation, for instance, mayor, marshal, clerk, treasurer, etc., *but to those created by the general assembly, and whose salary is to be fixed by that body.* That this is the true meaning of this section and the legislative construction placed upon it, we think is shown by sections 1716 and 1717 R. S., which provide that the councils of municipal corporations shall prescribe what fees or compensation officers of municipal corporations shall receive for their services, which shall in no case be increased or diminished during the term for which the officer was elected or appointed. If such officers came within the provisions of article II, section 20, such legislation would be unnecessary. Nor does a member of a board of examiners come within the designation of officers of municipal corporations. They are provided for in part second, title III, under the head 'schools' and not under part one, title XII, regulating 'municipal corporations.' *And we see no provision in the school laws prohibiting a change in the compensation of an officer during his term of office."*

Holding, then, as I must, that the county superintendent of schools is a public officer and that he is not such a public officer as comes within the constitutional provisions which prevent a change of salary during his official term, I cannot escape the conclusion that the board of education had a right to change the salary as indicated in your statement of facts and that no recovery can be had therefor.

Yours very truly,
JOSEPH MCGHEE,
Attorney-General.

296.

DITCH SUPERINTENDENT—NOT COUNTY OFFICER—SECTION 6726-1 IS CONSTITUTIONAL—WARRANTS PROVIDED FOR IN SECTION 6726-3—SHOULD BE PAID FROM COUNTY FUND—WHERE THERE IS NO DITCH FUND—COUNTY REIMBURSED BY ASSESSMENTS AGAINST BENEFITED PROPERTY—HOW APPORTIONMENT OF COST FOR CLEANING DITCH SHOULD BE MADE—WHEN SUPERINTENDENT SHOULD BE APPOINTED.

The ditch superintendent provided for by G. C. 6726-1 is not a county officer and said section is not unconstitutional by reason of providing for his appointment by the county commissioners instead of his election by the voters of the county.

Under section 6726-3 the warrants therein provided for may be paid out of the county fund and, where there is no ditch fund, must be paid out of the county fund.

Where such payment is made out of the county fund, the county should be reimbursed out of the assessments against benefited property.

Where there has been no proceeding for the cleaning out of such ditch, in which there has been an apportionment of the cost thereof, such apportionment of the cost of such cleaning out thereof should be made upon the basis of the apportionment for the original construction.

The requirement that such superintendent be appointed at the regular meeting in January is directory, and, if such appointment be omitted then it may be made afterwards.

The county commissioners have four regular sessions each year.

COLUMBUS, OHIO, May 21, 1917.

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

DEAR SIR:—In a communication by you to this office under date of February 15, 1917, you make the following inquiry:

> "I desire to inquire further whether or not the principle laid down in the decision by which the so-called Parrett-Whittemore law was held unconstitutional would make unconstitutional section 6726-1 and the succeeding sections on the same subject of the General Code as amended in 103 Ohio Laws at page 185. That is to say, is the county ditch superintendent provided for in that section a county officer who must be elected by a vote under the terms of that decision? If that act is constitutional, does section 6726-3 authorize the warrants provided for in that section to be drawn from the county fund when the county has no general ditch fund

and may the assessments provided in the succeeding sections be made to reimburse the county for repairs and cleaning of a ditch where no proceedings were had to which the party sought to be assessed was a party before the ditch was cleaned, except such proceedings as were had when the ditch was originally established? If these sections are constitutional and the commissioners of the county have failed to make the appointment at their regular meeting in January, may they make the appointment at a later date? In the strict sense of the term, the board of county commissioners has but four regular meetings a year. Is the term *regular* so used in this state to be so construed or does it mean the meeting at which it is the custom of the board to hold on a particular day of each week?"

Your first inquiry is whether or not the late decision of the supreme court in the case of State ex rel. Godfrey v. O'Brien holding the Parrett-Whittemore law unconstitutional would have the same effect as to section 6726-1, and whether or not the county ditch superintendent provided for in that section is a county officer. Section 6726-1 is as follows:

"That in addition to the other provisions of law, providing for the cleaning out, keeping in repair and maintaining county and joint county ditches, it is hereby provided as follows:

"The county commissioners of any county in this state within which there is a county or joint county ditch constructed and in operation, may of their own motion, or on the written petition of ten property owners of said county whose lands were assessed for the original construction or when enlargements have or will be made the last enlargement of said ditch, shall, at their first regular meeting in the month of January of each year, or as soon thereafter as possible, appoint a competent superintendent, who shall have charge of said ditch as hereinafter provided, within said county for the term of one year and until his successor is appointed and qualified, and shall fix his compensation. Before entering upon the discharge of his duties as provided for herein, said superintendent shall take an oath of office, and shall execute a bond for the faithful discharge of his duties in such sum and with such surety as said commissioners shall approve."

It will be observed that this section, which is drawn with exceeding looseness, starts out as though it were making provision for the maintenance of all county ditches in the county. By the time you get down to the middle of it, however, it is discovered that the separate provision is contemplated for each county ditch, or rather for each county ditch as to which the county commissioners conclude to make such appointment on their own motion or on the written petition of ten property owners. This functionary so provided for and to be appointed is styled the "superintendent." It would not occur to anyone that such person with limited, casual duties to perform, confined to one particular ditch was a county officer, except for the provision that "he shall take an oath of office and shall execute a bond for the faithful discharge of his duties."

The decision in the case above referred to having application, is found in the third section of the syllabus, which is as follows:

"A provision in an act of the general assembly of this state for the appointment instead of the election of a county or township officer, is in violation of section 1 of article X of the Constitution of Ohio, and void."

A member of the present supreme court, in discussing the effect of syllabi, said:—

> "It must be remembered that every syllabus that is written must be read in view of the facts found in the case decided, for it is not possible for a court to comprehend in every syllabus all of the many phases of the facts that may arise in other litigations touching similar transactions."
> RE Poage, 87 O. S. 72, at the top of page 83.

Whether the superintendent provided for in the section in question is an officer or not is a question of little moment. It does not follow from the mere requirement that he is to give bond and take an oath that he must be elected by all of the electors of the county. The general electors of the county have no concern either with him or with his duties. No one is interested except a few persons affected by the particular ditch, and it would indeed be a strange extension of the authority of the above case to require such person to be elected by all the voters of the county. No doubt exists that such duties with reference to a particular ditch can be done by someone in some manner, chosen for that purpose.

It therefore follows that the legislature has full power to provide for the selection of such person by appointment.

This question is therefore answered in the negative.

Your second question is conditioned upon the answer to the first in the affirmative and might therefore be passed by without answer. The section referred to—section 6726-2—provides that such officer shall file a report with the county auditor showing his expenditures and then proceeds:

> "and said county auditor shall issue his warrant to the county treasurer for the amounts thus allowed by said county commissioners in favor of said ditch superintendent payable out of the general expense or county ditch fund of the county, as directed by the county commissioners * * *"

It would seem, of course, somewhat strange that the expense of cleaning out or repairing a particular ditch for the benefit of particular persons affected should be paid out of the county fund, nevertheless the legislature has clothed the commissioners with power to do so, and the statute requiring it to be paid out of one fund or the other is, in case where only one of such funds happens to be in existence, a binding requirement to pay it out of that fund.

Your third question again depends upon the answer to the last, and that is:

> "if such payment has been made out of the general fund can the county be reimbursed out of the assessments provided for in the succeeding section?"

The answer to this is in the affirmative, as the legislative intent in the enactment of the scheme provided in this particular section is clearly evident that such maintenance and repair is to be paid by the party who receives the benefit.

Your third question, however, involves a fourth as to

> "whether such payment so made from the county fund may be assessed back in event that no proceedings for the cleaning of this ditch have taken place and consequently no apportionment therefor has been made except that apportionment made at the original establishment of the ditch."

This case seems to be met by section 4 of the act—section 6726-4 of the General Code, which is as follows:

> "There shall be kept in the office of the county auditor a special duplicate on which shall be entered and preserved a description of the lands and lots assessed for the construction of said ditch within said county, together with the names of the owners of same, and the amounts originally or if enlarged last enlargement assessed against each tract or parcel of land and annually when said county auditor is making up his tax duplicate he shall apportion all money expended as aforesaid for the year up to August 31 on the lands and lots aforesaid benefited on the basis of the assessments, as made, shall without delay notify the county commissioners of same; they shall thereupon fix a time for hearing at their office of any complaints by aggrieved parties as to said assessments, not later than ten days from said date, and notice in writing of said hearing shall be given by said county auditor to all parties assessed for said ditch, residing in the county, together with the amount of their respective assessments personally or by leaving same at their residence at least five days before said hearing, and like notice to all non-resident parties also shall be published in a newspaper of general circulation in said county at least five days before said day of hearing. At said time of hearing the report of said assessments as made by said county auditor, or as the same may be changed on the complaint of parties as aforesaid, shall be confirmed by said commissioners, and appeal may be had therefrom by any complaining party to the probate court of said county in the usual manner of appeals, if said appeal is filed in the office of said judge within three days thereafter and a bond with surety for same as given by said county to the approval of said probate judge conditioned that if the action of the commissioners is confirmed that appellant shall pay all costs of said appeal. Within five days after perfecting said appeal said probate judge, sitting as in equity, without a jury, shall hear said case, and his decision shall be final. Notice whereof shall be given by him to the county auditor and by which he shall be governed in making said assessments, but in future years unless the ditch is subsequently enlarged no notice of assessments shall be given, and said assessments shall be a lien on said lands and lots to be collected, the same as other taxes by the county treasurer, and as the same is collected shall be placed to the credit of the general expense or other fund of said county from which same was drawn by said treasurer."

This section contains the most startling innovations found in this remarkable law. For one thing it provides an appeal from the amount of an assessment, found nowhere else in the whole system of drainage laws of Ohio. In addition to that it gets upon the subject of the jurisdiction of the court and confers equity jurisdiction upon the probate court. Having gone to that extent all restraint is thrown away and the probate court is made a court of last resort. However, it is perfectly apparent from the provisions of this section that where a new apportionment is made the original apportionment may be used as the basis for assessing the cost of the maintenance and repairs.

Your fifth question again is based on the answer in favor of the constitutionality of the act, and is as to whether the county commissioners, if they fail to make the appointment at the regular meeting in January, may make it at a later date. The statute in question says that they can. The time fixed is

> "at the first regular meeting in the month of January of each year, or as soon thereafter as possible."

Without the qualifying phrase, however, the designation of this meeting as the time for the appointment would be held directory and the great purpose of the act would not fail by the neglect of the commissioners to make the appointment at the particular time, but their fault or oversight could be corrected later when the omission became apparent and the exigency pressing.

Your sixth question is as to the meaning of the word "regular" as used in section 6726-1 applying to the meeting at which initial action is taken. Section 2401 is as follows:

> "There shall be four regular sessions of the board of county commissioners each year, at the office of the commissioners at the county seat, commencing, respectively, on the first Monday of March, June, September and December. At each meeting the board shall transact such business as required by law."

From this it appears that there is no regular meeting in January in the proper sense of the word. The legislature, therefore, must have used it in a different sense. While the commissioners hold four regular sessions a year and they are said to be held upon those dates, in actual practice these regular meetings are not completed upon the days in question, but generally, or at least frequently, are continued from week to week and held on Monday, as you suggest. The meaning, therefore, of "first regular meeting in January" would be construed to be the first meeting they had in that month of the adjourned session beginning on the first Monday in December, which would ordinarily come on the first Monday in January. The fact, however, that a statement of this kind is directory is made certain by the phrase immediately following—"or as soon thereafter as possible."

Very truly yours,

JOSEPH MCGHEE,
Attorney-General.

297.

BANKS—DOING BUSINESS UNDER THOMAS ACT—TO WHAT EXTENT THEY MAY INVEST IN STOCKS, SECURITIES OR LOANS—SECTION 9790 APPLIES—LIMIT OF LOAN TO FIRM, CORPORATION OR PERSON—COLLATERAL SECURITY DEPOSITED TO SECURE LOAN NOT CLASSED AS INVESTMENT.

1. *Section 9790 G. C. applies to investments by all banks doing business under the Thomas act and limits such investments in any one stock, security or loan to 20 per cent. of the capital and surplus of the bank making the investment. This limitation may only be exceeded where the investment is made in securities enumerated in paragraphs b, c and d of section 9758.*

2. *Any bank doing business under the Thomas act is forbidden to loan to any one person, firm or corporation, more than 20 per cent. of its paid-in capital and surplus, the only exception being loans on real estate.*

3. *Collateral security deposited with a bank to secure a loan cannot be classed as an investment; and no rule of limitation applies to such collateral. The bank can use its funds only by way of loan or investment, and the limitations above specified apply to both, irrespective of the amount or value of the collateral deposited.*

COLUMBUS, OHIO, May 21, 1917.

HON. PHILIP C. BERG, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—On May 2, 1917, you made the following request for my opinion:

> "Please favor us with an opinion as to whether or not under section 9790, which prescribes:
>
> "'Not more than twenty per cent. of the capital and surplus of a corporation doing business under this chapter shall be invested in any one stock security or loan unless it be in bonds or other interest bearing obligations enumerated in paragraphs b, c and d of section ninety-seven hundred and fifty-eight, or in a building and vaults.'
>
> "A bank may *loan* more than twenty per cent. of its capital and surplus on any one stock or security not enumerated in b, c or d of section 9758.
>
> "This question arises where several borrowers put up as collateral the same stock or security, the aggregate of which very much exceeds the limit to which a bank may invest its funds in such one stock or security as provided by section 9790."

Section 9790, which you quote in your inquiry was original section 64 of the Thomas act (99 Ohio Laws 269) and has been carried into the General Code under the heading "General Provisions," which general provisions apply to *all* banks specified in the Thomas act, namely, commercial banks, savings banks, safe deposit companies, trust companies, and combinations of the same.

In answering your inquiry it will be necessary to construe section 9790 in connection with sections 9757, 9758 and 9754. These sections are as follows:

> "Sec. 9757. A commercial bank may receive deposits on which interest may be allowed. All deposits in such banks shall be payable on demand without notice, except when the contract of deposit otherwise provides. A commercial bank also may loan money on personal security, discount, buy,

sell or assign promissory notes, drafts, bills of exchange, and other evidences of debt, and buy and sell exchange, coin and bullion."

"Sec. 9758. Subject to the provisions of the preceding section commercial banks may invest their capital, surplus and deposits in, or loan them upon:

"a. Personal or collateral securities.

"b. Bonds or other interest-bearing obligations of the United States, or those for which the faith of the United States is pledged to provide payment of the interest and principal, including bonds of the district of Columbia; also in bonds or other interest-bearing obligations of any foreign government.

"c. Bonds of interest-bearing obligations of this or any other state of the United States.

"d. The legally issued bonds or interest-bearing obligations of any city, village, county, township school district or other district, or political subdivision of this or any other state or territory of the United States and of Canada.

"e. Mortgage bonds or collateral trust bonds of any regularly incorporated company, which has paid, for at least four years, dividends at the rate of at least four per cent. on their capital stock. Such loan shall not exceed eighty per cent. of the market or actual value of such bonds, the purchase of which first has been authorized by the directors. All such securities having a fixed maturity shall be charged and entered upon the books of the bank at their cost to the bank, or at par, when a premium is paid, and the superintendent of banks shall have the power to require any security to be charged down to such sum as in his judgment represents its value. The superintendent of banks may order that any such securities which he deems undesirable be sold within six months.

"f. Notes secured by mortgage on real estate, where the amount loaned thereon inclusive of prior incumbrances does not exceed forty per cent. of the value of the real estate if unimproved, and if improved sixty per cent. of its value including improvements, which shall be kept adequately insured. Not more than fifty per cent. of the amount of the paid-in capital, surplus and deposits of such bank at any time shall be invested in such real estate securities."

"Sec. 9754. A bank doing business as a commercial bank, shall not lend, including overdrafts, to any one person, firm or corporation, more than twenty per cent of its paid-in capital and surplus, unless such loan be secured by first mortgage upon improved farm property in a sum not to exceed sixty per cent. of its value. The total liabilities, including overdrafts, of a person, company, corporation, or firm to any bank, either as principal debtor or as security or indorser for others, for money borrowed, at no time shall exceed twenty per cent. of its paid-in capital stock and surplus. But the discount of bills of exchange drawn against actually existing values, and the discount of commercial or business paper actually owned by the person, company, corporation or firm negotiating it, shall not be considered as money borrowed."

It is apparent, from an examination of the above sections, that a distinction is made between the power to make loans and the power to make investments. This distinction is present throughout the act; thus, section 9753 provides for investments by a commercial bank in real estate, while section 9756 refers solely to

loans by such banks on real estate. (See also the provisions as to savings banks, safe deposit companies and trust companies—sections 9762, 9765, 9771, 9772, 9774, 9781, 9783, 9784, 9785, 9813, 9816, 9821, 9822.)

Bearing in mind this fact, that is, that the power to loan and the power to invest funds of a bank are distinct, and referring again to the sections quoted above, it will be seen that section 9757 gives the power, among other powers, to commercial banks to loan money on personal security, and to invest in promissory notes and other evidences of indebtedness. Section 9758 gives the power to commercial banks to invest their capital, surplus and deposits in, and to loan them upon, certain specified securities, or evidences of indebtedness. Sections 9754 and 9790 provide the limitations upon the exercise of the powers granted by section 9757 and 9758, section 9754 providing the limitation of 20% as to all loans and section 9790 the same limitation of 20% as to all investments, except those mentioned in paragraphs b, c and d of section 9758.

As stated before, section 9790 applies to all banks doing business under the Thomas act, and, therefore, none of such banks can invest more than 20% of its capital and surplus in any one stock, security, or loan, except in bonds or other interest-bearing obligations enumerated in paragraphs b, c and d of section 9758, **supra.**

Section 9754 provides the same limitation of 20% on all loans by a commercial bank. Under the law a commercial bank is forbidden to loan to any one person, firm or corporation more than 20% of its paid-in capital and surplus, the only exception being: (a) A loan secured by first mortgage upon improved farm property in a sum not to exceed sixty per cent. of the value of such property; and (b) the bona fide discount of commercial paper. This 20% limitation expressly applies to indebtedness by way of overdrafts, and security or endorsement.

Section 9754, for the purpose of this opinion, may be treated as a general provision, for the same 20% limitation as to loans by commercial banks prescribed by it, is prescribed for trust companies by section 9780 and for savings banks by section 9771.

Section 9790 thus applies strictly to investments and 9754 to loans; and neither has any reference to securities deposited as collateral to secure a loan. Such securities cannot be classed either as a loan or investment. The 20% limitation of section 9754 applies to the amount which the bank can loan to one person or firm, and, of course, the bank should be and is allowed to hold all the collateral of which it can obtain possession to secure the loan. Section 9790 applies only to investments and in no sense can collateral deposited in good faith to secure a loan be classed.

As an investment for a bank, it is true that the value of the loan may depend entirely upon the collateral, but, until, the bank is actually compelled to become the owner of the collateral, it cannot be classed as an investment. There being no statute whatever placing any limitation upon the amount of collateral a bank may take, it is my opinion that any bank, provided the 20% limitation as to the borrower is observed, may take as collateral any amount of stock or other security.

The limitation as to the amount of the loan cannot be affected by the value or amount of the collateral security offered.

My opinion is:

1. Section 9790 applies to investments by all banks doing business under the Thomas act and limits such investments in any one stock, security or loan to 20% of the capital and surplus of the bank making the investment. This limitation may only be exceeded where the investment is made in securities enumerated in paragraphs b, c and d of section 9758.

2. Any bank doing business under the Thomas act is forbidden to loan to any one person, firm or corporation, more than 20% of its paid in capital and surplus. The only exception being loans on real estate.

3. Collateral security deposited with a bank to secure a loan cannot be classed as an investment; and no rule of limitation applies to such collateral. The bank can use its funds only by way of loan or investment and the limitations above specified apply to both, irrespective of the amount or value of the collateral deposited.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

298.

BOARD OF EDUCATION—HAS NO AUTHORITY TO ERECT SCHOOL BUILDING OUTSIDE OF ITS DISTRICT.

A board of education has no authority to erect a school building outside of its district.

COLUMBUS, OHIO, May 21, 1917.

HON. C. G. ROETZEL, *Prosecuting Attorney, Akron, Ohio.*

DEAR SIR:—

ATTENTION W. A. SPENCER, ASSISTANT.

In your communication, the receipt of which was previously acknowledged, you ask my opinion upon the following proposition:

> "The board of education of the Hudson Township Rural School District, of this county, are contemplating buying a site and erecting a school building in their district. In their judgment the most convenient location for erecting this building would be in the Hudson Village School District, which is outside of their district. Have they the legal right to erect, own and operate this school building outside of their district and in the Village School District of Hudson?"

A board of education has only those limited powers which are especially granted it by statute. The power to own, control and hold real estate is found in certain sections of the General Code, hereinafter referred to.

General Code section 7620 provides:

> "The board of education of a district may build, enlarge, repair and furnish the necessary school houses, *purchase or lease sites therefor,* or rights of way thereto, or purchase or lease real estate to be used for playgrounds for children or rent suitable schoolrooms, provide the necessary apparatus and make all other necessary provisions for the schools under its control. It also shall * * * make all other provisions necessary for the convenience and prosperity of the schools within the subdistricts."

By the provisions of the above section a board of education is empowered to purchase or lease sites upon which it may build any necessary school houses or it may rent suitable school rooms and may make all necessary provisions for the convenience and prosperity of the schools under its control.

Section 4749 provides:

> "The board of education of each school district * * * shall be a body politic and corporate and as such capable of * * * contracting and being contracted with, *acquiring, holding, possessing and disposing of real* and *personal property*, and taking and holding trust for the use and benefit of such district any grant or device of land and any donation or bequest of money or other personal property and of exercising such other powers and privileges as are conferred by this title and the law relating to the public schools in this state."

By the provisions of the above quoted section the board of education has the right to acquire, hold and possess real property as and for its corporate use.

The above quoted part sections of the General Code contain the only provisions of law I have been able to find which grant boards of education the power of acquiring and holding real estate, except where territory is transferred to a school district certain other provisions apply which will be hereinafter mentioned.

A distinction should be drawn between the holding and owning of real estate for school purposes and for the levying and collecting of taxes upon property for school purposes. In the former the board of education has a right to acquire, only that real estate which is necessary for the convenience and prosperity of the schools within the district. In the latter board of education has the right for taxation purposes to levy and collect taxes upon all real and personal property *within* its district not exempt from taxation. I find no specific power given by any statute to a board of education to acquire real estate for the use of the schools, which real estate lies *outside* of its district.

It is held in Dillon on Municipal Corporations, 5th Edition, Volume 3, section 980:

> "Municipal corporations being created chiefly as governmental agencies and for the attainment of local objects merely, the general rule is that they *cannot purchase and hold real estate beyond their territorial limits* unless the power is conferred by the legislature. It has been expressly decided that a conveyance to a municipal corporation of lands beyond its boundaries for the purpose of a street is void, though the corporation has, by its charter, power 'to purchase, hold and convey any real property for the public use of the corporation.'"

In this case, as in the case of a municipal corporation, the board of education is created for local objects, and having only such powers as are conferred by the legislature and no specific power having been so conferred to acquire lands beyond its boundaries, it would seem that the above principle of law should be followed.

In General Code section 4690, where territory is annexed to a city or village, the territory thereby becomes a part of the city or village school district, but special provision is made in said section that the legal title to the school property which is located in such territory and which is being used for school purposes, shall remain vested in the board of education of the school district from which such territory was detached until such time as may be agreed upon by the several boards of education when such territory may be transferred by warranty deed.

In Board of Education v. Board of Education, 46 O. S., 595, a township school district built a school house at a certain central place in the district, which school house was to be used for the schools of a higher grade than primary. After said school house was built and in use, the territory surrounding such school house

was created into a village school district and the board of education of such village school district attempted to take possession of such school house and use the same for schools of the village school district. The court held that this could not be done, and on page 597 the following language was used:

> "The school house in dispute was built by the township board to be used for teaching a school of higher grade than primary for the benefit of the youth of the whole township. It was, presumably, located at a point most convenient for that purpose, and which happened to fall within the territory afterwards organized into a separate village district, but was not designed for the benefit of that territory alone; * * * * * * The township board never renounced its general control over, or transferred to the defendant its title to, the property; this must have been accomplished, if at all, by operation of law, from the circumstances that it was situated within the territorial limits of the defendant when the territory was organized into a village district. * * * * * * * * * * Can it be reasonably supposed that the legislature contemplated that, after a township board had, perhaps, expended a large sum of money in purchasing a site convenient for the whole township, erected a building in every way suitable and commodious for the youth of the township who might be desirous of higher education, and provided instruments appropriate to the object in view, their hopes could be defeated, and house, grounds and appliances wrested from them, by the inhabitants of the territory in which the building was situated, organizing themselves into a separate school district? * * * * * * * To hold that grounds, buildings and appliances, designed and intended to secure to the youth of the whole township an opportunity for education in the higher branches of learning could be thus transferred, would defeat a legislative purpose clearly discernible upon the face of the law; for township boards could hardly be expected to provide the necessary means to accomplish it, where the requisite property should be held by so uncertain a tenure."

The purpose, then, of section 4690 G. C. is by the above decision made plain; that is, that where a district has acquired property and has placed thereon valuable buildings and apparatus to be used for the schools of such district, such property should not be taken from such board of education without a clear provision of law in relation to the equities applying thereto.

The above permission to hold property outside of the territorial limits of a district is an exception instead of the general rule. Unless otherwise provided by statute, the general rule is that school property must be owned and controlled by the boards of education having jurisdiction over the territory in which such school property is located. 156 Calif., 416; 23 Pick., 62; 109 Ind., 559; 27 Ind., 465; 29 Ky. Law Rep., 391, etc.

The intention of the legislature confirms this view when it provides that a village and a rural school district may join for high school purposes. In that case the district is designated as a joint district and the property may be located in either the village or the rural district, but in either event it would be located in the joint district and be within the territorial limitations of same.

Holding these views, then, I advise you that the board of education of the Hudson Township Rural School District has no authority to erect a school building outside of its district.

Yours very truly,

JOSEPH MCGHEE,
Attorney-General.

299.

PETITION TO CITY COUNCIL TO VACATE STREET—NO LAW AUTHORIZING ANY STATE OFFICIAL TO SIGN SAME.

There is no provision of law authorizing any state official to sign a petition praying the council of a municipality to vacate a street or alley. This authority so to act must be given by the legislature, either by general provisions or by special enactment.

COLUMBUS, OHIO, May 22, 1917.

HON. GEORGE H. WOOD, *Adjutant General of Ohio, Columbus, Ohio.*

DEAR SIR:—I am in receipt of the communication addressed to your department by Captain Paul L. Mitchell, Troop "C," First Ohio Cavalry, Cincinnati, Ohio. The communication reads as follows:

> "I enclose plat showing the Cincinnati Cavalry armory property which is shown between parallel red lines and designated 'The Riding Club.'
>
> "I desire to present to the state the land adjoining the Riding Club property and shown by crossed red ink lines. This additional property to be used at some future date for an armory building suitable for housing the additional troops now authorized for Cincinnati.
>
> "In order to make this land suitable for such a building, it will be necessary to condemn that part of Cumberland street shown inside the crossed red lines.
>
> "The council of Cincinnati will vacate said part of Cumberland street if all abutting owners file a petition to that effect.
>
> "It appears obvious that with the acquisition of the additional land proposed, that the vacation of that part of Cumberland street will add to the property a considerable area and still leave access to that part of Cumberland street not vacated.
>
> "Kindly advise me whether the state will sign such a petition to vacate Cumberland street and refer me to your legal representative in Cincinnati so that I can take the matter up promptly.
>
> "All expense incident to acquiring this property and vacating the street to be borne by me."

As shown by the plat enclosed with said communication, the state of Ohio owns certain lands in Cincinnati, abutting upon Cumberland street. Captain Paul L. Mitchell also owns lands abutting upon said Cumberland street.

The council of Cincinnati is willing to vacate a certain part of said Cumberland street. The state of Ohio and Captain Mitchell own all the land abutting upon that part of Cumberland street which the council of Cincinnati is willing to vacate.

The question submitted to this department is as to whether the state of Ohio would join with Captain Mitchell in signing a petition requesting the council of Cincinnati to vacate the part of said street upon which the lands of the state of Ohio and the lands of Captain Mitchell abut.

The proceedings in reference to the vacation of a street or alley are set forth in sections 3725 et seq. G. C. Section 3725 G. C. provides that on petition by a person owning a lot in the corporation praying that a street or alley in the immediate vicinity of such lot may be vacated or narrowed, council may declare, by ordinance, such street or alley vacated.

Section 3727 G. C. provides as follows:

> "Notice of the intention of council to vacate any street, alley, avenue, or part thereof shall, in all cases, be given as provided in the next section, except when there is filed with council written consent to such vacation by the owners of the property abutting the part of the street or alley proposed to be vacated, in which case such notice shall not be required."

Section 3728 G. C. provides for the notice of application to be published, and this publication shall be made in those cases in which all the abutting property owners do not sign a petition praying for the vacation of the street or alley.

I have examined our statutes very carefully and find no provision whatever therein that would authorize any state official to sign such a petition. The power of selling or leasing or surrendering any rights which the state of Ohio has in lands rests with the legislature. It is the only body which has the power to grant authority to officials either to sign deeds or leases or any other instruments conveying its interest in land. As the state of Ohio has an easement in and to said Cumberland street, the state, by signing a petition for the vacation of the same, would be surrendering its rights in and to said street. The legislature has provided no general method by which any state officials may sign such a petition, and of course it has enacted no special legislation for this purpose. Hence, I must conclude that no official of the state would have authority to sign the petition praying for the vacation of said Cumberland street, the legislature being the only body that could give authority to a state official to sign such a petition.

I might suggest, however, that Captain Mitchell could sign a petition praying for the vacation of the street, but in proceeding in such a manner the provisions of section 3728 G. C., in reference to giving notice, would have to be complied with.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

300.

APPROVAL—TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE OF COUNTY COMMISSIONERS OF MORGAN COUNTY.

COLUMBUS, OHIO, May 22, 1917.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

> "IN RE: Bond issue of Morgan county, Ohio, in the sum of $64,500, the same being one hundred and twenty-nine bonds of the denomination of $500 each, issued by the commissioners of said county for the purpose of paying the respective shares of said county, certain townships and lands assessed for the improvement of certain sections of inter-county highways Nos. 162 and 393."

I have carefully examined the transcript of the proceedings of the board of county commissioners of Morgan county, Ohio, and other officers relating to the above bond issue, after said transcript has been corrected in order to comply with

the requirements of this department. As a result of this examination I am of the opinion that the issue of said bonds has been provided for in accordance with the provisions of the General Code of Ohio relating to the subject-matter, and that bonds prepared in accordance with bond and coupon form covering said issue will, when signed by the proper officers of Morgan county, Ohio, constitute valid and binding obligations of said county.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

301.

APPROVAL—TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE OF THE COUNCIL OF VILLAGE OF BEXLEY.

COLUMBUS, OHIO, May 23, 1917.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"IN RE:—Bonds of the village of Bexley, Franklin county, Ohio, in the sum of $14,000, issued by said village in anticipation of the collection of assessments for the improvement of Columbia avenue from the south line of South Commonwealth avenue to the south line of Maryland avenue in said village."

I have carefully examined the transcript of the proceedings of the council and other officers of the village of Bexley relative to the above bond issue. As a result of such examination I find said proceedings and the transcript thereof to be in accordance with the provisions of the General Code relating to the subject-matter.

I am of the opinion that properly prepared bonds covering said issue, signed and sealed by the proper officers of the village, will constitute valid and binding obligations of the said village.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

302.

APPROVAL—TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE OF THE COUNCIL OF VILLAGE OF BEXLEY.

COLUMBUS, OHIO, May 28, 1917.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"IN RE:—Bonds of the village of Bexley, Franklin county, Ohio, in the sum of $25,000, issued by said village in anticipation of the collection

of assessments for the improvement of South Drexel avenue from the south line of Dale avenue to the improved roadway of Broad street in said village."

I have carefully examined the transcript of the proceedings of the council and other officers of the village of Bexley relative to the above bond issue. As a result of such examination I find said proceedings and the transcript thereof to be in accordance with the provisions of the General Code relating to the subject-matter.

I am of the opinion that properly prepared bonds covering said issue, signed and sealed by the proper officers of the village, will constitute valid and binding obligations of the said village.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

303.

APPROVAL—FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN FULTON, WYANDOT, MONROE, MAHONING AND WASHINGTON COUNTIES.

COLUMBUS, OHIO, May 23, 1917.

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

DEAR SIR:——I have your communication of May 19, 1917, in which you enclose certain final resolutions and asking for my approval of the same. Said final resolutions have to do with the construction of the following named highways:

"Fulton County—Sec. 'A-1,' Liberty-Adrian road, Pet. No. 2359, I. C. H. No. 299.

"Fulton County—Sec. 'k-1,' Toledo-Angola road, Pet. No. 2360, I. C. H. No. 21.

"Wyandot County—Sec. 'A-2,' Kenton-Upper Sandusky road, Pet. No. 3116, I. C. H. No. 229.

"Monroe County—Sec. 'E,' Woodsfield-Sistersville road, Pet. No. 1025, I. C. H. No. 387 (also copy).

"Mahoning County—Sec. 'Y,' Canfield-Poland road, Pet. No. 2645, I. C. H. No. 486.

"Mahoning County—Sec. 'P,' Akron-Youngstown road, Pet. No. 3133, I. C. H. No. 18.

"Washington County—Sec. 'M,' Hockingport-Powhatan road, I. C. H. No. 7, Pet. No. 3059."

Among these final resolutions there are several which are defective in a slight degree, but not, as I view it, vitally so.

The final resolution which has to do with I. C. H. No. 7, Washington county, is defective, in that it is therein stated: "Being $9,330.45 of the total estimated cost;" whereas, it should be: "Being $9,330.45 less than the total estimated cost."

The final resolution having to do with I. C. H. No. 18, Mahoning county, sets forth the fact that the preliminary application of the board to the state highway department was made on the 28th day of December, 1917. This is plainly an error in that 1917 is used in the place of some other year.

The final resolution having to do with I. C. H. No. 387, Monroe county, is

defective in the same respect, namely, that the year 1917 is given as the date of the preliminary application of the board, instead of either 1916 or 1915.

However, as I said before, it is my opinion these defects are not material or vital. In other respects I find these final resolutions correct in form and legal and am therefore returning the same to you with my approval endorsed thereon.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

304.

APPROVAL—FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN TRUMBULL, PICKAWAY AND MAHONING COUNTIES.

COLUMBUS, OHIO, May 23, 1917.

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

DEAR SIR:—I have your communication of May 22, 1917, enclosing certain final resolutions in reference to road improvements, upon which you ask my approval. The resolutions are for the following named highways:

"Trumbull County—Sec. 'H,' Warren-Ravenna road, Pet. No. 2981.
"Trumbull County—Sec. 'C,' Warren-Meadville road, Pet. No. 2985.
"Pickaway County—Sec. 'N,' Cincinnati-Zanesville road, Pet. No. 2805.
"Mahoning County—Sec. 'b,' Youngstown-Lowellville road, Pet. No. 3132."

I have examined said final resolutions carefully and find them legal and correct in form, and am, therefore, returning the same to you with my approval endorsed thereon.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

305.

COUNCIL OF MUNICIPALITY—MAY ASSESS COUNTY PROPERTY—FOR STREET IMPROVEMENT—ASSESSMENT SHOULD BE PAID OUT OF GENERAL COUNTY FUND.

The council of a municipality, in the matter of making assessments against property abutting upon a street which is being improved, has authority in law to assess a part of the cost and expense of the improvement upon property owned by the county and used by the agricultural society of the county for holding fairs, and abutting upon the street improved. The assessments should be paid out of the general country fund.

COLUMBUS, OHIO, May 24, 1917.

HON. E. E. LINDSAY, *Prosecuting Attorney, New Philadelphia, Ohio.*

DEAR SIR:—Your communication of April 11, 1917, in which you ask for certain information, was received. Said communication reads as follows:

"Tuscarawas county owns in fee simple a tract of land upon which the Tuscarawas County Agricultural Society holds annual exhibitions.

This land is located wholly within the boundaries of the city of Dover. The city of Dover has paved a street upon which this land abuts, and the council of the city of Dover has assessed this land for its portion of the costs of this street improvement.

"May the county commissioners pay this assessment out of its road improvement fund, or shall the agricultural society pay it out of its funds, or shall the city of Dover pay it out of its street improvement funds?"

Your question in brief is as to whether the agricultural society or the county commissioners or the city of Dover shall be charged with assessments made against property owned by the county commissioners but used by the agricultural society for the holding of fairs, said assessments having been made by reason of a street improvement, upon which street the said lands abut.

Your question involves the liability of three different organizations and I will first proceed by the process of elimination. I think without any question we can hold that the agricultural society is not liable for the payment of the assessments made against this property. It is not the owner of the property. It simply uses the same for the purpose of holding fairs under and by virtue of the provisions of the statutes. In looking over the provisions which control the agricultural board, found in sections 9880 et seq. G. C., I find none that would warrant the society in paying out money for such a purpose.

Section 9906 G. C. provides:

"* * Moneys realized by the society in holding county fairs and derived from renting or leasing the grounds and buildings, or portions thereof, in the conduct of fairs or otherwise, over and above the necessary expenses thereof, shall be paid into the county treasury of the society, to be used as a fund for keeping such grounds and buildings in good order and repair, and in making other improvements from time to time deemed necessary by its directors."

So without further consideration I believe we can safely eliminate the agricultural society. This leaves for consideration the county of Tuscarawas and the city of Dover. When we come to settling this matter as between these two subdivisions, the question is much more difficult. The principle which underlies the settling of the question involves the right or authority of the city of Dover to make assessments against property the fee of which is in the county of Tuscarawas. If the city has the right and authority to make assessments against county property, the county would be under obligation to pay the assessments so made. Hence let us look at the question as to the right or authority of the city of Dover to assess this property which belongs to the county of Tuscarawas.

Upon this question there is no authority in Ohio which is directly in point, and when we go outside of Ohio we find the adjudicated cases to be in direct and irreconcilable conflict, and it is useless to try to harmonize them. There are two general principles laid down by the courts upon this proposition, along the lines of which the courts divide:

1. County property may be assessed by a municipality for local improvements, unless the statutes particularly exempt it from such assessment.

2. County property may not be assessed by a municipality for local improvements unless the statutes particularly give authority for so doing.

Possibly the second rule is followed by the greater number of cases.

The arguments used in favor of the first of these two principles are along the

following lines: Taxation is the rule and exemption is the exception, and therefore strict construction of the statute under which the exemption is claimed is the rule; that the property of the public is benefited and ought as a matter of fairness to bear its share of the cost of the improvement; that the property is not taxed in the strict sense of that term, but is charged simply with the benefits conferred by the improvement; that even though the property could not be sold to satisfy the amount of the assessments, yet courts can under their powers enforce payment of a judgment against the county by mandamus or otherwise; and that even though public property is exempt from taxation by the constitution or by statute, yet this does not exempt it from special taxation of contiguous property.

The arguments used in favor of the second proposition are along the following lines: The property of a state or any subdivisions of a state is one of the instrumentalities by which it performs its functions. Every tax would to a certain extent diminish its capacity and ability along this line. The remedies given to enforce the collection of the assessment could not be applied to public property. Hence it cannot be assumed that the legislature meant to include public property. If so, they would have provided a remedy to enforce the payment of the assessments. A county is one of the political subdivisions of a state, and only such burdens of taxation can be imposed upon its property as are expressly provided by law. It is not a question of exemption, but one of power.

I desire to quote from but a few cases in support of each of these two propositions. I find the following in support of the first proposition:

In Edwards and Walsh v. Jasper County et al., 117 Ia. 365, the court lays down the following proposition in the syllabus:

> "McClain's Code, section 1271, provides that property of the county devoted entirely to the public use and not held for pecuniary profit shall be exempt from taxation. Section 1274 provides that all property except that exempted shall be subject to taxation. Section 630 authorizes cities to pave and otherwise improve streets and levy special assessments therefor on abutting property. *Held*, that city property owned and used for public purposes by a county was not exempt from special assessments for street improvements."

At p. 380 in the opinion the court say:

> "While authority to levy such assessments is traceable to the taxing power, they are nevertheless assessed on the theory that the property against which they are levied is benefited thereby to the extent of the levy, and the municipality acts merely as agent in collecting the tax."

In County of Adams v. City of Quincy, 130 Ill. 566, the court say:

> "Although a special assessment is in the nature of a tax, and is a branch of the taxing power, yet a general statute exempting certain property does not exempt it from liability for an assessment levied for the improvement of a street upon which it abuts or is contiguous.
>
> "Property owned by a county for a court house is not exempt from special taxation by a city, levied for the purpose of paving a street upon which the same abuts."

In support of the second proposition we find the court holding in Inhabitants of Worcester County v. The Mayor et al., 116 Mass. 193, as follows:

> "Land of a county used for county purposes is exempt from all taxation, whether imposed for public purposes or for local improvements of a public nature."

In the opinion the court say:

> "The immunity of these estates from taxation depends, however, in our opinion, upon other grounds than that of a statute exemption, and extends to taxation not only for general public purposes, but for local improvements of a public nature * *. The property of the commonwealth is exempt from taxation because as a sovereign power it receives taxation through its officers or through the municipalities it creates, that it may from the means thus furnished discharge the duties and pay the expenses of government. Its property constitutes one of the instrumentalities by which it performs its functions. As every tax would to a certain extent diminish its capacity and ability, we should be unwilling to hold that such property was subject to taxation in any form, unless it were made so by express enactment or by clear implication."

In the City of Big Rapids v. Board of Supervisors of Mecosta County, 99 Mich. 351, the court say in the syllabus:

> "The rule that when the property of private corporations, such as churches, hospitals and cemeteries, is exempted from taxation in a general tax statute, the exemption applies only to the taxes mentioned therein, and not to those of a private and local character, such as assessment for sewers, sidewalks and the like, which are laid according to the benefits conferred, does not apply to public property owned and used by an entire county for public purposes, and whenever the taxing power seeks to impose a tax upon such property, it must be able to point to legislative or constitutional authority."

With the conflict of authority upon the proposition under consideration, as set forth above, in mind, let us now turn to our own state and try to solve the problem, with our own constitution, statutes and decisions in mind.

Section 2 of article XII of the constitution provides as follows, in reference to the matter of taxation:

> "Laws shall be passed, taxing by a uniform rule * * all real and personal property according to its true value in money * *; but burying grounds, public school houses, houses used exclusively for public worship, institutions used exclusively for charitable purposes, *public property used exclusively for any public purpose* * * may, by general laws, be exempted from taxation, etc."

From the above it will be noticed our constitution exempts no property whatever from taxation, but merely provides that certain classes of property may be exempted by general laws from taxation, and among these classes is found public property used exclusively for any public purpose.

With this in mind, let us turn to our statutes and ascertain to what extent the

legislature has seen fit to exempt public property. The statutes providing for exemptions are found in part II, title 1, chapter 2. Section 5328 of said chapter provides:

> "All real or personal property in this state, belonging to individuals or corporations, * * shall be subject to taxation, except only such property as may be expressly exempted therefrom."

It will be noted that this section makes no provision as to property which is owned by the state or any political subdivisions of the state; so this section is not as broad and as inclusive as the constitutional provision above quoted.

While there are many exemptions provided for in said chapter, yet I desire to note particularly what exemptions are made in reference to the matter of county property, inasmuch as it is county property that we have under consideration.

Section 5352 G. C. reads as follows:

> "Buildings belonging to counties and used for holding courts, and for jails or county offices, with the ground, not exceeding ten acres in any county, on which such buildings are erected, shall be exempt from taxation."

Section 5353 G. C. provides:

> "Lands, houses and other buildings belonging to a county, * * used exclusively for the accommodation or support of the poor, * * shall be exempt from taxation."

It seems that these two sections embody the only provisions made in reference to county property, and these provisions are limited to jails and court houses, together with ten acres of ground upon which said buildings stand, and also lands used for the accommodation and support of the poor.

Remembering that the constitutional provision does not exempt public property, but merely gives authority to the legislature to exempt it, and remembering that the legislature has seen fit to exempt no county property except as hereinbefore set out, it would seem that it was the intention of the legislature that all other property owned by the county should be taxed. This, of course, would include the property under consideration, which is used for the purpose of holding fairs thereon.

But it must be remembered that these sections exempt property merely from taxation and not from assessment. The courts are uniform in holding that in applying the principle of exemption there must be a distinction made between the term "taxation" and the term "assessment."

In Lima v. Cemetery Assoc., 42 O. S. 128, the court lays down the following principle in the first two branches of the syllabus:

> "1. In a general sense, a tax is an assessment, and an assessment is a tax; but there is a well-recognized distinction between them, an assessment being confined to local impositions upon property for the payment of the cost of public improvements in its immediate vicinity, and levied with reference to special benefits to the property assessed.
>
> "2. A municipal corporation insisting on the right to impose an assessment, should be able to show that such power has been clearly granted

to it by statute; but authority being shown, in general terms, to make the assessment, whoever insists that his property is exempted from the burden will be required to support his claim by a provision equally clear."

The first branch of the syllabus distinguishes between an assessment and a tax. The second branch lays down a most important proposition, as I view it, in connection with the question which we have to solve. The court say that a municipal corporation, insisting on the right to impose an assessment, should be able to show that such power has been clearly granted to it by statute, and after this authority is shown, any one insisting that his property is exempted from the burden will be required to support his claim by a provision equally clear. We feel that the principle stated herein is absolutely sound.

With this proposition in mind, let us note whether the city of Dover can show clearly that it has the power to make assessments against the property owned by the county of Tuscarawas. We must remember that section 2 of article XII, as set out above, makes all property subject to taxation, and then provides that "public property used exclusively for any public purpose" may be exempted by general laws. But as set forth above, the property in question here is not anywhere exempt by our statutes.

Let us now turn to the power of a municipality to make assessments.

Section 3812 G. C. provides:

"Each municipal corporation shall have special power to levy and collect special assessments, to be exercised in the manner provided by law. The council of any municipal corporation may assess upon the abutting, adjacent and contiguous or other specially benefited lots or *lands in the corporation*, any part of the entire cost of an expense connected with the improvement of any street, * *."

Section 3837 G. C. provides:

"When the whole or any portion of an improvement authorized by this title passes by or through a public wharf, market space, park, cemetery, structure for the fire department, water works, school building, infirmary, market building, workhouse, hospital, house of refuge, gas works, public prison, or any other public structure or public grounds within and belonging to the corporation, the council may authorize the proper proportion of the estimated costs and expenses of the improvement to be certified by the auditor or clerk of the corporation to the county auditor, and entered upon the tax list of all taxable real and personal property in the corporation, and they shall be collected as other taxes."

This section contains the only exemptions which are to be found in the chapter providing for assessments, and the exemptions are limited merely to certain classes of property which are owned by the municipality itself, and not to any property owned by the county; and furthermore, the provisions of this section merely permit the council to pay the proportion of the estimated cost and expenses which would otherwise be assessed against the property specified in said section.

Let us now analyze the provisions of law upon which we can base our answer to your problem.

1. Article XII, section 2 of the constitution provides that all real property must be taxed. This includes public property used for public purposes.

2. The same section provides that public property used for public purposes may be exempt from taxation under general laws.

3. The legislature, under the above provision of the constitution, has seen fit to exempt court houses and jails, together with not to exceed ten acres of land upon which they stand, and lands used for the accommodation and support of the poor; but no other county property is exempt from taxation.

4. There is a distinction, however, to be made between the principle of exemption, as applied to taxation proper, and as applied to assessments.

5. The court in Lima v. Cemetery Assoc., supra, holds that when the right to impose an assessment is clearly shown, the right to be exempted from the assessment must be shown equally clear.

6. Section 3812 G. C. gives full power to the council of each municipal corporation to assess a part, or the entire cost of an expense connected with the improvement of any street, etc., upon all abutting, adjacent and contiguous lands in the corporation.

7. The only property that is in a way exempt from assessment is that set out in section 3837 G. C.

If we keep in mind now, that it seems to be the aim of our constitution that all property should be taxed, except the property which may be exempted under general laws, and remember that the legislature has not even exempted the property, about which you ask information, from taxation, and further remember that the provisions of the law giving power to municipal corporations to make assessments authorize the council to assess all lands located in the corporation, what is the answer to your question? It seems to me clearly to be that the council of the city of Dover had authority in law to make an assessment, for the cost and expense of the improvemnt of the street, against the property of the county used as set out in your communication and abutting upon the street improved. This being the case, the county would be liable to pay the same.

You ask further whether the county commissioners might pay this assessment out of its road improvement fund. I think not. This expense has nothing to do with the improvement of the roads of the county. This assessment should be paid from the general county fund.

Hence, answering your question specifically, I am of the opinion that the city of Dover, in improving one of its streets, upon which certain lands, belonging to the county of Tuscarawas and used by your agricultural society for holding fairs, abut, has authority to assess against said property the proper share of the cost and expense of the improvement, and that the county commissioners would pay the assessment out of the general county fund.

In rendering this opinion I am not unmindful of an opinion rendered by my predecessor, Hon. Edward C. Turner, on April 13, 1916, found in Vol. I of the Opinions of the Attorney-General for 1916, p. 663, in which he held:

> "No part of the cost of the improvement of a street on which school property, used exclusively for public school purposes, abuts, can be assessed against such property."

This opinion was based upon statutes which had to do peculiarly with school property, and would not apply to property in reference to which I have rendered the within opinion.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

306.

DISAPPROVAL—TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE BY TRUSTEES OF VALLEY TOWNSHIP, GUERNSEY COUNTY, OHIO—BONDS FOR ROAD IMPROVEMENT MUST BE ISSUED UNDER PROVISIONS OF SECTIONS 3298-8 AND 3298-9—SECTIONS 3295 AND 3939 DO NOT APPLY.

Neither section 3295 nor section 3939, General Code, as amended 106 O. L. 536, has any application to the issue of bonds by township trustees for the improvement of designated highways under the provisions of chapter 3 of the Cass road law. Bonds for such purpose must be issued by the township trustees under the provisions of section 3298-8 and 3298-9 General Code, and the proceedings of the township trustees relating to such bond issue must conform to the provisions of said sections.

COLUMBUS, OHIO, May 25, 1917.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"IN RE:—Bonds of Valley township, Guernsey county, Ohio, in sum of $40,000, for the purpose of improving certain highways therein."

I herewith enclose, without my approval, transcript of the proceeding of the township trustees and other officers of Valley township, Guernsey county, Ohio, relating to the above bond issue.

As stated in the transcript, these bonds, which are in the aggregate amount of $40,000, in denominations of $1,000 each and which are payable at the rate of $2,000 principal sum each year, from 1918 to 1936, inclusive, are issued under the assumed authority of sections 3295 and 3939 of the General Code "and other sections of the General Code necessary to carry the same into effect."

Section 3295 General Code, as amended, 106 O. L. 536, among other things, provides that the trustees of any township may issue and sell bonds in such amounts and denominations, for such periods of time and at such rate of interest, not to exceed six per cent., for any of the purposes authorized by law, for the sale of bonds by townships or by municipal corporations for specific purposes, while section 3939 General Code (the same being a part of the Longworth law, so called), provides authority to municipal corporations to issue bonds for certain specific purposes therein designated. On familiar principles, however, though section 3295 General Code grants the township trustees authority to issue bonds for purposes within its terms, such section does not of itself grant authority in the township trustees to do the particular thing or to conduct the particular improvements to borrow money for which power is granted by this section, and in this case, in order to determine the particular power of the trustees of this township to improve the roads to meet the cost and expense for which this bond is provided, we must look to other provisions of the General Code.

The Cass road law (106 O. L. 574) which was enacted by the general assembly "to provide a system of highway laws for the state of Ohio and to repeal all sections of the General Code and acts inconsistent herewith," became operative September 6, 1915, and expressly repealed all township road improvement laws then existing. Since that date, therefore, township trustees have had and can now exercise only such power in constructing, improving and repairing roads within their respective townships as is conferred upon them by the provisions of said act. The

only provisions of said act granting authority in township trustees to improve highways in such township, in the manner contemplated by the township trustees, as indicated by the transcript, are those of sections 60 to 74, inclusive, of said act (sections 3298-1 to 3298-15 G. C.).

Section 3298-1 G. C. provides, among other things, that the board of trustees of any township may levy and assess upon the taxable property of such township a tax not exceeding three mills in any one year upon each dollar of taxable property therein for the purpose of improving, dragging, repairing or maintaining any public road or roads or part thereof.

Section 3298-2 G. C. provides that the taxes so authorized to be levied shall be placed by the county auditor upon the tax duplicate against the taxable property of the township and collected by the county treasurer as other taxes, and that when collected such taxes shall be paid to the treasurer of the township from which they are collected and the money so raised shall be under the control of the township trustees of such township for the purpose of improving the roads of said township.

Section 3298-3 provides that the trustees shall designate the road or roads or part thereof in said township to be improved and that after having determined which road or roads or part thereof shall be improved, they shall direct the county highway superintendent to go upon the line of such road or roads and make such survey, plans, profiles, etc., as may be required in the improvement of said road.

Section 3298-8 G. C. provides that if the money raised by the levy above mentioned does not furnish sufficient funds for the construction and repair of the designated roads in said township, the trustees may issue and sell the bonds oof said township to provide funds for the construction or reconstruction of such roads, and further provides that such bonds shall be issued at such time and in such amounts as in the judgment of such trustees shall be necessary. This section provides further that said bonds shall bear interest at a rate not exceeding six per cent. per annum, payable semi-annually and shall be in denominations of not less than $100.00, and not more than $1,000.00, and shall mature in not more than ten years as may be determined by such trustees.

Section 3298-9 G. C. provides that before such bonds are issued, the question of issuing the same shall be first submitted to the qualified electors of the township at a general or special election therefor.

It is thus seen that while sections 3298-1, and following sections of the General Code, provide a comprehensive scheme whereby the trustees of a township may improve highways therein, these provisions likewise provide for the issue of bonds for the purpose of raising money for such improvement. The provisions of section 3298-8 G. C., providing for the issue of bonds for such purposes, are in conflict with the provisions of section 3295 G. C. in at least one material respect, to wit, with respect to the time within which such bonds shall mature and become payable. Section 3298-8 provides that such bonds shall mature in not more than ten years, and section 3295 does not impose any limitation in this respect. Section 3295 G. C., on one hand, is a statute of general authority, while sections 3298-8 and 3298-9 are special in their nature, covering the particular improvements provided for in sections 3298-1 to 3298-15 of the General Code, and on familiar principles of construction must be held to govern in the matter of the issue of bonds for the purpose of raising money for such improvements.

Moreover, with respect to any matter of conflict between the provisions of section 3295 and section 3298-8 General Code, in the issue of bonds by township trustees for the construction or improvement of designated roads, effect should be given to the provisions of section 3298-8 as a later statute. Though section 3295, General Code, was passed by the general assembly and approved by the

governor subsequent to the enactment and approval of the Cass highway law, of which section 3298-8 is a part, the question of priority, in so far as any matter of conflict in the terms of these sections is concerned, must be determined with reference to the time they respectively went into effect as laws. As to this it will be noted that both acts were filed in the office of the secretary of state on the same date, to wit, June 5, 1915. Section 3295, as amended by the act of which it is a part, went into effect as a law at the expiration of the ninety day referendum period; while the Cass highway law by its own terms went into effect on September 6, 1915. For this reason, as well as that hereinbefore noted, to wit, that section 3298-8 General Code is one having special application to the matter of issuing bonds for the purpose of constructing road improvements in the manner provided by the sections of the Cass highway law, of which it is a part, I am of the opinion that section 3298-8 General Code must control in the matter of bond issues for said purposes and that section 3295 General Code has no application thereto.

State v. Lathrop, 93 O. S. 79, 86.

Having arrived at the conclusion that the provisions of sections 3298-8 and 3298-9 General Code apply in the matter of issuing bonds in cases of this kind, an examination of the transcript of the proceedings of the township trustees and other officers of Valley township relating to this bond issue fails to show that the issue of such bonds has been provided for according to law. The authority of the township trustees to designate the roads to be improved and to issue bonds for their improvement is predicated upon a levy for such purpose having first been made by the township trustees in the manner provided by section 3298-1 General Code. There is nothing whatever in the transcript to show that such levy was made; and while this defect in the transcript is one which may possibly be corrected on further information, the issue of bonds in question is invalid for the reason that the resolution providing for their issue specifically provides that such bonds shall mature on dates from 1918 to 1937, inclusive, a period of time in excess of the maturity period provided for in section 3298-8 General Code.

I may properly here note that the conclusion reached by me, that section 3295 General Code has no application to the issue of bonds for the purposes indicated by the proceedings set out in the transcript and that the provisions of sections 3298-8 and 3298-9 General Code apply with reference to such bonds, is in accord with an opinion rendered by my predecessor to the Industrial Commission of Ohio under date of April 27, 1916, disapproving certain bonds issued by Norwich township, Huron county, Ohio, for the purpose of improving highways in said township (Opinions of Attorney-General 1916, volume 1, page 739).

For the above reasons I am of the opinion that this issue of bonds is unauthorized and that you should refuse to purchase the same.

In this connection it is but fair to state, however, that so far as I know none of the courts of this state has as yet decided the question as to the application or non-application of section 3295 General Code to bond issues of this kind, and to the end that the township authorities may not be embarrassed in offering these bonds for sale in the open market, if they desire to do so, I feel no hesitancy in recommending that your rescission of your former resolution purchasing these bonds be in general terms rather than on the particular ground of irregularity in proceedings relating to the issue.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

307.

DISAPPROVAL—TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE BY TRUSTEES OF LIBERTY TOWNSHIP, TRUMBULL COUNTY, OHIO—QUESTION OF BOND ISSUE—FOR ERECTION, IMPROVEMENT, ETC., OF TOWN HALL—MUST BE SUBMITTED TO *ALL* THE ELECTORS OF TOWNSHIP—AND MUST RECEIVE A MAJORITY OF VOTES CAST ON QUESTION.

Before the trustees of a township are authorized to issue bonds under section 3396 General Code for the purpose of erecting, improving or enlarging a town hall the question of such bond issue must be submitted to the qualified electors of the township, including electors in any village in said township, and receive the approval of the majority of the ballots cast at the election on such question; and it is not sufficient to authorize the issue of such bonds that the question be submitted only to the qualified electors in the township outside of such village, even though the majority of the electors so voting on the question vote in favor of such issue.

COLUMBUS, OHIO, May 25, 1917.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bond issue of Liberty township, Trumbull county, Ohio, in the sum of $10,000 for the erection of a town hall.

I am herewith enclosing, without approval, transcript of the proceedings of the township trustees and other officers of Liberty township, Trumbull county, Ohio, relating to the above bond issue.

The proceedings relating to this bond issue have been conducted under the provisions of sections 3395 and 3396 of the General Code.

Section 3260 General Code authorizes the trustees of the township, on the approval of the electors thereof, to levy a tax on all the taxable property of the township in an amount not to exceed $2,000.00 for the purpose of purchasing a site for the erection of a town hall.

By section 3395 General Code it is provided that if in a township it is desired to build a town hall at a greater expense than is authorized by the section above noted, proceedings shall be had as provided in said sections 3395, 3396, 3397 and 3398 General Code.

Said sections 3395 and 3396 General Code read as follows:

"Sec. 3395. If in a township, it is desired to build, remove, improve or enlarge a town hall, at a greater cost than is otherwise authorized by law, the trustees may submit the question to the electors of the township, and shall cause the clerk to give notice thereof and of the estimated cost, by written notices, posted in not less than three public places within the township, at least ten days before election.

"Sec. 3396. At such election the electors in favor of such hall, removal, improvement or enlargement shall place on their ballots, 'Town Hall—Yes,' and those opposed, 'Town Hall—No.' If a majority of all the ballots cast at the election are in the affirmative, the trustees shall levy the necessary tax, but not in any year to exceed four mills on the dollar valuation. Such tax shall not be levied under such vote for more than

seven years. In anticipation of the collection of taxes, the trustees may borrow money and issue bonds for the whole or any part therefor, bearing interest not to exceed seven per cent, payable annually."

Section 3397 provides that after an affirmative vote in favor of the proposition, the trustees may make all needful contracts for the purchase of a site for and the erection of a town hall; while section 3398 provides that where necessary the trustees may in such case appropriate land as a site for such town hall.

The transcript shows that the proposition of building the town hall here in question and the issuance of the bonds therefor in the sum stated was submitted to the electors of Liberty township, Trumbull county, Ohio, at the general election held on November 7, 1916; and the transcript further shows that the total vote cast on said proposition was 260, of which 152 votes were in favor of the proposition and 104 against the same. The abstract of the vote of this township on file in the office of the secretary of state shows that the total vote cast at this election in the township outside of the village of Girard was 275, while the total vote of the township, including that cast in four precincts of the village of Girard, was 1341.

As may be inferred from the small number of votes cast on the town-hall proposition compared with the total vote in the township, the electors of the village of Girard did not participate in the election on this proposition, information furnished me by the prosecuting attorney of the county being to the effect that the question was submitted to the electors of the township outside of the village only. The only question to be determined, I take it, is whether or not the electors residing and voting in the village of Girard had a right to vote on the proposition, and whether the same should have been submitted to them likewise..

I am of the opinion that they had such right, and in as much as the proposition was not submitted to all of the electors of the township having a right to vote on the proposition, I am of the opinion that the bond issue provided for by the township trustees pursuant to the election is wholly unauthorized.

A village does not upon its creation cease to be a part of the township wherein it is located, but on the contrary such village forms a part of the township and its citizens take part in electing the trustees and other officers of the township, and are under their jurisdiction in many governmental particulars.

State ex rel. v. Ward, 17 O. S. 543;
Greek v. Joy, 81 O. S. 315, 328.

Moreover, the question submitted with respect to the proposed town hall in this township was essentially one with respect to the levy of taxes in the amount required for the erection of the same. In the absence of statutory provisions limiting the taxable property in a township upon which the township levy of taxes is to apply, such levy applies to all taxable property in the township including that in villages situated therein, and on this consideration the statutes here in question should be construed as affording to the qualified electors of such village the right to vote on the proposition.

Moreover, section 3395 General Code specifically provides that the trustees may submit the question to

"the electors of the township,"

and this, to my mind, clearly means all the electors of the township whether residents of the village or otherwise.

In arriving at this conclusion I find myself in accord with that reached by

my predecessor, Hon. Edward C. Turner, in an opinion addressed to Hon. John W. Watts, prosecuting attorney of Hillsboro, Ohio, under date of October 3, 1916 (Opinions of the Attorney-General, 1916, Vol. II, page 1646), and the correctness of this conclusion drawn from the provisions of sections 3295 et seq. is not, in my opinion, affected by the further provisions of sections 3399 to 3402, inclusive, of the General Code, which confer upon the electors of a township in which a village is situated and upon the electors of such village, authority to unite in the erection of a public building on the submission of such question to such electors by the township trustees and the village council, respectively.

The further provision is made that if at such election two-thirds of the electors of the village and of the township voting, vote in favor of such improvement, the trustees of the township and the council of the village shall jointly take such action as is necessary to carry out the improvement. This, to my mind, is an entirely different scheme of improvement from that contemplated by sections 3395 et seq. above considered, and does not in any manner affect the conclusion here reached with respect to the proper construction of the said sections in their application to the particular questions here under consideration.

I am, therefore, of the opinion that the resolution of the township trustees providing for the issue of these bonds was unauthorized, and that you should decline to purchase the bonds here in question.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

308.

DISAPPROVAL—BOND ISSUE OF BOARD OF EDUCATION OF FAIRVIEW VILLAGE SCHOOL DISTRICT, CUYAHOGA COUNTY, OHIO—BOARD OF EDUCATION—CANNOT SUBMIT BOND ISSUE TO ELECTORS—UNLESS IT FINDS THAT FUNDS AT ITS DISPOSAL OR THAT CAN BE RAISED UNDER SECTIONS 7629 AND 7630 ARE INSUFFICIENT—SECTION 5120—IMPOSING DUTY TO CANVASS RESULT OF ELECTION MANDATORY.

Before the board of education of a school district can submit to the electors of such school district the question of issuing bonds of such school district for the purpose of procuring, constructing or improving school property, it is required to affirmatively find that the funds at its disposal or that can be raised under the provisions of sections 7629 and 7630 General Code are not sufficient to accomplish the purpose, and a recital in the resolution providing for the submission of such question to the electors of the school district that "funds at the disposal of the board of education in the proper amount or that can be raised by the annual levy are not sufficient to meet the cost of said building and that a bond issue is necessary" is not a compliance with the provisions of said section 7625.

Though section 5120 General Code is directory in so far as it prescribes the time at which a board of education must canvass the result of an election on the question of issuing bonds, the provisions of said section imposing the duty of making such canvass is mandatory, and such canvass must be made and the result thereof entered on the records of the board of education before it can act on said election and issue bonds of the school district in pursuance to such election.

COLUMBUS, OHIO, May 25, 1917.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"IN RE:—Bond issue of Fairview village school district, Cuyahoga county, in sum of $20,000 for enlarging school building in said district."

I am enclosing herewith, without my approval, transcript relating to the proceedings of the board of education and other officers of Fairview village school district relating to the above bond issue. The issue of these bonds is provided for by a resolution of the board of education of said school district, adopted at a regular meeting of such board under date of April 24, 1917, after the proposition had been voted on by the electors of the school district. The proposition of issuing these bonds was submitted to the electors by a resolution of the board of education, adopted at a meeting under date of March 30, 1917.

In reciting the necessity for this bond issue, this resolution, among other things, recites that "the funds at the disposal of this board of education in the proper amount or that can be raised by the annual levy are not sufficient to meet the cost of said building and that a bond issue is necessary."

Section 7625 General Code provides that before the proposition of a bond issue for procuring, erecting or improving school property can be submitted to the electors of the school district, it must appear that the funds at the disposal of the board, or that can be raised under the provisions of sections 7629 and 7630 G. C. are not sufficient to accomplish the purpose and that a bond issue is necessary.

Sections 7629 and 7630 General Code authorize a board of education to issue bonds on its own initiative, without a vote of the people, for the purpose of erecting and improving school property, but the amount of such bonds that can be issued in any year is limited to the aggregate of a tax at the rate of two mills on the tax duplicate valuation of real and personal property in the school district for the preceding year.

The facts that the funds at the disposal of the board of education or that can be raised by a bond issue under section 7629 are not sufficient for the purpose of procuring, erecting, enlarging, repairing or otherwise improving school property, are jurisdictional in their nature and must be affirmatively found by the board of education before it is authorized to submit the proposition of a bond issue for such purposes, to a vote of the electors. In the resolution of the board of education, under date of March 30, 1917, above referred to, the board of education found that the funds at the disposal of the board were not sufficient to meet the cost of the building and thus far it has complied with the provisions of said section 7625. I am unable to agree, however, that the recital in said resolution, that the funds that can be raised by the annual levy are not sufficient to meet the cost of said building, is an equivalent to the finding required by section 7625, that the funds that can be raised by the bond issue provided by sections 7629 and 7630 are not sufficient for the purpose, and in this respect the recital in the resolution is not a compliance with the provisions of said section 7526.

Aside from the recital contained in the resolution of the board of education, under date of April 24, 1917, providing for the issuing of bonds, there is nothing in the transcript of the proceedings showing a compliance by the board of education with the provision of section 5120 General Code, which provides that in school elections the returns shall be made by the judges and clerks of each precinct to the clerk of the board of education of the district not less than five days after the election and that such board shall canvass such returns at a meeting to be held on the second Monday after the election and that the resolution thereof shall be entered upon the records of the board. As a matter of fact, the board of education seems to have relied upon the canvass of the vote cast at the election on the bond issue proposition made by the deputy state supervisors and inspectors of elections of Cuyahoga county, and on a certificate issued by the board of elections reciting that the vote on the proposition was thirty-six votes in favor of the bond issue and thirty-five votes against the same. I am inclined to the view that the time designated in section 5120 General Code, at which the board of education shall canvass the returns of the elections and enter the results thereof upon its records, is directory but I am equally convinced that the duty of the board to make such canvass and enter the result of the election upon its records is mandatory and must be complied with before the board is authorized to act upon the result of such election and issue the bonds of the school district.

The transcript is defective in a number of other respects in this that it fails to set out the proceedings of the board of education providing for its organization by the election of officers, fails to set out the tax duplicate valuation of taxable real and personal property in said school district and the existing tax rates for all purposes on the property of said school district. Neither is any statement made therein as to the existing indebtedness of the school district, and in a very general way fails to comply with the provisions of section 2295-3 G. C., which provides as to what should be set out in a transcript relating to a bond issue.

For the above reasons I am of the opinion that you should refuse to purchase the above bond issue, but inasmuch as there may be room for honest differences of opinion with respect to objections which I have here found to be fatally defective, it would probably be no more than fair to the school district that the res-

olution rescinding your former resolution purchasing this bond issue should be in general terms rather than on the specific ground of irregularity in the proceedings relating to their issue.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

309.

GOVERNOR—MAY APPOINT LOCAL BOARDS OF REGISTRATION—PROVIDED FOR IN ACT OF CONGRESS APPROVED MAY 18, 1917—ACTS OF SAID BOARD INCONTESTABLE.

1. *Under the act of congress approved May* 18, 1917, *the governor of the state may appoint the local boards of registration under the provisions of the same and carry out his duties thereunder without an unwarranted delegation of authority.*

2. *The acts done and rights exercised by the local boards of registration under and by virtue of said act and the registration regulations will be as incontestable as the act itself from which they get their authority.*

3. *I confirm and approve the opinion rendered by the judge advocate general of guard in relation to this act and the regulations of the president of the United States.*

COLUMBUS, OHIO, May 23, 1917.

HON. JAMES M. COX, *Governor of Ohio, Columbus, Ohio.*

DEAR SIR:—I have your communication of May 21, 1917, in which you ask for certain information. Your communication reads as follows:

> "We are desirous of exercising every possible precaution in every step taken with respect to carrying out the federal law on the subject of selective service. You are probably familiar with the plan of registration and selection within the counties of the state. These officers, while recommended to the governor by community agencies; will have, as a matter of fact, the powers under which they act, delegated to them by the governor.
>
> "I am extremely anxious to know whether there can be any possible doubt upon these two questions: First, the power of the governor under the president's proclamation, to delegate authority, and second, whether the right exercised by the local boards will be thoroughly incontestable.
>
> "I submit an opinion rendered by Col. Turney, judge advocate general of the guard, and would respectfully ask for your judgment on the same subject-matter."

Your communication embodies practically three different questions:

1. The power of the governor, under the president's proclamation in reference to the registration, to delegate authority.

2. Whether the right exercised by the local boards, appointed to make such registration, will be thoroughly incontestable?

3. Whether in my judgment the opinion rendered by Col. Turney, judge advocate general of the guard, is correct?

Your questions have to do mainly with power.

In discussing these questions it will be well for us to go to the source of power, in so far as the federal government is concerned, and trace it from its source to its ultimate limits. As we know, the constitution of the United States is the supreme law of the land and is the source of all power exercised by congress.

Section 8 of article I of the constitution of the United States provides as follows:

> "The congress shall have power to provide for the common defense and general welfare of the United States; to raise and support armies; to provide and maintain a navy; to provide for calling forth the militia."

We thus see that congress has full authority to act in the matter of raising an army to provide for the common defense and the general welfare of the United States. In pursuance of these constitutional provisions and the authority given congress under said provisions, congress enacted a law on the 18th day of May, 1917, in reference to the matter of selective conscription of men to serve in the army and navy of the United States. The only part of said act which is vitally connected with the subject under consideration is section 6, which reads as follows:

> "Sec. 6. That the president is hereby authorized to utilize the service of any or all departments and any or all officers or agents of the United States and of the several states, territories, and the District of Columbia, and subdivisions thereof, in the execution of this act, and all officers and agents of the United States and of the several states, territories, and subdivisions thereof, and of the District of Columbia; and all persons designated or appointed under regulations prescribed by the president whether such appointments are made by the president himself or by the governor or other officer of any state or territory to perform any duty in the execution of this act, are hereby required to perform such duty as the president shall order or direct, and all such officers and agents and persons so designated or appointed shall hereby have full authority for all acts done by them in the execution of this act by the direction of the president. Correspondence in the execution of this act may be carried in penalty envelopes bearing the frank of the war department. Any person charged as herein provided with the duty of carrying into effect any of the provisions of this act or the regulations made or directions given thereunder who shall fail or neglect to perform such duty; and any person charged with such duty or having and exercising any authority under said act, regulations, or directions, who shall knowingly make or be a party to the making of any false or incorrect registration, physical examination, exemption, enlistment, enrollment, or muster; and any person who shall make or be a party to the making of any false statement or certificate as to the fitness or liability of himself or any other person for service under the provisions of this act, or regulations made by the president thereunder, or otherwise evades or aids another to evade the requirements of this act or of said regulations, or who, in any manner, shall fail or neglect fully to perform any duty required of him in the execution of this act, shall, if not subject to military law, be guilty of a misdemeanor, and upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than one year, or, if subject to military law, shall be tried by court-martial and suffer such punishment as a court-martial may direct."

It will be noted under the provisions of this section that congress has seen

fit to delegate certain powers to the president, in the way of formulating rules and making regulations in the matter of selective conscription. The question might be raised here as to whether congress has the right to delegate to the president of the United States powers which might be held to be legislative in their nature, and, while it is not the province of this department to pass upon the constitutionality of a federal act, yet, in order to make this matter perfectly clear, I am going to cite one decision in support of this proposition.

In re Griner et al., found in 16 Wis. 423, the court had under consideration matters almost, if not altogether, similar to the matters now under consideration. In this case the question was raised as to the constitutionality of an act passed by congress on July 17, 1862, which gave the president certain authority in the matter of making all necessary rules and regulations for the purpose of enrolling the militia of the different states of the Union. The syllabus reads in part as follows:

> "That part of the act of congress of July 17th, 1862, which provides, that 'if by reason of defects in existing laws, or in the execution of them in the several states, or any of them, it shall be found necessary to provide for enrolling the militia and otherwise putting this act in execution, the president is authorized in such cases to make all necessary rules and regulations; and the enrollment of the militia shall, in all cases, include all the able bodied male citizens, between the ages of eighteen and forty-five, and shall be apportioned among the states according to representative population,' does not confer on the president any new or additional powers; but by this provision, it was intended that the president should, in making a draft, avail himself of the provisions of state laws so far as they were applicable, and where they were not, or there was no state law on the subject, that in such cases he would exert the authority conferred on him by the act of February 28, 1795, and make proper rules and regulations for calling forth and drafting the militia.
>
> "The making, by the president, of rules and regulations for calling forth and drafting the militia, is not the exercise of a power strictly and exclusively legislative.
>
> "A distinction exists between those important subjects which must be entirely regulated by congress, and those of less interest, in reference to which a general provision is made and power is given to those who act under it to fill up the details, as incidental to its execution.
>
> "The act of congress giving the president power to make all necessary rules and regulations to carry into effect the law for calling out the militia, is not a delegation of the legislative power of congress."

From the syllabus we note that the power given to the president to make rules and regulations for calling forth and drafting the militia is not the exercise of the power strictly and exclusively legislative, and that a distinction must be made between those important duties which must be entirely regulated by congress and those of less interest in reference to which a general provision is made and power is given to those who act under it to fill up the details as incidental to its execution.

The act, which the court was construing in this case, provided among other things as follows:

> "If by reason of defects in existing laws, or in the execution of them in the several states, or any of them, it shall be found necessary to provide for enrolling the militia and otherwise putting this act into execution, the president is authorized in such case to make all necessary rules and regu-

lations; and the enrollment of the militia shall in all cases include all able-bodied male citizens, between the ages of eighteen and forty-five, and shall be apportioned among the states according to representative population."

It was argued before the court that this act was unconstitutional, because it was an attempt on the part of congress to delegate its legislative power, upon the subject of detaching, drafting and calling forth the militia, to the president. It was argued that this was apparent as well from the language of the provision as from its scope and object.

The court in its opinion, on p. 433, uses the following language in reference to said arguments:

> "No one will seriously contend that congress can delegate legislative power to the president. But a distinction must be made of 'those important subjects which must be entirely regulated by the legislature itself, from those of less interest in which a general provision may be made, and power given to those who are to act under such general provision to fill up the detail.' It would seem that the power given to the president to make all rules and regulations to carry into effect the law for calling out the militia, is of the latter character. Congress might have regulated by its legislation the whole details of the draft, if it had thought proper to do so. But having, in the most ample manner, clothed the president with power to call forth the militia, it further provided that he should make all proper rules and regulations for the enforcement of the draft where state laws upon the subject were defective. Where state laws exist, it was undoubtedly intended or supposed that the president would avail himself of their machinery, in bringing into the field the quota of the state."

Upon the authority of this case and others that might be cited, it would seem that we are safe in assuming that congress had the authority to delegate to the president, as it has done in section 6 of the act under consideration, full power and authority to regulate the matter of making the registration and in providing for selective conscription.

With this in mind, let us go one step further in the matter of tracing the authority from the supreme law of the land to its ultimate limits. Said section 6 of said act provides that the president is authorized to utilize the service of any or all departments and any or all officers or agents of the United States and of the several states in the execution of this act. In compliance with the authority given to the president under this section, he has seen fit to call upon the governors of the states to assist him in the matter of providing the machinery to carry into effect this matter of selective conscription.

In the proclamation issued by the president of the United States, he uses the following language:

> "Now, therefore, I, Woodrow Wilson, president of the United States, do call upon the governor of each of the several states and territories, the board of commissioners of the District of Columbia, and of the counties and municipalities therein, to perform certain duties in the execution of the foregoing law, which duties will be communicated to them directly in regulations of even date herewith."

In this it is noted that he calls upon the governor of each of the several states and all officers and agents of the several states and territories and of the counties

and municipalities therein, to perform certain duties in the execution of the said law, which duties will be communicated to said officers directly in regulations of even date with the said proclamation.

So that in the further consideration of this matter we must turn to the rules and regulations prescribed by the president and approved by him on May 18, 1917, entitled "Registration Regulations," and sent out by him to the various officials at the same time he issued his proclamation.

In said "Registration Regulations," on page 5 thereof and in subdivision 9, the president has provided as follows:

> "As far as possible, the execution of the law in each state will be accomplished by state, county and municipal officers and agencies.
>
> "That the grand subdivisions for administration shall be the states under the direction of the governors.
>
> "That each state shall be divided into a number of districts corresponding normally to the county, and where there is a county administrative organization, the county unit must be used."

The provision is further made that

> "The execution of the law in each county or similar subdivision shall, in respect of registration, be intrusted to a board of registration consisting of at least three members to be named by the governor and composed of local authorities or other citizens residing in such county or subdivision."

It further provides that

> "Normally the county board or board of similar subdivision should consist of the sheriff, the county clerk, and the county physician. Where it is not practicable so to constitute the board, the governor may name other local authorities, or, in his discretion, other citizens residing in such subdivision."

From this it is seen that if the governor in his discretion feels that it is not practicable to constitute the sheriff, the clerk and the county physician as the board, he may appoint a board from local authorities or other citizens residing in such subdivision, the only limitation being that it must not be made up of fewer than three members.

From these provisions it is seen that the matter is discretionary with the governor as to whether he will appoint a registration board from the local authorities or other citizens residing in the county, or whether the county board shall consist of the sheriff, the clerk and the county physician.

That this construction is correct seems evident also from a provision found on page 15 of the act, which reads as follows:

> "For facility in effecting prompt distribution of blank forms, regulations, and registration cards to the various counties in the United States, these forms will be addressed to the sheriffs. Should the governor constitute local boards which do not include sheriffs, he will request such boards to procure blank forms from the sheriff."

This makes it clearly evident that the matter of the membership of these local registration boards rests in the sound discretion of the governor.

Now your first question is as to the power of the governor under the president's proclamation to delegate authority. From all that has been noted heretofore it is evident that the governor really delegates no power or authority; he is simply the agency through which the president of the United States speaks. The "Registration Regulations" issued by the president set forth clearly the duties of these local registration boards. Further, section 6 of the said act of congress provides that

> "All such officers and agents and persons so designated or appointed shall hereby have full authority for all acts done by them in the execution of this act by the direction of the president."

Hence, the local boards need not look particularly to the governor of Ohio for authority to act in the premises, but they can look to the rules and regulations formulated by the president and also to the very act under which they are appointed and which they are to assist in carrying out. Further, said section 6 makes them liable to punishment upon conviction if they fail to perform the duties prescribed by the president of the United States. Thus these local boards of registration virtually become federal agencies, and are answerable to the federal government for their acts or for their failure to act.

Said section further provides:

> "All persons designated or appointed under regulations prescribed by the president, whether such appointments are made by the president himself or by the governor or other officer of any state or territory to perform any duty in the execution of this act, are hereby required to perform such duty as the president shall order or direct, and all such officers and agents and persons so designated and appointed shall hereby have full authority for all acts done by them in the execution of this act by the direction of the president."

Now with all the above in mind, what is the answer to your questions?

First, as to the delegation of authority:

As said above, this delegation of authority is not so much delegated from the governor to the local boards as it is a delegation of authority to the local boards from the president of the United States through the governor of the state, and, as set out above, this delegation of power and authority by congress is warranted in the way of carrying out the provisions of the act itself. So that I am of the opinion that you are fully warranted in carrying out the provisions of the act and the regulations of the president of the United States, and need not be uneasy as to an undue delegation of authority.

In view of the above, what about your second question as to whether the right exercised by the local boards will be thoroughly incontestable? Their acts will be as incontestable as the law itself. They get their power and authority to act from the law, and their method of acting from the president of the United States, who gets his authority to make the rules and regulations from the act itself.

Hence, answering your questions specifically:

(1.) It is my opinion that you will not in the carrying out of the provisions of said act and the rules and regulations of the president of the United States violate the principles of law in the way of delegating authority to the local boards;

(2.) And that the acts and rights exercised by the local boards will be as thoroughly incontestable as the act itself.

I have carefully examined the opinion rendered by Colonel Turney, judge advocate general of the guard, and am of the opinion that he has correctly set

out the principles of law which have to do with said act and the execution of same.

I would like to suggest, however, that inasmuch as the president has laid down certain rules and regulations which are to be followed in the matter of this selective conscription, the said board should carry out implicitly the directions therein set out; this for the reason that congress has seen fit to place this matter in the hands of the president, and in accordance with the instruction of congress the president has issued these regulations.

I have said nothing in reference to the rules which should apply in cities over thirty thousand population, for which provision is made in the law and in the regulations of the president, for the reason that this question is not involved in your request for an opinion.

Very truly yours,
JOSEPH McGHEE,
Attorney-General.

310.

CLERK OF COURTS—NOT AUTHORIZED TO CHARGE FEE—FOR CERTIFYING TO MILITARY REGISTRATION CARDS OF NON-RESIDENTS.

Clerks of courts not authorized to charge fee for certifying to registration cards of non-residents for military registration.

COLUMBUS, OHIO, May 26, 1917.

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

GENTLEMEN:—You have requested my opinion as to whether or not clerks of courts are required to charge a fee under section 2901 G. C. for certifying to the registration cards of non-residents for military registration.

Section 6 of the act of congress of May 18, 1917, provides that the president is authorized to utilize the services of any and all departments and any or all officers or agents of the United States and of the several states, etc., and all persons designated or appointed under the regulations prescribed by the president, whether such appointments are made by the president himself or by the governor or other officer of any state or territory, to perform any duty in the execution of the act, are required to perform such duty as the president shall order or direct.

Section 32 of the registration regulations requires the regularly elected county clerk "to certify to the registration cards of such non-residents."

There is no provision in the act or registration regulations fixing the compensation of the clerk for such certificate nor does it appear that it requires the seal of the court.

I am, therefore, of the opinion that clerks of courts are not authorized to demand fees for such certification under section 2901 G. C.

Very truly yours,
JOSEPH McGHEE,
Attorney-General.

311.

LEGAL RESIDENCE—DEFINED—LEGAL SETTLEMENT IN SECTION 3477 HAS NO APPLICATION TO LEGAL RESIDENCE USED IN SECTION 1352-4 G. C.

1. *"Legal residence," as used in section* 1352-4 *G. C., means "domicile."*
2. *The provision of section* 3477 *G. C. as to legal settlement has no application to "legal residence" as used in section* 1352-4 *G. C.*

COLUMBUS, OHIO, May 28, 1917.

HON. H. H. SHIRER, *Secretary, Board of State Charities, Columbus, Ohio.*

DEAR SIR:—On April 6, 1917, you requested an opinion of this department upon the following:

> "Your advise is requested upon the application of the provisions of section 1352-4 of the General Code, and particularly to that part of said section which states that certain expenses incident to children received in the juvenile court shall be charged by the board of state charities to the county in which the child had a legal residence when received by said board.
>
> "We now have a case in which the judge of the juvenile court of Franklin county has before him three children who are in a very neglected condition. The judge desires to commit said children to this board. These children and their mother have been in said county for only a few days. There is every reason to believe that this family had resided in another county for one year before coming within Franklin county. The husband is dead.
>
> "Shall the board and other expenses for the children be charged to Franklin county or to the county in which they had resided previously?
>
> "Furthermore, do the provisions of section 3477 apply in any manner to the expression 'legal residence' as used in section 1352-4?"

Section 11352-3 G. C. reads in part as follows:

> "The board of state charities shall when able to do so, receive as its wards such dependent or neglected minors as may be committed to it by the juvenile court. County, district, or semi-public children's homes or any institution entitled to receive children from the juvenile court may, with the consent of the board, transfer to it the guardianship of minor wards of such institutions. If such children have been committed to such institutions by the juvenile court that court must first consent to such transfer. * * *"

Section 1352-4 G. C. reads as follows:

> "The actual traveling expenses of such child and that of the agents and visitors of said board in connection with placing such dependent or neglected child shall be paid from funds appropriated to said board, but the amount of board, if any, paid for the care of such child and the expenses for providing suitable clothing and personal necessities and for mental, medical, dental and optical examination and treatment shall be charged

by the board of state charities to the county in which the child had a legal residence when received by such board. The treasurer of each county, upon the warrant of the county auditor, shall pay to the treasurer of state the amount so charged for the preceding quarter upon the presentation of a statement thereof. The sum so received shall be credited to the fund appropriated for the purpose of maintaining the child placing work of the board."

Under the authority of the above statutes, when the juvenile court has found that the children in question are dependents, and has sought to commit them to your board, the board, when able to do so, is authorized to receive such dependents as its wards, and the actual traveling expenses, etc., provided in section 1352-4, are payable from funds appropriated to the board of state charities, but the amount of board, if any, paid for the care of such child or children, and the expenses for providing suitable clothing and personal necessities, and for mental, medical, dental and optical examination and treatment shall be charged by the board of state charities to the county in which the child had a legal residence when received by such board.

The only question to be determined is

"Where was the "legal residence" of such children when they were received by your board?"

Your inquiry does not present sufficient facts to determine this question, so I cannot answer same specifically, but will merely consider the law governing the question of legal residence. In the latter part of your inquiry you state:

"Furthermore, do the provisions of section 3477 apply in any manner to the expression 'legal residence' as used in section 11352-4?"

Section 3477 G. C. reads in part as follows:

"Each person shall be considered to have obtained a legal settlement in any county in this state in which he or she has continuously resided and supported himself or herself for twelve consecutive months, without relief under the provisions of law for the relief of the poor, subject to the following exceptions: * * *"

This section is found in Part I, Title XI, Div. IV, Ch. 1, entitled "Poor," and defines "legal settlement" under the poor laws of Ohio. It is limited to the statutes upon that subject and has no reference to sections here involved. "Legal residence," as used in section 1352-4 G. C., is not defined in the statute and the meaning of the words as used must be looked for elsewhere.

The Standard Dictionary defines "residence" as:

"The place * * * where one resides; domicile; abode; habitation."

"The words domicile and *residence* are frequently used synonymously by the courts and in statutes, but technically the latter word indicates merely the present place of abode of a person whether temporary or permanent, whereas domicile always means a permanent home. Nelson's Perpetual Encyc. Vol. IV, p. 97.

"LEGAL RESIDENCE, a phrase variously used, as to denote (1) the place where one's home or family is, (2) fixed and permanent abode or

domicile, (3) an abode of sufficient length to confer political rights or subject to personal taxation, or (4) permanency of abode more marked than mere lodging or boarding, but not fixed and final."

The Century Dictionary defines "residence" as follows:

"* * * 5. In law: (a) The place where a man's habitation is fixed without any present intention of removing it therefrom; domicile. (b) An established abode, fixed for a considerable time, whether with or without a present intention of ultimate removal."

In C. H. & D. Railroad Co. v. Ives, 3 N. Y. Supp. 395, the court, defining "legal residence," says:

"'Legal residence' is synonymous with domicile and is defined to be a residence at a particular place accompanied with positive or presumptious proof of intention to remain there an unlimited time. It means more than residence, there being a distinction between actual and legal residence."

A minor cannot himself change his domicile. 34 O. S. 535.

After the father's death, the mother becomes the natural guardian of the child, and the child's domicile is then the domicile of the mother.

Jacob's Law of Domicile, Sec. 238;
12 Ohio 194;
5 Ohio 315.

The mother can change the domicile of the child only by changing her own domicile.

112 U. S. 458;
12 Ohio 194.

As stated by Washburn, J., in In re Guardianship of Murray, 4 N. P. (N. S.) 233, at p. 238:

"A child's domicile never changes except with the domicile of the father or mother or grandparent or some other person standing in *loco parentis* or by operation of law as where the surviving parent dies domiciled at a place other than domicile of the grandparent, when if the child goes to live with the grandparent and actually resides with and becomes a member of the family of the latter, its domicile is changed to that of the grandparent. 114 U. S. 218."

In your statement of facts you say:

"These children and their mother have been in said county for only a few days. There is every reason to believe that this family had resided in another county for one year before coming within Franklin county. The husband is dead."

The fact that the family resided in another county a year before coming to Franklin county, has no bearing on this case. The sole question is, was the mother of the minors domiciled in Franklin county when the children were committed to your board? If this question of fact is decided in the affirmative, the legal residence

of the minors was in Franklin county. If, on the other hand, the mother had brought the children here for temporary purposes, and had no intention of taking up a domicile in Franklin county, they would not have lost their legal residence in the county where they last were domiciled, and the expense could be charged back to the latter county.

As stated before, on the meager facts in your communication, it is impossible to determine specifically where the legal residence of this family actually was, when the children were committed to your board; but from the above observations I have no doubt your board will have no trouble in determining where the legal residence of these minors was at the time they were so committed.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

312.

TEACHER—ENTITLED TO PENSION—PROVIDED SHE HAS TAUGHT TWENTY YEARS—AND BOARD DOES NOT RE-EMPLOY HER, ALTHOUGH TEACHER WILLING TO CONTINUE EMPLOYMENT.

Under the provisions of sections 7875 et seq. G. C., a teacher is entitled to a pension, providing she has taught for a period aggregating twenty years under the conditions set out in section 7882 G. C., and provided further that the board does not re-employ her, she being willing to continue in the employ of the board.

COLUMBUS, OHIO, May 28, 1917.

HON. F. B. PEARSON, *Superintendent of Public Instruction, Columbus, Ohio.*

DEAR SIR:—Your letter of May 1, 1917, in which you ask for certain information, was duly received. Your communication reads as follows:

> "Superintendent Wm. B. Guitteau of the Toledo schools has submitted the following statement of facts:
>
> "'Mrs. B____ was a former principal of a normal training school in Toledo. The school was discontinued in June, 1914, and so Mrs. B____'s services were no longer needed as principal. She was then a contributor to the pension fund, having made her regular payments of $2.00 each month from the inception of the fund. She had over twenty years of experience but not thirty years, either twenty-three or twenty-four years.
>
> "'Last fall Mrs. B____ applied for a pension but the board of trustees did not grant it believing that her case did not come within the scope of section 7880 for the reason that she was not retired on account of physical or mental disability. The trustees feel that Mrs. B____ should receive the pension if she is entitled to it but desire more light on the question as to whether or not she is eligible to receive this pension.'
>
> "In view of the above mentioned facts, is Mrs. B____ eligible to receive a teacher's pension?"

The question submitted by you is as to whether Mrs. B____ would be entitled to a teacher's pension upon the following statement of facts:

1. She has been a teacher for twenty-three or twenty-four years.
2. She has contributed to the fund ever since the same was created in the city of Toledo.

3. She discontinued teaching in June, 1914, because of the fact that the school, over which she was principal, was discontinued and she was no longer needed, therefore, as principal. The school in which she last taught was a normal training school in Toledo, this being the school which was discontinued.

Upon further inquiry from your department, I ascertained the fact to be that this normal training school was connected with the public school system of the city of Toledo and maintained at the expense of the taxpayers of said city.

The provisions of the statutes which have to do with teachers' pensions are found in sections 7875 to 7896 inclusive G. C., and in order to answer your question it will be necessary to note the provisions of a number of the sections of this chapter pertaining to teachers' pensions.

Section 7881 G. C. reads as follows:

"The term 'teacher', in this chapter, shall include all teachers regularly employed by either of such boards in the day schools, including the superintendent of schools, all superintendents of instruction, principals, and special teachers, but in estimating years of service, only service in public day schools or day high schools, supported in whole or in part by public taxation, shall be considered."

It will be noted in this section that in estimating years of service, only service in public day schools or day high schools, supported in whole or in part by public taxation, shall be considered. As said before, from information received from your office it is evident that Mrs. B____ would come under the provisions of this section while teaching in the normal training school.

There are several sections which have to do with the necessary conditions to entitle a teacher to pension.

Section 7882 G. C. reads as follows:

"Any teacher may retire and become a beneficiary under this chapter who has taught for a period aggregating thirty years. But one-half of such term of service must have been rendered in the public schools or in the high schools of such school district, or in the public schools or high schools of the county in which the district is located, and the remaining one-half in the public schools of this state or elsewhere."

Mrs. B____ does not come under this section, because she has not taught the required length of time, namely, thirty years, before voluntarily retiring from the profession of teaching.

Section 7880 G. C. reads as follows:

"Such board of education of such school district, and a union, or other separate board, if any, having the control and management of the high schools of such district, may each by a majority vote of all the members composing the board on account of physical or mental disability, retire any teacher under such board who has taught for a period aggregating twenty years. One-half of such period of service must have been rendered by such beneficiary in the public schools or high schools of such school district, or in the public schools or high schools of the county in which they are located, and the remaining one-half in the public schools of this state or elsewhere."

From your letter I note that Mrs. B____ was not retired from her profession on account of physical or mental disability, and hence, although she has taught over twenty years, yet she would not come under the conditions set out in said section.

Section 7891 G. C. reads as follows:

> "A teacher who resigns, upon application within three (3) months after such resignation takes effect, shall be entitled to receive one-half of the total amount paid by such teacher into such fund. If at any time a teacher who is willing to continue in the service of the board of education is not re-employed or is discharged before his term of service aggregates twenty years, then to such teacher shall be paid back at once all the money he or she may have contributed under this law. But if any teacher who has taught for a period aggregating twenty years is not re-employed by the board of education, such failure to re-employ shall be deemed his retiring, and such teacher shall be entitled to a pension according to the provisions of this act."

It will be noted that under the provisions of this section

> "if any teacher who has taught for a period aggregating twenty years is not re-employed by the board of education, such failure to re-employ shall be deemed his retiring, and such teacher shall be entitled to a pension according to the provisions of this act."

It is quite evident that Mrs. B____ might be brought within the provisions of this section, but in order to come under the provisions of this section the following conditions would have to obtain:

1. She must have taught for a period aggregating twenty years.
2. But this service must have been rendered under the conditions set out in section 7882 G. C.; that is, one-half of this term of twenty years of service must have been in the public schools or in the high schools of Toledo or in Lucas county, and the remaining one-half in the public schools of this state or elsewhere.
3. The board of education of Toledo must have failed to re-employ her at the time she ceased being principal in the normal training school, she being willing to continue in the employ of the board.
4. If the normal school in which she was principal ceased operation, she would have been compelled to remain in the employ of the board in some other capacity than principal, provided the board should be willing to employ her in some position in the Toledo public schools, or if she did not, she would not be entitled to a pension under section 7891 G. C. The mere fact that she was no longer needed in the position of principal of the normal school would not entitle her to a pension under said section, unless the board failed to re-employ her and place her in some other position in the public schools.

So that answering your communication specifically, it is my opinion that Mrs. B____ is not entitled to a teacher's pension, unless she comes within the provisions of section 7891 G. C., which conditions are set out and numbered above.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

313.

SECTION 614-14—PROHIBITING DISCRIMINATION IN RATES OF PUBLIC UTILITY—DOES NOT APPLY TO COUNTY OR POLITICAL SUBDIVISION—POWER OF COMMISSIONERS TO CONTRACT FOR LIGHT, HEAT, ETC.—WHEN COMMISSIONERS CONTINUE TO PAY CONTRACT PRICE FOR LIGHT, ETC., AFTER ADOPTION OF NEW SCHEDULE—MAY NOT RECOVER EXCESS OF CONTRACT PRICE OVER NEW SCHEDULE.

The provision of section 614-14 G. C., prohibiting discrimination in rates charged for a public utility, is limited by its terms to "any person, firm or corporation," and does not include a county or other political division.

The county commissioners, under section 2435-1, may contract for supplying their buildings with light, heat or power, for ten years at a time. Said section is not repealed or affected by the public utilities act.

The county commissioners having contracted for lighting county buildings at rates set out in the contract, and having continued to pay at the contract rates, after the adoption and approval of a new schedule, cannot recover the excess of such payment over the new schedule rates, and this is true, whether the contract rates were identical with those set out in the former schedule or not.

COLUMBUS, OHIO, May 28, 1917.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—Under date of February 2, 1917, you addressed the following communication to this office:

"We are transmitting herewith communication from Mr. Edward J. Ott, state examiner in the county division of this department, also schedule of rates of the Ohio Service Company effective September 1, 1913, schedule of rates effective March 15, 1916, together with copy of contract between the Coshocton Light and Heating Company and the Commissioners of Coshocton county, Ohio, under date of September 15, 1913, and we respectfully request your written opinion upon the following questions:

"(1) Can an electric light company, which has entered into a contract with a consumer for the purpose of furnishing said consumer with electric light service at certain rates set out in its schedule of rates approved by the Public Utilities Commission of Ohio and in effect at the time said contract was executed, continue to legally charge the said contract rates after a new schedule of rates issued by the electric light company and approved by the Public Utilities Commission of Ohio became effective?

"(2) Should findings for recovery be made for the excess amounts charged to and collected from the county by the Ohio Service Company since March, 1916, for the said electric light service?"

The communication referred to and addressed to you is as follows:

"On September 15, 1913, the Coshocton Light and Heating Company of Coshocton, Ohio, entered into a certain contract, a copy of which is herewith submitted, to furnish current for lighting the several rooms in the court house and the county jail.

"The charges under said contract are based upon commercial lighting rate 'B' of schedule No. 2 issued by the said Coshocton Light and Heating Company, which was approved by the public service commission of Ohio and which became effective September 1, 1913.

"A copy of the schedule of commercial lighting rate 'B' and of the terms and conditions (sheet No. 15) of said schedule No. 2 is also herewith submitted.

"On March 10, 1916, the Ohio Service Company, which had acquired the plant and business of the Coshocton Light and Heating Company issued a new schedule of rates for electric light, heat and power service at Coshocton, Ohio.

"This schedule was issued on less than statutory notice by permission of the Public Utilities Commission of Ohio, on account of first filing, and became effective on March 15, 1916.

"A copy of the new schedule noted above is also herewith submitted.

"'An examination of the bills rendered to the county by the Oil Service Company since March 15, 1916, the date upon which its new schedule of rates became effective, discloses that said company continued to base its charges for lighting the rooms of the court house and the county jail upon the old schedule of rates which had been cancelled when the new rates became effective on March 15, 1916.

"If the charges for current used since March, 1916, as shown by the bills rendered, had been based upon the rates of the new schedule, there would have been a considerable saving to the county in the cost of lighting the rooms of the court house and the county jail.

"QUESTION:—Can an electric light company, which has entered into a contract with a consumer for the purpose of furnishing said consumer with electric light service at certain rates set out in its schedule of rates approved by the Public Utilities Commission of Ohio and in effect at the time said contract was executed, continue to legally charge the said contract rates after a new schedule of rates issued by the electric light company and approved by the Public Utilities Commission of Ohio became effective?

"QUESTION:—Should findings for recovery be made for the excess amounts charged to and collected from the county by the Ohio Service Company since March, 1916, for the said electric light service?"

The control by the Public Utilities Commission of the subject of rates charged for service by persons or companies supplying such public utilities is provided in the acts known as the Public Service Commission Act and the Public Utilities Commission Act and amendatory and supplemental legislation thereto.

Sections 614-14, 614-15 and 614-18 G. C. are as follows:

"Sec. 614-14. No public utility shall directly or indirectly, or by any special rate, rebate, drawback or other device or method, charge, demand, collect or receive from any person, firm or corporation, a greater or less compensation for any services rendered, or to be rendered, except as provided in this act, than it charges, demands, collects, or receives from any other person, firm, or corporation for doing a like and contemporaneous service under the same, or substantially the same circumstances and conditions. Nor shall free service or service for less than actual cost be furnished for the purpose of destroying competition, and such free service and every such charge is prohibited and declared unlawful.

"Sec. 614-15. No public utility shall make or give any undue or unreasonable preference or advantage to any person, firm, corporation, or locality, or subject the same to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

"Sec. 614-18. No public utility shall charge, demand, exact, receive or collect a different rate, rental, toll or charge for any service rendered, or to be rendered, than that applicable to such service as specified in its schedule filed with the commission and in effect at the time. Nor shall any public utility refund or remit directly or indirectly, any rate, rental, toll or charge so specified, or any part thereof, nor extend to any person, firm or corporation, any rule, regulation, privilege or facility except such as are specified in such schedule and regularly and uniformly extended to all persons, firms and corporations under like circumstances for the like, or substantially similar, service."

It is seen that the operation of this system of laws is restricted to the dealings of such persons and companies with persons, firms and corporations, and does not include the public in its collective capacity, as political subdivisions represented by officials. The schedule of rates, therefore, as fixed by the Public Utilities Commission, does not of its own force apply to the public in that sense.

In so far, however, as the principal of uniformity and equality is made obligatory, these sections are merely declaratory of the common law as evolved by and applied to modern conditions.

It is a universal rule, supported by a vast mass of authority, with no dissent from any jurisdiction, that such public service corporations cannot discriminate among their patrons either as to fact or quality of service or price charged.

Munn v. Illinois, 91 U. S. 113.

The county is no more excluded from the operation of this beneficial rule than any other customer, and if unaffected by statute would indirectly receive the benefit of the rate as fixed, not by virtue of the statutes above quoted, but by the operation of this principle. To restate the proposition—the county would not come under the public service commission law and could receive no relief under any of its provisions nor from any appeal to or act by the Public Service Commission; but the county could under the principle established by the courts refuse to be discriminated against and appeal to their equity jurisdiction to prevent an exaction of payment in excess of other consumers, the effect of which would be to obtain for it the benefit of the exact rate fixed by the commission.

Another consequence of the omission of political divisions from said acts, is that it leaves them free to contract for the same or a different character of service from that provided for in published schedules and for different prices, either higher or lower, than therein set forth.

In addition to the above principles and arguments, there is a section of the statutes that confers power on the commissioners to make such contract, section 2435-1, which is as follows:

"The commissioners of any county may, at any time, either before or after the completion of any county building, invite bids and award contracts for supplying such building with light, heat and power, or any of the same, for any period of time not exceeding ten years; but none of the provisions of section fifty-six hundred and sixty of the General Code shall apply to any such contracts."

While the public utility acts are subsequent to this, there is thereby no repeal by implication because there is no contradiction between the two, and this by reason of the restriction of the public utilities law to persons, firms and corporations. If the term "corporation" were construed as including the public quasi-corporation, the county, then section 2435-1 might be repealed by implication; but such repeals are not favored, and where the language is capable of it, it will always receive such construction as will leave a former law in effect. Even if you gave this broad meaning to "corporation," the repeal by implication would not follow, but the former act would stand as an exception to the latter.

City of Birmingham v. Southern Express Co., 164 Ala. 529;
Gardner v. School District, 87 Kay Co., 126 Pac. 1018;
Board of Education v. Board of Education, 46 O. S. 575-600.

In the instant case there is ambiguity in the contract, which states, in respect to the incandescent lighting, that the rates charged are to be in accordance with the published schedule, and then giving the rates, which in one instance is different from the schedule rate, by being placed under a schedule in which it did not belong. The allusion is to the sheriff's residence which is charged the rate per commercial lighting instead of residence, which was a reduction to the county. The provision for arc lighting is not provided for in the schedules at all, but inasmuch as the contract is severable in this respect, the provisions for the incandescent lighting may be considered alone, and it differs from the schedule, not alone in respect to this one item of price, but also as to the manner of furnishing the service, certain accessories being supplied by the company, which in the schedule are required to be furnished by the purchaser.

So that here you have power to make a contract different from that contemplated in the published schedule, and such different contract actually made. Not only that, but it is fully executed on both sides. The county has voluntarily made payments on it since the new rate went into effect, and now it is sought to recover back the excess payment as illegal. They were not illegal, but only in excess of what the commissioners might have contracted for.

The answer to your first query, in the general form in which you put it, would be in the negative, but the rule thereby affirmed does not govern your concrete case.

Your second question is answered in the negative. No recovery could be had against this company for the excess payments in question.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

314.

TREASURER OF STATE—AUTHORIZED TO TRANSFER FUNDS DEPOSITED BY THE CAPITOL TRUST COMPANY—TO THE STATE SAVINGS BANK AND TRUST COMPANY.

Under facts stated, treasurer authorized to transfer $50,000 *of the* $100,000 *bonds deposited by The Capitol Trust Company to The State Savings Bank and Trust Company.*

COLUMBUS, OHIO, May 28, 1917.

HON. CHESTER E. BRYAN, *Treasurer of State, Columbus, Ohio.*

DEAR SIR:—Under date of May 23d you wrote me as follows:

"This office is in receipt of the enclosed communication from The State Savings Bank and Trust Company, Columbus, Ohio, relative to a transfer of securities from The Capitol Trust Company, to The State Savings Bank and Trust Company, which communication we are referring to you for your advice in the matter."

The enclosure to which you refer is to the following effect:

"There is now on deposit with you bonds of a par value of $155,000.00. One hundred thousand dollars of these bonds standing in the name of The Capitol Trust Company and $55,000.00 in the name of The State Savings Bank and Trust Company security required by the law under which we are incorporated. You will observe from the affidavit filed herewith that the $100,000.00 standing to the credit of The Capitol Trust Company were sold on the 16th day of January, 1911, to The State Savings Bank and Trust Company. The State Savings Bank and Trust Company at that time having acquired the assets and business of The Capitol Trust Company.

"In said affidavit it is set forth that The Capitol Trust Company has divested itself of all trusts with the exception of The Elk Coal Company of Roseville, Ohio, and as receiver for the Fritter estate.

"We also enclose a guarantee executed by The State Savings Bank and Trust Company guaranteeing 'the prompt and due performance of all of the duties and obligations on the part of The Capital Trust Company arising in connection with the aforesaid two trusts.'

"It is our desire that all of the securities now on deposit with you in the name of The Capitol Trust Company be transferred to The State Savings Bank and Trust Company to which company they properly belong.

"We trust you may see your way clear, with the information set before you, to comply with this request."

The affidavit accompanying your letter is dated on the 11th day of May, 1917, and is made by Randolph S. Warner, vice-president of The Capitol Trust Com-

pany, and Alexander W. Mackenzie, secretary-treasurer of said company, and recites that The Capitol Trust Co. had on deposit with the treasurer of the state of Ohio, $100,000.00 in approved securities, as required by section 9778 G. C., which section reads as follows:

> "No such corporation either foreign or domestic shall accept trusts which may be vested in, transferred or committed to it by an individual, or court, until its paid in capital is at least one hundred thousand dollars, and until such corporation has deposited with the treasurer of state in cash fifty thousand dollars if its capital is two hundred thousand dollars or less, and one hundred thousand dollars if its capital is more than two hundred thousand dollars, except that, the full amount of such deposit by such corporation may be in bonds of the United States, or of this state, or any municipality or county therein, or in any other state, or in the first mortgage bonds of any railroad corporation that for five years last past paid dividents of at least three per cent on its common stock."

Said affidavit further recites that on the 16th day of January, 1911, The Capitol Trust Company, by resolution of its stockholders, sold the assets of said company to The State Savings Bank and Trust Company, of Columbus, Ohio, among which were the approved securities on deposit with the treasurer of state.

The affidavit further discloses that all of the trusts assumed by The Capitol Trust Company as trustee have been terminated with the exception of a certain mortgage or deed of trust from The Elk Coal Company of Roseville, Ohio, and a certain receivership in which the said The Capitol Trust Company was made receiver in a suit brought by Philbrick, et al., against Fritter, et al.

So far as the trusteeship with The Elk Coal Co. is concerned, it appears that The Capitol Trust Company is not liable for any negligence, omission or wrongdoing on the part of its agents or attorneys if reasonable care has been exercised in their selection; that it has expended no money under such deed of trust, and that there is no obligation thereunder upon it to perform any act or to defend any suit unless first indemnified, and that the trustee is not under any obligation to file or refile the mortgage or deed of trust.

The affidavit discloses further that only $1,750.00 par value of the bonds are in the hands of holders; that $26,000.00 par value are held by the company and used from time to time as collateral for loans, and that $2,250.00 of the bonds have been paid and retired; that the trustee has been called upon to perform no duties in the premises and that no money under the mortgage or deed of trust has been deposited with the trustee.

The affidavit further recites that no situation can develop which will in any way cast upon the trustee a duty for which it could be liable or for which security is necessary for the protection of the holders of the bonds; and that there exists at this time with respect to said trust no claim or liability whatsoever.

It is further recited in the affidavit that unless the co-operation of The Elk Coal Co. bond holders can be secured to the end that The Capitol Trust Co. may divest itself of the trust, it will file an application with the court of common pleas asking for the appointment of a successor.

So far as the Fritter receivership is concerned, the affidavit states that the company merely acts as a real estate agent in the collection of rents and distributes all moneys under the direction of the court.

It is further disclosed by the affidavit that on the 6th day of April, 1917, The Capitol Trust Company reduced its capital stock from $400,000.00 to $2,500.00.

The guarantee referred to in the letter of The Capitol Trust Co. discloses that the board of directors of The State Savings Bank & Trust Co. "guarantee the prompt and due performance of all of the duties and obligations on the part of the said The Capitol Trust Company arising in connection with the aforesaid two trusts, (1) the said mortgage or trust deed from the said The Elk Coal Company and (2) the said receivership in the case of Philbrick v. Fritter, and that it assume and agree to pay any liability arising out of said trusts or either of them against the said The Capitol Trust Company."

From an examination of Opinion No. 1990, rendered to the Tax Commission of Ohio on October 20, 1916, it appears that the assets of The Capitol Trust Co. were sold to The State Savings Bank & Trust Co. in the year 1911 under what is termed a plan of consolidation of the two companies. The opinion referred to discloses the following facts:

> "In the plan of consolidation as agreed upon by the committees of the two companies in question it was agreed that The State Savings Bank and Trust Company should increase its capital stock and that The Capitol Trust Company *should go into voluntary liquidation* and that thereafter the stockholders of The Capitol Trust Company were permitted to acquire a certain amount of the capital stock of The State Savings Bank and Trust Company and to turn over in payment thereof certain assets of The Capitol Trust Company, the remaining assets to be distributed among the stockholders. The plan of consolidation, as I construe it, clearly shows that the initial step to be taken by The Capitol Trust Company was a voluntary liquidation. That is to say, that the stockholders of The Capitol Trust Company were to take steps to voluntarily dissolve the corporation and thereafter to use the assets of said company in the purchase of the shares of capital stock of The State Savings Bank and Trust Company.
>
> "From a letter received from Mr. James M. Butler it appears that at the time the stockholders of The Capitol Trust Company had agreed to the plan proposed for the absorption of The Capitol Trust Company by The State Savings Bank and Trust Company, The Capitol Trust Company had on deposit with the treasurer of the state of Ohio bonds aggregating in value one hundred thousand ($100,000) dollars, which had been deposited to secure the due performance of its trust; that The Capitol Trust Company desired to surrender the said bonds to The State Savings Bank and Trust Company, but that the then attorney-general thought that The Capitol Trust Company should defer this action so that there could be no criticism in the event that some claim arose under a trust which had been assumed by it, and that The Capitol Trust Company agreed thereto. It appears, therefore, that by request of the state authorities The Capitol Trust Company did not at that time go into voluntary liquidation but deferred such action on account of the request made by said state authorities, and it may well be assumed that had no such request been made the stockholders of The Capitol Trust Company would have taken such action as to voluntarily dissolve the said The Capitol Trust Company."

I have learned from Mr. J. M. Butler, the attorney for The State Savings Bank and Trust Co., that his company desires to withdraw $50,000.00 of the deposit so made, the same to be transferred to the name of The State Savings Bank and Trust Co., leaving the balance of $50,000.00 now in the name of The Capitol Trust Company until it can be shown to you that The Elk Coal Company trusteeship and the Fritter receivership have entirely terminated.

In view of the fact that The State Savings Bank and Trust Company is in reality the owner of the bonds now held by you in the name of The Capitol Trust Company, which bonds were deposited under the provisions of section 9778 for the faithful performance of the trusts assumed by such corporation, and in view of the fact that had it not been for the request of the state authorities that the trust company continue and not go into voluntary liquidation said trust company would long since have been dissolved, and in view of the fact that the paid in capital of the company is now below $200,000.00 and therefore under section 9778 was authorized to accept trusts if $50,000.00 were on deposit with the treasurer of state, and in view of the further fact that The State Savings Bank and Trust Company has by action of its board of directors guaranteed the faithful performance of the said remaining trusts of The Capitol Trust Company, I am of the opinion that you are authorized to transfer $50,000.00 of the securities now on deposit with you in the name of The Capitol Trust Company to The State Savings Bank and Trust Company, the remaining $50,000.00 to be held by you until satisfactory proof has been given you that the remaining trusts have ceased and determined.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

315.

WORKMEN'S COMPENSATION—ALIEN ENEMIES—POWERS AND DUTIES OF THE INDUSTRIAL COMMISSION RESPECTING THE ADMINISTRATION OF THE WORKMEN'S COMPENSATION LAW AS TO SUBJECTS AND RESIDENTS OF GERMANY, AUSTRIA-HUNGARY, ETC.

1. *With respect to claims for workmen's compensation which may arise on account of injuries to a subject of Germany residing within the United States occurring subsequently to the declaration of war between the United States and Germany, it is the duty of the industrial commission to proceed to hear and determine a claim and to administer the state insurance fund in that behalf as if the war did not exist, if they have been obeying the law and the president's proclamation.*

2. *With respect to claims, if any, which may arise on account of the death of a resident of the United States, who is a subject of the German empire, occurring subsequently to the declaration of war, when those claiming as dependents reside in Germany, the commission should ascertain whether the injury occurred prior to the declaration of war, or subsequently thereto; (a) If prior, the industrial commission may proceed to hear and determine the claim as in other cases; but any award that may be made should be held in trust by the commission during the war and not paid to the claimants nor to anyone on their behalf until peace is concluded. (b) If the injury occurred subsequently to the declaration of war the commission should receive and file the claim but take no action thereon for the time being, as such claims present questions of grave doubt which cannot be satisfactorily determined until the war is over.*

It appears, however, that as a matter of law a resident of an enemy country could not be a "dependent" of a resident of the United States during a state of war; and that where the fact of dependency is to be established as of a day falling within the duration of the war, it is legally impossible to establish it as such.

3. *Respecting claims which have arisen or may arise on account of injuries or death occurring prior to the declaration of war between the United States and Germany, where the claimants are residents of the United States, the industrial commission should proceed in the disposition of the claim and the disbursement of the fund on account thereof as if the war did not exist, if they have been obeying the law and the president's proclamation.*

4. *Respecting claims which have arisen or may arise from injuries or death prior to the declaration of war, when the claimants are residents of Germany, the commission should proceed to hear and determine the claim as in other cases; but any award that may be made should be held in trust by the commission during the war and not paid to the claimants nor to anyone in their behalf until peace is concluded.*

5. *With respect to making periodical payments on awards made prior to the declaration of war with Germany or thereafter made upon claims arising from accidents occurring prior thereto, when the recipients of the payments, though aliens, reside in the United States, the commission should continue the disbursements as if the war did not exist, though the recipients of the payments be subjects of the German empire (if they have been obeying the law and the president's proclamation).*

6. *Respecting cases of the last named class, when the recipients reside in Germany, the commission should discontinue making the periodical payments during the existence of the war, but should hold the fund represented by the whole award in trust for proper distribution at the end of the war.*

7. (a) *Respecting claims filed, or which may be filed, on account of accidents occurring since the war was declared, where the claimants, whether dependents or otherwise, though non-residents of this country, and subjects of Germany, reside in friendly countries, the commission should proceed in all cases as if the war did not exist.*

In like manner the commission should ignore the existence of war in the administration of the workmen's compensation law upon claims on account of injuries occurring before the war was declared, and the making of periodical payments under awards made before the war was declared, where the claimants or beneficiaries though subjects of Germany and not residents of this country, live in friendly countries.

8. *When the claimant, regardless of citizenship or nationality, actually resides in Germany the commission should be governed as follows:*

(a) *With respect to claims on account of injuries occurring since the war was declared the commission should take no present action in the premises, but should defer all action on such claims until the conclusion of peace; it being, however, the opinion of the Attorney-General that as a matter of law such claims can never be the foundation of a right to participate in the benefits of the state insurance fund.*

(b) *In such cases when the injury occurred prior to the declaration of war the commission should proceed to hear and determine the application and make the awards, if the facts so justify, but should hold the money represented by the awards in trust until after the war.*

(c) *With respect to making periodical payments on awards made to such claimants prior to the declaration of war the commission should discontinue such payments, but should hold the fund represented by the whole award in trust for proper distribution at the end of the war.*

9. *For the purpose of determining the application of all the foregoing conclusions the meaning of the phrase "residing in Germany" should be understood as embracing the residents of territories which are under well established military occupation by German armies, subject, however, to such exceptions as may be sanctioned by the government of the United States by way of relief measures in Belgium and Poland; and as excluding the inhabitants of territories formerly German, which are under well established occupation by friendly countries.*

10. *The inhabitants of Austria-Hungary, Bulgaria and Turkey, including such portions of such other countries as are under the well established military occupancy of the forces of any of these countries, and excluding such portions of the territory of any of them as may be in the well established military occupancy of the forces of friendly countries, are to be regarded, for all the foregoing purposes, in the same light as the inhabitants of Germany. The status of such persons should be determined irrespective of the date of the cessation of diplomatic relations between Austria-Hungary and the United States, and as commencing in its present aspect with the declaration of war between the United States and Germany.*

This course of action is recommended to the commission as the only safe and proper one under the circumstances and as calculated to enable claimants most conveniently to raise the legal questions involved in court.

COLUMBUS, OHIO, May 28, 1917.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I have your letter of April 10, 1917, which is as follows:

"This commission desires your opinion as to its duty in the matter of consideration, allowance and payment of claims for compensation under the workmen's compensation act:

"1. In cases of resident alien enemies who are injured in the course of their employment.

"2. In cases of non-resident dependents of resident alien enemies who are killed while in the course of employment.

"We desire this information in order that we may take proper procedure with reference to claims which may arise on account of injury or death occurring subsequent to the declaration of war between the United States and Germany so far as subjects of the German empire and their dependents are concerned, and claims which may arise subsequent to the suspension of diplomatic relations between the United States and Austria-Hungary so far as subjects of the last named empire and their dependents are concerned; also that we may be properly advised as to whether we should continue to make periodical payments on awards made prior to the declaration of war with Germany or the suspension of diplomatic relations with Austria-Hungary, and whether we should give any consideration to claims now pending on account of injury or death of subjects of the above mentioned countries."

For my own convenience I have divided the various questions, which you say you have in mind, as follows:

1. What is the duty of the commission respecting claims which may arise on account of injury to a subject of the German empire, resident here, occurring subsequently to the declaration of war between the United States and Germany?

2. What is the duty of the commission respecting claims, if any, which may arise on account of the death of a subject of the German empire, resident here, occurring subsequently to the declaration of war when those claiming as dependents reside in Germany?

3. What is the duty of the commission respecting claims which have arisen or may arise on account of injuries or death occurring prior to the declaration of war between the United States and Germany where the claimants are residents of the United States?

4. What is the duty of the commission respecting claims which have arisen or may arise from injury or death occurring prior to the declaration of war when the claimants are residents of Germany?

5. What is the duty of the commission respecting the making of periodical payments on awards made prior to the declaration of war with Germany, or thereafter made upon claims arising from accidents occurring prior thereto, when the recipients of the payments, though aliens, reside in the United States?

6. What is the duty of the commission respecting cases of the last named class when the recipients of the payments reside in Germany?

7. What is the duty of the commission respecting:

(a) Claims filed, or which may be filed, on account of accidents occurring since the war was declared where the claimants, whether dependents or otherwise, though non-residents of the United States, subjects of Germany, do not reside in Germany, as, for example, in Canada, or in France or in South America?

(b) Claims filed in behalf of such claimants on account of accidents occurring prior to the declaration of war?

(c) Continuance of periodical payments on awards made to such claimants prior to the declaration of war?

8. (Interpolated by myself in order to complete the schedule of possible cases).

What is the duty of the commission respecting its action in the three classes of cases with respect to time last above suggested when the recipient of the award, regardless of citizenship or nationality, actually reside in Germany, i. e., reside there though he or they may be citizens of the United States?

9. What is the duty of the commission respecting the various classes of cases above described in the inquiry concerning Germany and its residents and subjects in the case of subjects or residents of Austria-Hungary after the suspension of diplomatic relations between the United States and that nation?

In the development of the principles by the application of which these various questions must be answered I shall doubtless arrive at conclusions respecting them without regard to the order in which the questions are asked. In stating the questions I have followed the order suggested in your letter.

Nowhere have I found a better statement of the foundation principles, the application of which is invoked by some, if not all, of your questions, than in the judgment of Lord Reading, C. J., in Porter v. Freudenberg, (1915), 1 K. B., 857, (a judgment of the court of appeal of England, delivered January 19, 1915). Because this judgment so admirably and accurately sums up both the historical development of the doctrine and its present statement, I deem it appropriate to quote somewhat liberally therefrom:

"It is necessary at the outset to keep clearly in mind the meaning of the term 'alien enemy' when used in reference to civil rights and liabilities. Its natural meaning indicates a subject of enemy nationality, * * * and would not in any circumstances include a subject of a neutral state or of the British crown, but that is not the sense in which the term is used in reference to civil rights. Ever since the great case of *The Hoop*, 1 C. Rob. 196, the law has been firmly established as pronounced in the judgment of Lord Stowell (then Sir William Scott) that one of the consequences of war was the absolute interdiction of all commercial intercourse or correspondence by a British subject with the *inhabitants* of the hostile country except by permission of the Sovereign. * * * This branch of law was again considered as a result of the Crimean war, and Willes, J., in delivering the judgment of the Court of Queen's Bench in *Exposito v. Bowden* (1857) (7 E. & B. at p. 779) said: 'It is now fully established that the presumed object of war being as much to cripple the enemy's commerce as to capture his property, a declaration of war imports a prohibition of commercial intercourse and correspondence with the inhabitants of the enemy's country and that such intercourse, except with the license of the Crown, is illegal.' This law was founded in earlier days upon the conception that all subjects owing allegiance to the Crown were at war with subjects of the state at war with the Crown, and later it was grounded upon public policy, which forbids the doing of acts that will be or may be to the advantage of the enemy state by increasing its capacity for prolonging hostilities in adding to the credit, money or goods,

or other resources available to individuals in the enemy state. Trading with a British subject or the subject of a neutral state carrying on business in the hostile territory is as much assistance to the alien enemy as if it were with a subject of enemy nationality carrying on business in the enemy state, and, therefore, for the purpose of the enforcement of civil rights, they are equally treated as alien enemies. It is clear law that the test for this purpose is not nationality but the place of carrying on the business. * * * When considering the enforcement of civil rights a person may be treated as the subject of an enemy state, notwithstanding that he is in fact a subject of the British Crown or of a neutral state. Conversely a person may be treated as a subject of the Crown notwithstanding that he is in fact the subject of an enemy state. As Lord Lindley said in *Jansen v. Driefontein Consolidated Mines*, (1902) (A. C. at p. 505): 'When considering questions arising wtih an alien enemy it is not the nationality of a person but his place of business during war that is important. An Englishman carrying on business in an enemy's country is treated as an alien enemy in considering the validity * * * of his commercial contracts. Again the subject of a state at war with this country but who is carrying on business here or in a foreign neutral country is not treated as an alien enemy; the validity of his contracts does not depend on his nationality or even on what is his real domicile but on the place or places in which he carries on his business or businesses.' * * *

"In ascertaining the rights of aliens the first point for consideration is whether they are alien friends or alien enemies. Alien friends have long since been, and are at the present day, treated in reference to civil rigths as if they were British subjects, and are entitled to the enjoyment of all personal rights of a citizen, including the right to sue in the King's courts. Alien enemies have no civil rights or privileges unless they are here under the protection and by permission of the Crown. * * *"

(Lord Reading then goes on to refer historically to the establishment of the doctrine that property of an alien enemy is, theoretically at least, liable to confiscation.)

"* * * The severity of the common law rule was, however, in early days relaxed in favor of those who had the King's permission to come here. So long ago as the year 1454 it would follow from the reported observations of Ashton J., (Year Book, 32 Hen. 6, 23 (b) 5) that if an alien enemy came here under the King's license or a safe conduct he could maintain an action for trespass if any person took his goods from his house. * * *"

(Here Lord Reading traces the development of the theory of special protection to resident alien enemies showing that as a matter of pleading it had become established in England that the burden was upon the alien enemy, as a litigant, to establish that he was within the realm by the license of the King. In this connection he cites Lord Erskine's judgment in the case of Ex Parte Boussmaker (13 Ves. 71), to which I shall hereinafter refer, and comes ultimately to the citation of the recent case of *Princess Thurn and Taxis v. Moffit*, (1914) (31 T. L. R. 24). Of this case (which, unfortunately is not available in our supreme court law library at the present time), Lord Reading says:

"Sargent J. held that the subject of an enemy state who was registered under the Aliens Restriction Act, 1914, as an alien and the subject of an enemy state is entitled to sue in the King's court. This decision is in our opinion clearly right. Such an alien is resident here by tacit permission of the Crown. He has by registration informed the executive of his presence in this country, and has been allowed thereafter to remain here. He is '*sub protectione domini regis.*' * * *."

The remainder of the opinion is taken up with a discussion of the bearing of certain articles of the Hague convention of 1907, to which I shall hereinafter refer, upon the problem and with the liability of an alien enemy *to be sued.*

As stated, I am inclined to give great weight to the judgment from which I have quoted, not because it is that of the highest court of England—indeed another important judgment rendered by the same court on the same day has since been reversed by the House of Lords. (See Continental Tyre and Rubber Company v. Daimler Company, 1915, 1 K. B., 893; (1916) 2 A. C., 307, sub nom. Daimler Company v. Continental Tyre and Rubber Company.)

The question in the last cited case was as to the capacity of a company incorporated in England and carrying on some of its business there to sue in the English courts when its capacity was challenged by a plea of alien enemy and it was made to appear that the bulk of its shares were held in Germany by a German holding company and that all the directors were residents of Germany. The court of appeal had deemed itself bound by the decision of *Jansen v. Driefontein Consolidated Mines*, supra, and by decisions like *Salomon v. Salomon & Co.* (1897) (A. C. 22) to shut its eyes to whatever facts lay behind the fiction of corporate entity. The House of Lords, however, decided that the fiction of corporate entity could and should be disregarded in a case of this kind and that, it being disregarded, the principles of agency come into play and the case was to be decided in accordance with the character, as friends or enemies, of "its agents or persons in *de facto* control of its affairs, whether authorized or not." (Quoted from the important judgment of Lord Parker of Waddington, page 345.)

A close examination of the various opinions of the law lords delivered seriatim in this important case shows that so far from weakening the authority of the case of Porter v. Freudenberg, supra, decided by the latter court, it tends indeed to strengthen it. I quote the following:

"It is well established that trading with the most loyal British subject, if he be resident in Germany, would, during the present war, amount to trading with the enemy, and be a misdemeanor if carried on without the consent of the Crown; the reason being that the fruits of his action result to a hostile country and so furnish resources against his own country."

(Judgment of Lord Atkinson, page 319.)

"The rule against trading with the enemy is a belligerent's weapon of self-protection. I think that it has to be applied to modern circumstances as we find them, and not limited to the applications of long ago, with as little desire to cut it down on the one hand as to extend it on the other beyond what those circumstances require. Though it has been said by high authority * * * to aim at curtailing the commercial resources of the enemy, it has, according to other and older authorities, the wider object of preventing unregulated intercourse

with the enemy altogether. Through the Royal licence, which validates such intercourse and such trade they are brought under necessary control. Without such control they are forbidden. * * * *"

(Leading judgment of Lord Parker of Waddington, page 344.)

In this connection I wish merely to refer to a passage in the judgment of Lord Shaw of Dunfermline, in which he quotes from the Trading with the Enemy Acts of 1914 (4 and 5 Geo., 5, c. 87) and the royal proclamations issued in conformity therewith. Consistently with what has heretofore been developed with relation to the nature of a special license to trade, he holds that whatever is permitted by royal proclamation is not trading with the enemy. He calls attention to article 5 of the royal proclamation prohibiting all persons resident within the dominion from paying "any sum of money to or for the benefit of an enemy," the word "enemy" being defined generally in the same manner in which other definitions above quoted have expressed the idea.

I think, upon the whole, that although the House of Lords has apparently come no nearer to an adjudication upon the main questions than that embodied in Daimler Company vs. The Continental Tyre and Rubber Company, supra, the principles incidentally applied in that case are quite consistent with those laid down by Lord Reading in Porter v. Freudenberg, supra, so that the authority of the latter decision, though not that of a court of last resort, may be regarded as unshaken.

Summarizing the principles to be drawn from both the cases for present purposes I may state them as follows:

I. During public war it is unlawful, as a matter of common law and regardless of statutes or executive proclamations, to trade with the enemy.

Historically this rule of common law has been put on three distinct grounds:

(1) The ancient idea that all subjects or citizens of one belligerent state were enemies of all subjects or citizens of other belligerent states.

(2) The more modern notion that as a matter of public policy all kinds of commercial intercourse between residents of the belligerent states in time of public war is illegal.

(3) The still more modern notion that the reason of the rule is that the main object of war being to weaken the enemy and force his capitulation by diminishing his material resources as well as by overcoming his arms, such intercourse with residents of the enemy state as may directly or indirectly tend to increase the resources of that state by increasing those of one of its residents is inconsistent with one of the main aims and objects of war.

This last principle, if pressed to its logical conclusion, would not prohibit all intercourse but only that which would tend to bring funds or property into the enemy state and thus to subject them to the control of the enemy government.

As the cases previously cited and quoted from show the first of these three notions has now become obsolete and it is discarded. The other two, however, still persist, and in so far as they may be inconsistent with each other it is impossible to say that the courts of England have clearly chosen between them. For the purpose of your inquiry, however, it will not be necessary to make such a choice.

II. An enemy, commercial intercourse with whom or remittances to whom are forbidden by the above rules of the common law is to be defined as a voluntary resident of the enemy state—a person whose resources are subject to ex-

actions by the government of the enemy state to assist that government in sustaining itself during the war, and thereby to enable itself more successfully to prosecute the war.

III. Because of these fundamental rules of common law, and only because of them, in modern days an "alien enemy" may not sue in the court of a belligerent state in times of public war. Therefore the rule of pleading and practice as broadly stated admits of a very important exception in favor of such nationals of the enemy state as are commorant within the dominions of the belligerent state by license and under the protection, express or implied, of the government of that state, and in favor too of such non-resident nationals of the enemy state who do not reside within its borders, or residing there are entitled to the benefits of a license or safe conduct issued by the proper authority of the belligerent state. (Re Duchess of Sutherland (1915) 31 T. L. R., 248; Zachary v. Godfrey, 50 Ill., 186.) On the other hand, the rule itself extends to nationals of belligerent states themselves who have an actual or business domicile in the enemy state.

As a matter of fact it would naturally occur to one that the statement of the rule could be greatly simplified by omitting the word "alien" from the terms employed and substituting for the term "alien enemy" the simple phrase "enemy person." However, it is not true that alien enemies are regarded as persons of normal status in time of war; even though they are commorant within the jurisdiction they are subject to repressive military measures when deemed necessary by the authority of the belligerent state, such as registration, living in prescribed areas, or even imprisonment. It is true, however, for the purpose of the rule hereinbefore discussed that the mere allegiance or nationality of a person is of minor importance, at least, and his actual place of residence becomes more or less decisive.

I have attached importance to the decision of Porter v. Freudenberg, not merely because it stands as the most recent adjudication of the courts of England upon the fundamental questions involved in your inquiry, but also because it accords with such decisions of the courts of this country as are available upon the point.

> See Hanger v. Abbott, 6 Wal., 532,
> Griswold v. Waddington, 16 Johns., 438,
> Matthews v. McStea, 91 U. S., 7,
> New York Life Ins. Co. v. Statham et al., 93 U. S., 24,
> Kershaw v. Kelsey, 100 Mass., 561.

The last cited case is spoken of by Professor James Brown Scott, in the notes at page 538 of his Cases on International Law, as the leading American authority. It is true that Mr. Justice Gray treats very exhaustively of the principles now under discussion, citing many cases. The following excerpts from his opinion are in point:

> "An alien enemy residing in this country may contract and sue like citizens."
>
> 2 Kent's Comm., 63.

> "* * * the law of nations, as judicially declared, prohibits all intercourse between citizens of the two belligerents which is inconsistent with the state of war between their countries; * * * this includes * * * any act or contract which tends to increase his resources; and

every kind of trading or commercial dealing or intercourse, whether by transmission of money or goods, or by orders for the delivery of either, between the two countries, directly or indirectly, or through the intervention of third persons or partnerships, or by contracts in any form looking to or involving such transmission, or by insurances upon trade with or by the enemy. Beyond the principle of these cases the prohibition has not been carried by judicial decision. * * *"

In the interesting case of Small's Administrator v. Lumpkin's Executrix et als., 28 Grat., 832 (Virginia 1877), the court, per Burks, J., holding ultimately that payment of an obligation existing before the war of the Rebellion by a debtor within the confederate territory to a son of the creditor's executrix, who was himself a volunteer soldier of the confederate army but whose mother, the executrix, was a citizen and resident of Maryland, was valid as a payment, used the following language:

"When these payments were made, Lumpkin (the debtor) was residing in Virginia, and Mrs. Small, the guardian of her son and representative of her husband's estate, was a resident of Maryland.

"In the light of the authorities before cited, it may be conceded * * * that under the harsh rules of war, the mother and son are to be considered as bearing to each other the unnatural relation of alien enemies; that the occasional correspondence between them, which is proved to have taken place during the conflict of arms then raging, was forbidden and unlawful; and that, pending hostilities, she could confer no valid power upon him, as her agent, to make the collections which he did make. * * *"

The evidence showed that the son made collections and retained the proceeds until after the war and he paid them over to his mother. The court found nothing illegal in the transaction as it actually took place, especially in view of the fact that it was consummated, and the case really amounted to an attempt on the part of the creditors' representatives to secure double payment of the debt.

See also *U. S. v. Grossmayer*, (1869), 9 *Wall.*, 72.

It would seem that the American cases rather incline to the view that the enrichment of the enemy's resources is the real reason for the rules which have been laid down. However, it will also be seen that the American cases make no qualification whatever as to the right of a resident alien, though an enemy national, to sue in the court of the country where he resides. The English courts speak of the necessity of his pleading "licence" under such circumstances. Perhaps there is no technical difference between the English and the American cases in this respect as both would agree in the common result, namely, that unmolested and peaceful residence in the country of the forum is at least an implied license or safe conduct.

(See Hall, International Law, page 393, wherein the learned author refers to the growing custom on the part of civilized nations in war to permit enemy subjects to remain unmolested in the country during good behavior. This custom would seem to have attained virtually the force and effect of an unwritten law in the nature of an implied safe conduct.)

In the present case, however, it is not necessary to inquire whether subjects of Germany residing in this country are to be regarded as "alien friends" and entitled to be treated for civil purposes as citizens according to the unassisted common law; for all authorities agree that whatever be the effect of mere acquiesence on the part of the state of the forum, any direct and express protection which may be extended to such commorant aliens is effectual to give them the the "status" of "alien friends;" and it so happens that such direct protection has been given to the resident subjects of Germany.

Immediately upon signing the joint resolution of congress to the effect that "a state of war between the United States and the Imperial German government which has been thrust upon the United States is hereby formally declared" the president of the United States, acting under and by virtue of authority vested in him by section 4067 of the Revised Statutes of the United States, issued a proclamation to the American people, from which I quote the following:

* * * "WHEREAS, It is provided by section 4067 of the Revised Statutes as follows:

" 'Whenever there is declared a war between the United States and any foreign nation or government * * * and the president makes public proclamation of the event, all native citizens, denizens, or subjects of a hostile nation or government being male of the age of 14 years and upward, who shall be within the United States and not actually naturalized, shall be liable to be apprehended, * * * as alien enemies. The president is authorized in any such event by his proclamation thereof, or other public acts, to direct the conduct to be observed on the part of the United States toward the aliens who become so liable; the manner and degree of the restraint to which they shall be subject and in what cases and upon what security their residence shall be permitted, and to provide for the removal of those who, not being permitted to reside within the United States, refuse or neglect to depart therefrom; * * *'

"*Now, therefore*, I, Woodrow Wilson, president of the United States of America, do hereby proclaim, to all whom it may concern, that a state of war exists between the United States and the Imperial German government. * * *

"And, acting under and by virtue of the authority vested in me by the constitution of the United States and the said sections of the Revised Statutes,

"I do hereby further proclaim and direct that the conduct to be observed on the part of the United States toward all natives, citizens, denizens, or subjects of Germany, being male of the age of 14 years and upward, who shall be within the United States and not actually naturalized, who for the purpose of this proclamation and under such sections of the Revised Statutes are termed alien enemies, shall be as follows:

"All alien enemies are enjoined to preserve the peace toward the United States * * * and to refrain from actual hostility or giving information, aid, or comfort to the enemies of the United States and to comply strictly with the regulations which are hereby, or which may be from time to time, promulgated by the president, and so long as they shall conduct themselves in accordance with law they shall be undisturbed in the peaceful pursuit of their lives and occupations, and be accorded the consideration due to all peaceful law-abiding persons, except

so far as restrictions may be necessary for their own protection and for the safety of the United States, and toward such alien enemies as conduct themselves in accordance with law all citizens of the United States are enjoined to preserve the peace and to treat them with all such friendliness as may be compatible with loyalty and allegiance to the United States. * * *

"And pursuant to the authority vested in me, I hereby declare and establish the following regulations, which I find necessary in the premises and for the public safety: * * *"

(Here follows an interdiction of possession of certain military property and means of intelligence by alien enemies, etc.)

"6. An alien enemy shall not commit or abet any hostile acts against the United States or give information, aid, or comfort to its enemies;

* * * * * * * * * * * * * * *

"11. If necessary to prevent violation of the regulations, all alien enemies will be obliged to register; * * *"

While the proclamation is limited, in accordance with statute, to males of the age of fourteen years and upward, I think that its effect may by fair intendment be said to be such as to extend the protection of the United States to peaceful, law-abiding subjects of Germany who may remain in the United States during the war. That being the case, it is clear to me that for the purpose of the rule as above developed, such persons are to be regarded as *alien friends* and not as "alien enemies." Accordingly their civil rights are unimpaired by the existence of the state of war.

This conclusion at once disposes of all of the above submitted questions which involve the duty of the commission respecting claims payable to or for the benefit of residents of the United States whatever their nationality. Therefore an injured workman, though a subject of Germany and though the injury occurred after the outbreak of war, is entitled to file a claim for compensation with the industrial commission, to have an award made for his benefit, and to receive payments from the state insurance fund in pursuance of such award; and dependents of a German workman killed after the outbreak of the war are entitled, if they reside in the United States, to prosecute their claims before the industrial commission and to receive the benefits of such award as may be made to them, or for their benefit by the industrial commission, to the same extent as if they were citizens as well as residents of the United States.

A fortiori, of course, subjects of Austria-Hungary who are inhabitants of the United States are entitled to the benefit of the rule as laid down, and subjects of Germany and Austria-Hungary alike are entitled to prosecute claims and receive benefits on account of injuries occurring before the outbreak of the war or the suspension of diplomatic relations, as the case may be.

In short, where the claimant resides within the United States the commission can proceed as if in time of peace.

Moreover, on the principles above set forth, I am of the opinion that the commission should not in any way modify or alter its course of procedure upon claims, whenever arising, the proceeds of which when awarded by the commission will be payable to subjects of Germany or Austria-Hungary residing in friendly countries.

These eliminations bring me to the consideration of the more difficult

questions respecting the duties of the commission as to claims and awards in favor of persons as dependents of killed workmen when such persons reside in Germany.

Although the industrial commission is not a court in the exact sense, I am of the opinion that the disability under which such a person would rest to sue in a court of the United States or one of its states furnishes an analogy at least to the rule which must be applied here: and subsequently I shall support my conclusion on this point by the citation of authorities. At the outset,however, I find myself confronted by a provision of the Hague convention of 1907, the exact effect and application of which gave the English courts considerable concern at the outbreak of the great war. I refer to article 23 (h) of chapter I of section 2 of the Annex, entitled: "Regulations Respecting the Laws and Customs of War on Land," which, standing by itself, reads as follows:

> "Article 23. In addition to the prohibitions provided by special conventions it is particularly forbidden: * * *
>
> "(h) To declare abolished, suspended or inadmissible the right of the subjects of the hostile party to institute legal proceedings."

Prior to the outbreak of the present war (which is the first war to occur between or among the signatory powers after the general ratification of this particular convention of 1907 ratified by the senate of the congress of the United States, March 10, 1908, see note on page 229 of Scott's "Texts of Peace Conferences at the Hague.") The exact effect of this provision was discussed by publicists both in the United States and in Great Britain, and it was generally agreed that in view of the context in which it is found, and indeed in view of the nature of the entire annex, it is directed rather to the conduct of war by the armed forces in the field than to modifications of the municipal laws of belligerent nations.

Paragraph (h) occurs in connection with provisions against the use of poison or poisoned weapons, against killing or wounding by treachery, against the use of projectiles or material calculated to cause unnecessary suffering; against the improper use of a flag of truce of the national flag or of the military insignia and uniform of the enemy as well as the distinctive signs of the Geneva convention; and so these writers have agreed that the rule of the common law as a principle of municipal law, internal in its application, was not modified by the provision in question.

> (See Holland "Laws of War on Land," page 44; F. E. Smith's "International Law," page 130.)

The case of Porter v. Freudenberg, supra, constitutes the only available authority respecting the meaning of this provision. Lord Reading, in his judgment, reviews the history of the adoption of article 23 (h); comments upon the views of the publicists, without referring to them by name; directs attention to certain final negotiations between the diplomatic representatives of Germany and England just prior to the outbreak of the war between those countries; and concludes in accordance with what has already been stated, that the paragraph of the Hague convention, above quoted, does not have any effect upon the municipal law of England.

> (See pages 874 to 880, inclusive, of Porter v. Freudenberg, supra.)

I think, therefore, that we may safely assume that should the question as

to the effect of the Hague convention of 1907 upon the municipal law of this country be presented in the courts of this country, it would be resolved in the same way in which the English courts have resolved it.

Having concluded, then, that the common law rule which forbids commercial intercourse with the residents of an enemy state, or at least the transmission to them of movable property or funds, remains in force in this country, I am next led to inquire what may be the effect of that rule upon the activities of the industrial commission for the purpose of the several remaining questions as I have phrased them.

At this point I deem it expedient to turn to the workmen's compensation act itself.

Article II, section 35, of the constitution, as adopted September 3, 1912, constitutes the source of authority to enact the present compulsory workmen's compensation law. It recites that laws of this character may be passed.

> "for the purpose of providing compensation to workmen and their dependents, for death, injury or occupational disease, occasioned in the course of such workmen's employment."

It further provides that the laws which may be passed may determine the terms and conditions upon which payment "shall be made from the state fund," and that the board which may be established thereunder may be empowered to "collect and distribute such fund and to determine all rights of claimants thereto."

Section 1465-61 of the General Code provides, in part, as follows:

> "The terms 'employe,' 'workman' and 'operative' as used in this act, shall be construed to mean:
> * * * * * * * * * * * * *
>
> "2. Every person in the service of any person, firm or private corporation, including any public service corporation employing five or more workmen or operatives regularly in the same business, or in or about the same establishment under any contract of hire, express or implied, oral or written, *including aliens*, * * *"

Section 1465-68 General Code, provides in part as follows:

> "* * * Every employe mentioned in subdivision two of section fourteen hereof (G. C. Sec. 1465-61), who is injured, and the dependents of such as are killed in the course of employment, wheresoever such injury has occurred, * * * shall be entitled to receive * * * from the state insurance fund, such compensation for loss sustained on account of such injury or death, and such medical, nurse and hospital services and medicines, and such amount of funeral expenses in case of death as is provided by sections thirty-two to forty inclusive of the act."

Section 1465-70 General Code provides, in part, as follows:

> "Employes who comply with the provisions of the last preceding section shall not be liable to respond in damages at common law or by statute, save as hereinafter provided, for injury or death of any employe * * * during the period covered by such premium. * * *"

Section 1465-72 General Code provides, in part, as follows:

"The state liability board of awards shall disburse the state insurance fund to such employes of employers as have paid into said fund the premiums applicable to the classes to which they belong * * * or to their dependents in case death has ensued. * * *

"And such payment or payments to such injured employes, or to their dependents in case death has ensued, shall be in lieu of any and all rights of action whatsoever against the employer of such injured or killed employes."

Section 1465-73 General Code provides, in part, as follows:

"Employers mentioned in subdivision two of section thirteen hereof (G. C. 1465-60), who shall fail to comply with the provisions of section twenty-two hereof (G. C. 1465-69), * * * shall be liable to their employes for damages suffered by reason of personal injuries sustained in the course of employment caused by the wrongful act, neglect or default of the employer, * * * and also to the personal representatives of such employes whose death results from such injuries, and in such action the defendant shall not avail himself or itself of the following common law defenses:

"The defense of the fellow-servant rule, the defense of the assumption of risk or the defense of contributory negligence. * * *"

Section 1465-76 General Code provides, in part, as follows:

* * * "Every employe, or his legal representative in case death results, who makes application for an award, or accepts compensation from an employer * * * waives his right to exercise his option to institute proceedings in any court, except as provided in section forty-three (G. C. 1465-90) hereof. Every employe, or his legal representative in case death results, who exercises his option to institute proceedings in court, as provided in this section, waives his right to any award, or direct payment of compensation from his employer. * * *"

But for their length it would, perhaps, be appropriate to quote some of the provisions of section 1465-79 to section 1465-81, inclusive, General Code, prescribing a schedule of compensation for the various kinds of disabilities, each of them providing that the injured employe, to whom alone they relate, "shall receive" a certain percentage of the average weekly wages for certain specified times, for certain specified injuries or disabilities.

Section 1465-81 in particular provides that:

"In cases of permanent total disability, the award * * * shall continue until the death of such person so totally disabled, * *"

Section 1465-82 General Code provides, in part, as follows:

"In case the injury causes death within the period of two years, the benefits shall be in the amounts and to the persons following:

"1. If there be no dependents, the disbursements from the state insurance fund shall be limited to the expenses provided for in section forty-two hereof (G. C. 1465-89.) (i. e., medical, nurse and hospital services and medicines, and funeral expenses.)

"2. If there are wholly dependent persons at the time of the death, the payment shall * * * continue for the remainder of the period between the date of the death, and six years after the date of the injury. * * *

"3. If there are partly dependent persons at the time of the death, the payment shall * * * continue for all or such portion of the period of six years after the date of the injury, as the board in each case may determine. * * *

"4. The following persons shall be presumed to be wholly dependent for support upon a deceased employe:

"(A) A wife upon a husband with whom she lives at the time of his death.

"(B) A child or children under the age of sixteen years (or over said age if physically or mentally incapacitated from earning) upon the parent with whom he is living at the time of the death of such parent.

"In all other cases, question of dependency, in whole or in part, shall be determined in accordance with the facts in each particular case *existing at the time of the injury* resulting in the death of such employe, but no person shall be considered as dependent unless a member of the family of the deceased employe, or bears to him the relation of husband or widow, lineal descendant, ancestor or brother or sister. * * *"

Section 1465-83 General Code provides, in part, as follows:

"The benefits in case of death, shall be paid to such one or more of the dependents of the decedent for the benefit of all the dependents as may be determined by the board, which may apportion the benefits among the dependents in such manner as it may deem just and equitable. * * *"

Section 1465-86 General Code provides:

"The powers and jurisdiction of the board over each case shall be continuing, and it may from time to time make such modification or change with respect to former findings or orders with respect thereto, as, in its opinion may be justified."

Section 1465-90 General Code provides, in part, as follows:

"* * * In case the final action of such board denies the right of the claimant to participate at all in such fund on the ground that the injury was self-inflicted * * * or upon * * * any of the grounds going to the basis of the claimant's right, then the claimant, within thirty (30) days after the notice of the final action of such board, may, by filing his appeal in the common pleas court of the county wherein the injury was inflicted, be entitled to a trial in the ordinary way, and be entitled to a jury if he demands it. * * *" (The section goes on to provide in detail procedure in case of such appeal which, in effect, constitutes a judicial review of any determination by the board of awards against a claimant upon a ground "going to the basis of the claimant's right."

Section 1465-93 General Code provides, in part, as follows:

"A minor working at an age legally permitted under the laws of

this state, shall be deemed *sui juris* for the purposes of this act, * * * but in the event of the award of a lump sum of compensation to such minor employe, such sum shall be paid only to the legally appointed guardian of such minor."

The foregoing liberal quotations from the workmen's compensation law of this state have been made with a view to determining the nature or character of the "compensation" and the proceedings for its award and disbursement so far as regards the application of the principles of international and municipal common law heretofore discussed.

In connection with the sections themselves it is proper, I think, to refer to the decision of the supreme court in the case of State ex rel. Munding vs. Industrial Commission of Ohio, 92 O. S. 434, the syllabus of the case being as follows:

"An award of compensation from the state insurance fund, under Section 35 of the workmen's compensation act (103 O. L. 72), to a wholly dependent person *vests* in the dependent when the award is made; so that, in case of the death of such dependent, his or her personal representative is entitled to the balance, if any, remaining unpaid."

I quote the following from the opinion of Nichols, C. J., at page 447 et seq. of the report:

"The precise question involved in this case has been before the courts of England, and it is the holding there, not only that an award of compensation to a dependent vests on allowance, but that the right to claim an award vests in the dependent at the time of death of the employe, and if dependent dies before presenting such claim the personal representative of a dependent may make the claim and recover upon it. While the English acts are different from ours in many respects, an examination of the cases to which we now refer and to the statutes will show that the same question was before the English courts as is presented by the instant case, and that practically the same reasons were advanced in opposition to the theory which the court adopted as are now advanced by counsel for the state.

"In the case of *The United Collieries v. Simpson*, Appeal Cases (1909), 383, the House of Lords held that where a workman has been killed by an accident arising out of and in the course of his employment, and his dependent dies without making a claim, the dependent's legal personal representative is entitled to compensation under the workmen's compensation act of 1906.

"At page 389, Lord Loreburn says: 'The eighth paragraph also contemplates payment to a dependent. And though the ninth (similar to section 39 of the Ohio act as to apportionment of benefits) reserves a power to vary the apportionment, neither it nor any other paragraph proceeds upon any other view than that there is a definite right on the part of dependents as a class to the money, subject to a parental power of the court in dividing and applying it for their advantage.' The dissenting opinion of Lord Dunedin is interesting because it shows that the court had before it the objection that payments to a personal representative were not authorized because the law provides only for payment to dependents. This case approves the case of *Darlington v. Roscoe & Sons*,

1 K. B. (1907), 219, where it was held that if a notice of claim under the workmen's compensation act of 1897 has been given by a sole dependent, who dies before a request for arbitration is made or other proceedings are taken, the right to claim survives to such dependent's legal personal representative and the maxim *actio personalis moritur cum persona* does not apply.

"The only case we have been able to find advancing a contrary view is that of *In re O'Donovan & Cameron, Swan & Co.*, 2 Ir. R. (1901), 633, where it was held: 'The sole total dependent of a workman, who was killed by an accident arising out of his employment, died before she had filed or served a claim for compensation under the workmen's compensation act, 1897. Had she lived ,and taken the necessary steps to recover it, she would have been entitled to £150 compensation. The personal representative of the deceased workman subsequently took proceedings * * * to recover compensation, to be applied for the benefit of the dependent, and in payment of her debts: HELD, that neither her personal representative nor the personal representative of the deceased workman was entitled to recover the amount.'

"This case was distinctly disapproved by the House of Lords in *The United Collieries v. Simpson, supra.*

"Thus in England the authority is all in favor of the view that the right to compensation vests in the dependent at the time of the death of the employe and is transmitted to his personal representative even though the dependent has died without having made a claim for compensation. And this is a much more doubtful question than that before us, where the claim has been filed, compensation awarded and part payment made before death of dependent.

"The English cases emphasize the fact that a fixed sum is provided by the act and no provision made for a refund of any part of the award, and that in the case of a dependent dying before the compensation is exhausted the absence of such a provision shows that when once the compensation is fixed there is to be *no refund.*

"The question here, by the application of the most elementary rule of statutory construction, is settled by the statute. It speaks for itself and there is no ambiguity. It is also settled by all the adjudicated cases on the subject. * * *"

(Chief Justice Nichols thereupon traces the history of the enactment of the workmen's compensation laws in Ohio, and concludes thus:)

"The only fair inference to be drawn is that the legislature intended that compensation, under paragraph 2 of section 35, should be vested in the dependent when awarded. Again, this law was passed not in a spirit of 'charity,' but only simple justice. The fund it provides is called, and is in fact, an 'insurance' fund, from which payments are to be made, and it is in no sense a pension fund, and never, so far as we are aware, has it been contended that injured employes and their dependents were not entitled to compensation as a matter of right.

"The right to be compensated for an injury has no element of bounty or charity about it. No part of the fund (except such part as it pays for the protection of its own employes) is contributed by the state.

"As we have before stated, the theory is that when an employe is injured or killed in course of his employment, a sum fixed by law is set off from the fund to compensate him for his injuries, or his dependents

for his death, to compensate for taking away the man's right to earn a livelihood, which, but for the accident, he would have earned. A fixed sum goes out from the fund to compensate for the loss which has occurred.

"In case of death with no dependents, there is no loss to anyone except the employe other than the expenses provided for by the statute, which would otherwise fall on society. In case of dependents, the sum is likewise fixed by law and ordered paid to the dependent. There is nothing to indicate that this loss is to be compensated in part by the death of dependents and the part thus compensated to be returned to the state. On the contrary, the only situation considered is that existing at the date of death. At that time the amount is fixed, not by the board but by the statute; it is set apart from the general fund, may be paid in lump sums and there is no provision whatever for rebate.

"Thus, the payments being fixed in amount, ordered paid from a certain fund and awarded to a definite person, every element of a vested right is present and no element or suggestion of a pension that is to cease at the death of the pensioner.

* * * * * * * * * * * * *

"We hold that when the award is once made to a sole dependent the right to the compensation vests, and once vested there can be no condition attached except as to the time of payment, and it is equally immaterial whether the dependent subsequently dies or becomes independent.

"As to the argument that unless a rebate or refund is allowed in case of death of dependent a great wrong is done the injured and dependents of killed employes, it is perhaps sufficient to say that the assumption upon which this argument is based is utterly opposed to the theory on which the fund is established, maintained and administered. It is so plain as to be beyond all argument that the fund is provided to compensate in the manner and amount fixed by law for all losses which it covers; that it was never intended that the fund should be enhanced by lapses; that there is no conception of profit in the plan, and no one entitled to an award can have his right affected at all, either as to the amount or in any other manner, by the allowance or denial of the claim of any other person to compensation. A study of the act will show that it is the duty of the board to provide an adequate fund to pay all the compensation provided by the act. What amount will be necessary is calculated by the board, the theory being that all losses will be and must be paid in full; the methods of establishing the fund and the sources from which the money is to come are specified, and nowhere, even by inference, is the board authorized to speculate that a greater or less sum will be needed on account of unpaid or partly unpaid awards.

"Both the letter and spirit of the law show that the right to compensation vests when the same is awarded under paragraph 2 of section 30. * * *"

For present purposes the foregoing quotation and citations will be sufficient to disclose the general scope of the workmen's compensation law in relation to the question now under consideration. Later on in this opinion I shall have occasion to go into greater detail with respect to certain features thereof.

I call attention to the following significant facts:

1. The right of an injured employe is essentially a chose in action; indeed, it is expressly stated to be "in lieu" of a possible right of action against his

employer. Likewise, the right of dependents is in lieu of and therefore analagous to the statutory cause of action in favor of personal representatives for wrongful death.

2. Employers who do not contribute to the insurance fund, and hence are subject to be sued, are deprived of certain enumerated common law defenses, but they are not deprived, at least expressly, of the common law right to interpose the plea of *alien enemy*.

3. Should the commission in its administration of the state insurance fund find against the claim of either an injured workman or a dependent of a killed workman on a ground going to the foundation of the applicant's claim, such applicant must prosecute his right in the courts. When thus resorting to the courts there is at least no express provision removing such disability to sue in the courts as might rest upon him as an "alien enemy."

4. While the class of "workmen," or "operatives" or "employes" to whom the act applies is expressly made to include "*aliens*," yet this provision standing by itself is indicative of no other purpose than to make it clear that under ordinary circumstances, i. e., in time of peace, aliens as such shall be entitled to the benefits of the law. I think that it is true that some workmen's compensation laws not containing this express provision have been interpretated as not applicable to alien employes and dependents. Perhaps this phrase was put into the law to avoid the possibility of such an interpretation. At any rate, as I have shown, the disability to sue under the common law, as modified by the custom of the implied license to resident aliens is not one that results from alienage, nor even from alienage coupled with enemy nationality, but in the last analysis depends upon residence in the enemy country. There is, therefore, no inconsistency between the declaration of the statute to the effect that a person shall be considered a workman or operative for its purpose though he be an alien, and the common law rule that an "alien enemy" as the term must be properly construed is disabled from prosecuting judicial proceedings for his own benefit.

5. While the act commands the industrial commission to disburse the state insurance fund in a certain way under certain circumstances, and further enacts that certain persons under such circumstances "shall receive" compensation as therein prescribed, there is nothing by way of expression, at least, relaxing the common law rule against commercial intercourse with or sending funds to residents of an enemy country. In short, it would be a rather forced interpretation of the law to say that because of its admitted beneficial purposes the legislature must be deemed to have intended that war should have no effect upon its administration. On the contrary, the legislature has in the law specified certain common law rules which shall not have such effect, such as the rule of interpretation respecting alienage generally, and the rule with respect to the capacity of an infant to sue. These instances of solicitude on the part of the legislature to modify common law rules otherwise applicable to the administration of the law in connection with those elsewhere referred to respecting the deprivation of certain common law defenses otherwise available to an employer where he is subject to suit make it impossible for me to hold that the common law, in so far as it would otherwise be applicable, is abrogated by the workmen's compensation act in any respect other than those expressly mentioned.

The general rule of course is that a remedial statute of this kind is to be liberally interpreted to the end that the evil to be remedied shall be obviated; but that otherwise it is to be construed and administered in accordance with the settled principles of the common law. Obviously the evil to be remedied by the workmen's compensation law, as disclosed by the history of its enactment briefly referred to in the opinion of Chief Justice Nichols in the case last cited

but not quoted herein, is to substitute certain compensation for uncertain rights of action in cases of industrial accidents.

I cannot say that the policy of the law, as a whole, goes further than this, nor that the legislature intended to overturn the fundamental public policy, vital, as has been remarked, to the welfare of the nation, against enhancing the resources of an enemy in time of war.

6. While the right of a dependent is held in the Munding case, supra, to become vested, at least upon a ward, in the sense that it is not extinguished by death of such dependent after the award is made, the decision does not go to the extent of holding that such right is in the nature of a right of succession, like inheritance to property. On the contrary, it is very clear that such right is vested only in the sense in which the right of the personal representative to recover in an action for wrongful death under the statute in such case provided is vested. The question before the court in the Munding case required a choice between such a holding and a holding to the general effect that the award is a mere pension.

On the whole, then, I am of the opinion that generally in the administration of the workmen's compensation law the industrial commission is bound to follow and be governed by the fundamental common law rule against intercourse with a resident of an enemy country.

My conclusion in this respect is fortified by such analagous cases as I have been able to discover.

"An alien enemy may at the common law take and hold real property by devise until office found."

> Fairfax v. Hunter, 7 Cranch 603;
> Craig v. Radford, 3 Wheat 594.
>
> (Of course this rule is probably modified by statute in Ohio. See section 8589 General Code, which, however, does not refer to "alien enemy.")

A bequest of personal property to an alien emeny is not void, but may be recovered *after the cessation of hostilities.*

> Attorney-General v. Weeden, Parker 267.

On the other hand it seems to have been held by the majority of the court in the case of Bradwell v. Weeks, 13 Johns 1, that an alien enemy at common law may not take personal property by succession even where he seeks to recover it after the cessation of hostilities.

In Dangler v. Hollinger Gold Mines (Ontario supreme court (1915) 23 D. L. R. 384, the decision as described in the head note, is that:

> "An action under the fatal accidents act, R. S. O. 1914, ch. 151, brought by the administrator of the estate of a deceased person, cannot be maintained if brought for the benefit of alien enemies of the king."

This decision is mainly predicated upon the cases of Porter v. Freudenberg, supra, and Continental Tyre and Rubber Company v. Daimler Co., supra (although the last case had not then been reversed by the House of Lords.) However, the following quotation from the opinion of Sutherland, J., may be of service:

"This action is for the benefit of the father and mother of the deceased, who are undoubtedly alien enemies.

"In *Dumenko v. Swift Canadian Co., Limited* (1914), 32 O. L. R. 87, it was held * * * 'in an action commenced before the war was declared, that the plaintiffs, who were Austrians and entitled to bring the action during peace, became disentitled after a declaration of war in consequence of which they became alien enemies.' * * * It was held: 'As to the defendant's motion, it is quite clear upon the authorities that the plaintiffs, having become alien enemies, ought to be barred from further having and maintaining this action. See LeBret v. Papillon (1804), 4 East 502; Brandon v. Nesbit (1794), 6 T. R. 23; Mew's Digest, vol. 8, pp. 210, 211. The plaintiffs' action is, therefore, on this ground also, dismissed with costs. This dismissal is not necessarily—and I do not mean it to be—a bar to a subsequent action in respect to the same matter after peace shall have been declared.* * *'

* * * * * * * * * * * * *

"It is contended on behalf of the plaintiff that the right of action is clearly given under the fatal accidents act to an executor or administrator, and that it is an administrator duly appointed by a competent surrogate court of the province who has brought the action. It is argued that, as a company incorporated in Great Britain, even though its directors and shareholders are alien enemies, has a right to bring an action for the recovery of a debt due the company, even so an administrator, duly appointed by a surrogate court of this province to represent the estate of the deceased person, is legally entitled to bring an action for a claim such as is involved in this action, even though the benefit accrue to alien enemies.

"It is also contended that in any event, even if an order were made to stay the action, there should be no order to dismiss it. It is furthermore pointed out that even to stay the action may result in hardship and damage to the plaintiff, inasmuch as in actions of this character, the witnesses being in many cases miners and people who float about from place to place, the evidence necessary to establish a claim may be lost.

"If it were an action by the administrator to assert a claim for a debt due the estate of the deceased person, I would be disposed to think there might possibly be some analogy between this case and the Continental Tire and Rubber Company case. But, where the action is brought under an act by which it is expressly provided that it shall be for the benefit of the parents, etc., and such parents are, as here, unquestionably alien enemies, a different view should, I think, be taken, and it should be held that the plaintiff has no right of action.* * *"

(Of course if the Canadian court had had before it the decision of the House of Lords in the Continental Tyre and Rubber Company case the argument on this point would not have been necessary, and the court's conclusion would have been sustained on additional grounds.)

"In *Blake v. Midland R. W. Co.* (1852), 18 Q. B. 93, an action by the administratrix of a deceased person under 9 and 10 Vict. ch. 93, it was held that the jury, in estimating damages, could not 'take into consideration mental suffering or loss of society, but must give compensation for pecuniary loss only.' Coleridge, J., at p. 109, says: 'The title of this act may be some guide to its meaning; and it is "An act compensating the families of persons killed;" not for solacing their wounded feelings. Reliance was placed upon the first section, which states in what cases

the newly given action may be maintained although death has ensued; the argument being that the party injured, if he had recovered, would have been entitled to a solatium, and therefore so shall his representatives on his death. But it will be evident that this act does not transfer his right of action to his representatives, but *gives to the representative* a totally new right of action, on different principles.' At p. 110: 'The measure of damage is not the loss or suffering of the deceased, but the injury resulting from his death to his family. This language seems more appropriate to a loss of which some estimate may be made than to an indefinite sum, independent of all pecuniary estimate, to soothe the feelings; and the division of the amount strongly leads to the same conclusion; "and the amount so recovered" shall be divided amongst the before mentioned parties in such shares as the jury by their verdict shall find and direct.'

"And in *Pym v. Great Northern R. W. Co.* (1863), 4 B. & S. 396, at p. 407, Erle, C. J., says: 'The remedy however given by the statute is not given to a *class* but to *individuals*, for by sec. 2 "the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought." '

"In *Seward v. The 'Vera Cruz'* (1884), 10 App. Cas. 59, at p. 67, the Earl of Selbourne, L. C., says: 'Lord Campbell's act gives a new cause of action clearly, and does not merely remove the operation of the maxim, "*actio personalis moritur cum persona*," *because the action is given in substance not to the person representing in point of estate the deceased man*, who would naturally represent him as to all his own rights of action which could survive, but to his wife and children, *no doubt suing in point of form in the name of his executor.*'

"See also Town of Walkerton v. Erdman (1894), S. C. R. 352, at p. 366, where King, J., says: 'If indeed the admisibility of the evidence were to depend upon the causes of action being the same the respondent could not hope to succeed, because it is conclusively established that the cause of action given by the statute is different from that which the deceased had in his lifetime.'

"The administrator can, I think, have no higher right than those for whom he has brought the action. If he had failed for six months to do so, the parents of the deceased man would themselves have had the right to institute the action; but, if they had done so, they would have been met with what would be a fatal defence, the plea that they were alien enemies. This would have disentitled them to succeed.

"If I could see my way to do so, I would prefer to make an order staying the action, for the reason that, if it is dismissed, the statutory period may possibly run and so put an end to the action.

"I think, however, I must hold that the action must be dismissed with costs."

The same principle was applied in the case of *Crawford et al. v. The "William* Penn," Federal Case No. 3,372, holding that an alien enemy cannot bring suit in the name of a citizen trustee, as the public policy which forbids the property sued for to be carried out of the country to enrich the enemy would be as effectively violated in the one way as in the other. The test in such cases is not a technical one of parties; for the fact that one of the plaintiffs who is merely a nominal party and cannot control the suit and collect the judgment is a public

enemy is no ground for dismissing the petition of the beneficial plaintiff who is not an enemy.

Hoskins v. Gentry, 2 Duv. 285.
Mercedes v. Mandalay Motor Co. (1915), 31 T. L. R., 178.

On the other hand, however, it was held in the leading decision of Lord Erskine in ex parte Boussmaker, 13 Vesey Jun. 71, above referred to, that inasmuch as the right to recover a debt is merely suspended and not extinguished by a war, an alien enemy may make a claim in a bankruptcy proceeding though dividends thereon will be withheld until the conclusion of peace. The corollary of this principle, however, is that an alien enemy resident in the enemy country, though he may file a claim in bankruptcy proceedings cannot be heard in court to object to or complain of the rejection of his claim against the bankrupt's estate.

Re Wilson (1915) 84 L. J. K. B. N. S. 1893.

I have referred somewhat loosely in this opinion to the defense of "alien enemy." As a matter of fact, the rules of public policy which I have been discussing appear on principle, and to some extent at least on authority to be more than merely available to a defendant by way of defense; rather, when coming to the attention of the court in any way they are disabilities which cannot be waived by the adversary party.

See Jansen v. Driefontein Consolidated Mines, supra, dictum of Davey, J.
Bassi v. Sullivan (1914), 32 Ont. L. Rep. 14.
Robinson v. Continental Ins. Co. (1915), 1 K. B. 155.
Dorsey v. Kyle (1869), 30 Md. 512.
Brooke v. Filer (1871), 35 Ind. 402.
Stephens v. Brown (1884), 24 W. Va. 234.

All of the foregoing cases bear some analogy at least to the problems before me. All of them adhere to the great underlying principle that whatever be the effect of the disability of an alien enemy, it at least prevents him from being the recipient of direct pecuniary benefits, or securing control for himself or his agents of the direct means of reaping pecuniary benefits during the existence of the war. All are likewise consistent with the principle that where by valid contract made in time of peace or by devolution of property rights, whether in time of peace or in time of war, a right has vested in an alien he can only be divested of it during war by confiscation. Of course, though confiscation may be supported as a military measure, it is no part of the civil law, and it may be accepted as unquestioned that whatever civil rights an alien enemy may have cannot be taken away from him on account of his enemy character.

In short, then, the existence of a war does not defeat the rights of an alien enemy resident in the enemy country, but it does prevent him from enforcing those rights during the continuance of the war; and it prevents, moreover, any citizen of the belligerent country from enforcing them on his behalf or from transmitting to him the beneficial fruits thereof.

At the very least, the industrial commission may be likened to a court; at the very most the commission, in the administration of the law, may be likened to a resident trustee for a nonresident alien enemy—and this undoubtedly is the

character of the commission when it has made an award during time of peace and its order for payment of compensation to an alien enemy resident in the enemy country is still operative when war breaks out.

These things being true then, I am of the opinion that during the continuance of the war with Germany it is the duty of the industrial commission to withhold all payments to persons now resident in the German empire, whether such persons be workmen who were injured here and have returned to Germany since the injury, or dependents of killed employes who are residents of Germany, regardless of their nationality and citizenship.

As to claims for compensation on account of injuries occurring prior to the declaration of war with Germany and pending with the commission undisposed of at the date of such declaration, I am of the opinion that the commission may lawfully proceed to make an award; but that it may not under such award lawfully pay to any attorney in fact the compensation awarded to a resident of the German empire so long as the war continues. The same principle applies where the application for compensation was not made until after the declaration of war, but the injury occurred prior thereto.

The last two conclusions expressed involve as liberal an interpretation of the workmen's compensation law, in the light of the common law principles which underlie my whole discussion, as I am able to make.

As the commission will observe, some of the decisions cited would tend to support a conclusion to the effect that the commission might not lawfully even proceed with respect to these last two classes of claims; and if the commission were a court in the exact sense, I would feel obliged to hold in accordance with what seems to be the weight of authority (although there are decisions contra—see Luczyzki v. Spanish River Co. (1915), 34 O. L. R. 547, disapproving the dicta in Dumenko v. Swift Canadian Co., Limited, quoted in the opinion of Dangler v. Hollinger Gold Mines, supra) would have to suspend all proceedings beneficial to persons residing in Germany during the continuance of the war. But the commission is not a court, and in this respect I think it sufficient to hold, that while the commission is bound by the underlying principles of the common law rule it is not bound by the technical application of such principles to the forensic administration of justice. Rather, in this respect it should govern itself as Lord Erskine held that a court of bankruptcy should be governed—receiving claims not in themselves affected by the war and allowing them when in its judgment they should be allowed, but holding the proceeds of the awards as trustee for the benefit of the non-resident alien claimants until the cessation of hostilities may make it possible and lawful for the commission to transmit them to persons in whose favor the awards were made.

In this connection, however, I think the other side of the rule applicable to bankruptcy proceedings must necessarily apply under the workmen's compensation law, namely, that if the commission should decide adversely on a given claim the non-resident alien claimants would be powerless to secure a review of the commission's decision in the common pleas court in the manner provided by statute.

I come now to what appeals to me as the most difficult question raised by the general situation, namely, as to the duty of the commission respecting any claims that have been or may be filed with it by persons residing in Germany and claiming as dependents of killed workmen injured after the outbreak of the war.

As has been observed, the war does not affect the rights of subjects of Germany resident in the United States from claiming compensation as injured employes; and presumably there will be no cases in which a workman injured after the outbreak of the war will succeed in returning to Germany during the con-

tinuance of the war and before filing application for compensation under the act; so that the class of cases now under consideration is limited to those of dependents.

The statute, save in two cases which obviously can have no present application under any imaginable circumstances, makes dependency a question of fact (section 1465-82 G. C., supra). The commission has had occasion in the past to pass upon numerous cases in which the sufficiency of facts as establishing dependency in the case of persons residing in a foreign country has been considered. The position which the commission has taken is that the "real practical matter is whether assistance has been given or could reasonably have been expected from the victim of the accident."

> (Quoted from Orrell Colliery Co. v. Schofield, 2 B. W. C. C. 294, in the commission's decision In Re Kilmer, No. 139141, decided June 14, 1916.)

Therefore the commission has apparently, and I think correctly, in the light of numerous English cases such as New-Monckton Collieries, Limited, v. Keeling (1911), A. C. 648; and Turner v. Miller, 3 B. W. C. C., 305; considered that proof of more or less frequent remittances of money to members of a family in the "old country," coupled with at least the absence of any showing to the effect that the disposition of the workman with respect to making future remittances had been changed, would sufficiently establish dependency.

In the interesting case of In Re Mickolich, No. 57044, decided on November 16, 1915, the commission held, upon what I think are absolutely correct principles, that where the workman had been in the habit of remitting money from time to time to members of his family in Europe by mail and the outbreak of the great war in Europe had so interrupted the mail service with the central powers as to make it practically impossible for him to continue this practice, but the workman had made repeated attempts to send money by mail as before, thus confirming his continuing disposition to support his family, a case of dependency was made out. That is to say, dependency in fact may exist in spite of the *practical* impossibility of transmitting funds to the dependents.

But there is, in my opinion, a wide distinction between such a case and one in which the transmission of funds to members of one's family has become because of the outbreak of the war between this country and Germany *not merely impracticable but also illegal.*

The nice question is therefore presented as to whether dependency in fact, under the workmen's compensation law, can exist when the acts required to establish such dependency would be illegal. Of course dependency looks to the future. Though past acts are the only possible evidence of probable future conduct, yet the very fundamental idea of compensation is that of providing a substitute for the support which a deceased workman would have afforded to his family if he had lived. Therefore, the problem which now arises is conditioned for its solution upon the question as to whether the commission can lawfully conclude that particular persons would have received support from a given workman in the face of the principle that he could not *lawfully* have given them support.

No new cases are necessary to establish the conclusion that continued remittances by a workman in this country to his family in Germany during the war, whether practically possible or not, would be illegal. Therefore, I pass to the consideration of certain arguments that have suggested themselves to me as possibly available in support of the conclusion that in spite of the legal principles last above referred to the commission may lawfully take some favorable action at least with respect to the class of claims now under consideration.

In the first place it might be argued that inasmuch as war suspends civil rights and does not confiscate property, the rule applicable to the class of cases now under consideration should go no farther than laid down with respect to the two classes last above discussed; that is to say, that the commission in cases now being considered may ascertain who the present dependents are, make its award and hold the proceeds thereof in trust for the beneficiaries during the existence of the war.

The difficulties in the way of yielding to this argument may be summed up as follows:

In the first place dependency is a question of fact with a future implication; in the second place the class of dependents becomes absolutely fixed at the time of the injury resulting in the death of the employe; that is to say, the statute requires that the commission shall ascertain what persons were at the time of the injury actually receiving support from the injured workman and reasonably certain to continue to receive such support. Where, at the time of such injury, a given workman was prohibited by law from contributing to the support of a particular person now claiming as a dependent seems clear to me that such person could not in fact be a dependent. The mere fact that if the workman had lived he might have resumed his contributions to the support of such person after the cessation of hostilities assuming that hostilities will cease within a "reasonable time" does not help the case of such alleged dependent, because his right must be determined as of the date of the injury, and because, further, it is within the bounds of probability that such particular alleged dependent might cease to be dependent from other causes, such as death, or the acquisition of earning capacity, after said date and during the continuance of the war. In other words, the Munding case and the statutes—both being equally plain in this particular—make it clear that all rights of dependents are fixed as of a day certain and vested also as of a day certain. On such certain day or days such rights either exist or they do not exist. Subsequent developments, both possible and actual, can have no modifying effect upon them.

It is because dependency is a question of fact that this result is reached. This circumstance renders inapplicable, I think, the decisions respecting the right of alien enemies to succeed to the title of real, and possibly personal, property by inheritance, succession, devise or bequest during war. It brings into close analogy at least the decision in Dangler v. Hollinger Gold Mines Ltd., supra, case; in connection with this decision, which arose under the statutes of Ontario giving a cause of action for wrongful death, I note the interesting reasoning of an English authority under the English workmen's compensation law with respect to the right of aliens to share in its benefits, the statute not containing an express provision in favor of aliens such as our own statute.

I quote from Knowles on "Workmen's Compensation," page 128, as follows:

> "The general issue that emerges is whether aliens out of the jurisdiction can avail themselves of rights granted in general terms by English municipal law.
>
> "Such authority as exists in regard to the matter goes to show that the inquiry must be in the direction of ascertaining the intention of the particular statute. It was the earlier view that it was a principal of English law 'that acts of parliament do not apply to aliens, at least if they be not even temporarily resident in this country, unless the language of the statute expressly refers to them.' * * * This was the view taken by the House of Lords in Jeffreys v. Boosey (1854), 4 H. L. Cas. 815. * * *

"The application of the doctrine came up for consideration in 1901 before a court consisting of Kennedy and Phillimore, JJ., in the case of Davidsson v. Hill (1901), 2 K. B. 606. * * * The widow of the deceased, a foreigner, resident in Norway, brought an action against the owners of the British ship under Lord Campbell's act, * * * in respect of the defendant's negligence and the resulting death of her husband. The question was whether she, a foreigner resident outside the jurisdiction, could maintain an action. * * *

"* * * In deciding in favour of the right of action, Kennedy, J., said (at page 614): 'It appears to me * * * more reasonable to hold that parliament did intend to confer the benefits of this legislation upon foreigners as well as upon subjects, and certainly, that as against an English wrongdoer, the foreigner has a right to maintain his action under the statute in question. * * *"

The learned author then goes on to argue on this decision under Lord Campbell's act, that workman's compensation acts should be likewise construed for the following reasons:

"A dependent may elect to proceed under Lord Campbell's act. It has been seen that an alien resident abroad can sue under that act. * * * It would be a strange anomaly if, given *alternative remedies*, a person declared to be entitled to pursue one remedy were to be debarred from pursuing the alternative remedy should he prefer to proceed thereunder."

(In this connection see Krzus v. Crow's Nest Pass Coal Company, Limited (1912), A. C. 590.)

I have quoted from the text last referred to because of the argument which the author makes to the effect that where alternative remedies are available the principles applicable to one remedy should be deemed to govern the availability of the other remedy. While under our workmen's compensation law the election of remedies is limited, yet to the extent that it exists, it at least throws light upon the right to receive compensation. Accordingly it seems to me that if but for the workmen's compensation law (or in a case in which election of remedies is open under that act) an action could not be brought under the statutes providing for action for wrongful death in behalf of a particular class of alien enemies, such persons ought not to be considered to be dependents for the purpose of the workmen's compensation law.

Section 10772 of the General Code provides for the measure of damages in actions for wrongful death, and is as follows:

"Such actions shall be for the exclusive benefit of the wife, or husband, and children, or if there be neither of them, then of the parents and next of kin of the person whose death was so caused:

"It must be brought in the name of the personal representative of the deceased person and the jury may give such damages as it may think proportioned to the pecuniary injury resulting from such death, to the persons, respectively, for whose benefit the action was brought. Every such action must be commenced within two years after the death of such deceased person, except as provided in section 10773-1 of the General Code. Such personal representative, if he was appointed in this state, with the consent of the court making such appointment, may, at any

time, before or after the commencement of the suit, settle with the defendent the amount to be paid. The amount received by such personal representative, whether by settlement, or otherwise, shall be apportioned among the beneficiaries, unless adjusted between themselves, by the court making the appointment, in such manner as shall be fair and equitable, having reference to the age and condition of such beneficiaries and the laws of descent and distribution of personal estates left by persons dying in this state."

See in this connection Cincinnati Street Railway Co. v. Altemeier, Admr., 60 O. S. 10.

It is very clear from the statute and from decisions like the one cited, which is but one example of a line of authorities that might be multiplied in number, that the amount of recovery is limited to the pecuniary loss, nothing being allowed for mental suffering or punitive damages. The statute is exactly like the one commented upon in the Dangler case, supra.

It would seem to follow, therefore, that at the very least an action for wrongful death could not be maintained by resident administrators where the beneficiary of the judgment is a non-resident alien enemy. Of course, the Canadian decision does not go to the extent of deciding whether or not such an action would lie after the termination of the war and whether or not, if an affirmative answer be given to this question, the interest of various beneficiaries would be determined by relation back as of the date when in the absence of war a right of action would have accrued.

It is true also that under our statute providing for an action for wrongful death a cause of action may technically exist in behalf of the estate of the decedent without the necessity of showing by special allegations the extent of the pecuniary injury to the "next of kin," but in this particular the statute, as has been seen, differs from the workmen's compensation law under which "next of kin" have, as such, no standing, and under which too the question of pecuniary damage is the all-controlling criterion of the right to participate in the benefits of the fund.

On the whole, however, there appear to me to be insuperable difficulties in the way of holding that the commission is at liberty to entertain applications on behalf of alleged "dependents" arising out of injuries occurring after the declaration of war with Germany when the applicants are residents of Germany. The right of any persons claiming as dependents does not vest unless the fact of dependency be established, and in this case I cannot bring myself clearly to the conclusion that such fact can be established.

It is true that it might be argued that because war suspends the obligations of contracts and merely interrupts temporarily the commercial intercourse of private citizens the fact that dependency might be predicated upon the sending of money by the deceased workman to his family in Germany as long as it was possible for him to do so, and the absence of any evidence negativing his intention to continue to do so when circumstances might make it possible for him again to do so in the future should be sufficient; that is to say, it might be argued that inasmuch as the state of war has a suspending effect it should be regarded as suspending the necessity of actual contribution to the support of dependents as requisite proof of dependency in fact.

I have already stated the difficulty which lies in the way of an unreserved acceptance of this argument on my part when referring to the circumstances that dependency is a fact to be ascertained as of a given date.

I am very reluctant to reach the conclusion that any class of beneficiaries

under the workmen's compensation law are for all time cut off from the benefits of its operation by the occurrence of war, though the legal principles which the facts of the situation bring into play have seemed to inexorably point me to that conclusion.

Inasmuch as the commission could not in any event take final and complete action in such cases—that is, not only make an award, but disburse the fund to such claimants—I am of the opinion that the safest course to pursue is to receive such claims as may have been, or may be, filed in behalf of non-resident alien enemies, persons claiming as dependents on account of an injury received after the declaration of war, and to hold such claims in abeyance without action thereon, in the hope that the question may be passed upon in the meantime by some of the English or Canadian courts, and with a view to submitting it ultimately to the decisive decision of our own courts, in the absence of such intervening decision, when the cessation of hostilities shall have made it possible to litigate the question to a satisfactory conclusion.

The commission will observe that in discussing the question of dependency I have made the date of the injury and the date of the declaration of war the decisive points of time. The first choice is suggested by the statute which has been quoted, and irrespective of the question of "vested rights" as mooted in the opinion of Chief Justice Nichols in the Munding case, supra, I am satisfied that the class concerning which the conclusion last above expressed was drawn, is to be determined "in accordance with the facts in each particular case existing at the time of the injury resulting in the death of such employe." (Section 1465-82.)

The second date is chosen because, although war may exist without any formal declaration thereof, and although, indeed, the declaration of war against the Imperial German government by the joint resolution of the senate and house of representatives of the congress of the United States recites the existence of war as an established fact (See U. S. v. Cooke, 3 Wall. 258; Hall "International Law," pages 385, 390 and 393) yet under the peculiar circumstances under which we went to war with Germany I am satisfied that the safer rule, so far as the operation of municipal law is concerned, is to date the state of war from the declaration thereof.

The foregoing discussion disposes of all the cases submitted by you in so far as the interests of the subjects and residents of Germany are concerned. I come now to the consideration of the questions respecting residents of Austria-Hungary as "alien enemies."

Before discussing this question, however, I wish to consider whether or not some qualification ought not to be made with respect to the rules that have already been laid down. I have stated repeatedly that the true test by which the action of the commission in a given case may be determined is the residence of the person for whose benefit the given action of the commission may be taken. Hereinbefore I have referred to the persons for whose benefit the commission may not lawfully act as residents of the enemy country—Germany. Is that principle strictly limited to those who reside within the territorial jurisdiction of the German empire and its possessions?

From the practical viewpoint, and in the face of existing conditions, the answer to this question ought to be in the negative. For example, certain districts of Russia, including among others practically all of Russian Poland, and the Baltic provinces of Kovno and Courland, have for a long time been held firmly within the German lines, and Germany, according to current reports, has set up a military government therein to which the inhabitants of that conquered territory are bound to give actual allegiance. So, also, on the western front from the very earliest days of the war the German army has been in pos-

session of the entire territory of the Grand Duchy of Luxemburg and practically the entire territory of the kingdom of Belgium. In these districts military governments have been set up, and the government of the United States has had actual dealings with the military governments so set up under the authority of the German empire.

Is commercial intercourse with the inhabitants of these territories illegal? Very little authority is extant upon this exact subject, yet for the purpose of the cognate questions as to the application of prize laws authority is not wanting.

It was held in this country in the early case of Thirty Hogsheads of Sugar, 9 Cranch 195 (per Marshall, J.) that the former Danish possession of Santa Cruz captured by the British during the time when the United States was at war with Great Britain became thereupon British territory so that the fruits of its soil were subject to capture on the high seas as enemy property by the naval forces of the United States. This decision was followed in the case of United States v. Rice, 4 Wheat 246 (per Story, J.), holding that that portion of Castine which was originally and subsequently within the territory of the United States was for a time during the War of 1812, within which it was in the undisputed occupation of the enemy, British territory, for the purpose of the customs laws.

The rule thus established does not seem to have been acted upon with perfect consistency when the circumstances are reversed and the question is as to the status of the territory captured from the enemy and in the occupation of the military forces of the government of the forum. (See *The Circassian*, 2 Wall. 135, in which case, however, compensation for wrongful capture was subsequently awarded by the mixed commission on British and American claims. See Hall "International Law, 509, note.)

Cases arising out of the Civil war on this branch of the question may possibly be distinguished on the ground that they go no further than to hold that under the acts of congress then in force, trading with the inhabitants of territory captured from the enemy and held in military occupancy of the federal forces was subject to licensure by the president. (See Shaw v. Carlile, 9 Heisk. (Tenn.) 594; Butler v. Maples, 9 Wall. 766; United States v. Alleghany, Federal Case No. 14429.)

The Civil war cases are really not inconsistent with the principle of the cases decided under opposite facts; for though it may not be perfectly lawful to trade with the inhabitants of territory in the military possession of the military forces of one's own country, it does not therefore follow that it is lawful to trade with the inhabitants of territory in the military occupancy of the enemies of one's country. On the other hand, military occupancy in and of itself tends to give greater opportunity for exaction on the part of the enemy government and to afford more direct benefits to its military power than its civil jurisdiction over its own territory might afford.

For these reasons, then, I am of the opinion that, except as modified by whatever arrangement the government of the United States may have made for the transmission and distribution of relief to the inhabitants of Belgium and Poland, the principles above outlined as applicable to the different classes of cases discussed apply to such action of the commission as may be beneficial to the inhabitants of those territories which are under military occupation by the German army.

I have dealt with the problem just discussed as preliminary to the discussion of the question which you raise respecting the subjects and residents of Austria-Hungary because I deem it necessary to determine before approaching the discussion of the latter question whether the rules, the application of which has been worked out hereinbefore in this opinion are limited to the interests of persons residing within the technical boundaries of Germany. I have arrived at

the conclusion that they are not so limited; and by way of parenthetical statement may say, that for the same reasons a resident of the German colonial possessions, such as German West Africa, is to be regarded, for the purposes of the rule, as a "friend," as is a resident of that small portion of Alsace, which from the early days of the war has been in possession of the French army.

The application of the rule being thus qualified I find it unnecessary to determine whether or not an actual state of war now exists or has for any particular time existed between the government of the United States and the government of Austria-Hungary. It is true, as established by numerous authorities which I have cited, among them Matthews v. McStea, supra, that as a matter of international law a state of war may exist without a formal declaration thereof. This is particularly true in modern times when the ancient formality of announcing war by sending heralds, etc., has become obsolete; it is also true that technically it is the actual state of war and not the formal declaration thereof which brings into play the rules respecting the relation of nationals and residents of the enemy state. It is also true that this principle was to a certain extent, though not perfectly so, acted upon by the courts of this country in cases growing out of the Civil war, which was never formally "declared;" and also in the case of the Mexican war, which was not declared until after certain decisive battles thereof had been fought and until the military forces of the United States had invaded the territorial dominions of Mexico; yet the circumstances of the present situation are far different from those involved in the instances mentioned.

On the one hand, so far as I am informed, no actual clash between the military and naval forces of the United States and those of Austria-Hungary has taken place. Diplomatic representatives have been recalled, and while this step, as a matter of historical experience, is very frequently an inevitable forerunner of actual war, it is not tantamount to a state of war. The principles which I have been endeavoring to apply arise only in actual war. The existence or nonexistence of full diplomatic relations are in themselves irrelevant facts so far as their application is concerned.

On the other hand it is equally true that the military alliance between Germany and Austria-Hungary is exceedingly close. It has been currently reported that from the early days of the war Austria's troops have been officered by Germans and that Austrian munitions of war have been used by the German army. It is undeniably true that German armies have passed through Austria-Hungary and have engaged the forces of Roumania, which lies beyond Austria-Hungary with relation to Germany. At the present writing representatives of the Italian government are in this country conferring with officers of the federal government with a view to promoting effective co-operation in what seems to be regarded as a common enterprise; whereas Italian belligerent activities have been almost exclusively directed against Austria-Hungary, Bulgaria and Turkey, very little, if any, opportunity having been afforded for her military forces to come into contact with those of Germany proper. As a matter of fact all Europe is divided into two armed camps with one of which the United States has cast its lot. One would have to shut his eyes to the stern facts of the situation to enable himself to draw a line between the state of international relations existing between the United States and some of the powers in the other armed camp on the one hand, and such relation respecting the other powers in the same coalition on the other hand, yet for the lack of specific data upon which to base my conclusion as to the outbreak of actual hostilities between the United States and Austria-Hungary I find myself unable to say that Austria-Hungary should be considered as a separate belligerent with respect to the United States. Rather the

status of our relation to that country must be considered as appurtenant to that with respect to our relations with Germany. In other words, if we are at war with Austria-Hungary it is not because of any independent clash between the United States and that country, but because and as a result of the fact that we are at war with Germany. Accordingly whatever conclusion is arrived at with respect to Austria-Hungary, the state of affairs which now exists must be dated not from the interruption of diplomatic relations between this country and that empire, but rather from the declaration of war against Germany.

Under the present circumstances it would seem to be sound good sense to hold that war with Germany is war with its allies. Certainly the countries allied with Germany cannot be regarded as "neutral" or "friendly" in respect of their relation to the United States during the present war, and so, though the question is absolutely one of first impression as here are no cases so far as I have been able to find involving a situation where a country has been formally at war with one only of several other closely allied countries, I find myself strongly impelled to advise the commission that the allies of the enemy country must be regarded as enemies also; and that the inhabitants resident within their boundaries or dominions are to be regarded as alien enemies equally with the inhabitants of the country with which the belligerent country is formally at war under such circumstances.

As stated, the question last discussed is one of first impression. However, when the reasons for the rules which have been discussed are properly appreciated, I think the conclusion necessarily follows. As was well said by Lord Parker of Waddington in his opinion in the case of Daimler v. Continental Tyre and Rubber Company, supra:

> "The rule against trading with the enemy is a belligerent's weapon of self-protection. I think it has to be applied to modern circumstances as we find them, and not limited to the application of long ago, with as little desire to cut it down on the one hand as to extend it on the other beyond what the circumstances require."

While I have no desire to extend the somewhat harsh rule against commercial intercourse with an alien enemy beyond what modern circumstances—the terrible circumstances of the present world war—require, yet I think that upon the postulate that the rule is one of national self-defense, the present circumstances do require its extension to cover the present case. Because of the absence of authority, however, I have thought proper to refer in this connection, as well as for other purposes, to what I deem to be the rule respecting trading with persons who are inhabitants of the territory in the military occupancy of the enemy. Though Austria-Hungary is not in any sense in the military occupancy of Germany, yet the mlitary control of the entire territory of what are known as the "Central Powers" is apparently so highly centralized, and has acquired such tremendous ascendency therein over the civil governments of the respective countries—at last so far as external appearances indicate—that the analogy is, at least a fair one.

For these two reasons, then—first that on principle the allies of an enemy country ought to be treated as enemies themselves, and, second, that under the present circumstances the territory of Austria-Hungary may fairly be compared with territory under military occupation by German armies, for the purpose of the application of the rule, I advise that not only the inhabitants of Austria-Hungary, but also those of Bulgaria and Turkey be regarded for all purposes as in the same light as the inhabitants of Germany with respect to the various questions hereinbefore discussed in relation to the latter.

A line must be drawn, I think, between actually neutral or openly friendly countries, and those which are not so. It would be carrying the principle too far to hold that such commercial intercourse and trading with aliens or residents of alien countries as might indirectly benefit the military interests of the enemy are interdicted by the rule. Thus trade with Holland or Switzerland or the Scandinavian countries has undoubtedly been of benefit to Germany; England has acted on this theory in many instances, particularly in the operation of her assumed blockade of the North Sea. To what extent a belligerent nation may interfere with commerce to neutral countries or to countries allied with the enemy which may tend to enhance the enemy's resources, is a question of the law of nations; but when we return to the scope of the principles of municipal law we find no warrant for holding that private citizens or subjects of a state at war are prohibited by common law from dealing with any class of persons other than those who have acquired the technical status of alien enemies, as that status has been hereinbefore defined.

Therefore, it is my opinion that with respect to claims asserted by residents of Austria-Hungary the commission should continue for the time being to proceed without regard to the international situation.

Summarizing, the following are my answers to the nine distinct questions into which I have taken the liberty to resolve your more general questions:

1. With respect to claims for compensation which may arise on account of injuries to a subject of Germany residing within the United States occurring subsequently to the declaration of war between the United States and Germany, it is the duty of the commission to proceed to hear and determine a claim and to administer the state insurance fund in that behalf as if the war did not exist.

2. With respect to claims, if any, which may arise on account of the death of a resident of the United States, who is a subject of the German empire, occurring subsequently to the declaration of war, when those claiming as dependents reside in Germany, the commission should ascertain whether the injury occurred prior to the declaration of war or subsequently thereto. (a) If prior, the commission may proceed to hear and determine the claim as in other cases; but any award that may be made should be held in trust by the commission during the war and not paid to the claimants nor to any one on their behalf until peace is concluded. (b) If the injury occurred subsequently to the declaration of war the commission should receive and file the claim, but take no action thereon for the time being, as such claims present questions of grave doubt which cannot be satisfactorily determined until the war is over.

3. Respecting claims which have arisen or may arise on account of injuries or death occurring prior to the declaration of war between the United States and Germany, where the claimants are residents of the United States the commission should proceed in the disposition of the claim and the disbursement of the fund on account thereof as if the war did not exist.

4. Respecting claims which have arisen or may arise from injuries or death prior to the declaration of war, when the claimants are residents of Germany, the commission should proceed as above indicated in dealing with the first half of the second specific case supposed.

5. With respect to making periodical payments on awards made prior to the declaration of war with Germany or thereafter made upon claims arising from accidents occurring prior thereto, when the recipients of the payments, though aliens, reside in the United States, the commission should continue the disbursements as if the war did not exist, though the recipients of the payments be subjects of the German empire.

6. Respecting cases of the last named class, when the recipients reside in

Germany, the commission should discontinue making the periodical payments during the existence of the war, but should hold the fund represented by the whole award in trust for proper distribution at the end of the war.

7. (a) Respecting claims filed, or which may be filed, on account of accidents occurring since the war was declared, where the claimants, whether dependents or otherwise, though nonresidents of this country, and subjects of Germany, reside in friendly countries, the commission should proceed in all cases as if the war did not exist.

The same answer applies to 7 (b) and to 7 (c).

8. With respect to the action of the commission in the three classes of cases with respect to time suggested in question 7 when the claimant, regardless of citizenship or nationality, actually resides in Germany, the commission should be governed as follows:

(a) With respect to claims filed, or which may be filed, on account of injury occurring since the war was declared, the commission should proceed as above suggested in dealing with the corresponding portion of the second hypothetical statement of fact. That is to say, the commission should take no present action in the premises but should defer all action on such claims until the conclusion of peace.

(b) In such cases when the injury occurred prior to the declaration of war, the commission should proceed as likewise indicated in corresponding subdivision of the second hypothetical statement of fact. That is to say, the commission may proceed to hear and determine the applications and make the awards, if the facts so justify, but should hold the money represented by the awards in trust until after the war.

(c) With respect to making periodical payments on awards made to such claimants prior to the declaration of war, the commission should proceed as above indicated in dealing with the sixth hypothetical question.

9. For the purpose of determining the application of all the foregoing conclusions the meaning of the phrase "residing in Germany" should be understood as embracing the residents of territories which are under well established military occupation by German armies, subject, however, to such exceptions as may be sanctioned by the government of the United States by way of relief measures in Belgium and Poland; and as excluding the inhabitants of territories formerly German, which are under well established occupation by friendly countries.

10. The inhabitants of Austria-Hungary, Bulgaria and Turkey, including such portions of such other countries as are under the well established military occupancy of the forces of any of these countries, and excluding such portions of the territory of any of them as may be in the well established military occupancy of the forces of friendly countries, are to be regarded, for all the foregoing purposes, in the same light as the inhabitants of Germany. The status of such persons should be determined irrespective of the date of the cessation of diplomatic relations between Austria-Hungary and the United States, and as commencing in its present aspect with the declaration of war between the United States and Germany.

In this last connection I am mindful of the fact that the government of the United States still outwardly recognizes the existence of a state of peace as between this country and Turkey, for example, the embassador not even having been recalled. The whole situation with respect to the members of the group of nations known as the "Central Powers," other than Germany, is so equivocal that I find myself unable to express any opinion in the premises with assurance. I feel bound, however, to advise the commission to act in the manner above stated with respect to such cases so that the important questions involved may come

properly before the courts for final adjudication. Should the action taken by the commission be objected to by a subject of Austria-Hungary resident in his own country and he should endeavor to bring suit in a court of competent jurisdiction to obtain the relief claimed by him, the questions would be properly raised. In the meantime, however, it is, as I see it, the duty of the commission to take the attitude above outlined and adhere to it unless it should be judicially determined that the allies of Germany are our "friends."

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

316.

BOARD OF EDUCATION—MAY BORROW MONEY TO PAY INDEBTEDNESS FOR TEACHERS' SALARIES—WHEN BONDS ISSUED TO COVER SUCH INDEBTEDNESS—HOW SAME ARE REDEEMED.

1. *Under section 5656 of the General Code a board of education may borrow money to pay an indebtedness due for salaries of teachers.*

2. *If bonds are sold covering such indebtedness, an amount sufficient to redeem said bonds and the interest thereon shall be placed in the annual budget by the board of education and levied for the sinking fund for that purpose.*

COLUMBUS, OHIO, May 28, 1917.

HON. PERRY SMITH, *Prosecuting Attorney, Zanesville, Ohio.*

DEAR SIR:—In your letter of May 4, 1917, you ask my opinion upon the following statement:

> "Under section 5656 of the General Code the board of education of Brush Creek township has a deficit of $810.00 (approximately) due the teachers. Can we borrow this money under this section or shall we sell bonds to meet that deficit? If we sell bonds can the bonds be redeemed from the state aid fund? I see that the last legislature amended section 7596-1, which reads as follows:
>
> "'Whenever a school district receives state aid as is provided for in section 7595-1 of the General Code the board of education of such school district may refund any tuition indebtedness by issuing bonds as is provided by section 5656 of the General Code. When such bonds are due, the amount and interest of the bonds shall be a part of the deficit for the current year, and shall be paid as state aid by the auditor of state as is provided by section 7596 of the General Code.'
>
> "In case this school district should issue bonds and sell them, will they be redeemed at maturity by the auditor of state from the state aid fund?"

General Code section 5656 provides in part:

> "* * * The board of education of a school district * * * for the purpose of extending the time of payment of any indebtedness, which from its limits of taxation such * * * district * * * is

unable to pay at maturity, may borrow money or issue the bonds thereof so as to change, but not increase, the indebtedness in the amounts, for the length of time and at the rate of interest that said * * * board * * * deem proper, not to exceed the rate of six per cent per annum, payable annually or semi-annually."

Section 5658 G. C. provides in part:

"No indebtedness of a * * * school district * * * shall be funded, refunded or extended unless such indebtedness is first determined to be an existing, valid and binding obligation of such * * * school district * * * by a formal resolution of the * * * board of education * * *. Such resolution shall state the amount of the existing indebtedness to be funded, refunded or extended, the aggregate amount of bonds to be issued therefor, their number and denomination, the date of their maturity, the rate of interest they shall bear and the place of payment of principal and interest."

From the above sections, then, when a board of education of a school district determines that there exists a valid and binding obligation of such school district, and that from the limits of taxation such district is unable to pay the same at maturity, such school district may, under the conditions set forth in said quoted sections, *borrow money* or issue the bonds of the district so that the time of payment of said indebtedness may be extended. The amount of the indebtedness, however, shall not be increased. In your case you mention that the deficit has occurred in the tuition fund, that is, for the payment of teachers' salaries, and you ask if the board of education may borrow money to extend the time of payment of said indebtedness.

On March 27, 1915, you asked the attorney-general a similar question and the answer thereto is found in opinion No. 178, Opinions of the Attorney-General for 1915, page 328, as follows:

"A board of education may borrow money under section 5656 G. C. for the purpose of paying unpaid installments of teachers' salaries."

I agree with the above-mentioned opinion and advise you that your board can borrow money under the sections above mentioned to extend the time of payment of the said indebtedness.

Your second question is:

"If we sell the bonds, can the bonds be redeemed from the state aid fund?"

No such bonds can be redeemed from the state aid fund unless such redemption occurs under the provisions of General Code section 7596-1, as amended March 21, 1917, and filed in the office of the secretary of state April 2, 1917, and which will become effective July 1, 1917. If the bonds are issued, however, prior to the time of the filing of the annual budget of your board of education, I know of no way for you to escape the provisions of the constitution, article XII, section 11, and General Code section 7614.

Article XII, section 11, reads as follows:

"*No bonded indebtedness* of the state, or any political subdivision thereof, *shall be* incurred or *renewed, unless*, in the legislation under

which such indebtedness is incurred or renewed, *provision is made for levying and collecting annually by taxation an amount sufficient to pay the interest on said bonds, and to provide a sinking fund for their final redemption at maturity.*"

General Code section 7614 provides in part:

"The board of education of every district shall provide a sinking fund for the extinguishment of all bonded indebtedness * * *."

Said section 11 of article XII, above quoted, was considered at length by our supreme court in the recent case of Link v. Karb, 89 O. S., 326. On page 338 the court said:

"This amendment to the constitution was framed and adopted for the purpose of requiring not only the legislature of the state but the taxing authority of any political subdivision of the state proposing to issue bonds to include in the law, resolution or ordinance, under which such indebtedness is incurred or renewed, the provision for levying and collecting annually by taxation an amount sufficient to pay the interest and retire the bonds, otherwise the only effect of this amendment would be to carry into the organic law of the state the existing statutory provisions. In many instances this is a wise and proper thing to do, for it at once removes an important public policy from the realms of uncertainty and no longer permits it to become the battledore and shuttlecock of legislative fancy. However, that may be, this provision of the constitution must be held to serve some substantial purpose, and to the end that the will of the people may not be defeated by too narrow an interpretation of its terms, we have reached the conclusion that, *in obedience to this amendment to the constitution the taxing officials of any political subdivision of the state must provide* in the resolution or ordinance authorizing such issue, or in a resolution or ordinance in relation to the same subject-matter passed prior to the issuing of such bonds, *for levying and collecting annually by taxation an amount sufficient to pay the interest thereon and provide a sinking fund for their final redemption at maturity.* This, of course, does not require the immediate levying of a tax certain, either in amount or rate, for the provision of this amendment is that this tax shall be levied annually and collected annually, *but it does mean that, at the time the issue of bonds is authorized, the taxing authorities proposing to issue such bonds shall provide that a levy shall be made each year thereafter during the term of the bonds in an amount sufficient to pay the interest thereon and retire the bonds,* and such provision, so made at the time the bonds are authorized, shall be binding and obligatory upon these taxing officers of that political subdivision and their successors in office until the purpose of such levy shall have been fully accomplished by the retirement of the bonds so issued. Such a provision fills the full purpose of this amendment to the constitution and is not subject to the objection that it is impossible at the time of issue to determine either the amount that must be raised for that purpose or the rate that must be levied to raise such an amount. That amount may be determined from year to year, and levied annually, for that is the command of the amendment itself; but having declared at the time of the issue of such bonds that a levy shall be made in an amount sufficient, there then remains for

the taxing officials the mere matter of calculation as to the amount. The levy must be made at all events in pursuance to the original provisions therefor, and *subsequent taxing authorities must make such annual levy, regardless of what exigencies may arise in the future.*"

So that at the time you issue such bonds, it is necessary to make provision for the payment thereof by levying an annual tax in an amount sufficient to pay the interest and principal upon said bonds and to provide a sinking fund for the extinguishment of said bonds when the same become due and payable.

Inasmuch as said section 7596-1 G. C. will not become effective until July 1, 1917, I am of the opinion that any bonds issued prior thereto cannot be brought within its terms.

In direct answer to your questions, then, I advise you:

(1) Under section 5656 of the General Code a board of education may borrow money to pay an indebtedness due for salaries of teachers.

(2) If bonds are sold covering such indebtedness, an amount sufficient to redeem said bonds and the interest thereon shall be placed in the annual budget by your board of education and levied for the sinking fund for that purpose, and such bonds being issued prior to the going into effect of section 7596-1 G. C., as amended, they will not be redeemed at maturity by the auditor of state from the state aid fund.

Yours very truly,
JOSEPH MCGHEE,
Attorney-General.

317.

STATE DENTAL BOARD—MAY MAKE RULES GOVERNING ITS PROCEDURE—NOT IN CONFLICT WITH THE STATUTORY OR COMMON LAW PRINCIPLES OF PROCEDURE.

All state boards are amenable to the statutes of the state, but the state dental board may make necessary rules covering its procedure which cannot be in derogation of statutory or common law principles of procedure.

COLUMBUS, OHIO, May 29, 1917.

HON. HOLSTON BARTILSON, *Member State Dental Board, Columbus, Ohio.*

DEAR SIR:—I have yours of May 15, 1917, as follows:

"Can the state dental board, under section 1315, make a rule whereby resolutions can be submitted to members of the said board while the board is in adjournment, and a vote be cast on the said resolutions by mail?

"Are not all state boards amenable to the statutes of the state and parliamentary usages?"

General Code section 1314 provides in part:

"The governor, with the advice and consent of the senate, shall appoint a state dental board consisting of five persons * * *. One mem-

ber shall be appointed each year as the respective terms of the present incumbents expire, and shall serve for the term of five years and until his successor is appointed and qualified. * * *"

General Code section 1315 provides:

"The state dental board shall organize by the election from its members of a president and a secretary. It shall hold a meeting on the fourth Monday in June and October of each year, and other meetings as it deems necessary at such times and places as the board designates. The October meeting shall be held in the city of Columbus; the June meeting may be held at such place as the board designates. A majority of the members of the board shall constitute a quorum, but a less number may adjourn from time to time. The board shall make such reasonable rules and regulations as it deems necessary; provided, however, that it shall require the concurrence of a majority of the members of the board to grant, to refuse or to revoke a license."

General Code section 1318 provides in part:

"The state dental board shall * * * keep a record of its proceedings * * *."

The word "board" is defined by "Century" as:

"A number of persons having the management, direction or superintendence of some public or private office or trust; as a board of directors; a board of trade; the board of health; or a *school board.*"

The state dental board, then, is a body composed of the number of five persons, three of whom are necessary to constitute a quorum to do business, although, as noted above, a less number may adjourn from time to time. That a board must act as a unit and not as individuals has been frequently held. It is made the duty of the board to hold regular meetings at certain specified times and places for the transaction of any business which may be necessary in relation to the enforcement of the dental laws of this state. The board may also hold other meetings as it deems necessary and at such times and places as the board may designate. The member of the board who is elected president shall preside at such meetings, if present, or not otherwise disqualified, and the secretary who is also a member shall keep a record of the proceedings of the board. The public, for whom they act, have the right to their best judgment after free and full discussion and consultation among themselves of and upon the public matters entrusted to them to act upon. Such deliberation, consultation and discussion is lacking when they attempt to act separately. In re Ex parte John Walker, Habeas Corpus, 8 Bulletin, 198, the petitioner asked for a writ of habeas corpus, charging that the board of directors of the Cincinnati workhouse illegally restrained him of his liberty. He produced in court a paper signed by three of the directors authorizing his discharge, but the court held that the discharge was not valid "for the reason that it was not the result of the joint deliberation of these members or of the other members of the board and simply amounted to the individual act of each member; and that it was not a valid act." The court further held on page 200:

"Where a duty is devolved upon them by the legislature to discharge

as a board, *and a quorum may do an act*, it is contemplated that each member is entitled to the opinion and judgment of his fellows; and that where any matter is brought before the board, requiring action, that there should be action only after a joint consideration of the question * * * that they may act advisedly, and that each one may know what his fellow member's opinion is, and thus be able to act advisedly."

If, then, the act when performed would not be a valid act, the board is without power to make a rule whereby resolutions can be submitted to members of the said board to be acted upon by them individually, and when the board is not in session.

Your second question is, Are not all state boards amenable to the statutes of the state and parliamentary usages? You will understand that any board which is the creature of statute can do only those things which are specifically granted or in certain cases those incidental things necessary to carry out the powers specifically granted.

General Code section 1315 provides that the board shall make such reasonable rules and regulations as it deems necessary. This provision means that it may make such necessary rules of procedure as will properly permit the board to transact its business in an orderly and legal manner. It does not mean that the board can make any rule, in derogation of law, but it does mean that the board can make necessary rules governing its procedure, in the absence of which the usual parliamentary rules governing such bodies will govern.

Answering your questions specifically, then, I advise you:

First: The state dental board has no right to make a rule whereby resolutions can be submitted to the members of said board and be acted upon by them separately.

Second: Such boards are amenable to the statutes of the state and may make necessary rules governing its procedure which are not in derogation to statutes or common law principles of procedure.

Yours very truly,
JOSEPH MCGHEE,
Attorney-General.

318.

BOND ISSUE—FOR ERECTION OF SCHOOLHOUSE—MAJORITY OF BOARD OF EDUCATION MAY PASS RESOLUTION PROVIDED FOR IN SECTION 7626 G. C.

In issuing bonds under the provisions of sections 7625 *to* 7628 *G. C., inclusive, the provisions of section* 7629 *G. C. do not apply and a majority of the board of education may pass a resolution as provided in section* 7626 *G. C.*

COLUMBUS, OHIO, May 30, 1917.

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

GENTLEMEN:—Through your department I am answering a communication received from Hon. Harry S. Commager, Director of Law, Toledo, Ohio, as I

consider the matter of sufficient importance to demand an answer. The communication from said Harry S. Commager reads as follows:

> "The director of schools of the city school district of the city of Toledo has requested this department to submit to you for an opinion the following: A bond issue for the acquiring of land and the erecting of a high school was submitted at a general election to the electors of the city school district, under section 7625 of the General Code of Ohio, and a majority of the electors voted in favor of the issuance of said bonds for said purpose. Thereafter, and in conformity to section 7626 of the General Code of Ohio, a resolution providing for the issue and sale of said bonds was presented to the board of education, all members being present. The vote on said resolution being three yeas and two nays. Query: Did said resolution pass? This involves a construction of sections 7627 and 7629 of the General Code."

The question submitted by the director of law of Toledo has to do with the construction of sections 7625 to 7629 G. C., inclusive. These sections are too lengthy to quote in full, but an understanding of the question involved makes it necessary to quote sections 7625, 7626 and 7629.

Sections 7625 and 7626 G. C. read as follows:

> "Sec. 7625. When the board of education of any school district determines that for the proper accommodation of the schools of such district it is necessary to purchase a site or sites to erect a schoolhouse or houses, to complete a partially built schoolhouse, to enlarge, repair or furnish a schoolhouse, or to purchase real estate for playground for children, or to do any or all of such things, that the funds at its disposal or that can be raised under the provisions of sections seventy-six hundred and twenty-nine and seventy-six hundred and thirty, are not sufficient to accomplish the purpose and that a bond issue is necessary, the board shall make an estimate of the probable amount of money required for such purpose or purposes and at a general election or special election called for that purpose, submit to the electors of the district the question of the issuing of bonds for the amount so estimated. Notices of the election required herein shall be given in the manner provided by law for school elections.''
>
> "Section 7626. If a majority of the electors, voting on the proposition to issue bonds, vote in favor thereof, the board thereby shall be authorized to issue bonds for the amount indicated by the vote. The issue and sale thereof shall be provided for by a resolution fixing the amount of each bond, the length of time they shall run, the rate of interest they shall bear, and the time of sale. Such bonds shall be sold in the manner provided by law."

Section 7627 G. C. makes provision for the conditions and limitations under which the bonds authorized by a vote of the people are to be sold, and section 7628 G. C. provides for the making of a levy to provide for the redemption of the said bonds at maturity and interest.

Section 7629 G. C. reads as follows:

> "The board of education of any school district may issue bonds to obtain or improve public school property, and in anticipation of income

from taxes, for such purposes, levied or to be levied, from time to time, as occasion requires, may issue and sell bonds, under the restrictions and bearing a rate of interest specified in sections seventy-six hundred and twenty-six and seventy-six hundred and twenty-seven. The board shall pay such bonds and the interest thereon when due, but provide that no greater amount of bonds be issued in any year than would equal the aggregate of a tax at the rate of two mills, for the year next preceding such issue. The order to issue bonds shall be made only at a regular meeting of the board and by a vote of two-thirds of its full membership, taken by yeas and nays and entered upon its journal."

In the communication of the director of law he states that an election was held under the provisions of section 7625 G. C., a majority of the electors voting for a bond issue. That the board of education by a vote of three to two, all members being present, voted to issue bonds under the provisions of section 7626 G. C., a majority of the board thus voting for the issuing of bonds. The question now is as to whether the provisions of section 7629 G. C. requiring that "the order to issue bonds shall be made only at a regular meeting of the board and by a vote of two-thirds of its full membership, taken by yeas and nays and entered upon its journal" apply to the action of the board of education taken under section 7626 G. C. If said provisions do apply, the resolution failed to pass. If the provisions of section 7629 G. C. do not apply, the resolution passed.

Upon examination of these sections, one will readily see that they provide for the issuing of bonds under two different authorities and two different conditions. Section 7629 G. C. provides for the issuing of bonds by the board of education of any school district without any reference to a vote of the people, while sections 7625 to 7628 G. C., inclusive, provide for the issuing of bonds by a board of education of any school district, authority having been received for the issuing of the bonds by a favorable vote of the people in the district. Upon a careful comparison of these two provisions, it will be evident that the method for issuing bonds under the authority of the people in no wise refers to the provisions of section 7629 G. C., either directly or indirectly, which section provides for issuing bonds upon the authority of the board of education alone. It is true section 7629 G. C. provides that the bonds issued under the authority of said section shall be issued under the restrictions and bearing a rate of interest specified in sections 7626 and 7627, but this simply places a restriction upon the bonds issued and not upon the method by which the resolution to issue the bonds shall be passed, and sections 7626 to 7628 G. C., inclusive, do not in any way make reference to the provisions of section 7629. Hence, one would immediately conclude that sections 7625 to 7628 G. C., inclusive, furnish a complete, comprehensive and all-inclusive plan for issuing bonds, and that the conditions and limitations therein set out are in no wise related to or modified by the provisions of section 7629 G. C.

But there is another thing that is also fairly apparent upon the face of these statutes and that is that they are not logically arranged. A logical arrangement would require that section 7629 G. C. should stand before sections 7625 to 7628 G. C., inclusive, for the reason that section 7629 provides for the issuing of bonds by the board of education of any district without a vote of the people and sections 7625 to 7628 G. C. provide that, if the board of education cannot secure sufficient funds for buying sites and erecting schoolhouses under the provisions of section 7629, then in that event they may submit the proposition to the voters of the district asking permission to make a greater issue of bonds than the board is permitted to make without a vote of the people.

It will be very instructive if we look into the origin and the history of these statutes and trace them very briefly down to the present time. These statutes were first enacted in the year 1873 and they form a part of an act "for the re-organization and maintenance of common schools" found in 70 O. L., page 195, these particular statutes being found on page 211. The general purport and intent of these statutes were the same when they were first enacted as they are now, but what is now section 7629 stood first in the original enactment and what are now 7625 to 7628 G. C., inclusive, followed, thus making the arrangement of these sections logical.

It will not be necessary for us to note the different provisions of these statutes nor to trace the changes as they were made from time to time but it will suffice to say, as said before, that the provisions of these statutes have been from the beginning practically the same. But I desire to note particularly the history of the last sentence of section 7629 G. C. which is the matter that is particularly in question in the communication from the director of law. This sentence has been carried through as a part of the section from the beginning. When this statute was first enacted the said provision read as follows: "Provided, that the order of such board to issue *such* bonds, be made only at a regular meeting thereof, and by a vote of a majority of all the members of such board taken by yeas and nays entered on the journal of the board." From this reading it is quite evident that this provision was not intended to apply to any other bonds excepting those issued under the provisions of the section in which it is found.

In 95 O. L. 530, this particular provision was modified to read as follows:

> "But the order to issue *such* bonds shall be made only at a regular meeting of the board and by a vote of not less than three-fourths of all the members thereof, taken by yeas and nays and entered on the journal of the board."

The same observation can be made in reference to the provision as amended as was made in reference to the provision before it was amended, namely, that it is clear that it was not intended to apply to the issuing of any other bonds excepting those provided for in this particular section.

In 97 O. L. 357 this particular provision was again amended and made to read as it is now found in the General Code. But throughout the entire history of these two statutes this particular provision with all its changes was always made specifically and definitely a part of what is now section 7629 G. C., and this section as a whole in all its changes never made any reference whatever to the other statute which provides for the issuing of bonds under the authority of a vote of the people. And, further, the statute which provides for issuing bonds under the authority of a vote of the people throughout its entire history never made any reference, either directly or indirectly, to the provisions of section 7629 G. C. It provided throughout its history merely that the board of education shall be authorized to do so and so if a majority of the qualified electors vote for levying taxes or for issuing bonds for the purpose of purchasing a site or erecting a building. It is a fundamental principle applying to all boards, committees or commissions that unless other provisions are made a majority of the board, committee or commission may transact business along any line, and it seems to me quite evident that it was the intention of the legislature under the provisions of sections 7625 to 7628 G. C., inclusive, that this principle should apply to the board of education in issuing bonds under the authority of a vote of the people and that it requires but a majority of the

board to enact the necessary legislation in order to carry out the mandates of the people as expressed at the polls. This conclusion would also seem to be in harmony with the natural and logical view of the situation. We know that the people generally demand that more restrictions and limitations be thrown around the actions of their servants when said servants act without any authority from the people than they demand when their servants act in merely carrying out the wishes or mandates of the people as expressed directly at the polls. We also note that the legislature is wont, in view of this, to place greater restrictions and greater limitations upon officers and boards who act without any authority directly from the people than they place upon officers and boards who get their authority to act directly from the people.

The above construction of these statutes is in harmony with this general principle. Hence, in view of the manifest intention as set forth in the said statutes as they now exist, and in view of the light that is thrown upon them by tracing their history from their first enactment, and in view of the general principle which controls the legislature in matters of this kind, I am of the opinion that the provisions of section 7629 G. C. do not in any way limit or modify the provisions of sections 7625 to 7628 G. C., inclusive, and that a majority of the board of education may pass a resolution to carry out the mandates and wishes of the people as expressed at the polls.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

319.

COUNTY AUDITOR—NOT COMPELLED TO ISSUE WARRANT FOR MATERIAL PURCHASED BY COMMISSIONERS—WHERE CONTRACT NOT LET IN COMPLIANCE WITH SECTION 2445 G. C.

In those cases in which the county commissioners, in entering into contracts for material for the use of the county, fail to comply with the provisions of section 2445 G. C., the county auditor is not compelled to issue his warrant in payment of the material so furnished, even though the county commissioners pass favorably upon the bills and order the county auditor to issue his warrants in payment of the same.

COLUMBUS, OHIO, May 31, 1917.

HON. GEORGE F. CRAWFORD, *Prosecuting Attorney, Greenville, Ohio.*

DEAR SIR:—Your communication of April 13, 1917, was received, which communication reads as follows:

> "The auditor of Darke county has asked me for an opinion on issuing warrants on bills allowed by the county commissioners, the contracts for which were not awarded in accordance with section 2445 of the General Code.
>
> "I prepared an opinion for the auditor, but on account of the unpleasantness that is sure to arise, and on account of the sum involved in the various bills, approximating perhaps $6,000.00, I have some hesitancy in handing down this decision to the county auditor without a review of the matter by the attorney general.

"In my opinion, which is herewith enclosed, I have set out the authorities on which I based the conclusion reached. Unless there is some later decision than that in the 60th O. S., referred to in the enclosed opinion, and which section of the statute was, with others, considered in that opinion, I am unable to see why the auditor would be compelled to issue the warrants."

Your communication says nothing whatever about the nature of the contracts in reference to which the county commissioners have allowed the bills and ordered the county auditor to issue his warrant for the payment of the same. But from your letter I am assuming that the contracts, in reference to which the bills were incurred, were contracts which the county commissioners are authorized to make under the law; that the material was furnished at the instance and request of the county commissioners; that the material was furnished in good faith and was placed on the public roads of your county; that the material so furnished and placed upon the public highways cannot be returned to those furnishing same and thus be put in statu quo; that no fraud was practiced, either by the county commissioners or the persons who furnished the material, at the instance of the county commissioners; that there was no record made by the county commissioners of their transactions in the matter of the purchase of said material, as provided for under the provisions of section 2445 G. C.; and that the county commissioners have allowed the bills claimed due for material furnished and have ordered the county auditor to issue his warrant in payment of the same.

Now, the question is as to whether the county auditor is compelled to honor the orders of the county commissioners and issue his warrants thereunder.

Section 2445 G. C. reads as follows:

"No contract entered into by the county commissioners, or order made by them, shall be valid unless it has been assented to at a regular or special session thereof, and entered in the minutes of their proceedings by the auditor."

Your communication states that the provisions of said section have not been complied with, on the part of the county commissioners.

Under the law as applied to the facts, what is the answer to your question?

As there is considerable money involved and as material has been furnished by the parties in good faith and the county is getting the benefit from the same, and is in no position to return it, and the county commissioners have allowed the bills claimed due for the material furnished, your question is entitled to careful consideration. This I shall attempt to give it.

The statute says:

"No contract entered into by the county commissioners * * * shall be valid unless it has been assented to at a regular or special session thereof, and entered in the minutes of their proceedings * * *."

The provisions of this section seem to be plain. Unless certain conditions therein set out are complied with, it says no contract shall be valid. If the contract is not valid, no rights could be predicated thereupon. Further, those having claims against the county for material so furnished under contracts, in which the county commissioners have not complied with the terms of the

statute, would be compelled to base their right of action against the county, in case of a suit upon these contracts so entered into. But as the contracts are not valid, but void, the claimants could not predicate a cause of action upon them.

It follows that if those having claims against the county cannot predicate them upon said invalid contracts, the county auditor could not be compelled to issue his warrant in payment of the claims. This would seem to be the natural conclusion to be drawn.

The county commissioners had no right to make an order allowing the bills. If one were to hold otherwise, what use would such statutes as the above serve? The provisions of this statute and other statutes which place restrictions upon the right of public officials to contract were enacted with a view to restrain officials from entering into contracts in a promiscuous way, and were intended to protect the rights of the public in the matter of the expenditure of money derived from taxation.

The question of good faith cannot enter into the consideration of such a statute. There is no such a question contemplated in its terms. Supposing the rule of "good faith" should be adopted. How is anyone going to show "bad faith?" So that from a mere reading of the statute and from the drawing of a natural conclusion from the language of the same, one must conclude that the county auditor is not bound to issue his warrant for the payment of said claims; nor have the persons furnishing material any right to recover for the same against the county.

But what have the courts of our state held in reference to this statute and other statutes containing restrictive provisions in reference to the right of public officials to contract? There is an abundance of authority upon this proposition and it cannot be said that it is all harmonious. But when the cases are studied carefully, it will be found that in the main the courts of our state agree on the construction that should be placed upon said statutes and obligations and rights arising thereunder. There is *obiter dictum* in a number of decisions which would seem to be at variance with the general line of authority, but outside of this the decisions of our courts are harmonious.

I desire to note a number of cases upon this point.

In 58 O. S. 558 there is a case styled City of Lancaster v. Miller. While this case did not have under consideration the direct question involved in your inquiry, yet the court was construing in said case one of these restrictive statutes. The second and third branches of the syllabus in said case read as follows:

> "2. Nor will such contract impose on the corporation a valid obligation even if bids were advertised for pursuant to said section 2303, unless the auditor, or clerk, of the corporation, as the case may be, 'shall first certify that the money required for' that purpose 'is in the treasury to the credit of the fund from which it is to be drawn,' etc., as required by section 2702, Revised Statutes.
>
> "3. Where either of such requirements has been omitted the municipality will not by the acts of its officers be estopped to set up such omission as a defense to an action brought against it on such contract."

On pages 575-6 of the opinion, the court uses the following language:

> "The corporation should not be estopped by the acts of its officers to set up these statutes in defense to contracts made in disregard of

them. It would be idle to enact those statutes, and afterward permit their practical abrogation by neglect or other misconduct of the officers of the municipality. If such effect should be given to such acts of municipal officers it would defeat the operation of the statutes. The strict enforcement of these provisions may occasionally cause instances of injustice; it is possible that municipal bodies may secure benefits under a contract thus declared void and refuse to make satisfaction. In the nature of things, however, these instances will be rare. Those who deal with public agencies entrusted with the management of municipal affairs, usually experience liberal treatment. Such agencies are not stimulated to acts of injustice by cupidity. Self-interest, that great motive to over-reaching, is absent. If, however, cases of hardship occur, they should be attributed to the folly of him who entered into the invalid contract. The gateways of municipal prodigality should not be left wide open, because an attempt to narrow them may cause an occasional instance of seeming hardship."

In Buchanan Bridge Co. v. Campbell et al., Com'rs., 60 O. S. 406, there are facts as nearly similar to the facts involved in your question as it would be possible to get. The syllabus of this case reads as follows:

"A contract made by county commissioners for the purchase and erection of a bridge in violation or disregard of the statutes on that subject, is void, and no recovery can be had against the county for the value of such bridge. Courts will leave the parties to such unlawful transaction where they have placed themselves, and will refuse to grant relief to either party."

It will be noticed in the statement of facts set out in said cause that the commissioners never caused any memorandum or minute, concerning the purchase or order for the bridge material in question, to be entered on the county commissioners' journal; that the plaintiff furnished the material in good faith; that the material was used by the county commissioners in the construction of the bridge in question; and that the county commissioners, at the request of the plaintiff, signed and delivered to it two certain warrants or orders directing the auditor to issue or draw his warrant or warrants on the treasurer of said county for the payment of the same. At this particular juncture proceedings in injunction were begun by the prosecuting attorney against the county officials, seeking to enjoin the payment of the money claimed due the plaintiff from the board of county commissioners.

The court on p. 419 used the following language:

"Whatever the rule may be elsewhere, in this state the public policy, as indicated by our constitution, statutes and decided cases, is, that to bind the state, a county or city for supplies of any kind, the purchase must be substantially in conformity to the statute on that subject, and that contracts made in violation or disregard of such statutes are void, not merely voidable, and that courts will not lend their aid to enforce such a contract directly or indirectly, but will leave the parties where they have placed themselves. If the contract is executory, no action can be maintained to enforce it, and if executed on one side, no recovery can be had against the party of the other side.

* * * * * * * * * * * * * * * * * *

"In line with the spirit of this section, statutes have been passed providing for the public letting of contracts after advertisement by municipalities and providing that contracts not so let shall be void; and this court has construed those statutes as absolving municipalities from all obligations as to contracts made, work done, or supplies furnished in violation or disregard of such statutes."

On p. 425 the court says:

"These omissions are fatal to the validity of the contract, and by force of the above cited sections of the statute, the contract is totally void and imposed no obligation on either party to it.

"The statutes are notice to the world as to the extent of the powers of the commissioners, and the bridge company is bound by that notice. It knew, and was bound to know, that the commissioners had no power to thus enter into a contract, and that a contract thus attempted to be entered into would be null and void and would not bind either party.

"It is necessary to so construe the statutes, in order to prevent the evils which induced the enactment of them. If such statutes could be evaded, there would always be found some public servants who would be ready and willing to join in transactions detrimental to the public, but favorable to themselves or some favored friend; and if public officers should be ever so honest, some persistent agent or salesman would impose upon them, and obtain more out of the public treasury than is justly due. When the provisions of the statute are followed, and all is done openly and publicly, the public interests are best conserved, and even then there is often complaint to the effect that some one has been favored."

In this case it will be further noticed that the court held not only that the express contract was void and therefore the plaintiff was not entitled to recover under the contract, but that the plaintiff could not recover as upon an implied contract. This case would seem to be decisive of the question asked by you, but I will note very briefly a few other cases.

In the case of The City of Wellston v. Morgan, 65 O. S. 219, the court held in the syllabus as follows:

"While there is implied municipal liability at common law, the statutes of this state provide the manner in which contracts, agreements, obligations and appropriations shall be made and entered into by municipalities, and they cannot be entered into otherwise than as provided by statute.

"There has been no implied municipal liability in matters *ex contractu* in this state since the passage of the act of April 8, 1876 (73 O. L. 125), part of which now forms section 1693 Revised Statutes.

"To state a good cause of action against a municipality in matters *ex contractu* the petition must declare upon a contract, agreement, obligation or appropriation made and entered into according to statute. A petition on an account merely, or *quantum meruit*, in such cases, is not sufficient.

"Persons dealing with officers of municipalities must ascertain for themselves and at their own peril that the provisions of the statutes applicable to the making of the contract, agreement, obligation or appropriation have been complied with."

In the opinion of the court a review is made of previous cases decided in reference to restrictive statutes, and the conclusion of law set out in the syllabus was drawn from the same.

Possibly the last expression of our supreme court upon matters of this kind is to be found in the case of The Village of Carthage v. Diekmeier, 79 O. S. 323. While this case had to do with the provisions of our statutes requiring the certificate of the proper officer, that the money is in the treasury to the credit of the proper fund, before a contract can be entered into or order made for the expenditure of money, yet the reasoning by which the court arrived at its conclusion in said case is in point in this case. It reviewed a great many former decisions rendered by the same court and affirmed the findings made in said causes.

The following language is used by the court on p. 346 of the opinion:

> "It is there held, not only that the terms of a statute regulating the execution of a contract whereby public money will be expended, must be followed, but where the statutory requirements have been omitted, the corporation will not by the acts of its officers be estopped to set up such omissions as a defense to an action brought against it on such contract. The strictness of the rule is justified in the opinion of the court on page 575. Among other things, it is there said: 'Contracts made in violation of these statutes should be held to impose no corporate liability. Persons who deal with municipal bodies for their own profit should be required at their peril to take notice of limitations upon the powers of those bodies which these statutes impose.' The next paragraph of the opinion is also in point here, but space is not ours for its present quotation."
>
> (The above reasoning was based upon McCloud & Geigle v. City of Columbus, 54 Ohio St. 439, and Lancaster v. Miller, 58 Ohio St. 558.)

The question might be raised as to whether the fact that the county commissioners allowed these claims and ordered the county auditor to issue his warrant in payment of the same, might not have some effect upon the conclusion to be drawn; and whether a suit in mandamus might not lie against a county auditor to compel him to issue his warrants, the orders for which having been made by the county commissioners. We find this question to have been cited in State ex rel. Baen v. Yeatman, Auditor, 22 O. S. 546, in which the court held, in the third branch of the syllabus, as follows:

> "Where such contract is made, in disregard of the provisions of that section, a mandamus will not be awarded to compel the auditor of the county to draw a warrant on the treasurer for the payment of the sum allowed by the commissioners as the amount due on the contract."

This same question was also answered in Printing Co. v. State, 68 O. S. 362.

Upon this question I desire also to cite an interesting case, found in 114 Fed. Rep. 745, styled Lee v. County Com'rs. In this case the county commissioners entered into a contract with the Canton Bridge Company, for the furnishing of materials for bridges, and failed to comply with the provisions of the statutes in reference to the making of said contract. In this case the bridges were furnished, the bills for the same were allowed by the county commissioners, and the county auditor ordered to issue his warrant in payment for the same.

The county auditor issued his warrant and the county treasurer practically accepted the warrant by endorsing thereon: "Not paid for want of funds." At this juncture, the county officials were enjoined, the court holding that they had no authority to pay out the money, because the whole matter rested on an illegal contract. This was conceded by the court and by the counsel in this said case.

As said before, there are a few cases which at first sight do not seem to be in harmony with the foregoing conclusion. One of these cases is Emmert v. City of Elyria, 74 O. S. 185. In the opinion rendered in this case, on p. 194, we find the following language:

> "But, because a municipality is not legally liable to pay for a public improvement, it does not follow that it is not under a moral obligation to do so or that a court because it will not enforce payment will enjoin it. The contract for paving this street is not *ultra vires*. If invalid it is so merely because the contract was made before the bonds to provide the money to pay for it were sold. Now that the work has been done in accordance with the contract and the bonds have been sold and the money to pay for it is in the treasury, it is right that it should be paid for and a court of equity ought not, unless its failure to do so would defeat the purpose of the law, prevent the municipality from doing what equity and fair dealing would exact from an individual."

But it must be remembered that this case was dealing with the question as to whether public officials could be enjoined from paying money due under a contract, when the provisions of our statutes have not been complied with in entering into the contract, and not with the question as to whether the party who entered into the contract with the county commissioners could recover in a suit against the county. But the decision in this case finds no fault with the general proposition of law above laid down, as will be seen in the following language used by the court on p. 194:

> "Applying these provisions, it has been held that in a suit on a contract against a municipality an averment of an observance of them is essential to the statement of a cause of action, that in the absence of the strict observance of them no liability is incurred by the municipality, that an implied liability on the municipality cannot be created by its receiving or retaining the benefit of performance of such a contract by the other party and that it is not estopped by the acts of its agents or officers, for the reason that these provisions are intended for the protection of the citizen, and that persons dealing with its officers are presumed to know the extent of their authority."

Another case which might seem to be at variance with the conclusion arrived at in answering your question, is found in 77 O. S. 7, styled State ex rel. v. Fronizer et al. The facts in this case were entirely different from the facts set out in the case under consideration, in that the court was passing upon the question as to whether the county could recover money which had been paid out under a contract illegally entered into on the part of the county commissioners. The court was not passing upon the question as to whether a recovery could be had against the county under a contract illegally entered into on the part of the county commissioners. So that the holding in this case would not control nor even modify the holding in the case under consideration.

There is also an opinion rendered by Hon. Timothy S. Hogan, one of my predecessors, found in Vol. I, p. 808 of Annual Report of the Attorney-General for 1914, that might at first sight seem to be at variance with the question under consideration. But the question upon which Mr. Hogan passed was as to whether the county commissioners might pay for certain printed matter which they had purchased under a contract, in which the provisions of the statutes were not complied with; not whether they could be compelled to pay, but whether they would be allowed to pay. Mr. Hogan held that while the contract was void, yet the county commissioners, if they desired to do so, could pay what would be a reasonable amount for said printed matter. So that the facts in the case passed upon by him were different from the facts in the case under consideration, and to say the very least, Mr. Hogan went the limit in arriving at the conclusion which he reached in said matter.

I desire to say that I noted the suggestions made by you in your communication and gave the same the consideration to which they were entitled.

So that in view of all the above, answering your question specifically, I am of the opinion that your county auditor cannot be compelled to issue his warrants in payment for the amount claimed due for material furnished your county under said contracts; neither could those persons furnishing said material recover from the county the value of the material so furnished.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

320.

COUNTY BOARD OF REVISION—POWER TO HEAR COMPLAINTS AGAINST AND REVISE VALUE OF REAL PROPERTY—COUNTY AUDITOR—POWER TO REVALUE AND ASSESS REAL ESTATE.

If the county auditor and the county commissioners, proceeding under the provisions of section 5548 *General Code, as amended Senate Bill* 177, *find that the real property in any tax assessment district is assessed for taxation at its true value in money as the same now appears on the tax duplicate, and as a consequence of such findings the* 1916 *valuation of such real property is entered upon the tax list for the year* 1917, *the county board of revision provided for in said act has no power under the provisions of section* 5605 *of the General Code, as in said act amended, to revise the values of such real property.*

Neither has such county board of revision any power under sections 5597 *and* 5609 *General Code to hear complaints filed against real property valuations in such tax assessment district.*

Section 5548-1, *as amended in Senate Bill* 177, *authorizing the county auditor to revalue and assess any part of the real estate contained in a tax assessment district or subdivision which has been assessed by him in the manner provided for by section* 5548 *General Code, has no application to real property in a tax assessment district or subdivision which by action of the county auditor and the county commissioners under the first part of said section* 5548 *has been carried into the* 1917 *tax list at the* 1916 *valuations.*

COLUMBUS, OHIO, May 31, 1917.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I have the honor to acknowledge receipt of your favor of March 31, 1917, in which you ask for my opinion as follows:

"If the county auditor and the county commissioners, proceeding under the provisions of section 5548 G. C., find that the real property in any township, village, ward or assessment district is assessed for taxation at its true value in money as the same now appears on the tax duplicate, and as a consequence of such finding the 1916 valuation of real estate is entered upon the tax list and duplicate for the year 1917, has the board of revision any power under the provisions of section 5605 of the General Code to revise the values of such real property and may complaints be filed against such valuations under the provisions of section 5609 G. C. and be heard by the board under the provisions of section 5597 G. C.?

"Is the determination by the county auditor and county commissioners such an assessment as will authorize the county auditor under the provisions of section 5548-1 to thereafter at any time revalue and assess any part of the real estate contained in such subdivision where he finds that the same has changed in value or is not on the duplicate at its true value in money upon notice to the owner of such real estate?"

The first question in your communication is whether or not the board of revision provided for in Senate Bill No. 177 has any power under the provisions of section 5605 General Code to revise the values of real property in a tax assessment district or subdivision, the real property valuations of which are carried into the 1917 tax duplicate by the action of the county auditor and the board of county commissioners at the 1916 valuation. This question calls for a consideration of sections 5548, 5580, 5598 and 5605 General Code, which sections, so far as material to the question at hand, provide as follows:

"Sec. 5548. Each county is made the unit for assessing real estate for taxation purposes. The county auditor in addition to his other duties, shall be the assessor for all the real estate in his county for purposes of taxation, provided that nothing herein shall affect the power conferred upon the tax commission of Ohio in the matter of the valuation and assessment of the property of any public utility. Upon the taking effect of this act, on or before the second Monday in April, 1917, and annually thereafter between the first day of January and the first day of February, the county auditor shall ascertain whether the real property in each township, village, ward, or assessment district, as provided in section 3349 of the General Code, is assessed for taxation at its true value in money, as the same then appears on the tax duplicate. If he finds that it is assessed at its true value in money, in any such township, village, ward, or assessment district, he shall, subject to the provisions hereinafter made, enter such valuation upon the tax list and duplicate for the current year. In such event, and unless he finds that such property is not assessed at its true value in money, in each such subdivision, such assessments shall constitute the valuation for taxation for the current year, subject to the provisions hereinafter made. Said county auditor shall submit his findings concerning the valuation of such real estate to the board of county commissioners of his county, and said board shall, at a hearing fixed within not less than ten nor more than twenty days thereafter, confirm, modify, or set aside the same by order entered on the journal of said board. Notice of such hearing shall be given by publication in a newspaper of general circulation in the county. If by such order it is determined that the real

estate in any such subdivision is not on the duplicate at its true value in money, then such county auditor shall proceed to assess such real estate in such subdivision or subdivisions. Such assessment shall also be made by him in any such subdivision upon the filing of a petition therefor with the county auditor signed by not less than twenty-five freeholders in such subdivision, or by the board of trustees in any such township, or by the council of any such village. Such petition may be filed at any time after January first of any year, but not later than the fourth Monday in April, 1917, and the first Monday in March annually thereafter. * * *"

"Sec. 5580. The county treasurer, county auditor and the president of the board of county commissioners of each county shall constitute a county board of revision."

"Sec. 5598. The county board of revision shall have power to investigate all assessments on the tax list, with respect to the amount of property listed as well as with respect to the valuation at which the same is listed, *in which real or personal property has been assessed or listed for taxation for the current year*, but not assessments, additions or corrections hereafter made by the tax commission of Ohio."

"Sec. 5605. * * * On the first Monday of July, annually, the county auditor shall lay before the county board of revision the returns of *his assessment of any real property for the current year*, and such board shall forthwith proceed to revise the assessment and returns of such real property. If the board finds that any tract, lot or parcel of land or any buildings, structures or improvements thereon, or any minerals therein, or rights thereto have been improperly listed, either in the name of the owner, the description or quantity thereof, or have been incorrectly valued, or have been omitted and not yet valued, it shall make the necessary corrections and shall give to each such tract, lot or parcel of land, or any buildings, structures or improvements thereon or any minerals therein or rights thereto, incorrectly valued or omitted, the true value in money thereof. The county auditor shall not make up his tax list and duplicate, nor advertise as provided in section 5606 of the General Code, until the board of revision has completed its work under this section and has returned to the auditor all the statements and returns laid before it with the revisions and corrections thereof, as made by it."

Without attempting any extensive analysis of the provisions of section 5548 General Code, it is sufficient for the purpose of this opinion to note that this section authorizes the county auditor, with the approval of the board of county commissioners, to carry real property in any tax assessment district or subdivision into the new or current duplicate at the existing duplicate valuation, if he finds such real property to be there assessed at its true valuation in money; and an "assessment" by the county auditor of real property within any such tax assessment district or subdivision is authorized only when required by the order of the board of county commissioners made on a consideration of the findings of the county auditor, or when such assessment is petitioned for by not less than twenty-five freeholders in such tax assessment district or subdivision.

It is clear from the provisions of section 5548 General Code that the "assessment" by the county auditor therein provided for as to real property within a tax assessment district or subdivision does not mean the action taken by the county auditor with the approval of the board of county commissioners carry-

ing real property in such tax assessment district or subdivision into the new or current duplicate at the old duplicate valuation, but that the term has reference only to the actual assessment made of such real property by the county auditor on the order of the board of county commissioners finding that such real property is not assessed at its true value in money or on the petition of twenty-five or more freeholders of such tax assessment district or subdivision.

It is an established rule of statutory construction that where the same word or phrase is used more than once in the same act in relation to the same subject matter and looking to the same general purpose, if in one connection its meaning is clear and in another it is doubtful or obscure, it is in the latter case to receive the same construction as in the former, unless there is something in connection with which it is employed plainly calling for a different construction.

Rhodes v. Weldy, 46 O. S., 234.

Applying this rule of construction to the further provisions of section 5605 General Code, above quoted, the term "assessment" as therein employed is to be given the same meaning that the term carries in section 5548, and this being so, the conclusion is compelled, in answer to your first question, that inasmuch as under section 5605 General Code, in so far as real property is concerned, there is laid before the county board of revision for action only the county auditor's returns of his "assessment" of real property for the current year, said county board of revision has no power to revise the valuation of real property in a tax assessment district or subdivision which is carried into the 1917 duplicate at the 1916 valuation by the action of the county auditor and the board of county commissioners under the first part of section 5548.

In this connection it will be observed, however, that under the general power given to the county board of revision by section 5598 to *investigate* all assessments on the tax list, with respect to the amount of property listed, as well as with respect to the valuation at which the same is listed, in which real or personal property has been assessed or *listed* for taxation for the current year, as well as under the more specific authority given to the county board of revision by the provisions of section 5604, such county board of revision may *investigate* all real (and personal) property on the tax list, and if it finds that the same has escaped taxation or has been listed at less than its true value in money, it shall report to the county auditor all facts and information in its possession relating to such case; whereupon the county auditor shall make such inquiries and corrections as he is authorized and required by law to make in other cases in which real (and personal) property has escaped taxation, or has been improperly listed or valued for taxation.

Your second question is whether or not under such circumstances complaint may be filed against the valuation of real property in a tax assessment district or subdivision carried into the 1917 duplicate at the 1916 valuation under the provisions of the first part of section 5548 G. C. This section requires the further consideration of the provisions of sections 2583, 5597 and 5609 General Code, as amended in Senate Bill 177. Section 2583 General Code provides, in part, as follows:

> "On or before the first Monday of August annually, the county auditor shall compile and make up, in tabular form and alphabetical order, separate lists of the names of the several persons, companies, firms, partnerships, associations and corporations in whose names real or personal property has been listed in each township, city, village, special district, or separate school district in his county, placing sep-

arately, in appropriate columns opposite each name, the description of each tract, lot or parcel of real estate, the value of each tract, lot or parcel and the value of the improvements thereon, if any, and in a separate list the aggregate value of the personal property as listed therein and revised by him, or the county board of revision, as the case may be, and the number of dogs, and the value, if given by the owner. If the name of the owner of any tract, lot or parcel of real estate or of any item of personal property is unknown, the word 'unknown' shall be entered in the column of names opposite said tract, lot, parcel or item. Such lists shall be prepared in duplicate. * * *"

Said section further provides as follows:

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

Section 5597 General Code reads:

"It shall be the duty of the board of revision to hear complaints relating to the assessment made during the current year of both real and personal property laid before it by the county auditor and it shall investigate all such complaints and may increase or decrease any such valuation or correct any assessment complained of, or it may order a reassessment by the original assessing officer. Such board of revision shall also hear and determine complaints pending from the preceding year."

Section 5609 General Code provides as follows:

"*Complaint against any valuation or assessment made within a current year*, may be filed on or before the time limited for payment of taxes for the first half year. Any taxpayer may file such complaint as to the valuation or assessment of his own or another's property, and the county commissioners, the prosecuting attorney, county treasurer, or any board of township trustees, any board of education, mayor or council of any municipal corporation, in the county shall have the right to file such complaint. The county auditor shall lay before the county board of revision all complaints filed with him. The determination of any such complaint shall relate back to the date of such valuation or assessment, and liability for taxes, and for any penalty for non-payment thereof within the time required by law, shall be based upon the valuation or assessment as finally determined. Each complaint shall state the amount of overvaluation, or undervaluation, or illegal valuation, complained of; and the treasurer may accept any amount tendered as taxes upon property concerning which a complaint is then pending, and if such tender is not accepted no penalty shall be assessed because

of the non-payment thereof. The acceptance of such tender, however, shall be without prejudice to the claim for taxes upon the balance of the valuation or assessment. A like tender may be made, with like effect, in case of the pendency of any proceeding in court based upon an alleged excessive or illegal valuation."

Reading the provisions of sections 5597 and 5609 together, I am inclined to the view that the conjunction "or" between the words "valuation" and "assessment," in the first line of section 5609, is to be considered as having an equivalent rather than a disjunctive sense, and that the word "valuation" as used in section 5609 means "assessment." This being true, the considerations leading to the answer given above to your first question likewise lead to the conclusion that the board of revision has authority to hear and determine complaints as to assessments actually made in the current year, and that it has no power to hear complaints as to valuations of real property in a particular tax assessment district or subdivision which the county auditor and the board of county commissioners have carried into the 1917 tax list at the 1916 valuation.

Your third question is with reference to the power of the county auditor to revalue real property under the provisions of section 5548-1 General Code, as amended in Senate Bill 177.

From an examination of the provisions of this section it would appear that the duty of the county auditor to revalue real estate under the provisions of this section is limited to subdivisions in which real estate has been assessed by the county auditor under section 5548 General Code; and inasmuch as has been before observed, the only assessment made by the county auditor under section 5548 is that made by him in particular taxing districts or subdivisions on order of the board of county commissioners or on petition of the freeholders therein, it follows that the duty of the county auditor with reference to the matter of revaluation under section 5548-1 extends only to real estate which has been so assessed by him under the provisions of section 5548 General Code, whether such assessment is made on an order of the county commissioners finding such real property of such tax assessment district or subdivision not to be taxed at its true value in money, or is made by the county auditor on the petition of twenty-five freeholders of such tax assessment district or subdivision; and that the duty of the county auditor prescribed by section 5548-1 General Code does not extend to real property in any such tax assessment district or subdivision which has been carried into the new tax list at the old duplicate valuation.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

321.

MEMBERS OF BOARD OF REGISTRATION MUST SERVE—PRESIDENT OR GOVERNOR MAY ACCEPT RESIGNATION OF MEMBER—ARE NOT OFFICERS IN STRICT SENSE—MAY MAINTAIN AT SAME TIME MEMBERSHIP IN GENERAL ASSEMBLY.

1. *Persons selected by the governor to serve as members of boards of registration must, under the penalties of the law, perform the duties which devolve upon them by virtue of said appointment, but the president or governor may remove them or might accept their resignations when the best interests of the nation demand it.*

2. *Members of the boards of registration are not officers in the strict sense of that term, and therefore persons may hold positions on boards of registration and at the same time maintain their membership in the general assembly.*

COLUMBUS, OHIO, June 2, 1917.

HON. JAMES M. COX, *Governor of Ohio, Columbus, Ohio.*

DEAR SIR:—I have your oral request asking me to render an opinion upon two separate and distinct questions which are as follows:

> "1. Is a person, appointed by the governor as a member of a registration board, under obligation to serve as such member, or may he resign and another be appointed in his place?
>
> "2. Is there any provision of law or of the constitution, by virtue of which it would be illegal for a member of the general assembly to act as a member of a registration board and at the same time hold his office as a member of the general assembly?"

1. To answer this question it will be necessary for us to note the provisions of:

> "An act to authorize the president to increase temporarily the military establishment of the United States."

Section 6 of said act reads in part as follows:

> "That the president is hereby authorized to utilize the service of any or all departments and any or all officers or agents of the United States and of the several states, territories, and the District of Columbia, and subdivisions thereof, in the execution of this act, and all officers and agents of the United States and of the several states, territories, and subdivisions thereof, and of the District of Columbia, and *all persons designated or appointed* under regulations prescribed by the president, whether such appointments are made by the president himself or by the governor or other officer of any state or territory to perform any duty in the execution of this act, are *hereby required to perform such duty* as the president shall order or direct, * * *. Any person charged as herein provided with the duty of carrying into effect any of the provisions of this act or the regulations made or directions given thereunder who shall fail or neglect to perform such duty * * *, or who, in any manner, shall fail or neglect to perform any duty required of him in the execution of this act, shall, if not subject to mili-

tary law, be guilty of a misdemeanor, and upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than one year, or, if subject to military law, shall be tried by court-martial and suffer such punishment as a court-martial may direct."

Having noted the provisions of the act of congress, let us turn to the registration regulations issued with the approval of the president of the United States and under and by the authority of the act of congress, and ascertain what their provisions are in reference to the matter under consideration. The provisions therein are found on pages 5 and 6 of said registration regulations. They read as follows:

"The execution of the law in each county or similar subdivision shall, in respect of registration, be intrusted to a board of registration consisting of at least three members to be named by the governor and composed of local authorities or other citizens residing in such county or other subdivision. * * *

"The president or governor may remove any person from registration boards while such boards are acting as registration boards and may substitute another in his place whenever it is found that the interests of the nation demand it. After such registration boards are appointed as the local boards to execute the selective draft, the governor or mayor should recommend such removal to the president when such removal is deemed to be in the public interest."

When we consider the provisions of the act of congress itself and the provisions of the registration regulations issued by the president and under and by authority of said act, we readily see that there is no provision whatever made whereby a person appointed to a registration board may resign and thus be relieved from the performance of his duties under the act and under the said registration regulations.

On the other hand, section 6 of said act specifically provides that any person who fails to perform the duties required of him under and by virtue of the provisions of said act shall, upon conviction in the district courts of the United States, be imprisoned for a period not to exceed one year.

The duties of these boards of registration seem to partake somewhat of the nature of military duties, and something of the strictness of military rules and regulations seems to be thrown about the men selected for the various duties. When a man is called to serve his country under the said act, as a member of the board of registration, he is compelled to perform his duties just as an enlisted soldier would be. Of course the president or governor may remove any person from registration boards and substitute another in his place, or either would have power to accept a resignation whenever it is found that the interests of the nation demand it. Provision is made for this in the registration regulations approved by the president.

2. In answering this question it will be necessary for us to note the provisions of our statutes in reference to this matter and also the provisions of the constitution relative to the same.

Section 15 G. C. reads as follows:

"No member of either house of the general assembly except in compliance with the provisions of this act shall:

"1. Be appointed as trustee or manager of a benevolent, educational,

penal or reformatory institution of the state, supported in whole or in part by funds from the state treasury;

"2. Serve on any committee or commission authorized or created by the general assembly, which provides other compensation than actual and necessary expenses;

"3. Accept any appointment, employment or office from any committee or commission authorized or created by the general assembly, or from any executive, or administrative branch or department of the state, which provides other compensations than actual and necessary expenses.

* * * *."

This section contains the only provisions of the statutes in reference to the matter under consideration and it is readily seen that they do not apply to positions such as that under consideration.

The constitutional provision which has to do with this matter is found in section 4 of article II of the constitution, which section reads as follows:

> "No person holding office under the authority of the United States, or any lucrative office under the authority of this state, shall be eligible to, or have a seat in, the general assembly; but this provision shall not extend to township officers, justices of the peace, notaries public, or officers of the militia."

The question that arises under this constitutional provision is as to whether a member of the board of registration holds a lucrative office under the authority of this state, or holds an office under the authority of the United States. It is quite clear that he does not hold a lucrative office under the authority of the state, as he is not acting under and by virtue of any authority which he gets from state laws.

The question which then remains is as to whether a member of the board of registration would be holding an office under the authority of the United States. This makes it necessary for us to ascertain what the meaning of "office" is as interpreted by the courts.

In State ex rel. v. Brennan, 49 O. S. 33, the court, in discussing the question as to the meaning of the term "office," used the following language in the opinion on page 38:

> "It is not important to define with exactness all the characteristics of a public office, but it is safely within bounds to say that where, by virtue of law, a person is clothed, not as an incidental or transient authority, but for such time as denotes duration and continuance, with independent power to control the property of the public, or with public functions to be exercised in the supposed interest of the people, the service to be compensated by a stated yearly salary, and the occupant having a designation or title, the position so created is a public office. And where such duties are wholly performed within the limits of a county, and for the people of that county, the salary to be paid by the disbursing officer of the county, from the funds of the county, the office is a county office, and, as one who is lawfully invested with an office is an officer, the person lawfully filling such place is necessarily a county officer."

In State v. Kendle, 52 O. S. 346, the court was also discussing the question as to the meaning of the term "office," and in the opinion on p. 356 uses the following language:

> "The power of the legislature to provide for the appointment of persons to act as assistants in an office filled by election has not, and cannot

well be questioned. It is on this principle that the appointment of deputy clerks, deputy sheriffs, and so forth, are made and recognized, each of whom perform many, and in some cases all, the duties of the office in which he acts as deputy. So as to these jury commissioners: They are appointed by the common pleas judges to assist in the administration of justice, as are master commissioners and court constables. They are but handmaids of the court in the selection of judicious and discreet persons to serve on such juries as are required in the trial of causes, and the presentment of indictments."

State ex rel. Allen v. Mason, etc., 61 O. S. 62, is a case somewhat similar to the one under consideration. In this case a member of the general assembly had been appointed as a clerk in the United States pension office at Columbus, Ohio, for a period not to exceed three months, and it was contended that in view of this appointment he was not eligible to membership in the general assembly, because of the provisions of section 4, article II of the Ohio constitution. But the court held this contention was not well taken and that the position of clerk in the United States pension office is not an office in the true sense of that term.

In the opinion on p. 72 the court says:

"Since the relator performs no duties except such as by law are charged upon his superior, the pension agent, his position is not an office but merely an employment."

In the syllabus the court lays down the following principle of law:

"A clerk in the United States pension agency, serving by appointment for a period not exceeding three months, and compensated with money of the United States appropriated for that purpose by congress, having no duties defined by law nor discretion to act independently of the direction of the pension agent, is not 'holding an office under the authority of the United States' within the meaning of section 4 of article 2 of the constitution of the state which renders persons so holding office ineligible to membership in the general assembly."

In Commissioners of Wood County et al. v. Robt. Pargillis, 10 C. C. 376, the court, in the opinion p. 392, was discussing the matter of public officers, the particular matter under consideration being as to whether the members of a public building committee, appointed to act with the county commissioners, would be considered as officers. In discussing this question the court says:

"While they exercise powers that are exercised by public officers, they do not have that continuity of office which it seems to us is necessary to constitute and make them public officers. They are appointed for a definite purpose and when that purpose is carried out and that duty performed, their rights and duties terminate. * * * They are not a body which is required to continue in office with succession; to hold their offices until their successors are elected and qualified, or to continue on from time to time for the purpose of carrying out the general governmental duties of the county, and a majority of the court think they do not come within the class enumerated in section 1, of article 10 of the constitution."

The courts of other states do not seem to be uniform in their holding as to what constitutes an office or an officer, but the courts of our own state, as illus-

trated in the cases above cited, are fairly uniform upon the question as to what constitutes an office or an officer.

Possibly Commissioners v. Pargillis, supra, sums up as nearly as any other case the things which go to make up an office or officer. This case was affirmed without report in 53 O. S. 680. So that we can consider this case to be the judgment of the highest court in the state. In this case the court had under consideration the persons holding positions very similar to the positions we have under consideration. In said cause the appointees exercised the same duties in respect to the purpose of their appointment as did the county commissioners with whom they acted; that is, they exercised some of the sovereign powers of the state. But they had no continuity of office. They were appointed merely for a definite and specific purpose. When that purpose was carried out, their rights and duties terminated. They were not a body which was required to continue in office with succession. There was no provision that they should serve until their successors were appointed and qualified. These were propositions with which the court dealt in rendering its opinion, and all these propositions apply to the positions under consideration, just as they did to the positions considered by the court.

Further, the act, by virtue of which the board of registration is appointed, was enacted to take care of an emergency. This fact is shown in the title and throughout the entire act itself. As soon as the emergency ends, the provisions of the act will no longer be needed, nor will the persons appointed to positions thereunder longer hold their office. So that I feel that they are holding their positions merely for some definite and specific purpose, and when this purpose is fulfilled their duties are at an end. Therefore, under the decisions of the courts of our state, they could not be considered as officers in the strict sense of the term.

It might be well for us to note what powers and duties are placed upon the boards of registration by the act of congress itself.

When we examine section 4 of the act above mentioned, we note that the members of the boards of registration have some duties prescribed in the act and exercise a part of the sovereign powers of the government. They have

> "jurisdiction to hear and determine, subject to review as hereinafter provided, all questions of exemption under this act, and all questions of or claims for including or discharging individuals or classes of individuals from the selective draft."

While these members do exercise certain functions provided for in the act itself, yet, under the principles set forth in the Ohio cases above cited, I do not believe the members of the boards of registrations would be held by the courts of our state to be officers, and therefore they would not come within the provisions of section 4 of article II of the constitution of Ohio.

As said before, however, in other states there is a great variety of opinion in reference to what the word "office" or "officer" really should include. For this reason it might be well, if you should think best, to accept the resignations of any members of the general assembly who have been appointed members of the boards of registration, and appoint other persons to fill their places. However, as I said above, I am of the opinion that members of the boards of registration are not strictly within the term "officers," and that a person could hold a position on a board of registration and at the same time be a member of the general assembly.

Very truly yours,

JOSEPH MCGHEE,
Attorney-General.

322.

COUNTY COMMISSIONERS—POWER TO BORROW MONEY TO DEFRAY EXPENSE OF CHILDREN'S HOME.

There is no provision of law by virtue of which county commissioners may borrow money to defray bills already incurred in the running of a children's home and to pay contingent expenses thereafter to be incurred.

COLUMBUS, OHIO, May 31, 1917.

HON. G. B. FINDLEY, *Prosecuting Attorney, Elyria, Ohio.*

DEAR SIR:—I have your communication of May 15, 1917, in which you ask my opinion in reference to a certain matter therein set out. Your communication reads as follows:

> "The board of commissioners of Lorain county find that the money available for the support and maintenance of the county children's home has been exhausted. A small overdraft exists and numerous additional bills have been contracted. The county commissioners desire to have your opinion upon their legal authority to borrow money for the operation of the home. They desire to make some temporary provision until the next levy is available."

In answer to your communication I will say that I have noted the difficulty in which your county commissioners find themselves placed and therefore have given careful consideration to the matter therein set out in order, if possible, to arrive at some conclusion which will enable them to get relief.

In the first place, I would like to suggest that I do not understand just how your county commissioners have gotten themselves into the difficulty suggested by you, this in view of the provisions of section 5660 G. C., which provides, among other things, that:

> "The commissioners of a county * * * shall not enter into any contract, agreement or obligation involving the expenditure of money, or pass any resolution or order for the appropriation or expenditure of money, unless the auditor * * * first certifies that the money required for the payment of such obligation or appropriation is in the treasury to the credit of the fund from which it is to be drawn, or has been levied and placed on the duplicate and in process of collection and not appropriated for any other purpose; * * *"

The only exceptions to be found to the provisions of this section are those set forth in section 5661, and none of the exceptions set out in said section cover the expenditure of money by your county commissioners in the way of running and maintaining your children's home. So I say, in view of the provisions of said section 5660, I do not understand how your county commissioners have made an overdraft upon the fund to be used for the county children's home and in addition to this overdraft have numerous additional bills contracted for and outstanding.

But however this may be, the fact remains that your county commissioners are in a difficult situation on account of the fact that said fund has been overdrawn and that numerous additional bills have been contracted and are outstanding. Let us note the provisions of the statutes in reference to the matter

of borrowing money by the county commissioners for the purposes indicated by you in your communication.

Section 3078 G. C., which forms a part of the chapter having to do with the matters in reference to children's homes, provides that the county commissioners shall provide for the support of children's homes by means of taxation. Section 3079 G. C. provides that in anticipation of the collection of taxes levied or to be levied, *for the purchase of a site and erection of a building*, the commissioners may issue notes or bonds of the county. But there is no provision in these two sections for issuing notes or bonds of the county in anticipation of the collection of taxes to pay for the support of the children's home, neither is there any other provision made for borrowing money in the chapter having to do with the matter of children's homes. We must, therefore, look elsewhere for relief, if there is relief to be had.

Section 5656 G. C. provides:

> "* * * The commissioners of a county, for the purpose of extending the time of payment of any indebtedness, which from its limits of taxation such * * * county is unable to pay at maturity, may borrow money or issue the bonds thereof, so as to change, but not increase the indebtedness in the amounts. * * *"

My predecessor, Hon. Edward C. Turner, under date of April 17, 1915, in an opinion found on page 477 of the Opinions of the Attorney-General for 1915, volume 1, held, in placing a construction upon this section, that none of the boards mentioned in said section could use the provisions thereof to fund indebtedness consisting of unpaid bills for contingent expenses. I believe Mr. Turner was correct in his opinion so rendered and therefore concur in the same. Therefore, your county commissioners can get no relief under the provisions of this section.

I have looked over the situation very carefully and am of the opinion that there is no provision made whereby your county commissioners can borrow money to meet the expenses so incurred, neither are there any provisions made whereby they may fund this indebtedness for any length of time, so we must look in another direction for relief.

As stated before, section 3079 G. C. provides that the county commissioners shall levy a tax to provide for the support of the children's home and they are supposed to levy a tax sufficient to take care of the expenses of the home year after year. As there is a levy made for the support of the home, there is a fund created which must be used for this purpose alone. This suggests the only remedy that might assist you in the circumstances suggested in your communication. That remedy is to be found in section 2296 G. C., with which you are no doubt familiar.

Taking the provisions of section 2296 and the provisions of section 2300 together, you may have a remedy, that is, providing all the different funds of your county are not in a depleted condition. Your common pleas court could make an order transferring to the fund for the children's home certain moneys out of some other fund or funds and make an order under the provisions of section 2300 G. C. that the funds out of which the money is to be taken should be reimbursed from moneys that shall hereafter be realized from taxation for children's home fund.

I feel certain that I am making a suggestion herein with which you are already familiar, but it is, in my opinion, the only method that your county commissioners can adopt to relieve the situation under which they find themselves placed.

I might make suggestions as to matters which possibly would assist in

the future, such as the exercising of care in receiving children into the children's home, and collecting, from those persons who are financially able and who are charged with the support of children in the home, a fair price for said keeping, etc. But your question has not to do with the future, but with matters which are past.

Hence, answering your question specifically, it is my opinion that there is no provision of law which would authorize a board of county commissioners to borrow money in order to pay debts already incurred in the running of a children's home and to pay contingent expenses in the future, but they might get relief under the provisions of sections 2296 et seq. G. C., provided the condition of the other funds of the county is such as would warrant such a proceeding.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

323.

SCHOOL DISTRICT—WHEN TRANSFERRED TO ADJOINING DISTRICT —PROPERTY AND INDEBTEDNESS PASS TO NEW DISTRICT—LEVY TO PROVIDE FOR INDEBTEDNESS SHOULD BE MADE ON ALL PROPERTY OF NEW DISTRICT.

1. *When an entire school district is transferred to an adjoining school district, the bonded indebtedness of the district transferred becomes the debt of the whole district as it exists after the transfer is made.*

2. *The board of education of the district as it exists after the transfer is made must provide for all indebtedness by making the levy upon all the property in the district as it exists after the transfer is made.*

3. *Should the district transferred be the owner and holder of any property at the time the transfer is made, the property so held shall pass to the district as it exists after the transfer is made.*

COLUMBUS, OHIO, May 31, 1917.

HON. S. L. GREGORY, *Prosecuting Attorney, Wilmington, Ohio.*

DEAR SIR:—Your letter of May 16, 1917, was received, in which you ask for certain information. Your communication reads as follows:

> "1. When the whole of a school district has been transferred to an adjoining school district by a county school board pursuant to section 4692 G. C., and there is a bonded indebtedness outstanding against the district so transferred, should the district so transferred pay the whole of such indebtedness?
>
> "2. If so, should the county school board take such action as is necessary (or any action) to charge the same against the property of the district so transferred?
>
> "3. If not, should the county school board take such action as is necessary (or any action) to charge such indebtedness against the district as enlarged?

"4. Should there be outstanding bonded indebtedness against such adjoining school district and a small amount of money in the treasury of both, should the county school board make a division of such indebtedness and cash money as provided in said section 4692?"

In the first place, in answering your communication, I desire to call your attention to an opinion rendered by me on March 27, 1917 (No. 146), a copy of which I am enclosing with this opinion. Said opinion rendered on March 27, 1917, disposes of a part of the matter suggested in your communication and it will be well, therefore, for us in the first instance to look to said opinion in order to ascertain to what extent it answers your communication of 16th instant. Said opinion held:

1. That the debt of a school district, transferred to another school district, becomes the debt of the district enlarged and is a charge upon all the property therein located after the transfer is made:

2. That the provision in section 4692 G. C., that:

"The county board of education is authorized to make an equitable division of the school funds of the transferred territory either in the treasury or in the course of collection. And also an equitable division of the indebtedness of the transferred territory."

does not apply to cases in which the territory of an entire district is transferred to another district, but only to those cases in which a part of the territory of one district is transferred to another district, but the corporate entity of the two districts is maintained.

3. That the property of the district transferred to another district passes to the district as it is enlarged. This would apply to the money in the treasury of the district transferred, as well as to any other property which might be owned by the district transferred.

With these principles, already established, in mind, let us proceed with the further discussion of the matters suggested in your communication. About the only question that remains unanswered is as to what action, if any, the county school board shall take in reference to the indebtedness of the district transferred to another district. It is my opinion that the county board of education takes no action whatever in reference to this matter, but that the board of education of the district to which the other district is transferred, which board becomes the board of education of the district as enlarged, must take the necessary action to provide for the bonded indebtedness of the district as enlarged. This would include the bonded indebtedness of the district transferred, as well as the bonded indebtedness, if any, of the district as it existed before the transfer was made.

With a view of deciding as to what steps the said board of education must take in reference to said bonded indebtedness, let us note the provisions of section 5649-1 G. C., which reads as follows:

"In any taxing district, the taxing authority shall, within the limitations now prescribed by law, levy a tax sufficient to provide for sinking fund and interest purposes for all bonds issued by any political subdivision, which tax shall be placed before and in preference to all other items, and for the full amount thereof."

The levy provided for in said section would be made by the board of education upon the property of the entire district as it exists after the transfer is

made and the provision for the sinking fund and interest, which must be provided for according to the provisions of said section, would be such as would provide a sinking fund to take care of the bonded indebtedness of the whole district, together with interest; that is, the district as it exists after the transfer is made.

With the provisions of this section in mind, let us note those of section 5649-3a G. C. This section reads in part as follows:

> "On or before the first Monday in June, each year, the county commissioners of each county, the council of each municipal corporation, the trustees of each township, each board of education and all other boards or officers authorized by law to levy taxes within the county, except taxes for state purposes, shall submit or cause to be submitted to the county auditor an annual budget, setting forth in itemized form an estimate stating the amount of money needed for their wants for the incoming year, and for each month thereof. * * *"

From the provisions of this section as quoted, it will be seen that on or before the first Monday in June next, the board of education of the enlarged district should submit to the county auditor a budget setting forth in itemized form an estimate stating the amount of money that will be needed, among other things, for the creation of a sinking fund to take care of the bonds that will mature during the next year, together with interest that will be due upon said bonds.

I believe that the opinion rendered by me on March 27, 1917, copy of which I am herewith enclosing, together with this opinion, will answer the questions which you submit in your communication, which answers would be as follows:

1. When the whole of a school district has been transferred to an adjoining school district by a county board of education, pursuant to section 4692 G. C., the bonded indebtedness outstanding against the district so transferred becomes the indebtedness of the whole district as it exists after the transfer.

2 and 3. The county board of education takes no action whatever in reference to this indebtedness, but it is a matter which must be provided for by the board of education having jurisdiction over the district as it is formed after the transfer is made.

4. Any money or property belonging to the district transferred to another district becomes the property of the whole district as it exists after the transfer is made.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

324.

BOARD OF EDUCATION—RIGHT TO PAY TEACHER WHEN ON LEAVE OF ABSENCE BECAUSE OF SICKNESS, ETC.

A board of education has a right to make a rule granting teachers three days' absence on account of the death and burial of members of their immediate family, or one day for more remote relatives, without deduction of pay. The board can pay a substitute during such absence.

A board of education has a right to establish a rule granting teachers the difference between their salaries and that of substitutes for not to exceed forty days in any one school year when they are absent because of personal illness, and when such illness is certified to by a physician in good standing.

A board of education has a right to make a rule permitting teachers to visit other schools for two days a year without deduction of pay provided such visit is in the furtherance of the means of education and not for the personal benefit of the teacher and the board can pay a substitute to teach in the place of such teacher during such absence.

A board of education has a right to grant a teacher three half days to attend teachers' examination, the above being for the sole benefit of the teacher.

A board of education has no right to grant teachers permission to attend an educational convention or conference and cannot pay a substitute in his absence.

A board of education has the right to assign the superintendent, director or teacher to investigate and report upon methods of work, equipment and results obtained in other school systems.

Such assignment can be made with pay and actual traveling expenses and the board can pay a substitute during such absence.

COLUMBUS, OHIO, May 31, 1917.

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

GENTLEMEN:—My opinion is requested by you upon the following statement of facts:

"We would respectfully refer you to opinion of Attorney-General Edward C. Turner, No. 1200, under date of January 24, 1916, and in view of a communication received this day from the clerk of the board of education of the city of Cincinnati, Ohio, and a copy of a resolution as follows:

" 'In view of the fact that the opinion of the attorney-general, rendered on January 24, 1916, and the opinion of the city solicitor to the Union board on April 8, 1916, have limited the power of the board of education in granting leaves of absence without loss of pay to teachers for school visiting, attendance on educational conventions, and for professional study; and in view of the fact that the board of education and the city solicitor on April 24, 1916, joined in a request to the chairman, state bureau of accounting, Columbus, Ohio, for a full opinion covering the entire subject of the right of the board of education to grant such leaves of absence as are authorized by the rules of the board, which have been in force for many years and which are in accord with the general practice through the state; and since the board is seriously embarrassed in its administration by conforming to these opinions, while it is currently reported that the boards of education in other communities are not so acting; and since the opinion requested by the board and the city solicitor has not been rendered; now, therefore,

" 'BE IT RESOLVED, that the state bureau of accounting be earnestly requested to render the opinion asked for, and be it further

" 'RESOLVED, that the city solicitor be requested to join the board of education in asking for an early decision upon the points raised, and be it further

"'RESOLVED, that in the absence of such an opinion that the city solicitor be requested to examine the entire subject and to render an opinion upon the points raised, to the end that the board may, in so far as it can legally do so, grant such leaves of absence with pay, as shall enable the schools of this city to receive the benefit which comes from the attendance of teachers upon educational gatherings and from visiting the schools of other cities—all of which makes for the professional growth of the individual teacher and for the progress and development of the schools under their instruction.

"'(Signed) SAMUEL ACH.'

"Passed January 22, 1917.

"We are compelled to resubmit for your written opinion the following questions:

"1. Has the board the right, in accordance with regulation 1(a), to grant teachers three days' absence on account of the death and burial of members of their immediate family, or one day for more remote relatives, without deduction of pay? Can the board pay for substitutes during such absence?

"2. Has the board the right, in accordance with regulation 1(b), to grant teachers the difference between their salaries and that of substitutes for not to exceed 40 days in any one school year when they are absent for personal illness, when such illness is certified to by a physician in good standing?

"3. Has the board, in accordance with regulation 20, of its rules under which the board has acted for many years, the right to grant teachers permission to visit other schools for two days a year without deduction of pay? Can the board pay for substitutes during such absence?

"4. Has the board the right, in accordance with regulation 24, to grant teachers pay for three half days when they are absent on account of re-examination for teachers' certificates? Can the board pay for substitutes during such absence?

"5. Has the board the right to grant teachers permission to attend, without deduction of pay, a limited amount of educational conventions and conferences? Can the board pay for substitutes during such absence?

"6. Has the board the right to assign the superintendent, directors, or teachers to investigate and report upon methods of work, equipment and results obtained in other school systems and obtain such other information as is desired for the development or modification of the work and equipment of the schools under charge?

"7. Has the board the right to make such assignments with pay and with actual traveling expenses allowed? Can the board pay for substitutes employed to fill the vacancies during such absences?"

Your seven questions involve in a large measure the authority of a board of education to make rules for the teachers and employes under its control and I shall take it, for purposes of my answer thereto, that said rules were all promulgated, in force and within both the knowledge of the board and the employes prior to the time any contract of employment was entered into, and were, therefore, subject to any change which might be made therein, a part of the several contracts of employment.

General Code section 7690 provide:

"Each board of education shall have the management and control of all of the public schools of whatever name or character in the district. It may appoint a superintendent of the public schools, truant officers, and janitors and fix their salaries. If deemed essential for the best interests of the schools of the district, under proper rules and regulations, the board

may appoint a superintendent of buildings, and such other employes as it deems necessary, and fix their salaries. Each board shall fix the salaries of all teachers, which may be increased, but not diminished during the term for which the appointment is made. Teachers must be paid for all time lost when the schools in which they are employed are closed owing to an epidemic or other public calamity."

General Code section 4750 provides in part:

"The board of education shall make such rules and regulations as it deems necessary for * * * the government of its employes * * *."

Section 7620 provides in part:

"The board of education of a district may * * * make all other provisions necessary for the convenience and prosperity of the schools within the subdistricts."

So that the rules and regulations of the board must be those which fall within the provisions of one or more of the above quoted sections. That is to say, a board of education being a *quasi* corporate body, and having only limited authority, can do only those things which are conferred upon it by law and when they take action outside of the law and against the plain provisions of law, such actions are absolutely void. Keeping the above provision, then, in mind and also the provision that within its powers each board of education is allowed a proper discretion, the principle to be followed in the establishment of its rules and regulations can best be determined by a review of a few of the many decisions of our courts along this line.

In Board of Education v. State, 80 O. S. 133, mandamus was asked to compel the board of education to promote a pupil from one grade to another, the board having made a rule which would not permit such promotion. The court said, on page 150:

"It should be borne in mind, as an obvious and controlling fact, that the statute imposes the duty of the regulation and conduct of all public schools upon the boards of education and not upon the courts and interference by the courts in the discharge of those duties should not be lightly entered upon."

In Sewell v. Board of Education, 29 O. S. 89, the action was to recover damages from the board of education for the wrongfully excluding of plaintiff's son from the schools following the rules and regulations of the board of education in reference to the course to be followed in instruction in rhetoric. The court held that the board of education has the entire control and management of the common schools and may make and enforce all necessary rules and regulations for the government of teachers and pupils therein. The law does not direct how or in what manner the rules and regulations, which the board may adopt for the government of the schools under its care and management, shall be enforced, but leaves the whole subject of the making of such rules and their enforcement to the judgment and sound discretion of the board.

In State v. Board of Education, 76 O. S. 297, the board of education made certain rules and regulations to secure the vaccination of the pupils of the schools. A writ of mandamus was asked to compel the board to admit relator's children, who had not complied with such rule, to the public schools. The court held that whether a rule or regulation adopted by the board of education is a reasonable rule or regulation, is to be judged of, in the first instance, by the board of education, and the courts will not interfere unless it is clearly shown that there has been an abuse of discretion.

In Board of Education v. Minor, 23 O. S. 211, the board of education of the city of Cincinnati passed a resolution prohibiting the reading of a portion of the Bible as an opening exercise. The court held that the legislature having placed the management of the public schools under the control of the boards of education, the courts have no rightful authority to interfere by directing what instruction shall be given or what books shall be read therein.

In Board of Education v. Pulse, 7 N. P. page 58, the board of education passed a resolution prohibiting religious instruction and reading of religious books, including the bible, in the schools of the district. Injunction was asked restraining the board from enforcing said rule. The court held that the members of a board of education are charged with the performance of important public duties. They are bound, under the solemn obligations of an oath, "to perform faithfully the duties of the office." In selecting such officers the electors of the various school districts are presumed to exercise judgment and discretion and the members chosen are presumed to understand the local conditions and the interests of the schools committed to their control and to act with intelligence and fairness in the performance of their duties. *If such men are not chosen, the fault lies with the electors and the remedy is the ballot.* Whether the rule adopted was wise or unwise, reasonable or unreasonable, is not a question for the court to determine and it was not a question for the teacher to consider. The power to determine such matters has been by law committed to the board of education and to such board of education belongs also the responsibility of such rule. If the rule is pernicious in its effect and obnoxious to the public sentiment of the patrons of the school, the remedy is as above mentioned. "It is to be found where are to be found all remedies for bad government, with the people themselves."

In Nessle v. Hum, 1 Ohio N. P. 140, injunction was sought to prevent the board of education from adopting and enforcing a rule requiring the reading of the bible as a part of the opening exercises of the school. The court held that the legislature having placed the management of the public schools under the exclusive control of boards of education, the courts have no rightful authority to interfere by directing what instruction can be given or what books shall be read therein.

In Youmans v. Board of Education, 13 O. C. C., 209, a teacher hired for two years. He served one year and was about to commence his second year when the board attempted to hire another. Injunction was asked, and the court held:

> "The control and management of the schools of this state are given the boards of education. These boards of education cannot be interfered with in any manner by the court unless there is a gross abuse of the discretionary powers given."

Under the circumstances of the case injunction was refused.

In Frederick v. Owens, 35 Cir. Ct. Rep., 552, the plaintiff brought an action in injunction restraining the board of education from enforcing a rule which in effect would prohibit the teachers from joining labor unions. Injunction was granted in the lower court but in reversing said judgment the court of appeals held in part:

> "It is difficult to conceive of anything that would be more certainly productive of confusion in practical application than the proposition that the courts may state to public officers the various grounds upon which they shall not determine against appointing an applicant for a position under the control of such officers. This doctrine, extended to its logical result, necessarily takes from the public officer very much of the authority given him by law to make the selections in question, and to that extent, and without the slightest warrant of law, passes this power over to the courts. We are very clearly of opinion that nothing exists in the statutes giving the courts any such

power. We think it would be quite as justifiable for the courts to undertake to regulate all political appointments in the state by prescribing that different political affiliations should not furnish sufficient ground for denying appointments, and then proceed to punish the public officer who violated the order by denying appointments on political grounds.

"The members of the board of education are elected by the people. If the people make mistakes in their selection of men to fill these important positions, the ballot box, and not the courts, is the place to correct these errors."

In State v. McCann, 21 O. S., 198, mandamus was asked against the board of education to compel it to admit the children of plaintiff to a particular school. Said children were colored and the board of education had established a rule that no colored children should attend the school provided for white children. The court held that the board of education had a right to make such rule, and that colored children residing in either of the districts for white children were not, as of right, entitled to admission into the schools for white children.

In Board of Education v. State, 45 O. S., 555, the action was a proceeding in mandamus to compel the board of education to admit colored children into the white schools. The court held that the power to establish and maintain separate schools for colored children was conferred upon boards of education by specific authority of section 4008, which has been repealed, and therefore the board has no authority to provide separate schools and the writ was granted.

In State ex rel. v. Freed, 10 Ohio C. C., 294, the board of education purchased "Kenedy's Mathematical Blocks" for use in the schools. The court held that boards of education are possessed only of such limited powers as are expressly provided by statute, and persons who deal with such boards are held, and presumed to know, the limits within which they can lawfully transact business, and can secure no rights which are enforceable, by a contract, unless the contract is clearly authorized by law, and the purchase was prohibited.

In Watkins v. Hall, 13 O. C. C., 255, the board of education were taking steps to tear down and remove a certain school house. The court held that while a township board of education has exclusive control within its jurisdiction in the selling of a school house site, and of the size and character of the building to be erected, yet where such board, without any valid reason or necessity therefor, is about to expend the public funds in taking down a suitable and satisfactory building on a central and improved lot, and re-erect it at another place in the district, a court of equity may properly enjoin the same, as an abuse of discretion and authority.

In Moss v. Board of Education, 58 O. S., 354, plaintiff brought an action against the school board to prevent the board from erecting a school house upon a site selected by the board. The law specifically prohibited the board from selecting a site and placed the power of such selection in commissioners appointed by the probate judge. Said commissioners selected a site which the board endeavored to change. The court held that where the board of education attempts to abandon the site so selected by the commissioners and attempts to select and purchase another site, and proceeds to erect a school house thereon, such action is unauthorized and void.

In Board of Education v. Best, 52 O. S., 138, the question was as to whether or not it was necessary to call the roll when a teacher was hired and the court held that the clause "upon a motion * * * to employ a * * * teacher * * *, the clerk of the board shall call, publicly, the roll of all the members composing the board and enter on the records required to be kept the names of those voting aye, and the names of those voting no," is a mandatory provision and must be strictly pursued.

In Weir v. Day, 35 O. S., 143, the board of education attempted to lease the school house for a private or select school. The court held that while all public school

houses are vested in boards of education in trust for the use of the public or common schools, any appropriation of them to other use is unauthorized and unlawful, and the injunction was granted.

Many other cases might be cited along the above line but these should be sufficient from which conclusion can be drawn that wherever a matter is prohibited by law a board of education has no power to act in relation to the matter so prohibited and a board of education has only such power as is specifically granted or which may be inferred in order to carry into effect those powers which are specifically granted, and that the complete management and control of the public schools of the state are under the said boards of education and with reference to those matters within their control their actions cannot be interfered with unless the same are grossly abused.

So that, answering your several questions, I am of the opinion:

First. If the board of education establishes a rule or regulation that teachers may be granted three days absence on account of the death and burial of members of their immediate family, or one day for more remote relatives, without deduction of pay, and the board finds that such a rule is necessary for the proper prosperity of the schools, the discretion of such board cannot be interfered with and the board may pay a substitute during such absence.

Second. So likewise, if the board establishes a rule or regulation to grant teachers the difference between their salaries and that of substitutes, for not to exceed forty days in any one school year, when they are absent from personal illness, and such illness is certified to by a physician in good standing, such a rule or regulation would ordinarily be within the power of the board and be valid, but both the answer to this No. 2 question and the answer to No. 1, depend entirely upon the good faith of the board to establish such rule and in applying the same. On April 12, 1912, my predecessor, Hon. T. S. Hogan, in opinion No. 278, held that a teacher who was kept from school on account of illness was rightfully paid his salary which became due during said illness. "A matter of this kind seems to be peculiarly within the legislative control of the board of education."

Third. A rule of the board that teachers are granted permission to visit other schools for two days in a year without deduction of pay would seem to be a reasonable rule, provided the board finds that such visits are made so that the information gathered may be imparted to the pupils upon the return of such teachers from such visits, and that the same is in the furtherance of the means of education, and, following the answer to your first question, the board can pay substitutes for such teachers during such absence.

Fourth. A rule in accordance with your regulation number 24 to grant teachers pay for three half days when they are absent on account of re-examination for teachers' certificates and the paying of substitutes during such absence, is under the above reasoning within the discretion of the board and if it is found that the same is for the proper prosperity of the schools, would be held to be legal.

Fifth. Has the board the right to grant teachers permission to attend, without deduction of pay, a limited amount of educational conventions and conferences? And can the board pay for substitutes during such absence? It has been held by this department that boards of education have no authority to pay expenses of teachers in attendance at conventions and the same reasoning would apply to the granting of pay and hiring of substitutes for teachers while attending conventions and conferences. It surely cannot be said that a teacher can be hired for one thing, that is, to teach, and then be paid for another, that is, to attend conventions, and I therefore advise you that a board of education has no right to grant teachers permission to attend an educational convention or conference, without deduction of pay, and have no right to pay substitutes for such teachers during such absence.

Sixth and Seventh. Your questions No. 6 and No. 7 must be answered together. Whatever the board finds is necessary for the proper education of the youth of the

schools and not prohibited by law, and coming within the discretionary rules laid down in the cases above mentioned, may be ordered by the board, and if the board finds that for the proper education of the school youth it would be necessary to assign a superintendent, director or teacher to investigate the methods of work, equipment and results obtained by a certain school system, and report the results of such investigation, it would seem as though the same might be ordered by the board.

Such employment would be aside from the usual school employment and only under the exigencies of each particular case. If expenses are allowed or substitutes paid, the funds therefor would come from the contingent fund of such school district.

It must be understood, however, that each particular case, in a large measure, stands or falls upon its own facts. What might be an abuse of discretion in one case with local conditions and surroundings changed might not be considered such abuse. The only safe rule is to permit expenditures for only those things which are specifically permitted under our laws.

Yours very truly,
JOSEPH MCGHEE,
Attorney-General.

325.

APPROVAL—FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN ADAMS, ATHENS, BROWN, COSHOCTON, FULTON, GALLIA, KNOX, LORAIN, MORGAN, SCIOTO, SHELBY, VINTON AND WASHINGTON COUNTIES.

DISAPPROVAL—FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN MEDINA COUNTY.

COLUMBUS, OHIO, May 31, 1917.

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

DEAR SIR:—I have your communication of May 26, 1917, with which you enclose certain final resolutions in reference to the improvement and construction of highways, and ask my approval of the same. The final resolutions are for the following:

"Adams county—Section 'C-2' West Union-Sinking Springs road, I. C. H. No. 124.

"Athens county—Section 'K-1' Logan-Athens road, I. C. H. No. 155.

"Brown county—Section 'b' Ripley-Hillsboro road, I. C. H. No. 177.

"Coshocton county—Section 'D' New Comerstown-Coshocton road, I. C. H. No. 407.

"Fulton county—Section 'L' Toledo-Wauseon road, I. C. H. No. 20. Type 'B.'

"Fulton county—Section 'L' Toledo-Wauseon road, I. C. H. No. 20. Type 'A.'

"Gallia county—Section 'F-1' Gallipolis-Jackson road, petition No. 2370, I. C. H. No. 399.

"Knox county—Section 'K' Mt. Vernon-Coshocton road, I. C. H. No. 339.

"Knox county—Section 'K-2' Mt. Vernon-Coshocton road, I. C. H. No. 339.

"Lorain county—Section 'P' Oberlin-Norwalk road, petition No. 2599, I. C. H. 290. Type 'A.'

"Lorain county—Section 'P' Oberlin-Norwalk road, petition No. 2599, I. C. H. No. 290. Type 'B.'

"Lorain county—Section 'R' Oberlin-Elyria road, petition No. 2598, I. C. H. No. 313.

"Morgan county—Section 'P' McConnelsville-Marietta road, I. C. H. No. 393.

"Medina county—Section 'L-2' Barberton-Greenwich road, I. C. H. No. 97.

"Scioto county—Section 'A-1' Portsmouth-Lucasville road, I. C. H. No. 406. Type 'A.'

"Scioto county—Section 'A-1' Portsmouth Lucasville road, I. C. H. No. 406. Type 'C.'

"Scioto county—Section 'A-1' Portsmouth-Lucasville road, I. C. H. No. 406. Type 'D.'

"Scioto county—Section 'A-1' Portsmouth-Lucasville road, I. C. H. No. 406. Type 'B.'

"Shelby county—Section 'B-1' Piqua-St. Marys road, I. C. H. No. 170 (also duplicate).

"Vinton county—Section 'G' McArthur-Athens road, petition No. 3039, I. C. H. No. 160.

"Washington county—Section 'O' Marietta-McConnelsville road, petition No. 3058, I. C. H. No. 393.

"Scioto county—Section 'A-1' Portsmouth-Lucasville road, I. C. H. No. 406. Type 'E.'

I have examined these final resolutions carefully and find them, with one exception, regular in form and legal, and am therefore returning the same to you with my approval endorsed thereon.

The final resolution of the commissioners of Medina county, having to do with the improvement of I. C. H. No. 97, is defective in a number of respects; first, the date given for the preliminary application is December 13, 1917. This in and of itself undoubtedly not be vital; but the clerk of the board of commissioners certifies that the resolution was adopted on the 13th day of December, 1916, while the resolution itself shows that it was adopted on the 23rd day of May, 1917. This it seems to me ought to be corrected and I am returning said final resolution for correction.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

326.

APPROVAL—TRANSCRIPT OF PROCEEDINGS FOR ROAD IMPROVEMENT OF COUNTY COMMISSIONERS OF ALLEN COUNTY, OHIO.

COLUMBUS, OHIO, May 31, 1917.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"IN RE: Bonds of Allen county, Ohio, in the sum of $25,000, for the improvement of Allentown road, commencing at the west corporation line of the city of Lima, Ohio, and extending west in German township to the intersection of the Eastown road in German township, said county."

I have carefully examined the transcript of the proceedings of the county commissioners of Allen county, Ohio, relating to the above bond issue, and find said proceedings to be in substantial conformity to the provisions of the General Code relating to improvements of this kind.

I am of the opinion that bonds properly prepared according to the bond form submitted will, when signed by the proper officers of Allen county, constitute valid and binding legal obligations of said county.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

327.

PRINTING COMMISSION—MAY LET CONTRACTS FOR PRINTING TO PERSONS, FIRMS OR CORPORATIONS REGARDLESS OF WHETHER PLACE OF BUSINESS WITHIN STATE OR NOT.

There is no provision of law requiring the printing commission, in receiving bids for printing maps, under the appropriation by the 80th general assembly, to restrict the bidders to persons, firms or corporations, residing or located in the state of Ohio. They may contract with any one, to the best advantage, without regard to the residence or place of business of such contractor.

COLUMBUS, OHIO, May 31, 1917.

The Printing Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Under date of May 15th you addressed the following inquiry to this department:

"I have been directed by the printing commission to ask for your opinion as to their authority to purchase a railroad map of the state of Ohio, on competitive bids from a 'firm not located in the state of Ohio.'

"An opinion at your earliest convenience will be appreciated by the commission."

Let it be assumed that what you desire is to contract for printing the maps in question rather than purchasing them in the market from some one having them already on hand; also that you mean to inquire whether bids may be received from firms or parties located outside the state.

You are advised that maps do not come within the description of any of the five classes mentioned in section 754 G. C. and that the legislature itself so recognized by the terms of section 786, which is as follows:

> "All printing and binding for the state not authorized by the provisions of this chapter, except maps, shall be subject to the provisions thereof so far as practical, and whether provided for by law or resolution of the general assembly the commissioners of public printing shall advertise for proposals and let contracts therefor as herein provided."

This section goes so far as to except maps from all the regulations of the chapter. The only other statutory enactment bearing on the subject is the item in the appropriation bill by the 80th general assembly, and is found in 106 Ohio Laws, page 715, and included in the list of appropriations for your committee the following:

> "F-9 General Plant
> Printing railroad maps.....$9,000.00."

> "General Plant includes things not readily classified under other subheads:" (Section 5, page 826, 106 Ohio Laws).

Competitive bidding is provided for in section 6, on the same page, as follows:

> "The monies appropriated in sections 2 and 3 of this act shall be drawn upon a requisition or voucher presented to the auditor, approved by the head of the department or by the trustees of an institution or by the members of a board of commission, or by an officer or employe of such department, institution, board or commission, specially designated by resolution or order to approve and present such requisition or voucher, a copy of which resolution or order shall be filed with the auditor of state. Such requisitions or vouchers shall set forth in itemized form and specify the classification of the service rendered, material furnished, or expenses incurred, and the date of purchase or time of service, and show that competitive bids were secured unless otherwise provided by law; or unless in the judgment of the board provided in section 4 herein, it is impracticable because of the peculiar nature or location of the work to be done, in which case the above mentioned board may in writing authorize the department affected to proceed to do the work, or that it was an emergency requiring purchase; * * *."

No restriction is found in the statutes confining the letting of this contract to bidders located in Ohio. You are therefore advised that you have full power to make the best contract on behalf of the state that you may be able to secure by receiving bids without regard to the residence or location of the bidder.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

328.

COUNTY AUDITOR—MAY APPOINT EXPERT ASSISTANTS IN CERTAIN CASES.

Expert assistants to the county auditor can be appointed and compensated in the manner provided for by section 5548, *General Code, as amended in senate bill* 177, *only in connection with the assessment by the county auditor of real property in particular tax assessment district or districts when such assessment is ordered by the board of county commissioners or petitioned for by the requisite number of freeholders therein. Said section confers no authority either for the appointment or compensation of expert assistants to the county auditor in the matter of making additions to the tax values of particular parcels of real estate by reason of new buildings or improvements thereon and in assessing allotments under the provisions of sections* 5576, 5577, 5568 *and* 5604 *General Code.*

COLUMBUS, OHIO, June 2, 1917.

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

GENTLEMEN:—I have the honor to acknowledge receipt of your favor of May 22, 1917, in which you ask the opinion of this department as follows:

> "In counties where it has been decided to have no reappraisement of real estate, either general or in local taxing districts, may the county auditor employ expert assistants under the provisions of section 5548, as amended in amended senate bill No. 177, or under any other section of law, to value new buildings or new allotments? If so, how are such experts to be paid?
>
> "In counties where a local district or districts are to be reappraised can experts be employed to value new buildings or new allotments outside of the limits of such district or districts?"

Under section 5548 General Code, as amended in senate bill 177, passed March 21, 1917, and which went into effect on the approval of the governor the same date, each county is made the unit for assessing real estate for taxation purposes, and the county auditor, in addition to his other duties, is the assessor of all real estate in his county for purposes of taxation, other than that of public utilities assessed by the tax commission of Ohio. By this section it is provided that the county auditor, if he ascertains that the real property in any tax assessment district or subdivision is assessed for taxation at its true value in money, shall, with the approval of the board of county commissioners evidenced by order of such board, enter such valuation of real property in such tax assessment district or subdivision upon the tax list and duplicate for the current year.

By this section it is further provided, however, that if by the order of the board of county commissioners it is determined that the real estate in any such tax assessment district or subdivision is not on the duplicate at its true value in money, or if an assessment of the real property in such assessment district be petitioned for by not less than twenty-five freeholders in such subdivision, the county auditor shall proceed to assess such real estate in such subdivision or subdivisions.

With respect to the assessment to be so made this section further provides as follows:

> "The county auditor shall cause to be made the necessary abstracts from books of his office, containing such description of real estate in such subdivisions, together with such plat books and lists of transfers of title to land as the county auditor deems necessary in the performance of his duties

in valuing such property for taxation. Such abstracts, plat books and lists, shall be in such form and detail as the tax commission of Ohio may prescribe. The county auditor is empowered to appoint and employ such expert assistants and clerks, or other employes, as he may deem necessary to the performance of his duties as such assessor; the amount to be expended in the payment of their compensation to be fixed and determined by the county commissioners. If, in the opinion of the county auditor, the board of county commissioners shall fail to provide a sufficient amount for their compensation, he may make application to any judge of the common pleas court of his county for an additional allowance, and the additional amount of compensation, allowed by such court, if any, shall be duly certified to the board of county commissioners and the same shall be final. The salaries and compensation of such employes shall be paid, upon the warrant of the auditor, out of the general fund of the county. Such experts and other employes, in addition to their other duties, shall perform such services as the county auditor may direct, in ascertaining such facts, descriptions, location, character, dimensions of buildings and improvements, and such other circumstances reflecting upon the value of such real estate, as will aid the county auditor in fixing its true value in money. Said county auditor may also, if he deems it necessary or advisable, summon and examine any person under oath in respect to any matter pertaining to the value of any real property within the county. If, upon the taking effect of this act there are not sufficient funds in the treasury of any county to provide for the requirements of this section for the year 1917, the county commissioners may borrow the amount so required, and issue certificates of indebtedness therefor, payable not later than three years from the date thereof, together with interest thereon, payable semi-annually, at a rate not in excess of six per cent. per annum."

The statutory authority for additions to the taxable value of real property by reason of new structures or improvements thereon and for the assessment of allotments is granted by the provisions of sections 5576, 5577, 5568 and 5604 General Code as amended in said senate bill 177.

Section 5576 General Code provides that if the county auditor ascertains that a mistake has been made in the value of an improvement or betterment of real property, or that the true value of such improvement or betterment has been omitted, he shall return the correct value thereof, having first given notice to the owner or agent thereof of his intention so to do; while section 5577 General Code provides, with respect to the question at hand, that additions made by the county auditor in conformity to the provisions of section 5576 shall be listed on the grand duplicate of the county and placed in the hands of the county treasurer for collection.

With respect to the assessment of allotments section 5568 General Code provides that when any person lays out a village or city, or any addition thereto, or any subdivision of any lot or tract of land, before the plat thereof is recorded, he shall present such plat to the county auditor, who shall assess and return the true valuation of each lot or parcel of land described in such plat in like manner as new structures are valued and that thereupon such lots or parcels shall be entered on the tax list in lieu of the land included therein.

Section 5604 General Code provides that when the county board of revision provided for in the act of which the sections above noted are a part, discovers or has its attention called to the fact that in a current year, or in any year during the five years next preceding, any taxable land, building, structure or improvement has escaped taxation, or has been listed for taxation at less than its true value in money, the board may investigate the same and report all facts and information in its possession to the

county auditor, who is required to make such correction as he is authorized and required by law to make in other cases in which real and personal property has escaped taxation or has been improperly listed or valued for taxation.

In opinion No. 227, addressed to the tax commission of Ohio, under date of May 1, 1917, this department, among other things, held that the fact that the real property in a particular tax assessment district or subdivision was by action of the county auditor and the board of county commissioners carried into the current tax list at the existing duplicate valuation under authority of said section 5548 General Code does not prevent the county auditor from making additions to the taxable value of particular parcels of real property in such tax assessment district or subdivision under the authority of said sections 5576, 5577 and 5604, above noted.

Your first question is whether or not, under the provisions of section 5548 General Code, or other provision of law, the county auditor may employ expert assistants in the matter of making additions to the taxable value of particular parcels of real estate by reason of new structures or improvements thereon, and in assessing allotments, where no assessment of the real property in the tax assessment district or subdivision wherein said parcel is located, is made under the provisions of section 5548, General Code.

I am of the opinion that section 5548 General Code furnishes no authority for the employment by the county auditor of expert assistants other than in the particular case and for the particular purpose therein provided for, viz.: where the real property in subdivisions of the county is assessed by the county auditor under order of the county commissioners or on petition of freeholders therein; and that the provisions of said section authorizing the employment of expert assistants and prescribing the manner in which their compensation shall be paid have no application to cases other than those therein contemplated, to wit, where real property in tax assessment districts or subdivisions of the county is assessed by the county auditor on order of the county commissioners or on petition. In making the assessment of the real property of tax assessment districts or subdivisions of the county on order of the board of county commissioners or on petition of freeholders in such districts or subdivisions, the county auditor acts in his distinct capacity as assessor for all the real estate in his county; and the expert assistants, clerks and other employes that he is authorized to appoint under section 5548 General Code are such as the county auditor may deem necessary to the performance of his duties *as such assessor.*

The sections of the General Code above noted, applying specifically to the authority and duty of the *county auditor* to make additions to the taxable values of particular parcels of real estate by reason of new structures or improvements thereon and to assess allotments, make no provision for assistants, expert or otherwise, to the county auditor with respect to such duties. The duties which the county auditor performs under these sections are performed in his capacity as county auditor, and not as assessor of real property in the county.

Under sections 2563 and 2981 General Code the county auditor has authority to appoint such deputies, assistants and clerks as may be necessary for the proper discharge of the duties of his office, and the number of the deputies, assistants and clerks that may be employed by him, and the compensation he is authorized to pay them, are limited only by the amount fixed by the county commissioners under the provisions of section 2980 General Code, as the amount to be expended by the county auditor out of the fee fund of his office for the compensation of such deputies, assistants or clerks, or by the additional allowance or allowances which may be made for such purposes by a judge of the common pleas court upon application of the county auditor made therefor.

In the case you suppose, therefore, where the services of expert assistants are required only for the purpose of assisting the auditor in making additions to the taxable value of particular parcels of real estate by reason of new structures or improvement

thereon, or in assessing allotments, I am of the opinion that the only authority for the employment of such assistants is that found in the general provisions of section 2563 and 2981 General Code, and such assistants should be paid out of the county auditor's fee fund; and that if the allowance made by the county commissioners under section 2980 G. C. for the payment of deputies, assistants or clerks is not sufficient to meet the compensation of such expert assistants, application for an increased allowance should be made to a judge of the common pleas court in the manner prescribed by section 2980-1 G. C.

As to your second question, I am of the opinion that expert assistants may be appointed and compensated in the manner provided by section 5548 General Code only in respect to services rendered by such expert assistants in the assessments of real property in tax assessment districts or subdivisions, the assessment of the real property in which has been ordered or petitioned for in the manner designated in said section 5548 General Code. Expert assistants appointed in such cases by the county auditor under the authority of section 5548 General Code may be retained by the county auditor to assist him in making proper additions to the tax values of parcels of real estate in other tax assessment districts or subdivisions on account of new structures or allotments, where no assessment under section 5548 General Code is to be made, but in such case such assistants when so retained should be considered as assistants such as the auditor is authorized to appoint under sections 2563 and 2981 General Code and they should be paid out of the auditor's fee fund, and not otherwise.

Very truly yours,
JOSEPH McGHEE,
Attorney-General.

329.

CORPORATIONS—UNABLE TO FILE REPORT REQUIRED BY SECTIONS 5495, 5496, AND 5497, G. C., UNTIL CERTIFICATE THAT 10% OF CAPITAL STOCK HAS BEEN SUBSCRIBED AND DIRECTORS ELECTED—DATE OF INCORPORATION IS DATE ON WHICH ARTICLES OF INCORPORATION ARE FILED WITH SECRETARY OF STATE.

For want of ability to do so, a corporation organized under the laws of this state is not required to file the report provided for in sections 5495, 5496 *and* 5497 *General Code, until it has filed its certificate that ten per cent. of the capital stock has been subscribed and until directors of the corporation are elected.*

Within the meaning of section 5519 *G. C., the "date of incorporation" is the date upon which articles of incorporation are filed in the office of the secretary of state, and after filing the certificate that ten per cent. of the capital stock has been subscribed and the directors elected, such corporation is required to file its first annual report in the month of May following the expiration of six months from the date of the filing of its articles of incorporation.*

COLUMBUS, OHIO, June 2, 1917.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—As previously acknowledged, I have your favor of March 2, 1917, in which you ask my opinion as follows:

> "If a domestic corporation for profit has filed articles of incorporation, but has not filed a certificate of subscription to ten per cent. of its capital stock, as provided by section 8633, is such corporation liable for the report under section 5495 and for franchise tax?

"What is the 'date of incorporation,' within the meaning of section 5519?

"Your attention is respectfully directed to A. G. R. 1912, volume I, page 530, and 1915, volume II page 1196."

The second of the two opinions of this department referred to in your communication was one by my predecessor, Hon. Edward C. Turner, addressed to you under date of July 3, 1915, in which he discusses fully the questions here submitted by you and arrives at the conclusion that a corporation is not required to file a report under section 5495 General Code until it has filed a certificate that ten per cent. of its capital stock has been subscribed and the directors of the corporation have been elected, and that within the meaning of section 5519 General Code the date of the incorporation is the date upon which the certificate is filed in the office of the secretary of state showing that ten per cent. of the capital stock of the corporation has been subscribed.

It will be sufficient for me to say in this opinion, after a careful consideration of the questions presented, that I am in full accord with both the reasoning and the conclusion reached by Mr. Turner with respect to the first question presented in your communication.

In this connection I note that the earlier decisions considered by Mr. Turner in support of his conclusion that a corporation is not complete when the articles of incorporation are filed have been followed by the supreme court in the case of Cemetery Association v. Traction Company, 93 O. S. 161, 168. In this case, the court speaking of the provisions of sections 8632 to 8635, inclusive, General Code, which provide that at the time of making subscriptions to the capital stock of a corporation ten per cent. on each share subscribed for shall be payable, and that when ten per cent. of the capital is so subscribed the subscribers to the articles of incorporation, or a majority of them, shall so certify in writing to the secretary of state, after which directors of the corporation shall be chosen, says:

"The statutory requirements provided by section 8632 et seq. General Code, for the creation of a corporation are mandatory and must be complied with before the corporation can be in existence."

In its opinion in this case the court says:

"The corporation statutes of Ohio differ from those of many states in reference to the creation of a corporation. Section 8629 General Code, provides that a certified copy of the articles of incorporation shall be *prima facie* evidence of the existence of the corporation therein named, but the mere filing of the articles in due form does not create the corporation. This is the distinct holding in State ex rel. v. Insurance Co., 49 Ohio St. 440, where it is held: 'The making and filing, for the purpose of profit, of articles of incorporation in the office of the secretary of state, do not make an incorporated company; such articles are simply authority to do so. No company exists within the meaning of the statute, until the requisite stock has been subscribed and paid in, and the directors chosen."

I am aware that the court in this case, and likewise in the earlier cases cited by Mr. Turner, was looking at the question from a different angle from that at which we are required to view the question in its application to the particular inquiry made by you, and that the franchise tax imposed by section 5495 et seq. General Code is a tax upon the right to be a corporation rather than upon any user that may be made of such franchise by the corporation; nevertheless I am convinced that the only practical solution of the question made by you, if we are to give effect to the provisions

of the statute specifying the kind and nature of the report required of corporations, is that reached by Mr. Turner, and for these reasons I agree with his opinion on your first question, although it was a reversal of a former opinion of his predecessor, Hon. Timothy S. Hogan, on the same question.

With respect to your second question I note the provisions of section 5519 General Code as follows:

> "A corporation shall not be required to file its first annual report under sections one hundred and six to one hundred and fifteen (G. C. section 5495 to section 5504) inclusive, of this act, until the proper month, hereinbefore provided, for the filing of such report, next following the expiration of six months from the date of its incorporation or admission to do business in this state."

I am convinced that the words "date of its incorporation," as found in this section, refer to the date of the filing of the articles of incorporation with the secretary of state; and although such corporation does not have, on the filing of its articles of incorporation, the organization necessary to enable it to file the report provided for in sections 5495, 5496 and 5497 General Code, and will not have until it files its certificates that ten per cent. of its capital stock has been subscribed and directors have been chosen, nevertheless upon the filing of such certificate and election of directors the first annual report which said corporation is required to file is that required to be filed in the month of May following the expiration of six months from the date of the filing of its articles of incorporation, if the certificate of stock subscription has been filed and directors elected in the meantime.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

330.

SHERIFF—WHEN APPOINTED RECEIVER—IN AID OF EXECUTION IS APPOINTED IN OFFICIAL CAPACITY—IN PARTITION PROCEEDINGS IN PERSONAL CAPACITY.

1. *If the sheriff of a county is appointed receiver in aid of execution, he is appointed not as an individual but as sheriff and compensation paid to him for his services as such receiver must be paid into the sheriff's fee fund.*

2. *When a sheriff is appointed receiver in partition proceedings, he is appointed not as sheriff but as an individual and the fees allowed him by the court may be retained by him personally.*

COLUMBUS, OHIO, June 2, 1917.

HON. JOHN C. HOVER, *Judge Court of Common Pleas, Bellefontaine, Ohio.*

DEAR SIR:—I have your letter of April 14, 1917, as follows:

> "I wish to obtain your opinion as to the compensation for the sheriff when acting as a receiver.
>
> "Section 11952 provides, 'in addition to his actual disbursement, the receiver shall be entitled to such commissions as the court allows, not exceeding the sum allowed to executors or administrators, as well as reasonable counsel fees for services rendered him.'

"Section 11782 provides: 'The judge, by order, may appoint the sheriff of the proper county or other suitable person a receiver of the property of the judgment debtor. He also by order may forbid transfer or other disposition of or interference with the property of the judgment debtor, not exempt by law.'

"Section 11783 provides: 'If a sheriff be appointed receiver, he and his sureties shall be liable on his official bond as such receiver. If another person be appointed, he must take an oath and give bond as in other cases.'

"Section 11787 provides: 'The judge shall allow to clerks, sheriffs, referees, receivers and witnesses such compensation as is allowed for like services in other cases to be taxed as costs in the case, and by order shall enforce the collection from such party or parties as ought to pay them.'

"The question is this: when the sheriff is appointed receiver, in properties where there is partition pending, or where there is a sale pending on execution and the court makes an allowance to cover expenses and compensation, is the compensation the sheriff's personal pay, or does it go into the fee fund to be turned into the treasury with other fees?

"This does not seem to be any part of his official duties, but being altogether outside of the duties imposed upon him by statute. Such compensation has always been turned in to the county treasury in this county, but I am not certain that it should be so."

Sections 11782, 11783, 11787 and 11952 General Code provide:

"Section 11782. The judge by order, may appoint the sheriff of the proper county, or other suitable person, a receiver of the property of the judgment debtor. He also, by order, may forbid a transfer, or other disposition of, or interference with, the property of the judgment debtor not exempt by law.

"Section 11783. If the sheriff be appointed receiver, he and his sureties shall be liable on his official bond as such receiver. If another person be appointed, he must take an oath and give a bond as in other cases.

"Section 11787. The judge shall allow to clerks, sheriffs, referees, receivers, and witnesses, such compensation as is allowed for like services in other cases, to be taxed as costs in the case, and by order, shall enforce their collection from such party or parties as ought to pay them.

"Section 11952. In addition to his actual disbursements, the receiver shall be entitled to such commissions as the court allows not exceeding the sum allowed to executors or administrators, as well as reasonable counsel fees for services rendered him."

On February 21, 1910, one of my predecessors, Hon. U. G. Denman, rendered an opinion to the bureau of inspection and supervision of public offices, in which it is held that the sheriff must pay fees and compensation into the county treasury in cases in which he is appointed receiver, trustee or master commissioner.

Mr. Denman, in considering this question, said:

"Section 5498 Revised Statutes which regulates the matter of costs in proceedings in aid of execution, provides that,

" 'The judge shall allow to clerks, sheriffs, referees, receivers and witnesses, such compensation as is allowed for like services in other cases to be taxed as costs in cases * * * .'

"Section 5485 provides that:

" 'If the sheriff be appointed receiver, he and his sureties shall be liable on his official bond as such receiver * * * *.'

"These two sections indicate to me that the sheriff when appointed receiver in proceedings in aid of execution, acts in his official capacity, and that the fees taxed in his name should be paid into the fee fund of his office, and not retained by him for his own personal use."

On April 30, 1915, my predecessor, Hon. Edward C. Turner, in an opinion found in the attorney-general's Opinions for 1915, page 601, held:

"Fees paid to sheriff while making a sale as master commissioner are official and payable into the fee fund under section 11692 G. C."

In this opinion Mr. Turner said:

"Under the provisions of section 11691 of the General Code, when there exists some special reason that the sale of real estate shall not be made by the sheriff of the county where the decree or order was made, the court shall make and issue an order to a master commissioner for the sale of such real estate."

"Section 11692 of the General Code provides that 'a sheriff may act as a master commissioner,' and 'on notice and for a reasonable compensation to be paid by the master out of his fee, he shall attend and make the sale for the master, who, by reason of sickness, is unable to attend.'

"We have here the anamalous situation of the master commissioner's being appointed only when the sheriff, for some special reason deemed sufficient by the court, is disqualified to make the sale; and upon the master commissioner's being unable to attend by reason of sickness the statute directs said sheriff so disqualified in the first instance to attend and make the sale for the master. Such is the provision of the statute. The sheriff makes the sale as sheriff, hence the 'reasonable compensation to be paid him' comes to him in his official capacity as a county officer. * * * It therefore follows that this compensation so earned by the sheriff is payable into the sheriff's fee fund."

Viewing section 11782 General Code in the light of these opinions, and with the provision of section 11783 in mind, to the effect that if the sheriff be appointed receiver he and his sureties shall be liable on his official bond as such receiver, it seems clear that when a sheriff is appointed receiver in aid of execution, he is appointed not as an individual, but as sheriff and that the compensation paid him is to go to the fee fund and not be retained by him personally.

Your inquiry also has reference to fees paid the sheriff as a receiver in partition proceedings.

I am aware of no statute making special provision for the appointment of a receiver in partition proceedings and if one is appointed it must be under the general authority of the statute on this subject. Neither am I aware of any special statute authorizing the appointment of a sheriff as receiver in such cases, and if a sheriff is appointed, it follows that it must be as an individual and not as sheriff.

In the opinion of Mr. Turner, above referred to, he also held that when the suitable person appointed to make a sale of real estate under section 11927 G. C., is the sheriff of the county, the fee received by such person is personal and not payable into the sheriff's fee fund.

In that opinion Mr. Turner said:

"As to your second inquiry, section 11927 and other sections of the same chapter of the General Code, in *pari materia* therewith, prescribe the method for the sale of entailed and other estates. If, upon the hearing provided for in said sections, the application of the petitioner is granted, 'the court shall direct a sale to be made, the manner thereof, and appoint some suitable person or persons to make it.'

"Now, if under this authority the court appoints as such 'suitable person or persons' the individual or individuals who are serving as sheriff or other county officers, the compensation allowed for the making of such sale will be payable to such person or persons as individuals and not in their official capacities. Therefore, such compensation is the property of the person or persons making the sale, and is not subject to be paid into the fee fund provided for in said section 2977 of the General Code."

I agree with this reasoning and by the same process conclude that in partition cases the sheriff is not appointed as sheriff, but as an individual, and that the fees allowed him may be retained by him personally.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

331.

TAX ASSESSOR—NOT ENTITLED TO COMPENSATION—FOR OATH ADMINISTERED TO RESIDENT OF ANOTHER COUNTY.

An assessor or assistant assessor, who has administered an oath to a tax return of resident of neighboring county, not entitled to compensation therefor.

COLUMBUS, OHIO, June 2, 1917.

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

GENTLEMEN:—I have your letter of May 11, 1917, as follows:

"We would respectfully request your written opinion upon the following question:

"Under the provisions of section 5366 of senate bill No. 177, the new taxation law—

"'* * * The person making such return for taxation shall subscribe and make oath to the correctness of all matters contained therein, and such oath may be administered by any *assessor, assistant assessor,* county auditor, deputy county auditor, mayor, justice of the peace, township clerk or notary public, after which the same shall be delivered in person or by mail to the county auditor, on or before the first day of May * * *.'

"QUERY: May any of the assessors or assistant assessors mentioned above, residents and officials of a given county, be paid for administering oaths to tax returns of residents of a neighboring county appearing before them for said purpose, and which county pays the assessor for such services under such circumstances, if they are entitled to pay for such services?

"It has come to the attention of this bureau that since the new tax law

went into effect, people of one county, living near a county line, would go over into the next county to find a convenient official to swear them to their returns."

The act referred to in your communication is an act passed March 21, 1917, entitled "An emergency bill to provide for the listing and valuation of property for purposes of taxation, and to amend sections 2583, 2593, * * *." Section 1 of this act provided that certain sections of the General Code therein enumerated should be amended to read as therein set out. Section 5366 G. C., as amended in such act, reads:

"In order to facilitate the listing of personal property, moneys, credits, investments in bonds, stocks, joint stock companies or otherwise, in the subdivisions mentioned in section 3349 of the General Code, each person required by law to list the same shall make a return thereof under oath to the county auditor on the second Monday in April, or within fifteen days thereafter, of any year, the same to be made on the blanks furnished, by order of the state tax commission for such purpose, which the auditor shall have supplied at his office for use of persons required to list such property of any character. The county auditor may mail such blanks prior to the second Monday in April to the persons required to list such property, or may place listing blanks at convenient places in each taxing subdivision, and give notice thereof in one newspaper of general circulation in the county. Each person required by law shall correctly list all such property on such blanks giving the true value thereof in money, and answer all questions correctly, and give all information, asked and required by the printed forms contained on such blanks. The person making such return for taxation shall subscribe and make oath to the correctness of all matters contained therein, and such oath may be administered by any assessor, assistant assessor, county auditor, deputy county auditor, mayor, justice of the peace, township clerk or notary public, after which the same shall be delivered in person or by mail to the county auditor, on or before the first day of May. Any person required by law to list such property for taxation, who fails or neglects to file with the county auditor, as required by this act, a true list and valuation of his property, shall not be entitled to any exemption as provided by section 5360 of the General Code. The county auditor shall examine such returns and after giving notice to the person making oath thereto, may make corrections thereof and may go over the same together with the assessor of the same taxing subdivision and if they believe any property is omitted from any returns, or that the value is incorrect, the assessor shall call upon the person listing such property and upon actual view list and assess such property at its true value in money. The county auditor shall deliver to the assessors of the respective subdivisions at the time of their meeting for instructions, a list of all persons and property so returned for taxation, and may deliver the original returns to such assessor for his use, and such assessor shall inspect the returns made and cause to be listed and returned for taxation as provided in this act, all such property not at that time listed and returned to the county auditor. No assessor or assistant assessor shall be paid any per diem salary for administering an oath as herein provided where returns are being made to the county auditor, but they shall administer all oaths to persons making returns as herein provided to the county auditor, without charge to such person, but shall be paid the sum of ten cents for each person so sworn to his return prior to May first of any year, on the warrant of the county auditor, at the time of payment of his per diem services. Provided, however, that the

provisions of this section shall not apply to public utilities, banks and bankers, or corporations, the listing and return of the property of which is otherwise provided by law."

Section 5586 G. C. reads:

"Each assessor, assistant assessor and member or chief clerk of a county board of revision, shall have power to administer oaths."

Section 5368 G. C. provides:

"At the direction of the county auditor, the assessor shall examine the lists returned under the provisions of section 5366 of the General Code, and ascertain what property, if any, is omitted therefrom, and what persons, if any, have failed to make returns; and it shall be his duty to list and return at its true value in money, all the personal property required to be listed by persons in his subdivision which has not then been returned. The return of any property which has been improperly valued by the person listing, shall likewise be corrected by the assessor, and such property listed by him at its true value. He shall return all lists taken by him or his assistant to the county auditor, on or before the first Monday in June."

Section 5369 G. C. provides:

"Each person required to list property for taxation shall take and subscribe an oath or affirmation that all the statements in such list are true, and that such list contains a full disclosure of all property required by law to be listed for taxation, and the true value in money of all such property; and when any person required by law to list and make return of property to the county auditor, shall wilfully fail or refuse to make such list or return within the time fixed by law, or shall refuse to take and subscribe an oath or affirmation to such list or return, or shall wilfully omit to make a full and complete list and return of taxable property, or shall wilfully fail to give the true value of any property in such list or return, or shall wilfully fail or refuse to answer all questions contained in the blanks for listing such property, the county auditor shall cause all such property to be listed and assessed and shall add to the amount thereof the penalty provided in section 5398 of the General Code; and in case of a false oath to any such list, he shall certify the facts to the prosecuting attorney, who shall proceed as in other cases of perjury. This section shall be printed in plain type upon all blanks for the listing of any property."

Tax assessors have no power generally to administer oaths in this state and we must look, therefore, to the provisions of the act conferring such authority upon them in order to determine the extent of their powers in this respect.

It will be noted from a reading of section 5366 that "no assessor or assistant assessor shall be paid for any per diem salary for administering an oath as herein provided where returns are being made to the county auditor, but they shall administer all oaths to persons making returns as herein provided to the county auditor, without charge to such person, but shall be paid the sum of ten cents for each person so sworn to his return prior to May first of any year, on the warrant of the county auditor, at the time of payment of his per diem services." Under this provision of the act the assessor or assistant assessor must furnish the county auditor with a statement containing all the names of persons sworn by him to the tax returns, and it is the duty

of the county auditor to examine such list, and if correct issue his warrant for such services to the assessor or assistant assessors for an amount to be computed at the rate of ten cents per name.

This provision would strongly indicate that the assessor or assistant assessors are to be paid for administering oaths only when they administer them to persons residing within the county, since the county auditor could not well determine whether the assessor or assistant assessors had actually administered these oaths only by reference to the tax list returned by the owner. If the list of owners submitted by the assessor or assistant assessor should include the names of residents of other counties, it is clear that the county auditor could not well apply this test in the verification of the claim of the assessor or assistant assessor. The further provision of section 5366 that the assessor or assistant assessor is to be paid by the county auditor "at the time of payment of his per diem services" and the fact that a county could only be charged with the expense of assessing property within its boundaries, so strengthens this conclusion as to leave no room for doubt.

Now since the provisions of section 5366 furnish the only statutory authority for the payment of assessors or assistant assessors for administering oaths to persons listing their own property, it is my opinion, following the above reasoning, that assessors or assistant assessors can only be paid compensation for their services in administering oaths in such cases when the person or persons to whom they administer the oaths reside within the county.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

332.

COUNTY COMMISSIONERS—DISCRETIONARY WITH SAID OFFICIALS WHETHER THEY SHALL PROVIDE OFFICES FOR COUNTY OFFICIALS.

Section 2419 G. C. is the only section relative to providing offices for county officers and said section makes it discretionary with the commissioners in regard thereto.

COLUMBUS, OHIO, June 2, 1917.

HON. DAVID A. WEBSTER, *Prosecuting Attorney, Bryan, Ohio.*

DEAR SIR:—I am in receipt of your letter of April 27th wherein you submit three inquiries.

> "1. Is it the duty of the county commissioners to furnish and provide an office for the prosecuting attorney? If it is their duty to provide an office, with what should it be equipped?
>
> "2. If the county commissioners fail or neglect to furnish and provide an office for the prosecuting attorney, can they pay rent for the prosecutor's office?
>
> "3. If they are to provide an office, would a desk, filing case and the statutes in a one room office, without a private consultation room, be sufficient to constitute the furnishing and providing an office?"

The only authority of law relative to the matter is that found in section 2419 G. C., which reads as follows:

> "A court house, jail, public comfort station, offices for county officers,

and an infirmary, shall be provided by the commissioners when, in their judgment, they, or any of them, are needed. Such buildings and offices shall be of such style, dimensions and expense as the commissioners determine. They shall provide all rooms, fire and burglar proof vaults and safes, and other means of security in the office of the county treasury, necessary for the protection of public moneys and property therein."

Said section provides that the discretion as to whether or not the county commissioners shall furnish any office for the prosecuting attorney rests solely with the said commissioners. The statute is an old statute and must have undoubtedly been passed at a time when it was not deemed necessary that the prosecuting attorney should be provided with an office.

Hon. George K. Nash, former attorney-general of Ohio, in an opinion to Frank P. McGhee, prosecuting attorney of Vinton county, under date of May 20, 1880, referring to section 2419 G. C., then section 859 Revised Statutes, states:

"Section 859 of the Revised Statutes gives authority it seems to me to county commissioners to provide an office for the prosecuting attorney as well as other county officers.

"It leaves the matter *discretionary* with the commissioners."

Hon. David K. Watson, attorney-general, in an opinion to D. B. Pearson, prosecuting attorney of Brown county, under date of April 15, 1890, ruled as follows:

"Relative to the matter of the county commissioners furnishing the prosecuting attorney an office when there is none in the court house for him, under section 859 R. S., the whole matter I think rests in the judgment of the commissioners. That section says that 'a court house, jail, offices for the county officers and an infirmary shall be provided by the commissioners when in their judgment the same or any of them are needed,' etc.

"If in the judgment of the commissioners an office is not needed for the prosecuting attorney, there being none in the court house, I am of the opinion that they cannot be compelled to furnish one outside. Their discretion in the matter will not be controlled."

Hon. J. M. Sheets, attorney-general, in an opinion to W. H. Bowers, prosecuting attorney of Richland county, under date of September 8, 1902, takes a different view of the statute and is out of line with the later rulings. He says:

"As to the second inquiry, it is very clear that under the provisions of section 859 of the Revised Statutes the commissioners are under obligations to furnish all county officers with acceptable offices. If they are not to be had in the court house they are required to procure them outside."

Hon. W. H. Miller, assistant attorney-general, under date of February 12, 1908, rendered an opinion to William L. David, prosecuting attorney of Hancock county, and referred to section 859 Revised Statutes as follows:

"Under this section I am of the opinion that the county commissioners may, if they think the same is needed, provide an office for the county coroner and pay the rent therefor."

Under various rulings of former attorneys-general it has been determined that the discretion resting with the commissioners would go so far as to permit also the furnishing of the office as well as the providing of the bare office rooms.

Answering your first question, since the matter is discretionary with the county commissioners, I do not believe it can be held that there is any duty on the commissioners to provide an office for the prosecuting attorney.

Answering your second question, there being no duty to provide an office for the prosecuting attorney, if they fail and refuse so to do they can not be compelled to pay rent for an office outside of the court house.

Answering your third question, since there is no duty resting upon the county commissioners to provide an office, if they in their discretion determine to furnish an office they are the sole judges of what will be furnished in the office.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

333.

CERTIFICATE OF AUDITOR—THAT MONEY IS IN TREASURY TO CREDIT OF PROPER FUND—UNNECESSARY—WHEN BONDS HAVE BEEN SOLD AND MONEY IS IN TREASURY AND CONTRACT LET.

In cases in which bonds have been sold and the proceeds placed in a special fund to be used for a specific work, and a contract is entered into for the construction of said work, the provisions of section 5660 G. C. that a certificate must first be made by the proper officer, to the effect that the money is in the treasury to the credit of said fund, do not apply. 81 *O. S.*66, 74 *O. S.* 185; 59 *O. S.* 446; 20 *C. C. (n. S.)* 47; *however, Village v. Diekmeier,* 79 *O. S.* 323, *seems to hold otherwise.*

COLUMBUS, OHIO, June 2, 1917.

HON. S. W. ENNIS, *Prosecuting Attorney, Paulding, Ohio.*

DEAR SIR:—I have your communication of May 4, 1917, in which you ask for certain information. Your communication, in so far as the question involved is concerned, reads as follows:

> "I would like to ask your opinion as to whether or not it is necessary for the county auditor to make a certificate that the money required for the payment of the contract price for a county road improvement under the provisions of section 5660 of the General Code of Ohio (is in the treasury to the credit of the proper fund) where the bonds have been sold and the money raised and in the treasury of the county, at the time the contract is signed, to the credit of the road fund.
>
> * * * * * * * * * *
>
> "The reason that I ask that a construction be placed on the above statutes (sections 3810 and 5660 G. C.) is due to the fact that we have a very serious situation in this county in four pike road improvements involving very near $100,000.00, where the auditor of the county has failed to place these certificates of record or to have made the same, and by reason of the increased cost of materials the contractors are now about to throw up their contracts and claim the same are illegal and that we can not enforce the completion of the roads under the same nor the obligations of the bondsmen for the reason that the auditor has failed to put said certificate upon record.

And if the contracts and bonds are invalid, it will cost the county possibly $25,000.00 more to build the roads now, than the contract prices originally awarded for said roads."

In answering your question, it will be necessary to note a number of court decisions which have to do not only with section 5660 G. C., which section applies directly to your matter, but which have to do also with sections 3806 and 3810 G. C. On account of this fact I desire to quote not only section 5660 G. C., but also sections 3806 and 3810 G. C. I do this to show that there is no vital difference between the provisions of section 5660 G. C. and sections 3806 and 3810 G. C., and that whatever construction the courts would place upon sections 3806 and 3810 G. C., they would necessarily have to place the same construction upon section 5660 G. C.

Section 5660 G. C. provides as follows:

"The commissioners of a county, the trustees of a township and the board of education of a school district, shall not enter into any contract, agreement or obligation involving the expenditure of money, or pass any resolution or order for the appropriation or expenditure of money, unless the auditor or clerk thereof, respectively, first certifies that the money required for the payment of such obligation or appropriation is in the treasury to the credit of the fund from which it is to be drawn, or has been levied and placed on the duplicate, and in process of collection and not appropriated for any other purpose; money to be derived from lawfully authorized bonds sold and in process of delivery shall, for the purpose of this section, be deemed in the treasury and in the appropriate fund. Such certificate shall be filed and forthwith recorded, and the sum so certified shall not thereafter be considered unappropriated until the county, township or board of education, is fully discharged from the contract, agreement or obligation, or as long as the order or resolution is in force."

Section 3806 G. C. provides:

"No contract, agreement or other obligation involving the expenditure of money shall be entered into, nor shall any ordinance, resolution or order for the expenditure of money, be passed by the council or by any board or officer of a municipal corporation, unless the auditor or clerk thereof, first certifies to council or to the proper board, as the case may be, that the money required for such contract, agreement or other obligation, or to pay such appropriation or expenditure, is in the treasury to the credit of the fund from which it is to be drawn, and not appropriated for any other purpose,which certificate shall be filed and immediately recorded. The sum so certified shall not thereafter be considered unappropriated until the corporation is discharged from the contract, agreement or obligation, or so long as the ordinance, resolution or order is in force."

Section 3810 G. C. provides:

"Money to be derived from lawfully authorized bonds or notes sold and in process of delivery, shall for the purpose of the certificate that money for the specific purpose is in the treasury, be deemed in the treasury and in the appropriate fund."

It might further tend to clearness if we remember that section 3806 G. C. was originally section 1536-205 R. S.; that section 1536-205 R. S. was formerly section 2702 R. S., and that section 3810 G. C. was originally section 1536-205a R. S.

1. Before noting the decisions of our courts which have to do with the question suggested in your communication, I desire to note the reading of the above sections of our statutes, with a view of arriving at a conclusion as to the construction which ought to be placed upon them. Your question has to do with this:

> What effect has the issuing of bonds and the receipt of money derived from the sale of said bonds upon the question of the requirement of a certificate to the effect that the money is in the treasury to the credit of the appropriate fund?

So that it is this part of the sections I shall particularly note.

Section 5660 G. C., in so far as it applies to the bond question, reads as follows:

> "Money to be derived from lawfully authorized bonds sold and in process of delivery shall, for the purpose of this section, be deemed in the treasury and in the appropriate fund."

Section 3810 G. C., which has reference to the bond question, reads as above set forth:

It will be noticed that the language used in sections 3810 and 5660 G. C. is practically the same upon this question of the bond issue, and, as said before, the provisions are practically the same which have to do with the requirement of the certificate of the auditor or clerk. Both the statutes provide that no contract, agreement or obligation of a county, township, school board or municipality shall be entered into, involving the expenditure of money, unless the auditor or clerk thereof respectively *first* certifies that the money required for the payment of such obligation is in the treasury to the credit of the fund from which it is to be drawn. That is, two things must obtain before a contract or obligation involving the expenditure of money can be entered into upon the part of any of said officials, namely:

1. The money must be in the treasury.
2. The auditor or clerk must certify to the fact that it is in the treasury.

Now, if lawfully authorized bonds had been sold and in process of delivery, what effect has this circumstance upon the two above prerequisites to the entering into of a valid contract? Does this circumstance do away with both of said prerequisites? It would not seem so from a careful reading of said sections.

The sections provide that the money to be derived from the bonds shall be deemed in the treasury and in the appropriate fund. That is, the one condition is fulfilled. The auditor or clerk may assume that the money is in the treasury, and will be justified in certifying to that fact. But there is nothing in the statute that would seem to indicate that the certificate need not be made, filed and recorded, merely from the fact that bonds have been sold and in process of delivery. Our courts have held that it is not sufficient merely that the money is in the treasury before a contract involving the expenditure of money can be entered into. This fact must be certified to by the proper official.

In City of Findlay v. Pendleton et al., 62 O. S. 80, there is authority for this proposition. The first branch of the syllabus reads as follows:

> "1. A contract made by a municipality with attorneys for legal services is void, unless the auditor or clerk first files and records a certificate, as required by section 2702, Revised Statutes."

On page 88 the court used the following language:

> "The financial statement made each meeting night to the council by

the city clerk as to the status of each fund, was not the equivalent of the certificate required by section 2702, Revised Statutes. The presence of the $1,300 in the treasury did not in legal effect dispense with such certificate. The object of that section is not only to show the presence in the treasury of sufficient funds unappropriated to meet the contract, but also to prevent such funds from being taken out of the treasury for any other purpose. * *

"With the financial statement of the clerk, and the presence of the $1,300 in the treasury, there was still nothing to prevent the city authorities from using the money so in the treasury for other purposes, and then be compelled to make a levy on the general tax list to pay those attorneys' fees. The filing of the proper certificate would have tied up the money in the treasury to be used only for the payment of those fees."

In this case the court holds that the certificate of the proper official has two purposes:

"1. To show that the money is in the treasury to the credit of the proper fund.

"2. To prevent such funds from being taken out of the treasury for any other purpose."

From all the above it would seem that the only effect of a bond issue to take care of the cost and expense of an improvement would be to do away with the necessity of having the money in the treasury—that is, if the bonds were in process of collection, the money would be assumed to be in the treasury. But it does not seem to do away with the second prerequisite, namely, the issuing of the certificate by the proper official, to the effect that the money is in the treasury. This is the natural conclusion to which one would come by a careful reading of the above sections.

2. But let us turn to the courts of our state, in order to arrive at an answer to the question propounded by you. There have been quite a number of decisions upon this question; in fact so many decisions that it would seem that the proposition of law in reference to your question is well established.

In the City of Akron v. Dobson, 81 O. S. 66, we find the following proposition set forth in the third branch of the syllabus:

"3. Section 1536-205, Revised Statutes, providing that no contract, agreement or other obligation involving the expenditure of money shall be entered into, nor shall any ordinance, resolution or other order for the expenditure of money, be passed by the council or by any board or officer of the municipal corporation, unless the auditor of the corporation shall first certify to council that the money required for the contract, agreement or other obligation, or to pay the appropriation or expenditure, is in the treasury to the credit of the fund from which it is to be drawn and not appropriated for any other purpose, does not apply to an ordinance appropriating the money obtained by council, from a sale of bonds made by it, to the purpose for which the bonds were sold."

On page 78 the court in its opinion uses the following language:

"The supplemental petition avers that the auditor did not so certify. This is denied by the answer in the circuit court, and that court does not make any finding upon that issue. This contract cannot create an obligation against the city in the nature of a debt, to meet which no funds have been provided. The council issued and sold the bonds and appropriated

the proceeds to meet the expenditures it authorized, and any obligations incurred by the ordinance under the authority conferred are payable only out of the appropriation, so that the section can have no application to such a case."

It will be noted from this language that the court really was not called upon to decide this particular question, because of the fact that the petition averred that the auditor did not so certify. The answer denied this fact and the circuit court made no finding upon that issue. But the court did pass upon the question in the language found in the syllabus and as found in the opinion.

In Emmert v. City of Elyria, 74 O. S. 185, the following proposition of law is laid down in the second branch of the syllabus:

"2. Sections 45 and 45a of the municipal code (1536-205 and 1536-205a, Revised Statutes, Bates' 5th Ed.), providing in substance that no contract involving the expenditure of money shall be entered into unless the auditor of the corporation shall first certify to council that the money required for the contract is in the treasury to the credit of the fund from which it is to be drawn and not appropriated for any other purpose and that a contract entered into contrary to such provision shall be void and that the money to be derived from lawfully authorized bonds or notes sold and in process of delivery shall be deemed in the treasury and in the appropriate fund, do not apply to contracts for street improvements, when bonds have been authorized by the municipality to be issued to pay the entire estimated cost and expense of the improvement."

On page 197 the court in the opinion uses the following language:

"So that it would seem to follow now that a municipality may issue bonds in sufficient amount to pay the estimated cost and expense of an improvement and may levy taxes in addition to all other taxes authorized by law, to pay the bonds issued and sold to pay its part of the cost of the improvement, that sections 45 and 45a do not apply to improvements for which the city has authorized bonds to be issued to pay the entire estimated cost and expense.

"Having found that these sections are not applicable, their interpretation is not necessary."

The last sentence of the above quotation is as follows:

"Having found that these sections are not applicable, their interpretation is not necessary,"

and throws some little doubt upon the question as to whether the court really placed a construction upon sections 3806 and 3810. But at least the court held that the provisions in said sections did not apply to the case under consideration by the court. In the last part of the second branch of the syllabus the court say that the provisions of said section

"do not apply to contracts for street improvements, *when bonds have been authorized by the municipality to be issued to pay the entire estimated cost and expense of the improvement.*"

In Kerr v. Bellefontaine et al., 59 O. S. 446, the court, in discussing the provisions

of the statute in reference to the filing of the certificate of the proper official, to the effect that the money is in the treasury, uses the following language:

> "Not only was this requirement of the statute designed to place a restriction upon the increase of municipal indebtedness, but its terms are inapplicable to a contract of this character. The requirement is that the certificate must show that the money required for the contract is in the treasury to the credit of the fund and not appropriated for any other purpose. The fund from which the plaintiff is entitled to satisfaction of his demand is not raised by taxation. It is derived from the operation of the gas works and made subject to the order of the board whose authority is so limited that they can make valid contracts only for appliances and supplies for the gas works to which the fund is devoted. The fund can be appropriated to no other purpose, and the trustees can contract for no other purpose."

The facts in this case are somewhat different, in that the fund out of which payment was to be made was not raised by taxation, it being a fund created from the operation of the gas works in the city of Bellefontaine. But it was a special fund and one which could only be used for a specific purpose, and hence is in point.

In Lloyd v. Toledo, 20 C. C. (N. S.) 47, the court lays down the following proposition in the fourth branch of the syllabus:

> "4. Where an appropriation for a specific municipal improvement has been made and funds provided by a sale of bonds to pay for the entire cost of such improvement, and thereafter a new contract is entered into modifying some of the terms of the original contract, the failure of the city auditor to certify that the money was in the treasury to the credit of the fund from which it is to be drawn does not render the modified contract invalid, and this is true for an additional reason when the modifying contract imposes no increased liability upon the city."

From all the above, the principle seems to be well established that the certificate provided for in sections 5660 and 3806 G. C. is not required when the cost and expense of the work contracted for is to be paid out of some special fund, not being the general fund and not created by taxation, especially when said fund can be used for no purpose other than that provided for in the contract.

The court in Cincinnati v. Waite, 12 N. P. (N. S.) 633, puts the proposition thus in the syllabus:

> "The provision of section 3806, P. & A. Anno. G. C., making it necessary before any contract, agreement or other obligation involving an expenditure of money is entered into by a municipality that the auditor certify the money required to meet the proposed expenditure is in the municipal treasury to the credit of the fund from which it is to be drawn and not appropriated for any other purpose, is primarily applicable to expenditures derived from the general revenue producing powers of the municipality, and such a certificate is not necessary where a specific power is conferred upon a municipality for a specific purpose with a specific provision for payment of the expenditure involved in the exercise of such power."

Your county commissioners, in anticipation of the levying of taxes, issued bonds under the provisions of section 6929 G. C., the last sentence of the section reading as follows:

> "The proceeds of such bonds shall be used exclusively for the payment of the costs and expenses of the improvement for which they are issued."

That is, the proceeds from the sale of the bonds create a special fund which can be used for no purpose other than the one for which the bonds were sold. In other words, these principles obtain in your proposition:

1. The county had a certain work which it desired to do.
2. The statutes gave it power and authority to do it.
3. The statutes further gave the county a method to create a fund to take care of the cost and expense of the work, namely, by issuing and selling bonds.
4. The proceeds derived from the sale of these bonds can be used for no other purpose than that for which they were issued and sold. That is, it is a special fund.
5. The money derived from the sale of the bonds was in the treasury to the credit of the special fund, against which the contracts were made.

Applying the principles of law set forth in the above cited cases to the facts above set out, it would seem that but one conclusion could be drawn, and that is, that in a case similar to the one you suggest the certificate of the county auditor, to the effect that the money is in the treasury, would not be necessary.

There is another decision of our courts to which I desire to call your attention, and that is Village v. Diekmeier, 79 O. S. 323. In this case the court seems to have arrived at a different conclusion from that arrived at in the above cited cases. The facts in this case are somewhat similar to those set out in your communication. The court herein held that a certificate of the proper official, to the effect that the money is in the treasury, is a prerequisite to the entering into of a contract. In this case the plaintiff was a contractor, attempting to recover on his contract.

In the two supreme court cases cited above, the plaintiff was a taxpayer, seeking an injunction.

In your case the contractors are attempting to evade a contract. So that the court has not passed upon your specific question.

Hence, answering your question specifically, it is my opinion that in your case the certificate of the county auditor is not necessary, and this from the great weight of authority of the courts of our state, although Village v. Diekmeier, supra, seems to be against this holding.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

334.

DISTRICT SUPERINTENDENT—SALARY PAID TO SAID OFFICIAL BEFORE BEGINNING OF SCHOOL YEAR FOR WHICH HE WAS HIRED—MAY BE RECOVERED.

Money paid to a district superintendent for services rendered prior to the beginning of school for which he was hired is an illegal payment and should be recovered.

COLUMBUS, OHIO, June 2, 1917.

HON. DONALD F. MELHORN, *Prosecuting Attorney, Kenton, Ohio.*

DEAR SIR:—You request my opinion upon the following statement of facts, to wit:

"On June 19, 1915, the county board of education of Hardin county,

wishing to arrange its supervision districts agreeably with the provisions of Code section 4738 G. C., theretofore enacted, but not yet become a law, passed resolutions providing for four supervision districts.

"Sometime thereafter, to wit, between said 19th day of June, 1915, and August 1, 1915, the presidents of the boards of education within the four supervision districts aforesaid, met, as provided by section 4739 G. C., and elected district superintendents in each of the four supervision districts. Each of said district superintendents was elected for the period of one year commencing August 1, 1915.

"The four persons so elected as district superintendents accepted their offices, and fully performed all duties incident thereto, during the entire month of August, 1915, and drew one-twelfth of their year's salary as compensation for that period.

"State examiner Edwin E. Hall on page 40 of the report of his examination of the Hardin county offices, returns findings against each of the four district superintendents for the amount of their August, 1915, salary. Mr. Hall's theory is that inasmuch as section 4738, as amended, did not become operative until September 1, 1915, no compensation could be legally allowed the district superintendents prior to that date, for superintending districts created as aforesaid under this amended section.

"I desire your opinion on the legal soundness of these findings."

In order to arrive at the solution of the above matter it is well that we note the scheme provided in our school code for district supervision.

General Code section 4729, as enacted in 104 O. L. page 136, provides for the election of the members of the county board of education, and General Code section 4732, enacted at the same time, provides for the organization of such county school board. General Code section 4738, as enacted in 104 O. L. 140, provides in part:

"The county board of education shall, within thirty days after organizing divide the county school district into supervision districts. * * *"

The above section was amended May 29, 1915, to read in part as follows:

"The county board of education shall divide the county school district, any year, to take effect the first day of the following September into supervision districts, each to contain one or more village or rural school districts. * * * The county board of education shall, upon application of three-fourths of the superintendents of the village and rural district boards of the county, redistrict the county into supervision districts. * * *"

By the above, then, the entire county school district, except that territory which had separate supervision, was divided into supervision districts, and General Code section 4739 provides:

"Each supervision district shall be under the direction of a district superintendent. Such district superintendent shall be elected by the presidents of the village and rural boards of education within such district except that where such supervision district contains three or less rural or village school districts the boards of education of such school districts, in joint session, shall elect such superintendent. * * *"

General Code section 4741 provides:

"The first election of any district superintendent shall be for a term *not longer than one year* * * *."

General Code section 4743 provides:

> "The compensation of the district superintendent shall be fixed at the same time that the appointment is made and by the same authority which appoints him; such compensation shall be paid out of the county board of education fund on vouchers signed by the presidents of the county board. The salary of any district superintendent shall in no case be less than one thousand dollars per annum, half of which salary not to exceed seven hundred and fifty dollars shall be paid by the state and half by the supervision district. * * * The half paid by the supervision district shall be pro-rated among the village and rural school district in such district in proportion to the number of teachers employed in each district."

General Code section 7698 provides that the school year shall begin on the first day of September of each year and close on the 31st day of August of the succeeding year. So that when the district superintendents were elected for the supervision districts of the county in the year 1914, their terms began on September 1st of said year and ended on the 31st day of August, 1915.

In opinion No. 2069, found in opinions of the attorney-general for 1916 page 1855, it is held that the district superintendent having once had his salary fixed, pursuant to the provisions of section 4743 G. C., his employment is for at least the term certain of one year and that said salary cannot be changed during the year.

Following the reasoning of said opinion, the term, then, of the district superintendents who were elected in 1914 would extend, as above noted, to August 31, 1915. How, then, could any district superintendents receive another or a different salary covering the said period. If the same district superintendents were re-elected, they had already been paid for said time, or at least their contract covered said period. If other district superintendents were elected than those who served in the original supervision districts, they could not receive pay for a school year covered by the term of their predecessors. The various presidents or members of the boards of education who made up the supervision district were without authority to enter into contracts covering a period which was included in the contracts previously entered into and, as above noted, the entire county school district was covered by the several supervision districts, so that in no case was there any territory without a district superintendent. The officers who employed such district superintendents could exercise only such powers as are conferred upon them by law. They had no authority to make a contract overlapping any other contract. The money having been paid thereon, recovery of the same back can be had. Very truly yours,

JOSEPH McGHEE,
Attorney-General.

335.

PARK POLICE—AUTHORITY TO ENFORCE FISH AND GAME LAW.

Park police patrolmen appointed by board of public works have authority to enforce the fish and game laws.

COLUMBUS, OHIO, June 4, 1917.

HON. JOHN C. SPEAKS, *Chief Warden, Fish and Game Division, Board of Agriculture, Columbus, Ohio.*

DEAR SIR:—Under date of April 27th you submitted to this department for opinion the following:

"Section 1397 of the General Code provides that sheriffs, deputy sheriffs, constables and other police officers shall enforce the laws for the protection, preservation and propagation of birds, fish and game and for this purpose they shall have the power conferred upon the wardens.

"Will you please give an opinion as to whether or not a park policeman appointed by the board of public works and on duty at Portage Lakes, Summit county, has authority to enforce the fish and game laws?"

Section 1397 G. C., to which you refer, provides as follows:

"Sheriffs, deputy sheriffs, constables and other police officers shall enforce the laws for the protection, preservation and propagation of birds, fish and game and for this purpose they shall have the power conferred upon the wardens and receive like fees for similar services. Prosecutions by a warden or other police officer for offenses not committed in his presence shall be instituted only upon the approval of the prosecuting attorney of the county in which the offense is committed or upon the approval of the attorney general."

Section 469 of the General Code provides that the lands therein described, among which is what is known as Portage Lakes, are dedicated and set apart forever for the use of the public as public parks or pleasure resorts.

Section 472 of the General Code provides that the lakes, reservoirs and state lands dedicated and set apart for park or pleasure resort purposes shall be under the control and management of the superintendent of public works, and at the end of such section it is provided as follows:

"The superintendent of public works shall maintain such police regulations and enforce all needed rules for the government of the public parks as may be prescribed by law."

Section 475 G. C. provides that the superintendent of public works may appoint police patrolmen to preserve order and protect the public and prescribe their compensation, and further provides:

"Such police patrolmen shall have the same power and authority as constables in the discharge of their official duties, and their jurisdiction shall be coextensive with the counties touching or including any portion of such public park or pleasure resort."

Section 479 G. C. adopts certain rules for the guidance of the superintendent of public works and police patrolmen. Rule 11 under such section provides:

"It shall be the duty of each patrolman to arrest on view or warrant and bring to justice all disturbers of the peace and *violators of the criminal laws of the state*, when the offense is commmitted on land or water in or adjacent to state reservoirs and lands that have been set aside or dedicated to the use of the public for park and pleasure resort purposes, and when such patrolman deems it necessary, he may call to his assistance any one within the hearing of his voice to assist in making such arrests."

The latter part of rule 12 provides as follows:

"Police patrolmen shall have the same power and authority as constables, and their jurisdiction shall be coextensive with the counties touching any reservoir park."

In view of the fact that section 1397 provides that the sheriffs, deputy sheriffs, constables and *other police officers* shall enforce the laws for the protection and preservation of fish and game and shall have the powers conferred upon deputy wardens and the fact that rule 11 of section 479 makes it the duty of each patrolman to arrest violators of the criminal laws of the state (a violation of the fish and game laws being a violation of the criminal laws of the state) I am of the opinion that a park policeman appointed by the superintendent of public works has authority to enforce the fish and game laws.

Section 485 G. C. provides:

> "All lakes, reservoirs and state lands dedicated to the use of the public for park and pleasure resort purposes, with respect to the enforcement of all laws relating to the protection of birds, fish and game, shall be under the supervision and control of the board of agriculture. All laws for the protection of fish in inland rivers and streams of the state, and all laws for the protection of birds, fish and game shall apply to all such state reservoirs and lakes."

While section 485 places the enforcement of the fish and game laws under the supervision and control of the board of agriculture, nevertheless, I am of the opinion that the park policemen have the power on view or warrant to arrest those found violating the fish and game laws of the state on state lands dedicated to the use of the public for park and pleasure resort purposes. This conclusion is somewhat strengthened by an examination of section 479, rule 16, which provides that all patrolmen "shall visit, as often as circumstances warrant, all resorts located on land or water in or around the reservoir to which he is assigned, that are reported to be the rendezvous of thieves, gamblers and other notorious characters and likewise of *persons reported as habitually violating the fish and game laws of the state.* * * *"

Answering your question, therefore, I am of the opinion that a park policeman, appointed by the superintendent of public works, on duty at Portage Lakes, Summit county, has authority to enforce the fish and game laws.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

336.

APPROVAL—FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN WILLIAMS AND HOLMES COUNTIES.

DISAPPROVAL—FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN HANCOCK COUNTY.

COLUMBUS, OHIO, June 6, 1917.

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

DEAR SIR:—I have your communication of June 1, 1917, with which you enclose certain final resolutions in reference to the construction of highways, upon which you ask my approval. I have examined these final resolutions carefully and find

them, with one exception, to be correct in form and legal, and am therefore returning the same to you with my approval endorsed thereon, with the exception of the one hereinafter mentioned. These resolutions are as follows:

"Williams county—Section 'C,' Bryan-Edgerton road, Pet. No. 3083, type 'B' (also duplicate).

"Williams county—Section 'C,' Bryan-Edgerton road, Pet. No. 3083, type 'A' (also duplicate).

"Williams county—Section 'C,' Bryan-Edgerton road, Pet. No. 3083, type 'C' (also duplicate).

"Holmes county—Section 'H,' Mansfield-Millersburg road, Pet. No. 2505.

"Hancock county—Section 'b-1,' Findlay-Kenton road, Pet. No. 2428 (also duplicate).

"Medina county—Section 'L-2,' Barberton-Greenwich road, Pet. No. 2668."

There is an error in the final resolution of the commissioners of Hancock county, I. C. H. No. 221, in that they have stated the amount appropriated as being $30,050.00, and it should be $3,050.00. This error also appears on the duplicate. While this might not be vital, yet I am of the opinion that you should have it corrected before I approve the same.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

337.

APPROVAL—FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN SANDUSKY COUNTY.

COLUMBUS, OHIO, June 6, 1917.

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

DEAR SIR:—I have your communication of June 2, 1917, with which you enclose final resolutions as follows:

"Sandusky county—Section '—,' Fremont-Perrysburg road and Fremont-Bellevue road, I. C. H. Nos. 275 and 274.

"Sandusky county—Section 'j-1,' Fremont-Bellevue road, I. C. H. No. 274 (also duplicate)."

I have carefully examined these final resolutions and find them to be correct in form and legal, and am therefore returning the same to you with my approval endorsed thereon.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

338.

APPROVAL—TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE OF COUNTY COMMISSIONERS OF LOGAN COUNTY.

COLUMBUS, OHIO, June 6, 1917.

The Industriol Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"IN RE: Bonds of Logan county, Ohio, in the sum of $10,000.00, for the purpose of constructing certain bridges and repairing certain other bridges in said county."

I have carefully examined the transcript of the proceedings of the board of county commissioners of Logan county, Ohio, relative to the above bond issue, and find same to be in accordance with the provisions of the General Code relating thereto.

I am therefore, of the opinion that bonds of said county, properly prepared in accordance with bond form submitted, will, when signed by the proper officers, constitute valid and binding obligations of said county.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

339.

APPROVAL—FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN LAWRENCE AND STARK COUNTIES.

COLUMBUS, OHIO, June 6, 1917.

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

DEAR SIR:—I have your communication of June 2, 1917, with which you enclose final resolutions as follows:

"Lawrence county—Section 'I' Ohio river road, I. C. H. No. 7.
"Lawrence county—Section 'K' Ohio river road, I. C. H. No. 7, Type 'A.'
"Lawrence county—Section 'K' Ohio river road, I. C. H. No. 7, Type 'B.'
"Lawrence county—Section 'K' Ohio river road, I. C. H. No. 7, Type 'C.'
"Lawrence county—Section 'K' Ohio river road, I. C. H. No. 7, Type 'D'.
"Stark county—Section 'B-2' Canton-New Franklin road, I. C. H. No. 72."

I have carefully examined these final resolutions and find them to be correct in form and legal, and am therefore returning the same to you with my approval endorsed thereon.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

340.

COUNCIL—HAS POWER TO DISCONTINUE AN IMPROVEMENT OR EXTENSION OF PUBLIC UTILITY—AND TRANSFER UNEXPENDED BALANCE TO TRUSTEES OF SINKING FUND.

Where bonds have been issued and a fund created for the improvement or extension of a public utility of a village and only a certain portion thereof has been expended, and there are no contracts outstanding or entered into against said bond fund, the village council may, in the exercise of its discretion, legally determine to discontinue any further improvement or extension of said public utility and transfer the unexpended balance to the trustees of the sinking fund under the authority of section 3804 G. C., although the board of trustees of public affairs of said village considers the further extension of said public utility necessary and expedient.

COLUMBUS, OHIO, June 6, 1917.

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

GENTLEMEN:—Under date of April 5, 1917, you submitted for my opinion the following request:

> "If bonds have been issued for the improvement or extension of a public utility of a village, in the amount of $25,000.00, and $15,000.00 of this amount has been expended, leaving a balance of $10,000.00 in the fund, if the board of trustees of public affairs considers it necessary, and are desirous of making further extensions and improvements to such public utility, in the event that there are no contracts outstanding or entered into against such bond fund, may the council legally determine to discontinue any further improvement or extension and transfer the balance of $10,000.00 to the trustees of the sinking fund under the authority of section 3804 General Code?"

Section 3804 General Code reads as follows:

> "When any unexpended balance remaining in a fund created by an issue of bonds, the whole or part of which bonds are still outstanding, unpaid and unprovided for, is no longer needed for the purpose for which such fund was created, it shall be transferred to the trustees of the sinking fund to be applied in the payment of bonds."

The foregoing section requires the transfer of any unexpended balance remaining in a fund created by an issue of bonds to the sinking fund, when the whole or part of any such bonds are still outstanding, unpaid and unprovided for and such balance is no longer needed for the purpose for which said fund was created, and that such balance shall be applied to the payment of said bonds.

I presume, inasmuch as you have cited section 3804, supra, in your request, that the issue of bonds in question is either in whole, or to the extent of $10,000.00 at least, still outstanding, unpaid and unprovided for.

Before said transfer is made the section requires that said balance shall no longer be needed for the purpose for which such fund was created.

As stated in your request, there seems to be some difference of opinion between the village council and the board of trustees of public affairs of said village on the question of whether or not the particular public utility should be further extended and improved. Hence it is necessary to determine which particular body or board of the village is vested with the authority to determine whether or not the balance

in a particular fund created by a bond issue is needed longer for the purpose for which such fund was originally created.

Section 4215 General Code provides in part as follows:

> "The legislative power of each village shall be vested in, and exercised by, a council, * * *."

Section 4240 General Code provides:

> "The council shall have the management and control of the finances and property of the corporation, except as may be otherwise provided, and have such other powers and perform such other duties as may be conferred by law."

It will be noted from the above sections of the General Code that the legislative power in a village is vested in its council, and that the council shall have charge of the management and control of the finances and property of said village.

Section 4361 General Code provides in part as follows:

> "The board of trustees of public affairs shall manage, conduct and control the water works, electric light plants, artificial or natural gas plants, or other similar public utilities, furnish supplies of water, electricity or gas, collect all water, electrical and gas rents, and appoint necessary officers, employees and agents. * * * The board of trustees of public affairs shall have the same powers and perform the same duties as are possessed by, and are incumbent upon, the director of public service as provided in sections 3955, 3959, 3960, 3961, 3964, 3965, 3974, 3981, 4328, 4329, 4330, 4331, 4332, 4333 and 4334 of the General Code, and all powers and duties relating to water works in any of these sections shall extend to and include electric light, power and gas plants and such other similar public utilities, and such boards shall have such other duties as may be prescribed by law or ordinance not inconsistent herewith."

The last mentioned section vests in the board of trustees of public affairs the authority to manage, conduct and control the public utilities of the village. It further provides that the said board shall have the same powers and perform the same duties as are possessed by and incumbent upon the director of public service as provided in certain other sections of the General Code therein stated. Two of these sections are 3960 and 3961 General Code, which provide as follows:

> "Section 3960. Money collected for water works purposes shall be deposited weekly with the treasurer of the corporation. Money so deposited shall be kept as a separate and distinct fund. When appropriated by council it shall be subject to the order of the director of public service. Such director shall sign all orders drawn on the treasurer of the corporation against such fund."
>
> "Section 3961. Subject to the provisions of this title, the director of public service may make contracts for the building of machinery, water works buildings, reservoirs and the enlargement and repair thereof, the manufacture and laying down of pipe, the furnishing and supplying with connections all necessary fire hydrants for fire department purposes, keeping them in repair, and for all other purposes necessary to the full and efficient management and construction of water works."

Section 3960, supra, in its application to the board of trustees of public affairs of a village under the terms of section 4361, supra, provides in effect that when public utility money is appropriated by council it shall be subject to the order of said board.

Section 3961, supra, being incorporated by reference in section 4361, authorizes the said board of trustees of public affairs to make contracts, among other things for the enlargement and repair of certain public utilities of the village, subject to the provisions of the General Code with reference to the making of contracts by the director of public service of a city.

Section 4328 General Code provides for the making of contracts by the director of public service of a city and is made applicable to the board of trustees of public affairs of a village by section 4361, supra.

Section 4328 General Code reads as follows:

> "The director of public service may make any contract or purchase supplies or material or provide labor for any work under the supervision of that department not involving more than five hundred dollars. When an expenditure within the department, other than the compensation of persons employed therein, exceeds five hundred dollars, such expenditure shall first be authorized and directed by ordinance of council. When so authorized and directed, the director of public service shall make a written contract with the lowest and best bidder after advertisement for not less than two nor more than four consecutive weeks in a newspaper of general circulation within the city."

The last mentioned section provides in effect that when an expenditure of the board of trustees of public affairs with reference to the management, conduct and control of a public utility of the village exceeds five hundred dollars, such expenditure shall first be authorized and directed by ordinance of council, and when so authorized and directed the said board shall make a written contract with the lowest and best bidder after proper advertisement. Hence it is clear that before the said board could enter into a legal contract for the enlargement or extension of a public utility under its charge, the village council must authorize and direct it to do so, and then said board must proceed as provided by law.

You do not state in your communication whether said board of trustees of public affairs has been so authorized and directed by said council to expend the $10,000.00 which still remains in said fund in the making of a contract for the extension and enlargement of said public utility; but you do state that there are no outstanding contracts or obligations against such bond fund as far as third parties are concerned. However, if the board of trustees of public affairs has been authorized by the council of said village to enter into a contract for the extension and enlargement of a public utility thereof, and the money therefor has been appropriated for its use by council, said board would be vested with the authority of advertising for bids for such extension and enlargement, and such authority would continue to exist until the village council had repealed the ordinance which vested such authority in said board.

However, the council, in the exercise of its discretion as to what it might consider to be for the best interests of the village, would have the right, in my opinion, to repeal at any time the ordinance vesting such authority in said board, in the absence of any rights being vested in third parties under contract made in pursuance to such original authorization. As has been noted heretofore, the council is vested with the legislative or law making power of said village, and as such is authorized to pass and ordain legislation with respect to powers vested in it by the legislature.

The power to make a law carries with it the power to repeal said law, and in the absence of some constitutional limitation or limitation placed upon it by the legislature, the council of a municipality has the same right to repeal an ordinance as it has to pass it.

Dillon on Municipal Corporations, 5th Ed., Vol. II, section 584;
Lewis' Sutherland Statutory Construction, section 244;
State ex rel. Attorney-General v. Jennings, 57 O. S., 415.

An examination of the constitution and the General Code does not disclose any provision therein which requires that money in a special fund created for a specific purpose shall be expended for that purpose, if conditions or circumstances arise which would make it expedient to abandon the project, or a part of the project, for the accomplishment of which said fund was created. The very fact that the legislature has provided for the transfer of such unexpended balance in said fund to the sinking fund, when the purpose for which it was created no longer exists, indicates that the legislature had in mind cases in which such a change in plan might be contemplated, and made provision therefor accordingly.

It is apparent that circumstances and conditions as above mentioned will arise at times which will make necessary a determination of the matter as to whether or not a certain project should be carried through to completion or be abandoned. It is necessary that the discretion should be vested in some certain representative or representatives to pass on such a case. It seems to me that the exercise of such discretion and the determination of such a matter is legislative in character and should be, and is, vested in the legislative power of the municipality.

The village council as such legislative body created the fund in question and provided for its expenditure, and hence I think it follows unquestionably that it is for said council to say whether or not such authorization for such expenditure, in whole or in part, is withdrawn, and any funds remaining therein shall be transferred to the sinking fund as provided by law.

Answering your question, then, specifically, I am of the opinion that if bonds have been issued for the improvement or extension of a public utility of a village in the amount of $25,000.00, and $15,000.00 of this amount has been expended, leaving a balance of $10,000.00 in the fund, and there are no contracts outstanding or entered into against said bond fund, the village council may, in the exercise of its discretion, legally determine to discontinue any further improvement or extension of said public utility and transfer the balance of $10,000.00 to the trustees of the sinking fund under the authority of section 3804 General Code, although the board of trustees of public affairs considers it necessary and is desirous of extending and improving said utility further.

A similar conclusion was reached by one of my predecessors, Hon. Timothy S. Hogan, on an analogous state of facts in an opinion rendered to Hon. Van A. Snyder, city solicitor, Lancaster, Ohio, under date of October 26, 1911, and found in Annual Report of Attorney-General for the years 1911-1912, volume I, page 1588.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

341.

VILLAGE SCHOOL DISTRICT—IS NOT AUTOMATICALLY DISSOLVED WHEN TAX VALUATION FALLS BELOW $500,000.00.

A village school district once organized as such, and whose tax valuation falls below $500,000, is not by that act alone dissolved and the board of education of such district will continue to perform the duties thereof.

COLUMBUS, OHIO, June 6, 1917.

HON. JOHN M. MARKLEY, *Prosecuting Attorney, Georgetown, Ohio.*

DEAR SIR:—I have your letter in which you submit for my official opinion the following proposition:

> "On the first day of December, 1916, the board of education of the Higginsport village school district of Brown county, Ohio, by resolution duly adopted, provided for the issuance of the bonds of said school district in the sum of $1,200, for the purpose of repairing the public school building in said school district; said bonds having been authorized by the electors of said school district at an election held therein on the 7th day of November, 1916.
>
> "These bonds were offered to the industrial commission of Ohio and were accepted by them and a transcript of the proceedings of the board was duly prepared and submitted to Hon. Edward C. Turner, attorney-general. The proceedings of the board relative to the issuing of these bonds were approved, but as the amount of taxable property within said school district was less than $500,000, the bonds were rejected upon the authority of an opinion rendered by the attorney-general's office to Hon. S. W. Innis, prosecuting attorney, Paulding, Ohio, under date of August 9, 1916.
>
> "On the 24th day of March, 1917, in conformity to the holdings of said opinion, an election was held in the Higginsport village school district, under the provisions of section 4682, at which election there was submitted to the electors the proposition to organize the territory, heretofore constituting the Higginsport village school district, into a village school district under the provisions of said section.
>
> "Kindly advise me whether this is an organization of a new district or the continuing of the old district; also whether the old board continues as the board of education of said school district or whether it will be necessary to appoint an entire new board. The board of education desires to issue the bonds, heretofore referred to, and I would like to know if the bonds heretofore provided for can be sold, or whether it will be necessary to call another election and provide for a new issue. The transcript of the proceedings of the board, heretofore referred to, is now on file in your office."

By the above statement I gather that the Higginsport village school district existed as such prior to the amendment of General Code section 4681, which placed the valuation of the territory which constituted a village at $500,000 and over, before such village should constitute a village school district and that the first question for me to determine is: Does such change in the law dissolve the district which had so existed prior thereto, or does such district, once existing, continue until otherwise changed?

If the district was dissolved by operation of law, when said section was amended,

then a new school board is necessary for the new district. If said district was not dissolved, then the school board having charge of the district will continue.

A school district is a creature of statute, and when once organized under and by virtue of the law such district will continue, and the school board having control of such district is a *quasi* corporate body until changed, as provided by law.

A village school district in Ohio is defined by General Code section 4681 as:

> "Each village, together with the territory attached to it for school purposes, and excluding the territory within its corporate limits detached for school purposes, and having in the district thus formed a total tax valuation of not less than five hundred thousand dollars, shall constitute a village school district."

So that if the village were now to be incorporated, there is no question but that a village school district would not, at the same time, be formed unless the territory of such village for school purposes be valued at $500,000.00 or more. But if a village were now to be incorporated, and the tax valuation were less than $500,000.00, the proposition to organize the territory of such village "thus formed" into a village school district might be submitted to the electors thereof, as provided by General Code section 4682, which reads as follows:

> "A village, together with the territory attached to it for school purposes, and excluding the territory within its corporate limits detached for school purposes, with a tax valuation of less than five hundred thousand dollars, shall not constitute a village school district, but the proposition to organize the territory thus formed into a village school district may be submitted by the board of education, and shall be submitted by the board of education upon the presentation to it of a written petition for such purpose signed by 25 per cent. of the electors of the territory thus formed, to a vote of the electors of the territory thus formed at any general or a special election called for that purpose, and be so determined by a majority vote of such electors."

Should such proposition carry by a majority vote of such electors, then said village may be *organized* into a village school district, and if such proposition does not carry by a majority vote of such electors, then such village shall not be *organized* into a village school district.

The history of the above section 4681 throws some light upon the legislative intent in relation thereto.

The first word of our legislature in relation to the matters contained in said section is found in 70 O. L., p. 195, and in an act which provided for the re-organization and maintenance of the common schools. Chapter I of said act classifies school districts and section 4 of said chapter reads as follows:

> "Each incorporated village, including the territory attached to it for school purposes and excluding the territory within its corporate limits detached for school purposes is hereby constituted a school district to be styled a village district."

Said act, of which said section is a part, was passed May 1, 1873, and the above section was amended April 27, 1877, to read as follows:

> "Each incorporated village, including the territory attached to it for school purposes, and excluding the territory within its corporate limits, detached for school purposes, shall be constituted a school district, to be styled

a village district, in the following manner, to wit: Written or printed notices, signed by not less than five electors, residents of such village, shall be posted in at least five of the most public places within the limits of said village, requesting the electors of said village to meet for the purpose of voting on the question of establishing a village district, on a day and between specified hours, not less than six, between six o'clock in the forenoon, and six o'clock in the afternoon, and at a place designated in said notices, within the limits of said village, which notices shall be posted not less than ten days prior to the day designated in them for such meeting. The electors so assembled at the time and place designated, shall appoint a chairman and two clerks, who shall be the judges of said election. The electors in favor of the proposed village district shall have written or printed on their ballots the words, 'Village district, yes;' and those opposed thereto, the words, 'Village district, no;' and the votes so cast shall determine the question whether such village district shall be established. If a majority of the votes cast at said election shall be found opposed to establishing such village district, the question of establishing such village district shall not be again submitted to the electors of said village until the succeeding regular annual election for village officers, and then only upon the usual notice being given as above; and if a majority of the votes cast at said election shall be found to be in favor of establishing such village district, the said village may be organized as a village district in the manner provided in sections five and six of an act entitled 'An act supplementary to an act for the re-organization and maintenance of common schools,' passed March 30, 1874."

It will be noted at the outset that when said section 4 was first enacted, as above quoted, it provided that *all* villages should constitute village school districts, but in the amendment last above mentioned certain limitations are placed upon the organization of villages into village school districts, and no provision is made for the dissolution of any district already created, but all the language speaks in the present or future and even though a village is incorporated and the valuation is that which is required by law, while such village may become, *ipso facto*, a village school district in name, it is not so for school purposes until a board of education may be elected or appointed. (See Opinions of the Attorney-General for 1913, page 470.) That is to say, something outside of the mere designation of territory is necessary to completely establish the school district for all practical school purposes.

Said section 4 of the original act, above mentioned, was carried into the Revised Statutes as No. 3888, and was amended April 25, 1904, to read as follows:

"Each incorporated village, *now existing, or hereafter created*, together with the territory attached to it for school purposes, and excluding the territory within its corporate limits detached for school purposes, shall constitute a village school district."

It is worthy of note, however, that the above amendment is in almost the identical form in which said above mentioned section 4 was enacted, adding, however, "now existing" and "or hereafter created," for it will be remembered that from the time said section was amended in 1887 up until the amendment of 1904, there were again, in all probability, many villages which had not organized into village school districts, and so without disbanding or dissolving any districts, said section 3888 established or created all *villages* in the village school districts.

But on April 2, 1906, said section 3888 was again amended to read as follows:

"Each incorporated village, now existing or hereafter created, together

with the territory attached to it for school purposes and excluding the territory within its corporate limits detached for school purposes, *and having in the district thus formed a total tax valuation of not less than one hundred thousand dollars* shall constitute a village school district, provided that each incorporated village now existing or hereafter created, together with the territory attached to it for school purposes and excluding the territory within its corporate limits detached for school purposes, with a tax valuation of less than one thousand dollars, shall not constitute a village school district; *provided at any general election the proposition to dissolve or organize such village school district be submitted by the board of education to the electors of such village and be so determined by a majority vote of such electors.*"

After the last mentioned amendment, a village, whose tax valuation exceeded $100,000, became *ipso facto* a village school district and a village whose tax valuation was less than $100,000 shall not constitute a village school district. But if a district already existed or if a district with less than $100,000 tax valuation desired to organize, the question of such dissolution or organization could be submitted by the board of education to the electors of such village and be determined by a majority vote of such electors.

In the last above mentioned amendment is the first time provision is made for the dissolution of a village district by the electors thereof. Said section 3888 R. S. was carried into the General Code as No. 4682 and was amended February 28, 1911, to read as follows:

"A village, together with the territory attached to it for school purposes and excluding the territory within its corporate limits detached for school purposes, with a tax valuation of less than $100,000, shall not constitute a village school district, but the proposition to dissolve or organize such village school district shall be submitted by the board of education to the electors of such village at any general or special election called for that purpose and be so determined by a majority vote of such electors."

The material change in said section, as last amended, is that the question *to dissolve* or *to organize* such village district may be submitted at a *special* election called for that purpose, as well as at a general election, as provided in Revised Statutes 3888. On May 9, 1913, said section 4682 was again amended to read as follows:

"A village, together with the territory attached to it for school purposes and excluding the territory within its corporate limits detached for school purposes, with a tax valuation of less than five hundred thousand dollars, shall not constitute a village school district, but the proposition to organize the territory *thus formed* into a village school district may be submitted by the board of education, and shall be submitted by the board of education upon the presentation to it of a written petition for such purpose signed by 25 per cent. of the electors of the territory thus formed, to a vote of the electors of the territory thus formed at any general or a special election called for that purpose, and be so determined by a majority vote of such electors."

In the last above quoted amendment no provision is made for dissolution of a village district, but only for the organization of the territory *thus formed* into a village school district and the words "thus formed," used in the manner in which they are, can mean but one thing, and that is they must refer to the village which is thus formed;

and at the same time the last above quoted section was amended and in which words "to dissolve" were omitted, there was enacted a new section numbered 4682-1, which read as follows:

> "A village school district organized as a village school district at the time of the passage of this act, or that may be hereafter organized, which has a total tax valuation of less than $500,000, shall continue as a village school district, but the proposition to dissolve such village school district may be submitted by a board of education and shall be submitted by the board of education upon the presentation to it of a written petition for such purpose, signed by 25 per cent. of the electors of such village school district, to a vote of the electors of such village school district at any general or special election called for that purpose, and be so determined by a majority vote of such electors."

That is to say, a village school district which existed at the time of the passage of this act, or a village school district which has a tax valuation of less than $500,000, and that may be hereafter organized, as provided by law, shall continue as a village school district until a proposition to dissolve such village school district may be submitted by a board of education or must be submitted by the board of education upon the presentation of the petition mentioned in said section. To give said last mentioned section any other construction would be to do violence to the entire village school system of the state of Ohio. For if this section, when amended, of itself dissolved all the then existing village school districts, what became of the school property of the villages, particularly in those villages made up from territory taken from two or more townships; what became of the bonded indebtedness of the school district where the village territory had been organized from two or more school districts? These and many other questions would be left by the statute undetermined. But, to give the statute the construction above mentioned, leaves every organized village school district *in existence* and causes every village, with a tax valuation of $500,000 or more, to constitute village school districts.

In Sutherland on Statutory Construction, section 489, the following language is used:

> "A construction which must necessarily occasion great public and private mischief must never be preferred to a construction which will occasion neither, or not in so great a degree, unless the terms of the instrument absolutely require such preference. Of two constructions, either of which is warranted by the words of the amendment of a public act, that is to be preferred which best harmonizes the amendment with the general tenor and spirit of the act amended. A statute may be construed contrary to its literal meaning, when a literal construction would result in an absurdity or inconsistency, and the words are susceptible of another construction which will carry out the manifest intention. *'When the literal enforcement of a statute would result in great inconvenience and cause great injustice, and lead to consequences which are absurb and which the legislature could not have contemploted, the courts are bound to presume that such consequences are not intended, and adopt a construction which will promote the ends of justice and avoid the absurdity.'* "

The same author, in section 490, says:

> "Statutes will be construed in the most beneficial way * * * to favor public convenience, and to oppose all prejudice to public interests."

When the new school code was enacted in 1914, section 4682, last above quoted, was carried into said Code unchanged. But section 4682-1 was repealed and in place thereof there was enacted a section by the same number, which provides when and how village school districts, with a population of less than 1,500, may vote to dissolve and join contiguous rural school districts.

No provision is made, however, for the dissolution of village school districts with a population of over 1,500 and whose tax valuation is less than $500,000, except that the county board of education may transfer such village district to an adjoining village or rural district.

Some light, however, might be had in the construction of these statutes by noting the provisions of the General Code which affect village districts as they advance and become cities. If a village increases in population, that is, if the population therein contained reaches 5,000, then such village is advanced to a city. The constitution of Ohio, article 18, section 1, provides:

> 'Municipal corporations are hereby classified into cities and villages. All such corporations having a population of five thousand or over shall be cities; all others shall be villages. The method of transition from one class to the other shall be regulated by law."

Sections 3497, 3498 and 3499 of the General Code, regulate the method of transition of municipal corporations from one class to the other and are not inconsistent with the constitutional amendment above quoted.

Section 3497 G. C. provides:

> "Municipal corporations, which, at the last federal census, had a population of five thousand or more, shall be cities. All other municipal corporations shall be villages. Cities which, at any future federal census, have a population of less than five thousand shall become villages. Villages which, at any future federal census, have a population of five thousand or more, shall become cities."

Section 3498 G. C. provides:

> "When the result of any future federal census is officially made, known to the secretary of state, he forthwith shall issue a proclamation, stating the names of all municipal corporations having a population of five thousand or more, and the names of all municipal corporations having a population of less than five thousand, together with the population of all such corporations. A copy of the proclamation shall forthwith be sent to the mayor of each municipal corporation, which copy shall be forthwith transmitted to council, read therein and made a part of the records thereof. From and after thirty days after the issuance of such proclamation each municipal corporation shall be a city or village, in accordance with the provisions of this title."

Advancement of a village to a city, therefore, depends upon the proclamation of the secretary of state, making known the result of the federal census. That is to say, some act outside of the mere increase or decrease of population is necessary before such transition is complete.

It was contended in Murray v. State, ex rel., 91 O. S. 220, that article 18, section 1, above quoted, was self executing and when a municipality was shown by a census taken to contain more than 5,000 inhabitants, that fact of itself was sufficient to advance it from a village to a city, but the court held that a municipal corporation

which had a population of less than 5,000 at the last federal census did not advance to a city when it was made to appear by a census taken by a municipal corporation subsequent thereto, that it had a population of more than 5,000.

General Code section 4686 provides:

> "When a village is advanced to a city, the village school district shall thereby become a city school district. When a city is reduced to a village, the city school district shall thereby become a village school district. The members of the board of education in village school districts that are advanced to city school districts, and in city school districts that are reduced to village school districts, shall continue in office until succeeded by the members of the board of education of the new district, who shall be elected at the next succeeding annual election for school board members."

From the time a village school district is organized complete statutory provision is made for its continuance, whether it remains a village over $500,000 in valuation or increases to a city, or votes to dissolve if under 1,500 in population, or votes to organize if under $500,000 in tax valuation. But no word is mentioned how dissolution can be had except as provided by section 4682-1, above quoted.

All the territory of the state is in one of four classes of districts; in fact, in one of three classes, as will be hereinafter noted,—either city, county, village or rural. Provision is made by law for the organization of or what shall constitute each of the above districts and the county district being for but a sort of supervisory purpose over rural and certain village districts, all territory of the state must, therefore, be contained in either a city, village or rural school district. If the village district is dissolved automatically, that is, if section 4681 works such dissolution, then whenever a village district falls below $500,000 in tax valuation and dissolution is had, such dissolution must occur through no provision of law. If the village district, as above noted, was made up from two or more rural districts, then the property, upon dissolution, would revert to the original districts. It could not revert to a rural district because rural districts are defined in General Code section 4735 as:

> "The *present existing* township and special school districts shall constitute rural school districts until changed by the county board of education and all officers and members of boards of education of such existing districts shall continue to hold and exercise their respective offices and powers until their terms expire and until their successors are elected and qualified."

Nothing therein is said about a village district whose tax valuation falls below $500,000. Where, then, could the territory revert to except to districts from whence it came? The school house in the village district might be located in territory from a district the valuation of which is very small or the extent of which territory is very small, and under the above course of reasoning such school house would then revert to the district from which such small portion or valuation came, and the village school-district might have a large amount of indebtedness. Would the indebtedness fall to the district in which the school house is located, and why? How could any indebtedness be divided? No provision is made for an equitable division of indebtedness as in a transfer. If the territory of the village remains such until transferred by operation of law, then the law which would apply would be that law which provides that a county board of education may transfer any or all of a rural or village district to an adjoining rural or village district and at the same time would make an equitable division of the funds and the indebtedness. In other words, the county school board in that case acts in a semi-judicial capacity and determines the rights and the equities which attach. No other plan is provided for distribution of indebtedness.

Let us note a few of the cases upon the dissolution of a district once formed: In School District v. Godding, 24 So. W., 1034, the court held:

"Each organized school district is a body corporate and its territorial form can only be changed in the manner pointed out by statute."

In Bowen v. King, 34 Vt., 156, 165, it is held:

"It has always been understood to be clear that when a union district was once legally formed * * * such district could only be dissolved in the manner provided by the statute."

In Briggs v. Borden, 38 No. W., 712, the statute provided that no district shall be disbanded without a vote of a majority of the resident tax payers. A vote was taken and a majority of those present voted to disband, but said majority was not a majority of all the resident tax payers of the district and the court held that it being necessary to follow the statute strictly, a majority of the tax payers meant a majority over all, and therefore that the statute had not been complied with and the district was not disbanded.

In State v. Henderson, 46 So. W., 1076, a municipal corporation had been incorporated as provided by law, and a school district created therein. The municipal corporation disbanded and the question was whether or not such disbanding of the municipal corporation would also be a disbanding of the school district, but the court held:

"When once organized their (school district) corporate lives are unlimited and remain unchanged until they are changed in the manner prescribed by the legislature."

In School District No. 1 v. School District No. 4, 7 So. W., 285, the court held:

"Each organized school district in the state is a body corporate, *whose corporate life is of unlimited duration* and no power has been vested by law, either in the voters of such district, or of all the districts in the township, or in the boards of directors of such districts, or in the school commissioner of the county, to deprive them of their corporate existence and in their stead create new districts. The extent of the power of the voters in such organized districts, and the county school commissioner, when his power is called into action, is to form a new district composed of portions of two or more organized districts and to change the boundary lines of organized districts."

In considering the dissolution of school districts, my predecessor, Hon. Timothy S. Hogan, held in opinion No. 1273, Annual Reports of the Attorney-General, 1914, volume II, page 1495:

"While the statute provides a clear method whereby adjoining rural school districts or a rural and a village school district may *unite* for high school purposes, there is no provision whereby such a district can be *dissolved.* After forming such union the only thing that can be done is to look to the legislature for a legislative enactment providing for such dissolution."

In Russell v. District, etc., 62 No. W., 661, the question was raised as to the dis-

solution of a school district by an act of the legislature where such district actually existed prior to such legislative enactment, but was not recognized in such new act. The court held:

> "This section makes no direct provision as to subdistricts then existing. This court held in the Hancock case, supra, and in District Township of Magnolia v. Ind., District of Boyer, 45 N. W., 907, that districts formed from two townships, because of obstacles prior to the enactment of the Code, continue to exist as such until the territory is restored, as provided by law. *This subdistrict was legally organized for the convenience of the people. There is nothing in the law expressly dissolving an organization.* It is such an organization as the code of 1873 recognizes and we think *it must be held to continue* as such until it is dissolved by restoration of the territory composing it to the respective townships."

No case, it seems to us, could be more in point in our matter than the above case, for in our case the village school ditrict was legally organized prior to the amendment of General Code 4681, which amended section named an amount of tax duplicate greater than that which existed in the school district when the former amendment was passed and no express language is used in such amended section dissolving those districts which already existed. The rights of the tax payers of the district had already attached. Property rights were existing. A school board was in existence and was a *quasi corporate* body. As suggested in the above case, it must be held to continue until it is dissolved by law.

In State ex rel. School District, No. 29, v. Huhlin, et al., 2 Ore., 306, the court held:

> "School districts are public corporations and their corporate existence cannot be annulled except as provided by law, and (under the laws of the state of Oregon) the action for that purpose must be directed by the governor of the state."

The test of dissolution of a corporation is whether or not it has lost its capacity to sustain itself by election of new officers. The school district being separate and distinct could continue to elect new officers, whether the tax valuation was below as well as if it were above $500,000.

You call my attention to opinion No. 1847 of my predecessor, Hon. Edward C. Turner, found in Opinions of the Attorney-General for 1916, page 1388, the syllabus of which reads as follows:

> "When a village district has a tax valuation of less than $500,000, as required by section 4781 G. C., its board of education should submit to its electors the question of reorganizing such district as provided by section 4682 G. C., or of dissolving such district and joining some contiguous territory as provided by section 4682-1 G. C."

In the body of said opinion the following language is used:

> "It is claimed that by reason of the failure of the legislature to make any specific provision for such districts to continue as village districts a strict construction of section 4682 G. C. precludes any further continuation of such districts as village school districts.
>
> *"I am unable to concur in this contention.* While the sections aforesaid may be susceptible of different constructions, it is my judgment that when

considered together they afford a complete procedure for the disposition of a village district when it falls under the limitation of $500,000 tax valuation, as provided in section 4682 G. C. aforesaid. In other words, I am of the opinion that the provisions of said section 4682 aforesaid must be given a prospective operation in that their provisions mean that when a village district ceases to have a tax valuation of $500,000, it shall not continue as a village district under its former right as provided by section 4681 G. C., but that in the happening of such contingency it may proceed by vote, under the provisions of its board of education, either to organize as a village district and so continue as such as provided by said section 4682, or by a vote, under the supervision of its board of education after the approval of the county board, determine to dissolve itself and join some contiguous rural district as provided by section 4682-1 aforesaid."

I cannot agree with the above, for, as pointed out heretofore, in this opinion section 4682-1 formerly provided that a village school district, which has a total tax valuation of less than $500,000, may submit the proposition to dissolve the village school district to a vote of the electors of such village school district, and said provision was repealed and in its place was enacted said section 4682-1, as above quoted. It surely cannot be said that the repeal of said section which contained said language would have the effect of permitting it again to be read into the law as now enacted, but that is exactly what would have to occur if said section is given the construction contended for it. What also would occur if the position taken in said last mentioned opinion were followed and a vote were submitted to dissolve a district with a tax valuation of less than $500,000 and join some contiguous territory and such vote failed, or, if a vote were submitted to organize a district with less than $500,000 valuation into a village district and the proposition failed? Would it then, *ipso facto*, be dissolved? And why any more after either of such elections had failed to carry than before, for there is nothing in the statute which provides for any such dissolution after such vote or after such election failed to carry?

From all the above I must conclude that a village school district which once existed and whose tax valuation falls below $500,000 is not by that act alone dissolved, and when your school district of the Higginsport village fell below $500,000, the district was not dissolved. A new school board would not be necessary. The old school board would exist and your bonds would, therefore, be permitted to be issued by the old board.

This conclusion causes me to reverse my former ruling found in opinion No. 145 of this department, rendered under date of March 27, 1917, in which I held, following the reasoning of opinion No. 1847 of my predecessor, Hon. Edward C. Turner, that the bonds aforesaid were invalid.

Very truly yours,
JOSEPH MCGHEE,
Attorney General.

342.

COUNTY BOARD OF EDUCATION—CAN ORDER ONLY ONE INSTITUTE HELD IN COUNTY DURING ANY ONE YEAR—WHEN SAME MUST BE HELD.

The county board of education is authorized to order but one institute held in the county during any one year and such institute must be held during some one certain week. If other institutes are held the expense thereof cannot be paid from the county board of education fund.

COLUMBUS, OHIO, June 6, 1917.

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

GENTLEMEN:—In your letter of April 7, 1917, you request my opinion as follows:

"Section 7869 G. C. provides that the county board of education shall decide the length of time county institutes may remain in session, but in no case for a longer period than five days.

"Does this provision fix the maximum of days that a county institute may be held, and must these days be continuous, or may the institute be held on five separate days of the year?

"After the five days' institute has been held, if so ordered by the board, may an adjourned session be held and the expenses of same paid from the county board of education fund? If you decide that such adjourned session may be held, may teachers be paid for attending said adjourned sessions?"

General Code section 7869 provides in part:

"* * * The county board of education shall decide the length of time county institutes may remain in session, *in no case for a longer period than five days.* At least one day of such session shall be under the immediate direction of the county superintendent, who shall arrange the program for such day."

The above part section can mean but one of probably three things as to the length of time and when institutes may be held under the jurisdiction of the county board of education. It might mean that the county board of education can hold or cause to be held, several institutes during the school year, no one of which shall be for a longer period than five days; it might mean that said institutes may be held at various times during the year as a regular and as an adjourned session, the aggregate of which shall not be longer than five days; or, it might mean that the county board of education has power to order but one institute held and that such institute can last for no longer than five days. It will be necessary, therefore, to look to other provisions of the General Code that we may determine just what is the true meaning of the language of said above quoted part section.

Section 7868 G. C. provides:

"The teachers' institutes of each county shall be under the supervision of the county boards of education. Such boards shall decide by formal resolution at any regular or special meeting held prior to February 1st of each year *whether a county institute shall be held in the county during the current year.*

The words "a county institute," used in the above section, mean one institute.

They designate a single thing and would, therefore, indicate that the board is limited to the calling of but one institute, and the proposition that several institutes may be held, no one of which is for a longer period than five days, must fall.

If, now, but a single institute can be held, then we must determine whether such single institute can be held as a regular session on one day or days and adjourned sessions on other days during the year, the extent of which regular and adjourned sessions do not in the aggregate cover more than five days, or, if such single institute must be held, covering said five days, that said five days must be during any particular time.

The chapter of our school laws which refers to county teachers' institutes was first enacted as a part of the school laws of this state May 1, 1873, 70 O. L. 226, and in said chapter it was provided, among other things, that "any teacher in any public school is hereby authorized to dismiss the school under his or her charge *for the week* in which is held the county teachers' institute," and said chapter further provides that such teachers should receive pay *for such week.* Thus it is plainly set forth that originally the institute was to be held during a single week and it was also provided that such institute should continue for "not less than four days." Said section was carried into the Revised Statutes as section 4019 and provides that "all teachers of the public schools within any county in which a county teachers' institute is held *may dismiss their schools for one week* for the purpose of *such institute.*" Said section further provides that teachers should receive the regular salary "for the week" they attend such institute. Some light is also gathered from section 7870 G. C., which provides as follows:

> "When a teachers' institute has been authorized by the county board of education, the boards of education of a school district shall pay the teachers and superintendents of their respective districts their regular salary *for the week they attend the institute* * * *",

thus indicating that a single institute is contemplated and that the same is to be held during but one week. It is also provided in section 7870 that if the institute is held when the schools are not in session, such teachers or superintendents shall be paid $2.00 a day for actual daily attendance for not more than five days, but in no place in the statutes is it provided that the teachers shall be paid for attending institutes both while the schools are in session and while the schools are not in session.

I must therefore hold and advise you that the county board of education is authorized to order but one institute held in the county during any one year and that such institute shall be held during some one certain week, either while the schools are or while the schools are not in session, and that if other institutes are held at other times during the year the expenses thereof cannot be paid from the county board of education fund.

Yours very truly,
JOSEPH MCGHEE,
Attorney-General.

343.

TOWNSHIP TREASURER—NOT ENTITLED TO FEES FOR DISBURSING TOWNSHIP'S SHARE OF CEMETERY IMPROVEMENT FUND.

Where a union cemetery has been created and a board of cemetery trustees elected under section 4193-1 G. C., and the township trustees provided, as their proportion, the sum of $7,000.00, which was set apart in a bank under the control of the township treasurer, and said fund was disbursed on the order of the clerk of the cemetery trustees, which was countersigned by the township treasurer, the payment of such fund is not paying out moneys belonging to the township treasury by the treasurer upon the order of the township trustees, and the township treasurer is not entitled to any fees thereon, under section 3318 G. C.

COLUMBUS, OHIO, June 6, 1917.

HON. CLARE CALDWELL, *Prosecuting Attorney, Warren, Ohio.*

DEAR SIR:—I have your communication of March 14, 1917, and the additional communication with further facts under date of April 2, 1917, wherein you ask for an opinion upon the following state of facts:

> A union cemetery has been created under sections 4183 et seq. G. C., whereby the council of the city of Niles and the trustees of the township of Weathersfield jointly control the Niles Union Cemetery. Cemetery trustees were selected under section 4193-1 G. C.
>
> In the providing of funds for certain improvements, the township trustees, as their proportion, voted the sum of $7,000.00. This sum was set apart in the bank under the control of the township treasurer, and was paid out in various sums, on the order of the clerk of the cemetery trustees, which was countersigned by the township treasurer.
>
> Is the treasurer entitled to his fees under section 3318 G. C., for receiving, safekeeping, and paying out money belonging to the township treasurer upon the order of the township trustees?

Section 4193-1 G. C. reads as follows:

> "At any such joint meeting or at the joint meeting provided for by section 4192 of the General Code, by a majority vote of all present counting council members and trustees, such meeting may elect a board of cemetery trustees consisting of three members, of which one or more must be a member of each of the separate boards of township trustees and municipal councils comprised in the union cemetery association represented by such joint meeting. Such board of cemetery trustees so elected shall have all the powers and perform all the duties exercised and performed by directors of public service of municipalities under sections 4161 and 4168 inclusive, of the General Code. At the first election of such board of cemetery trustees, one shall be chosen for one year, one for two years and one for three years, together with such part of a year as may intervene between the time of such election and the first day of January next thereafter. Yearly thereafter at the joint meeting held in May one trustee shall be chosen for three years commencing on the first day of January next thereafter. Any regular or regularly called joint meeting of the township trustees and municipal council may fill vacancies occurring on the board of cemetery trustees by a majority vote of the members present, such election to be for the unexpired term.
>
> "Any member of such board of county trustees may be removed by

such joint meeting on a two-thirds vote of all members entitled to sit in such joint meeting, for misfeasance or malfeasance in office, any gross neglect of duty or gross immorality, but no member shall be so removed until he shall have had at least ten days' notice in writing, together with a copy of the charges against him, and shall have had opportunity to appear and defend himself either in person or by counsel."

It will be noted that the board of cemetery trustees elected under the above section shall have all the powers and perform all the duties exercised and performed by directors of public service of municipalities under sections 4161 et seq. G. C. These last mentioned sections among other things give the director of public service possession, charge and entire management, control and regulation of cemeteries, subject to ordinances of council. Subject to the approval of council, he appoints and determines the amount of compensation of the necessary superintendents and employes, etc.

Under section 4164 G. C. he performs such other duties as council by ordinance prescribes.

Under section 4167 G. C. he has entire charge and control of receipts from the sale of lots and the laying off and embellishing of the grounds. He is authorized to sell lots, receive payment therefor, direct the improvements and make the expenditures under such rules and orders as he prescribes, and invest, manage and control property received by donations and surplus funds in his hands from any source whatsoever.

Prior to the enactment of supplemental section 4193-1 G. C., and where the provisions of said section have not been taken advantage of by virtue of section 4189 G. C., this character of union cemetery shall be under the control and management of the trustees of the township and the council of the municipality, and their duties in relation thereto shall be the same as where the cemetery is the exclusive property of a single corporation.

In an opinion found in the annual report of the attorney-general for 1914, Vol. I, p. 164, under date of February 5, 1914, it was held that the trustees of townships and councils of municipalities, acting as a joint board in the control of union cemeteries, have the same powers and duties for managing and controlling such cemeteries that a city or village has when controlling its own cemetery, and at p. 165 the opinion reads:

"Under favor of this section (referring to section 4193 G. C.), and in virtue of the power granted in section 4189, as amended, all joint boards may create a superintendent, manager, board of trustees, or such other officer or officers as it deems best and proper for the government of the cemetery and the application of all moneys belonging to such cemetery, and including the selection of a treasurer, provision for his bond, and the loaning, investment, reinvestment of moneys belonging thereto."

Since the rendering of this opinion, the supplemental section 4193-1 G. C. has been passed, expressly granting the power to elect a board of cemetery trustees in the manner therein provided.

From your question I understand that the joint board has elected a board of cemetery trustees under this section. Your inquiry does not contain facts sufficiently detailing whether this board of trustees has organized, other than the facts stated that the money referred to in the inquiry was paid out on the order of "the clerk of the cemetery trustees." I take it, then, that the newly elected board of cemetery trustees has selected a clerk, but your question does not disclose whether or not they have selected a treasurer.

You say the sum of $7,000.00 was set apart in the bank under the control of the township treasurer and payments were made out of that fund, on the order of the clerk of the cemetery trustees, countersigned by the township treasurer. But the

question is, would the township treasurer under such a state of facts be entitled to fees under section 3318 G. C.?

Section 3318 G. C. provides:

> "The treasurer shall be allowed and may retain as his fees for receiving, safe keeping and paying out moneys belonging to the township treasury, two per cent. of all moneys paid out by him upon the order of the township trustees."

This section authorizes a fee of 2 per cent. of all moneys paid out by the township treasurer upon the order of the township trustees as an allowance for "safe keeping and paying out moneys belonging to the township treasury." So before the treasurer would be entitled to fees under this section the money which was paid out should belong to the township treasurer and the payments out of this fund should be paid out upon the order of the township trustees. It is well settled that unless there is express statutory authority, an officer is not entitled to the particular fee.

In an opinion rendered by my predecessor, Hon. Edward C. Turner, found in Opinions of the Attorney-General for the year 1916, volume I, page 760, under date of May 3, 1916, one of the questions involved was whether or not a township treasurer was entitled to fees for receiving and disbursing funds under the provisions of sections 7035 and 7051 G. C. (these sections have since been repealed).

At page 761 reference is made to a case litigated in the common pleas court of Medina county, S. E. Forney, plaintiff, v. Jacob Nolt et al., as the Board of Trustees of Homer township, Medina county, Ohio, defendants, which was decided on October 9, 1915, by said court. In the opinion in said case the court said:

> "Counsel upon both sides agree that there is no express statutory authority imposing a duty upon the township treasurer to receive said funds. But the question is not as to the proper custody of the fund, but as to whether compensation can be allowed for the service. And even though there were an express provision of the statute, designating the township treasurer as the custodian of the funds of the township road district, in the absence of any provision, other than section 3318 G. C., fixing his compensation for the service, the court would still be constrained to hold under the authority of cases herein cited, that the treasurer would not be entitled to receive compensation for receiving and distributing said road funds."

It is evident that the reasons for the above decision, as well as the other decisions in said opinion referred to, are not only that there was no express authority in the statute authorizing the particular fee, but since reference had to be made to section 3318 G. C., compensation was denied because the particular fund in question belonged to some other jurisdiction than the township treasury.

So in this case, the funds belonging to the joint or union district are not funds belonging to the township treasury, and while it does not appear how the township treasurer holds this fund, according to the facts stated, it is not paid out, under section 3318 G. C., "upon the order of the township trustees," but it is paid out, as stated in your inquiry, "on the order of the clerk of the cemetery trustees."

In view of all the foregoing, my answer to your question is that the township treasurer is not entitled to the fees provided for in section 3318 G. C., for paying out the money of the union cemetery referred to,upon the order of the clerk of the cemetery trustees, countersigned by himself.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

344.

APPROVAL—TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE OF THE COMMISSIONERS OF PERRY COUNTY.

COLUMBUS, OHIO, June 6, 1917.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of Perry county, Ohio, in the sum of $60,000, for the purpose of funding and extending the time of payment of certain indebtedness of said county, which from its limits of taxation it is unable to pay at maturity.

I have carefully examined the transcript of the proceedings of the county commissioners of Perry county, Ohio, relative to the above bond issue, and find said proceedings to be in conformity to the provisions of the General Code relating thereto.

I am of the opinion that properly prepared bonds covering said issue, signed and sealed by the proper officers of Perry county, will constitute valid and binding obligations of said county.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

345.

APPROVAL—TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE OF THE COUNCIL OF THE VILLAGE OF LISBON.

COLUMBUS, OHIO, June 6, 1917.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"RE:—Bonds of the village of Lisbon, Columbiana county, Ohio, in the sum of $5,000, for the purpose of funding certain indebtedness of said village which from its limits of taxation it is unable to pay at maturity."

I have carefully examined the transcript of the proceedings of the council and other officers of the village of Lisbon, Ohio, relating to the above bond issue, and find said proceedings to be in conformity to the provisions of the General Code relative thereto.

I am of the opinion that properly prepared bonds covering said issue, signed and sealed by the proper officers of the village of Lisbon, will constitute valid and binding obligations of said village.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

346.

PUPIL—WHEN ENTITLED TO ATTEND HIGH SCHOOL AND HAVE TUITION PAID.

1. *A pupil holding a diploma under the provisions of section 7744 G. C. (now repealed) is entitled to the advantages of a high school education as provided in sections 7747 and 7748 G. C.*

2. *But he must use these advantages under the limitations set out in section 7748 G. C., and whenever the board of education of the township or district in which he resides establishes a first grade high school within four miles of his residence, he must attend the same; or if he attend another, the said board will not be liable for his tuition.*

COLUMBUS, OHIO, June 7, 1917.

HON. ADDISON P. MINSHALL, *Prosecuting Attorney, Chillicothe, Ohio.*

DEAR SIR:—Your communication of May 1, 1917, was received, in which you ask for certain information. Your communication reads as follows:

> "Under date of November 15, 1916, I submitted a question to Hon. Edward C. Turner, attorney-general, and on November 28, 1916, the question was answered. The question at that time did not contain all the facts and I am desirous of having your opinion upon the following proposition:
>
> "Under the Boxwell law a pupil passed a satisfactory examination and took part in the commencement exercises as provided for by law. Under the new school law the pupil has been promoted to high school as provided for by law. Does this entitle such pupil to attend any high school and have his tuition paid if, since that time, the township board of education has established a township high school in the township wherein this pupil lives which is less than four miles distant from the home of said pupil and who will be transported by said township to said township high school?"

In your communication you suggest that my predecessor, Hon. Edward C. Turner, rendered an opinion in reference to this same matter, but that the question upon which he passed did not contain the statement upon which you now ask my opinion.

In order to understand the matter fully, it will be necessary for me to notice the opinion rendered by Mr. Turner, which is in Vol. II of the opinions of the attorney-general for 1916, p. 1853, bearing date November 28, 1916. His opinion was rendered in reference to the following question:

> "Under the Boxwell law a pupil passed a satisfactory examination and took part in the commencement exercises as provided by law. Does this entitle him to attend a high school and have his tuition paid for the number of years he would have been entitled to attend the high school if the Boxwell law had not been repealed?"

Mr. Turner did not directly answer this question but he held as follows, in the syllabus:

> "A pupil who held a diploma under the provisions of section 7744 G. C. at the time of its repeal, and is now of lawful school age, and has not completed the high school work, is entitled to all the rights and privileges conferred by sections 7747 and 7748 G. C., 104 O. L. 125, subject to the provisions of section 7750 G. C."

That is, Mr. Turner held that the pupil who held the diploma under the old law would be entitled to enter high school and have all the rights and privileges conferred under the new law. Thus he virtually answered that the old law did not control in the matter of high school advantages, but that the new law controls, the sections of which, having to do with high school advantages, being sections 7747 and 7748 G. C. With this opinion I concur. The law does not guarantee to a pupil that he shall have the high school advantages that may be in force at any particular time, but his high school advantages are to be ascertained from the law as it exists from time to time.

With the opinion rendered by Mr. Turner in mind, let us consider the new facts submitted to this department, which in short is this, that since the graduation of the said pupil under the old Boxwell law, your board of education has established and organized a high school in the township of which this pupil is a resident, and that this high school is located within four miles of the home of this said pupil, and further, that the pupil will be transported by said township to said township high school. Upon this statement of fact you ask whether the said pupil may "attend any high school and have his tuition paid" by the board of education of the township in which he resides.

Mr. Turner held that he was entitled to the advantages of the new law, that is, the advantages set forth in sections 7747 and 7748 G. C. If he is entitled to the advantages set forth in said two sections, I think it is clear that he must take these advantages with the conditions and limitations set out in the same sections. In order to understand the limitations set forth in these sections, let us note what his advantages would have been under the law as it stood when he secured his diploma.

Section 7744 G. C., then in force, provided:

> "Such diploma shall entitle its holder to enter any high school in the state."

But this does not mean that he could enter any high school he might choose and have his tuition paid, for section 7747 as it stood before it was amended provided:

> "The tuition of pupils holding diplomas and residing in township or special districts in which no high school is maintained, shall be paid by the board of education of the school district in which they have legal school residence."

Thus under the old law, if there was a high school located in the township or special district where the pupil resided, no difference how far distant from his home he could not attend another high school outside the township or district and have his tuition paid by the board of education of the township or district in which he resided.

Inasmuch as your board of education had no high school at the time the pupil received his diploma, he would have been entitled to have entered any high school in the state, and his own board of education would have been compelled to have paid his tuition. This has been modified under the provisions of section 7748 G. C., which provides among other things:

> "No board of education is required to pay the tuition of any pupil for more than four school years; except that it must pay the tuition of all successful applicants, who have complied with the further provisions hereof, residing more than four miles by the most direct route of public travel, from the high school provided by the board, when such applicants attend a nearer high school, or in lieu of paying such tuition the board of education main-

taining a high school may pay for the transportation of the pupils living more than four miles from the said high school maintained by the said board of education to said high school."

Under the old law the said pupil would have been compelled to have attended his own high school, no matter how far he lived from the same; but under the law as it now stands he is not compelled to attend his own high school if he lives more than four miles from the said high school and can attend another high school that is nearer than four miles.

Your communication, as I understand it, virtually raises this question: Suppose that a board of education, during the year 1916-1917, maintained no high school within the boundaries of the township, and suppose that a pupil enters a high school without the township and attends there during said school year, and attends said high school say for two years; but in the meantime the board of education established and maintained a high school, having it ready for school for the year 1918-1919, it being located within four miles of the residence of said pupil. Then could said pupil still attend the high school which he had been attending for two years, and ask that the board of education, in the township where he resides, pay his tuition for the remaining two years? I think not.

The policy of the law seems to be that every pupil should receive the advantages of a high school education for a term of four years, but there is no indication in the statutes and no reason can be given why this education should all be furnished in the same high school. Hence, whenever a board of education furnishes high school advantages coming within the conditions and limitations set forth in section 7748, G. C., the pupil can not attend a high school in another township and ask the board of education of his own township to pay the tuition.

I am answering this question on the theory that the board of education in the case suggested has established and is maintaining a first grade high school. If it is maintaining a second or third grade high school, the provisions of the first part of section 7748 G. C. would control.

Hence, answering your question specifically, a pupil who received a diploma under the Boxwell law, at a time when the board of education of the township in which he resided maintained no high school, but afterwards establishes and maintains a high school, must attend said high school after it has been established, provided it is within four miles of his residence; or if he does not attend said high school, and attends some other, the board of education of the township or district in which he resides will not be liable for his tuition.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

347.

LIBERTY LOAN BONDS—ARE GOVERNMENT BONDS.

"Liberty Loan Bonds" are "Government Bonds" in every sense of the term, and may be accepted as such by the state treasurer for all purposes authorized by law.

COLUMBUS, OHIO, June 7, 1917.

HON. CHESTER E. BRYAN, *Treasurer of State, Columbus, Ohio.*

DEAR SIR:—I have your favor addressed to me under date of May 12, 1917, in which you ask my opinion as follows:

> "This office would like to have your opinion as to whether the new liberty loan bonds can be accepted as security on the same basis as other government bonds.
>
> "We are having inquiries as to the above and for that reason we have written you so that we may intelligently answer these inquiries."

The "Liberty Loan Bonds," so called, mentioned in your communication are bonds issued by the government of the United States pursuant to an act of congress approved April 24, 1917, enacted by that body under its constitutional power "to borrow money on the credit of the United States." Section 1 of said act, wherein the issue of said bonds is authorized and provided for, reads as follows:

> "Be it enacted by the senate and house of representatives of the United States of America in congress assembled, That the secretary of the treasury, with the approval of the President, is hereby authorized to borrow, from time to time, on the credit of the United States for the purposes of this act, and to meet expenditures authorized for the national security and defense and other public purposes authorized by law not exceeding in the aggregate $5,000,000,000, exclusive of the sums authorized by section four of this act, and to issue therefor bonds of the United States.
>
> "The bonds herein authorized shall be in such form and subject to such terms and conditions of issue, conversion, redemption, maturities, payment, and rate and time of payment of interest, not exceeding three and one-half per centum per annum, as the secretary of the treasury may prescribe. The principal and interest thereof shall be payable in United States gold coin of the present standard of value and shall be exempt, both as to principal and interest, from all taxation, except estate or inheritance taxes, imposed by authority of the United States, or its possessions, or by any state or local taxing authority; but such bonds shall not bear the circulation privilege.
>
> "The bonds herein authorized shall first be offered at not less than par as a popular loan, under such regulations prescribed by the secretary of the treasury as will give all citizens of the United States an equal opportunity to participate therein; and any portion of the bonds so offered and not subscribed for may be otherwise disposed of at not less than par by the secretary of the treasury; but no commissions shall be allowed or paid on any bonds issued under authority of this act."

There is nothing in this section or the act of which it is a part, or elsewhere in the legislation of congress, which indicates that these bonds are not to be considered

"Government Bonds" in all that that term implies; and, answering your inquiry, I advise you that you are authorized to accept said bonds as security for deposits, or otherwise, on the same basis as other government bonds.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

348.

PROBATE JUDGE—MUST CHARGE PHYSICIAN FEE FOR CERTIFIED COPY OF CERTIFICATE TO PRACTICE MEDICINE.

Probate judge is without authority to furnish free of charge to a physician a certified copy of his certificate to practice medicine, but such judge must charge for such service the fee provided for in section 1280 *General Code.*

COLUMBUS, OHIO, June 7, 1917.

HON. W. J. BISSMAN, *Probate Judge, Mansfield, Ohio.*

DEAR SIR:—I have your letter of May 28, 1917, as follows:

"Some days ago I wrote you asking your opinion in regard to this office making medical certificates to the doctors, who intend to use them in making application for the medical service in the army.

"This question was brought about because certain doctors became indignant when told of the fee to this office.

"The sections I refer to are as follows:

"Section 1279. Upon application the probate judge shall make a certified copy of a certificate and the indorsement thereon, which certified copy shall be prima facie evidence of the matter and facts therein contained.

"Section 1280. For services under the provisions of this chapter the probate judge shall receive from the holder of a certificate the following fees: For recording and indexing each certificate, fifty cents; for certified copies, the same fees as are allowed by law for copies of record kept by him.

"The law is very specific and really needs no construction, but what I should like to have your opinion on and for which I wrote several days ago, is, would I be permitted to issue these certificates free gratis?"

Sections 1278, 1279 and 1280 G. C. read:

"Section 1278. Each person who receives a certificate to practice medicine or surgery, before beginning practice, must deposit his certificate with the probate judge of the county in which he resides. The probate judge shall record it in a book kept for that purpose and indorse on the margin of the record and on the certificate the time when he received it for record, and make an index to all certificates by him recorded. The probate judge shall also note the revocation of a certificate, or the death or change of location of the owner of a certificate in the margin of the record. If the

owner of a certificate changes his place of residence, he must have such certificate recorded by the probate judge of the county into which he removes.

"Section 1279. Upon application the probate judge shall make a certified copy of a certificate and the indorsements thereon, which certified copy shall be prima facie evidence of the matters and facts therein contained.

"Section 1280. For services under the provisions of this chapter, the probate judge shall receive from the holder of a certificate the following fees: For recording and indexing each certificate, fifty cents; for certified copies, the same fees as are allowed by law for copies of records kept by him."

Sections 1601 and 1602 General Code provide for fees of the probate judge, but make no provision for fees for furnishing copies of records. However, section 1603 General Code provides as follows:

"For other services for which compensation is not otherwise provided by law, the probate judge shall be allowed the same fees as are allowed the clerk of the court of common pleas for similar services."

Section 2901 General Code, relating to the fees of the clerk of the common pleas court, provides in part:

"* * * for making copies of pleadings, process, record or files, including certificate and seal, ten cents per hundred words; * * *"

The question you ask is whether or not the probate judge must charge for copies of physicians' certificates or whether, if he chooses, he may make and furnish same free.

The fees provided to be paid the probate judge for his services are to be paid by him into the county treasury and the fee charged is, therefore, charged for the benefit of the county. This being so, the probate judge cannot waive the charge provided for by the statute and it is therefore my opinion that in the case you refer to he is without authority to furnish a copy of the certificate free of charge.

Yours very truly,
JOSEPH MCGHEE,
Attorney-General.

349.

ARTICLES OF INCORPORATION OF THE FAIRPORT FIRST HUNGARIAN YOUNG MEN'S CLUB AND SICK BENEFIT ASSOCIATION —DOES NOT COMPLY WITH SECTION 9427—SUCH ASSOCIATION SHOULD CLAIM AND PROVIDE FOR RIGHT OF ASSESSING MEMBERS TO INSURE PAYMENT OF BENEFITS.

Articles of incorporation which are tendered for the incorporation of an association under the provisions of section 9427 of the General Code, which, among other things, provides that said association is incorporated for the purpose "of receiving contributions and in case of the death of the contributors to pay the beneficiary certain designated funeral benefits" does not in this respect comply with section 9427, which provides, among other things, that such associations may be incorporated "for the payment of stipulated sums of money to the families, heirs, executors, administrators or assigns of the deceased members of such association, as the member may direct."

An association incorporated under the provisions of section 9427, General Code, should in its articles of incorporation claim and provide for the right of making assessments on its members for the purpose of insuring the payment of the benefits therein provided for.

COLUMBUS, OHIO, June 7, 1917.

HON. WILLIAM D. FULTON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I have your favor of May 18, 1917, submitting for my approval or rejection articles of incorporation of the Fairport First Hungarian Young Men's Club and Sick Benefit Association, a proposed corporation not for profit, together with check in the sum of $25.00 covering the filing fee of said articles of incorporation.

I know of no statutory provision which requires my official approval of these articles, but treating your communication as one requesting my opinion with respect to the legality of the articles of incorporation of this proposed corporation, I beg to note some objections apparent on an inspection of said articles.

The purpose clause of the articles of the proposed corporation reads as follows:

> "Said corporation is formed for the purpose of promoting friendly social intercourse and to encourage education and investigation in matters of public convenience and welfare; of providing social entertainment and amusement for its members and their friends and of providing a meeting place for its members; of receiving contributions from and extending relief to its contributors and members in case of sickness or injury by paying them certain designated sums of money per week, as sick and accident benefits; of receiving contributions and in case of the death of the contributors to pay the beneficiary certain designated funeral benefits; of holding real estate; of investing its funds in mortgages, bonds or other interest bearing securities; of making by-laws, rules and regulations for the government of its stockholders, members and contributors; and generally of doing every other act or thing not inconsistent with the constitution and laws of this state or of the United States which may be necessary to promote the objects and purposes for which the said association was incorporated."

The social and educational features noted in the purpose clause above quoted might well be covered by incorporation not for profit under the general incorporation laws of the state. Other provisions of the purpose clause, however, indicate

a purpose on the part of the proposed corporation to conduct the business of insurance, and this purpose must be covered by incorporation under statutory provisions relating specifically to the incorporation of insurance companies; for it is certain that a corporation can not be incorporated under the general incorporation laws of the state for the purpose of carrying on an insurance business.

State v. Pioneer Livestock Co., 38 O. S. 347;
See Sec. 665 General Code.

Authority to incorporate for the insurance purposes set out in the purpose clause of these articles must be found, if at all, in the provisions of section 9427, General Code which reads as follows:

> "A company or association may be organized to transact the business of life or accident or life and accident insurance on the assessment plan, for the purpose of mutual protection and relief of its members, and for the payment of stipulated sums of money to the families, heirs, executors, administrators, or assigns of the deceased members of such company or association, as the members may direct, in the manner provided in the by-laws. The company also may receive money either by voluntary donation or contribution, or collect it by assessments on its members, and may accumulate, invest, distribute and appropriate such money in such manner as it deems proper. All accumulations and accretions thereon shall be held and used as the property of the members and in the interest of the members, and not be loaned to, used, appropriated, or invested for the benefit of any officer or manager of such company or association. No company or association shall issue a certificate for a greater amount than it is able to pay from the proceeds of one assessment. Such company or association shall be subject to the provisions of this chapter,"

and the fact that a filing fee of $25.00 is tendered with the articles of incorporation evidences an intent on the part of the incorporators to incorporate under this section. (See 176 G. C., Sub. 4).

Applying the provisions of section 9427 General Code, to those found in the purpose clause of the articles, I note that the articles provide, among other things, that said corporation is formed for the purpose "of receiving contributions and in case of the death of the contributors to pay to the beneficiary certain designated funeral benefits." It is manifest that this provision is not a compliance with section 9427 of the General Code, which provides that a company or association may be organized, among other purposes, "for the payment of stipulated sums of money to the families, heirs, executors, administrators, or assigns of the deceased members of such company or association, as the member may direct."

That the clause in these articles providing for the payment to the beneficiary of certain designated funeral benefits is a species of insurance seems to be recognized by section 666 of the General Code. It is certain, however, that there is nothing in the provisions of section 9427 General Code, which authorizes insurance of this kind.

As a second objection to the articles of association of this proposed corporation, it will be noted that there is nothing in the provisions of the purpose clause of said articles conferring upon the association the right to make assessments on its members for the purpose of securing the payment of the benefits therein provided for. The question of the necessity of such provision is placed in some doubt in construing the provisions of section 9427 General Code, in the light of the history of its enactment in its present form.

What is now section 9427 General Code was originally enacted April 20, 1872 (60 Ohio Laws, page 82.) Section 1 of this act provided as follows:

> "Any number of persons, not less than five, may associate themselves together as provided in the first section of the act entitled 'An act to provide for the creation and regulation of incorporated companies in the State of Ohio,' passed May 1, 1852, for the purpose of mutual protection and relief of its members, and for the payment of stipulated sums of money to the familes or heirs of the deceased members of such associations."

This act was carried into the Revised Statutes as section 3630 thereof, and later the same was amended by acts found in 83 Ohio Laws, page 61, and 88 Ohio Laws, page 251. By these amendments the phrase "to transact the business of life or accident, or life and accident insurance on the assessment plan" and the words "executors, administrators or assigns" were, among other things, added to original section 3630 Revised Statutes, which is now section 9427 of the General Code.

The question presented is whether or not the legislature in inserting at the beginiing of section 3630 Revised Statutes, the phrase "to transact the business of life or accident or life and accident insurance on the assessment plan" had in mind a description of a different class of corporations from that described in the section as first enacted, viz.: for the purpose of the mutual protection and relief of its members.

Notwithstanding the manner in which the provisions of section 9427 General Code were enacted, I am inclined to the view that with respect to the question here suggested the said provisions should be read and construed as a whole. So reading the section I am convinced that the provision therein, that no company or association shall issue a certificate for a greater amount than it is able to pay from the proceeds of one assessment, has reference and application to all companies or associations organized under section 9427; and giving effect to this particular provision of the section, and construing the whole in the light of a recognized public policy which looks to certainty in the payment of the benefits provided for, I am inclined to the view that all companies or associations organized under the provisions of this section should, in their articles of incorporation, specifically claim and provide for the right of making assessments on its members for the purpose of securing the mutual protection and relief of its members and for the payment of stipulated sums of money to those who in case of the death of a member are entitled to receive such payment.

Though I do not think that an association of this kind is required to incorporate for all the purposes authorized by section 9427 of the General Code, and though under the specific provisions of section 9427 such association may receive donations and contributions, I do not think that the payment of the benefits provided for in the section should be compelled to depend upon such voluntary contributions, but that the association should claim and have the right to make assessments to carry out the prime purpose of the association, which is that of protection and relief of its members while living and the payment of certain stipulated sums to the families, heirs, executors, administrators or assigns of members who may die.

For the reasons above noted, I am of the opinion that the articles of incorporation do not conform to the statutory provisions relating to the incorporation of such association and that you should not file the same.

I am returning herewith the articles of incorporation and check for $25.00 submitted by you.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

350.

PROBATE JUDGE—BOND—APPROVAL BY COMMISSIONERS RELATES BACK TO TIME SAME WAS FILED WITH THEIR SECRETARY—WHEN JUDGE ENTERS UPON DISCHARGE OF DUTIES—PRIOR TO FILING BOND—DOES NOT FORFEIT OFFICE.

When a probate judge gave his bond to the county auditor as secretary of the board of county commissioners, on the 9th day of February, 1917, and the commissioners at a later date approved same, the approval relates back to the date of the filing with the secretary of the board.

Where a probate judge enters upon the discharge of his duties on the first day of his term, prior to the filing of his bond, for approval, with the secretary of the board of county commissioners on the same day, and the county commissioners later approve said bond, there is no ipso facto forfeiture of said office, nor is a vacancy created which should be fil ed by the governor.

Whether such facts are grounds for a judicial determination of the status of such officer, by a proceeding in quo warranto, query.

COLUMBUS, OHIO, June 7, 1917.

HON. JAMES M. COX, *Governor of Ohio, Columbus, Ohio.*

DEAR SIR:—Some time ago you received an inquiry as to whether or not a vacancy exists in the office of probate judge of Guernsey county, with the request that the matter be submitted to me for an opinion, and said request was forwarded to this department for attention.

The facts regarding the situation, as I have gathered them, are as follows:

At the November election, 1916, Mr. Dyson was elected as probate judge of Guernsey county, for the term beginning February 9, 1917. He was then the incumbent of that office and was re-elected to succeed himself. It appears that he did not attempt to file the bond required by law until some time in the afternoon of November 9, 1916, at which time, the county commissioners not then being in session, he tendered the bond to the county auditor, who marked thereon the date of receiving it.

On Februray 10, 1917, Mr. Dyson withdrew the bond from the hands of the auditor and took it to two of the county commissioners at their respective residences and had these commissioners, respectively, approve said bond, and then presented the bond to the county treasurer, who under objection took same, placed it in the vault, but made no record of said bond.

On February 12, 1917, two of the county commissioners, being the same two commissioners who had theretofore approved the bond, again approved said bond, and then it was refiled with the county treasurer.

It is further represented that on February 20, 1917, there was a meeting of the board of county commissioners and the minutes of the special meeting held on February 12, 1917, were approved.

There is no question made, as I understand it, as to the form or sufficiency of the bond presented and approved.

It further appears that prior to the filing of the bond with the auditor on November 9, 1916, said Dyson performed sceral acts as probate judge of Guernsey county, and the claim is therefore made that he entered upon the discharge of his duties as probate judge before giving the bond required by law.

In the discussion of the questions involved, it will be necessary to consider the following sections of the constitution and General Code, to wit:

Article IV, section 7' constitution:

"There shall be established in each county, a probate court, which shall be a court of record, open at all times, and holden by one judge, elected by the electors of the county, who shall hold his office for the term of four years, and shall receive such compensation, payable out of the county treasury, as shall be provided by law. Whenever ten per centum of the number of the electors voting for governor at the next preceding election in any county having less than sixty thousand population as determined by the next preceding federal census, shall petition the judge of the court of common pleas of any such county not less than ninety days before any general election for county officers, the judge of the court of common pleas shall submit to the electors of such county the question of combining the probate court with the court of common pleas, and such courts shall be combined and shall be known as the court of common pleas in case a majority of the electors voting upon such question vote in favor of such combination. Notice of such election shall be given in the same manner as for the election of county officers. Elections may be had in the same manner for the separation of such courts, when once combined."

Section 7 of the General Code:

"A person elected or appointed to an office who is required by law to give a bond or security previous to the performance of the duties imposed on him by his office, who refuses or neglects to give such bond or furnish such security, within the time and in the manner prescribed by law, and in all respects to qualify himself for the performance of such duties, shall be deemed to have refused to accept the office to which he was elected or appointed, and such office shall be considered vacant and be filled as provided by law."

Section 1580 General Code:

"Quadrennially, one probate judge shall be elected in each county, who shall hold his office for a term of four years, commencing on the ninth day of February next following his election."

Section 1581 General Code:

"Before entering upon the discharge of his duties, the probate judge shall give a bond to the state in a sum not less than five thousand dollars, with sufficient surety, approved by the board of county commissioners or by the auditor and recorder, in the absence from the county of two of the commissioners, and conditioned that he will faithfully and impartially perform all the duties of his office. Such bond, with the oath of office indorsed thereon, shall be deposited with the county treasurer and kept in his office. From time to time, as the state of business in his office renders necessary, the county commissioners may require the probate judge to give additional bond."

Section 2566 General Code:

"By virtue of his office, the county auditor shall be the secretary of the county commissioners, except as otherwise provided by law. When so requested, he shall aid them in the performance of their duties. He shall

keep an accurate record of their proceedings, and carefully preserve all documents, books, records, maps and papers required to be deposited and kept in his office."

The question then is, whether under the facts stated and under the constitution and statutes above quoted, a vacancy exists in the office of the judge of the probate court of Guernsey county. The constitution fixes and limits the term of office of probate judge. There is no holding over and, unless Mr. Dyson is legally the probate judge under the election of November 16, 1916, the office is vacant.

State v. Brewster, 44 O. S. 589.

The duties performed by Mr. Dyson on February 9, 1917, prior to any attempt on his part to qualify for the new term by the filing of a proper bond, were performed as probate judge under the new term, and if there is any default by reason of which he would be liable on his bond, the bond for the new term would have to be looked to, and there would be no liability upon the sureties for the old term.

This brings us to a consideration of the provisions of section 7 G. C. supra, because section 1581 G. C. supra provides:

"Before entering upon the discharge of his duties, the probate judge shall give a bond to the state", &c.,

and under section 7 G. C., supra, one who refuses or neglects to give the bond required by law to be given previous to the performance of the duties imposed on him by his office,

"within the time and in the manner prescribed by law, and in all respects to qualify himself for the performance of such duties, shall be deemed to have refused to accept the office to which he was elected or appointed, and such office *shall be considered vacant* and be filled as provided by law."

The statutory requirements, that a bond must be executed within a required time, and providing for vacancy for failure so to do, are found in the laws of nearly all the states, and, as stated in Throop on Public Officers, section 173, the weight of authority supports the doctrine that the provision respecting the time is directory, rather than mandatory.

Our supreme court, in State ex rel. v. Commissioners, 61 O. S. 506, had before it a case of a sheriff failing to give a bond before the first Monday in January, after his election, which at first blush appears to be in point in the instant case, and lays down what seems to be a very strict and harsh rule on the question of filing a bond within the time prescribed by law. The statute in that case provided that sheriffs' bonds shall be given within ten days after receiving their commissions and before the first Monday of January next after their election. The sheriff, not finding the board of county commissioners in session on the first day of January, presented his bond to them on the second day of January, when they were in session, but the board, although satisfied with the form and sufficiency of the bond, refused to approve the same because it had not been tendered prior to the first Monday in January, as required by law.

The commissioners thereupon declared the office of sheriff vacated and proceeded to make an appointment to fill it. The sheriff filed a petition in mandamus to require the commissioners to approve the bond.

In a *per curiam* opinion found on p. 511, the court quotes section 19 R. S., which

is now section 7 G. C., and further quotes sections 1203 and 1205 R. S. and then concludes the opinion with the following language:

> "The case before us presents no justification for the failure of the relator to comply with the requirements of the law, nor is the court able to relieve him from the consequences which the statute in plain terms affixes to his failure."

A reading of section 1205 R. S. shows that if the sheriff failed to give the bond within the time specified, then the commissioners "shall declare the office vacant and said office shall thereupon be filled as provided by law."

In the statutes bearing upon the present case, we find no such specific declaration. Section 1581 G. C., referring to the bond of the probate judge, does not contain a provision such as was contained in section 1205 R. S. That section imposes a duty upon the commissioners to declare the office vacant. They were the tribunal that found the facts sufficient for such declaration.

In the present case we are relegated to the words of section 7 G. C., that upon failure to give the bond within the time and in the manner prescribed by law, such action shall be deemed to be a refusal to accept the office "and such office shall be considered vacant and be filled as provided by law." The words "shall be considered" have a definite, legal meaning.

So while the 61st Ohio State case above quoted may have some bearing, it is not at all conclusive of the question at issue, and may be fairly distinguished. The question before us is not whether a mandamus would lie, to compel the commissioners to approve the bond of Mr. Dyson. There is no need of such a procedure. The commissioners have approved his bond. They have not refused to do so, as in the 61st O. S. case, nor was there any specific statutory authority given them, as in that case, upon a refusal, to declare the office vacant and make a new appointment therefor.

In the case of State ex rel. v. Nash, 65 O. S. 549, if we look at the syllabus alone, we might infer that the mandatory rule is laid down in Ohio, as far as infirmary directors are concerned. In this case Hill was elected to the office of infirmary director, received his commission on the first Monday of January, 1912, but failed and neglected to give a bond upon that date or any date prior thereto. It appears further that said Hill on the 7th day of January, 1902, executed his bond and presented the same to the prosecutor, who refused to approve it, that this bond was filed in the auditor's office on January 7, and on the 15th day of the same month it was presented to the county commissioners for their approval, who refused to approve the same because it was not executed until the 7th of January, and because it was not approved by the prosecutor as required by law. The board of county commissioners proceeded to declare the office of infirmary director vacant for he reasons aforesaid, and appointed one, Witham, to fill said vacancy. The facts were all set forth in a petition for mandamus filed in the supreme court by Witham,who, as above stated, was appointed by the board of county commissioners to fill the supposed vacancy, and upon a demurrer thereto the court in a *per curiam* decision held:

> "An infirmary director must give bond 'before entering on the discharge of his duties.' Revised statutes, section 960. In this respect the law differs from that governing the bond of a sheriff, which prescribes that a sheriff shall give bond 'within ten days after receiving his commission and before the first Monday of January.' State ex rel. Poorman v. Commissioners, 61 O. S. 506. * * *."

The petition does not show that he performed any official duty prior to the signing of the bond on January 7, 1902, which was the day after the first Monday in Jan-

uary; but it does show that the board of county commissioners refused to approve Hill's bond solely because it appeared from the bond that it was not executed nor filed in the office of the board until the 7th day of January, 1902,

> "and that the prosecuting attorney had not certified the sufficiency of the bond for the same reason. This was not enough to authorize the commissioners to consider the office vacant, under Revised Statutes, section 19, and to proceed to fill the vacancy, under Revised Statutes, section 959. The demurrer is therefore sustained and the petition dismissed."

It will be noted that the provision for the giving of the bond by the infirmary director under section 960 R. S. was almost identical with the provision requiring the giving of a bond by judge of a probate court, to wit, "before entering upon the discharge of his duties."

In this case in 65 O. S., the court distinguishes the sheriff's case as found in State ex rel. v. Commissioners, 61 O. S. 506, by calling attention to the fact that in the sheriff's case the requirement for the giving of a bond is that it be given "within ten days after receiving his commission and before the first Monday of January."

But what was the court called upon to decide in the infirmary directors' case, supra, and what did it really decide? Reading the syllabus in the light of the facts as presented, it manifestly appears that the court held that the mere showing that a board of county commissioners had refused to approve Hill's bond, and this solely because it appeared from the bond that it was not executed nor filed in the office of the board until the 7th of January, 1902, and further that the prosecuting attorney had not certified the sufficiency of the bond for the same reason, did not constitute sufficient ground for the commissioners to

> "consider the office vacant under Revised Statutes, section 19, and to proceed to fill the vacancy under Revised Statutes, section 959."

In other words, as it seems to me, the court found that the matters referred to were not sufficient grounds upon which to base a decision that the office was vacant. In that case the commissioners under the statute were the officials to determine whether or not grounds existed for the declaring of the office to be vacant, and they also were the appointing power. But they had no arbitrary power to declare the office vacant, nor was their decision final as to whether the grounds were sufficient or not. At least this would appear from the action of the supreme court, for in the face of the fact that the commissioners had considered the office vacant and appointed Witham to fill the vacancy, the court refused the writ of mandamus asked.

In the case of Davies, Auditor, v. State ex rel. Scherer, 11 C. C. (N. S.) 209, the court was called upon to pass upon the question as to whether or not the failure of an assessor in a municipality to qualify within the period after election prescribed by law, would be deemed a refusal to accept the office and create a vacancy.

Section 1536-999 R. S. provided that:

> "The council may declare vacant the office of any person elected or appointed to an office who shall fail to take the oath required in section 1737 or to give any bond required of him within ten days after he has been notified of his appointment or election or obligation to give a new or additional bond, as the case may be."

The court held that such failure was deemed a refusal to accept the office, which became *ipso facto* vacant. The court considered the provisions of section 19 R. S.,

now section 7 G. C., and says at p. 213 that this section should be read in connection with section 1518 R. S., referring specifically to the office of assessor, and concludes that the vacancy is not dependent upon the declaration by the council, but that the office becomes *ipso facto* vacant upon the failure to file the bond within the period prescribed by law.

The court in this case seems to have been governed particularly by the decision of the Nebraska supreme court in State ex rel. v. Lansing, 64 N. W. 1104. It is well to remember that the statute of Nebraska contains the phrase "shall thereupon *ipso facto* become vacant," for the authorities seem to give extra significance to the use of the term *ipso facto* as being self-executing, where the omission of such words is held to render the statute not self-executing.

Irvine, J., in the Nebraska case, 46 Neb. 524, at p. 528, uses the following language:

> "Were the statute much less distinct in its terms and were we to follow the general current of authorities elsewhere, we would be obliged to hold that such a condition precedent did attach; but evidently, for the purpose of permitting no room for doubt upon the question, the legislature has adopted language which, as strongly as any language could, conveys that the bond must be filed within the time limited or the person elected loses all right to the office. The language of the statute is that a neglect to have the bond approved and filed within the time limited shall *ipso facto* vacate the office. If possible in construing a statute every word thereof must be given effect, and if we give the term *ipso facto* any effect, it must be in the way indicated."

Attention may be called to the fact that even with such strong and positive language, Norval, C. J., and Ragan, C., dissented, holding under the authority of State v. Ruff, 29 Pac. Rep. (Wash.) 999, Commissioners of Knox County v. Johnson, 24 N. E. Rep. (Ind.) 148 and Atchafalaya Bank v. Dawson, 13 La. 497, that the provisions as to vacancy are not self-executing; that the execution and filing of an official bond was not a condition precedent to his right to enter upon and discharge the duties of the office; that the holding of the office was by a defeasible title from the time of his neglect to execute and file his official bond—that is, he held the office by a title capable of being divested at any time by the proper legal authorities; and that the execution and filing of his official bond by respondent, coupled with the neglect and failure of the proper authorities to declare the office vacant or to take any steps to that end prior to the time that respondent did execute and file his bond, saved the forfeiture incurred.

It might be well at this point to consider the case reported in 7 Richardson's Law Rep. (S. C.) at pages 216 et seq. This was an action on a bond given by a master in equity, the defense being that the bond was not filed in proper time, and the master had not taken, subscribed and caused to be endorsed the proper oaths of office. At page 226 the court uses the following language:

> "The first question here is, the effect of Laurens's failure to sue out his commission within the time required by law, and to take and endorse thereon the prescribed oaths of office. By the 3rd section of the act of 1840 (11 Stat. 109), every master-in-equity, is required within three weeks after his election, or appointment, to tender his bond to the proper officers for approval, and immediately after the same has been approved, to deposit the same with the treasurer, and sue out his commission; 'and upon his neglect or failure to do so within the said time, his office shall be deemed absolutely vacant, and shall be filled by election or appointment, as heretofore provided.'"

At page 230 the following language is used:

"While the right of the lawful incumbent in office to resist the entry of his successor until the official title of the latter is perfected, is fully conceded, it is clear, however, that such right can only be practically enforced where the incumbent and the successor are different persons, and that such right, too, can only exist so long as the title of the latter is in complete; but the moment such title is actually perfected, no matter what may have been the laches or delay that retarded its completion, by a full compliance with all the provisions of the law, the incumbent's right to resist the entry of his successor is *eo instanti* at an end; and this period, whenever it does happen, will form the terminating point of the old tenure, and the commencement of the new.

* * * * * * * * * *

"In that condition of things, and being out of office, as we have supposed, the lawful incumbent might rightfully have resisted his entry, and the state might also have declared his office vacant, and ordered the vacancy to be filled, either by election or appointment, pursuant to the provisions of the act. But the moment he was permitted to file his bond in the treasurer's office, and to sue out his commission, these several delinquencies became completely cured, and his title *de facto* was rendered as perfect as if there had been a literal compliance with all the provisions of the act."

The court held that because the bond was not approved and deposited with the treasurer within the time prescribed by the act of 1840, paragraph three, was no defense to the action; that the provisions requiring the master to tender his bond for approval, deposit it with the treasurer, sue out his commission and take, endorse upon the commission and subscribe certain oaths within a given time, are merely directory, and that the failure or neglect to comply is a cause of forfeiture.

The last paragraph of the syllabus reads as follows:

"It is the duty of the officer elect to perfect his title by complying with the directions of the law. His failure to do so is his own wrongful neglect, and is no defense to an action against his sureties on his official bond."

In a Pennsylvania case, found in 64 Atl. 443, In re Supervisor of Nether Providence Township, the first paragraph of the syllabus reads as follows:

"1. Officers—Failure to File Bond—Effect.

"Act March 16, 1860 (P. L. 174), providing that certain offices shall be declared vacant on the failure of the official to file a bond within a month after his election, *held* not mandatory; the word 'shall' in the act meaning 'may.' "

Mitchell, C. J., at p. 444, quotes Sharswood, J., in Pittsburgh v. Coursin, 74 Pa. 400:

"Where the words are affirmative and relate to the manner in which power or jurisdiction vested in a public officer or body is to be exercised, and not to the limits of the power or jurisdiction itself, they will in general be so construed."

The court continues:

"The intent of the present act is not to defeat the will of the electors

by ousting newly elected officers, nor to make an opportunity for the other officials of the township to do so, but to secure the proper safeguards of the public funds before the new officials begin to handle them. In that interest it is important also that the interval should be brief between the termination of the security under the old officers and the attaching of the security under the new. What the statute intends to provide against is not a temporary omission, irrespective of all circumstances, to enter the prescribed security, but a default on the part of the officer, an omission not legally excused."

In State ex rel. v. Carroll (Wash.), 106 Pac. Rep. 748, the third paragraph of the syllabus reads:

"The failure of one duly appointed to a public office to give the required bond does not prevent him from being a *de jure* officer, holding by a defeasible title; the giving of the bond being a ministerial act for the security of the government, and not a condition precedent to the officer's authority to act unless specially made so by statute."

At p. 750 the court uses this language:

"So, also, the failure to give a bond does not render an officer duly elected or appointed a *de facto* officer. He is a *de jure* officer, holding by a defeasible title. Foot v. Stiles, 57 N. Y. 399. The giving of a bond is a mere ministerial act for the security of the government, and not a condition precedent to the officer's authority to act unless especially made so by statute. Glavey v. United States, 182 U. S. 595. * * * The courts generally hold that, even though the statute expressly provides that, upon a failure to give a bond within the time prescribed, the office shall be deemed vacant, and may be filled by appointment, the default is a ground for forfeiture only, not forfeiture *ipso facto*, and that if, notwithstanding such default, the state or other power sees fit to excuse the delinquency by granting the officer his commission, the defects of his title are cured, and it is a title *de jure*, having relation back to the time of his election or appointment. People ex rel. Bennett v. Benfield, 80 Mich 265, 45 N. W. 135."

The Illinois supreme court in 95 Ill., 593, City of Chicago v. Gage, was called upon to construe a similar provision to the one found in section 7 G. C. The charter of the city provided that when official bonds are not filed with the city clerk within fifteen days after the official canvassing of the votes,

"the person so in default shall be deemed to have refused said office and the same shall be filled by appointment, as in other cases."

There is a further provision in the charter that makes it the duty of the clerk,

"to notify all persons elected * * * to office of their election * * *, and unless such persons shall respectively qualify within fifteen days thereter, the offices shall become vacant."

It was held these provisions, in respect to the time within which the official bonds were required to be filed, were not mandatory, but merely directory. The municipal uthorities were empowered in their discretion to declare a vacancy or to waive the

default as to the mere time of filing bond, and to accept and approve it when afterwards filed. The mere default in that regard would not of itself operate to vacate the office.

The court, at p. 621, adopting what it terms the reasonable construction of the charter provisions, holds that if an officer files his bond strictly in time, his right and title to the office are indefeasible. If he files it afterwards and it be accepted and approved, his right and title thereupon become equally indefeasible.

The court further says:

> "The law does not favor forfeitures, and 'in enforcing forfeitures courts should never search for that construction of language which must produce a forfeiture, when it will bear another reasonable construction.' Hartford Insurance Company v. Walsh, 54 Ill., 168."

A page 622 the court says:

> " 'There is a known distinction,' says Lord Mansfield, 'between circumstances which are of the essence of a thing required to be done by an act of parliament, and clauses merely directory. The precise time, in many cases, is not of the essence.' Rex v. Loxdale, 1 Burr. 447. It seems reasonable that it is only when 'the rights of the public, or of third persons, depend upon the exercise of the power or the performance of the duty to which it refers,' that the statute should be held mandatory, and otherwise but directory. Kane v. Footh, 70 Ill. 590, and see Sedgw. Stat. and Const. Law, 368-74. Here the essence of the thing to be done,—that upon which the rights of the public depend—is the giving of the bond, not the precise time when it is done."

The court reviews the cases of State v. Toomer, 7 Rich. Law Rep. 216; Sprowl v. Lawrence, 33 Ala. 674, and cites the following cases:

> People v. Holly, 12 Wend. 480.
> State v. Churchill, 41 Mo. 41.
> State v. Porter, 7 Ind. 204.
> Speake v. United States, 9 Cranch. 28.

In Clark v. Ennis, 45 N. J. L. 69, the first proposition of the syllabus reads as follows:

> "When a statute declares that if a sheriff shall not renew his bond within a specified time, his office shall immediately expire and become vacant, a failure to renew the bond within the prescribed time does not *per se* vacate his office. He is an officer with a defeasible title until the judgment of forfeiture is pronounced in due form and all his acts prior to such judgment are valid as to the public and third persons."

In the opinion the court quotes Stokes v. Kirkpatrick, 1 Metcalf 138:

> "The provisions of the act can not be construed as abrogating the ancient and well established rules and principles applicable to the vacation or forfeiture of offices according to which such vacancy or forfeiture can be declared only by a direct proceeding."

The court at page 77 calls attention to the fact that the New Jersey statute further provided:

> "And if such sheriff shall thereafter presume to execute his office, then all his acts done under color of office shall be absolutely void."

The court construes this strong language to merely apply so far as the officer himself is concerned, and that as to the public and third persons the official acts are valid until in the manner duly prescribed by law the office shall be deemed and taken to be vacant by reason of the alleged default.

In Sprowl v. Lawrence, 33 Ala., 674, the sixth proposition of the syllabus reads as follows:

> "The failure of a public officer to give bond within the time prescribed by law (Code, paragraph 125), only renders him liable to a proceeding for the forfeiture of the office, but does not, *per se*, operate his instantaneous removal from it."

The court at page 690 says:

> "Whenever the constitution provides for the election of an officer, he derives his title to the office from the election and not from his commission, which is the mere evidence of his right * * *. The election having thus invested him with his title to the office, the statute requiring him to file his bond within fifteen days and providing that on his failure to do so 'he vacates his office' operates as a defeasance and not as a condition precedent. The question we are considering is therefore analogous to that which arises in reference to corporations when they do some act which it is provided by their charter shall amount to a forfeiture of their vested rights; and decisions in such cases are in point here."

The court then cites a number of cases from different states, in support of the proposition that there is no forfeiture *ipso facto*, but that proper proceedings might be brought to have the forfeiture judicially decreed.

Judge Caldwell, in 18 C. C. 304, State ex rel. v. Pollner, seems to have taken for granted that the Ohio doctrine holds that the filing of a bond is not a condition precedent to the entering upon his office by a mayor.

At page 310 he uses this language:

> "The contention of the relator is, in this case, that, until he is elected, has taken the oath of office, has filed a bond and that bond been accepted by the city council, that he is not mayor, and can not act as mayor legally.
>
> "On the other hand, the respondent claims that the law is if there is no time fixed by statute when the officer shall take his office, shall enter upon his duties, then his term commences immediately if he sees fit to enter upon the duties of it and, if he does not, it is a mere waiver upon his part. And secondly, that the requiring of the oath, that the requiring of the bond or any other thing that the statute may require, although the statute may be explicit, is merely directory language, and is not mandatory, and I believe the courts in this country now quite unanimously and, I do not know but entirely, say so at this time, that language of that kind is merely directory, and is not mandatory language."

This case should be noted because section 3352 G. C., which was repealed (103 O. L. 786) and was formerly section 1518 of the Revised Statutes, provided as follows:

> "If a person elected assessor in any ward * * * fails to give bond and take the oath of office for one week after his election, * * * the office shall be deemed vacant, * * *."

In State, for the Use of the Commissioners, &c., v. Findley, et al., 10 Ohio 51, the second paragraph of the syllabus reads as follows:

> "The oath of office is a mere ministerial act, and not a condition precedent to entering upon the duties of the office, nor will the omission to take it by the principal in an official bond discharge the sureties."

This was a case of a Guernsey county treasurer, wherein an action had been brought on the treasurer's bond and the defense was made that the treasurer could not be considered as such officer before the oath of office was taken.

The court at page 59 says:

> "If an officer be created by letters patent, he is a complete officer before he is sworn. This is almost the only way in which administrative officers are created in Great Britain; but it can not be denied that the creation of an officer by election is as high, if not higher, source of title to the officer. * * *
>
> "But there are a class of persons who derive their office, even in England, from election. The officers of towns corporate are thus created, and by the statute of 13 Car. II, it is declared, that in case certain oaths are not taken, the election shall be utterly null and void, yet the same authorities just cited have declared the same doctrine, which was considered applicable to the test act. It must be recollected, that the question is not made in an information, or *quo warranto*, where it would directly and properly arise, it is made after the state has consented to waive the objection, after the principal has enjoyed the benefits and emoluments of the office, and for aught that appears, in consequence of the very bond which has been given. The taking of the oath can only be considered as directory to the officer, and not as a condition precedent to his authority to act as treasurer."

This decision is important when we note the similarity between the statutes at that time applying to county treasurers and the statutes now applicable to probate judges.

Section 2 of the act prescribing the duties of county treasurers, as found in Swan's Statutes of Ohio, 1841, at page 963 provided:

> "That each county treasurer, *previous to entering on the duties of his office* shall give bond * * * and shall also take and subscribe an oath or affirmation to be endorsed on said bond * * *."

Section 3 provided:

> "That if any person elected to the office of county treasurer shall not give bond and take the oath or affirmation as required in the preceding section on or before the first Monday in June next after his election, his office shall be considered vacant."

But conceding that the rule in Ohio is the strict or mandatory rule, and going to the extent that a failure to file the bond in question *ipso facto* vacated the office, let us consider whether or not in law there was a filing of the bond under the peculiar facts of this case. The claim is made that the bond was given to the auditor of the county as clerk of the board of commissioners, on the afternoon of February 9, 1917. (Section 2566 G. C.). The next day the bond was taken by Judge Dyson, the commissioners not being in session, and was brought to the respective residences of two of the commissioners, where it was severally signed.

On February 12, 1917, two of the commissioners, at what seems to have been a special meeting, but concerning which claim is made that the third commissioner had no notice of same, formally approved said bond. Later, at a meeting of the board of commissioners on February 20, 1917, the minutes of the meeting of February 12, 1917, were approved.

There seems to be no question but that Judge Dyson entered upon the discharge of some of the duties of the office of probate judge on February 9, 1917, and since it is my holding that his first term expired on February 8, 1917, and there was no holding over, in consequence any duties transacted on the 9th of February, 1917, constituted an "entering upon the discharge of his duties."

We then have two questions:

1. When was the bond filed?
2. When were the duties referred to performed, in relation to the time of the filing of the bond?

I am inclined to the view that the presentation of the bond to the auditor, as clerk of the board of county commissioners, on the afternoon of February 9, 1917, was a filing of said bond with the commissioners. Under the strict letter of the law, the probate judge is required to "give bond to the state," before entering upon the discharge of his duties.

The bond given must be "with sufficient surety approved by the board of county commissioners or by the auditor and recorder in the absence from the county of two of the commissioners."

Section 1581 G. C. further provides that this bond, with the oath of office endorsed thereon, shall be deposited with the county treasurer, but the section does not specifically provide that such deposit with the treasurer be made at any particular time. It will be noted that the section above mentioned does not provide that the bond shall be "filed" with any officer. The provision is that the probate judge shall "give" a bond before entering upon the discharge of his duties, and in the same sentence there is the other provision that the bond given is to be "with sufficient surety approved by the board of commissioners" or the other officers in their absence.

Section 2566 G. C. provides:

> "By virtue of his office, the county auditor shall be the secretary of the county commissioners, except as otherwise provided by law. When so requested, he shall aid them in the performance of their duties. He shall keep an accurate record of their proceedings, and carefully preserve all documents, books, records, maps and papers required to be deposited and kept in his office."

As stated by Okey, J., in Lima v. McBride, 34 O. S. 338, at p. 349:

> "The commissioners of the county constitute a board, and the county auditor is their secretary. * * * The proceedings of the board are in many respects those of a court of special and inferior jurisdiction."

In Jones, Auditor, v. Commissioners, 5 Ohio Cir. Dec. 152, the court points out that in the commissioner statutes the duties are prescribed for the "clerk," while in the county auditor statute he is designated "secretary." At p. 154 of the opinion it is held, in speaking of the use of the terms "secretary" and "clerk":

> "whether he fills one position or both, and they are therefore used by the legislature in this chapter as synonymous terms—describing the same officer."

The term "secretary" to my mind implies broader powers and duties than would necessarily devolve upon a mere "clerk," and since by virtue of his office the county auditor is made the secretary of the county commissioners, and under the law the bond of the probate judge should be approved by said county commissioners, it is my opinion that the probate judge had performed all that was incumbent upon him to do, as far as filing the bond for the approval of the county commissionners was concerned, when he filed his bond with the secretary of the county commissioners, if same were proper in form and sufficient in surety.

Under the conceded facts as I understand them, the formal approval by the commissioners took place some time subsequent to the filing with the county auditor, as secretary of the board of county commissioners, on the afternoon of February 9, 1917. There seems to have been some action taken by two of the commissioners on February 10, 1917, and later, on February 12, 1917, the bond was formally approved by the commissioners, with two members present, and still later, on February 20, 1917, the minutes of the meeting of February 12, 1917, were formally approved, all members being present.

To my mind, the case of State ex rel. v. Tool, 4 O. S. 553, is sufficient authority for the proposition that the bond was given and approved on the 9th of February, 1917, when it was filed with the county auditor as secretary of the board of county commissioners. In the Tool case the statute provided that if any person, elected to the office of county treasurer, shall not give bond and take the oath or affirmation as required by section 2, on or before the first Monday in June next after his election, his office shall be considered vacant. The requirements of section 2 were that he should give bond with four or more freehold sureties to the acceptance of the county commissioners, and should also take and subscribe an oath or affirmation to be endorsed on said bond, that he would faithfully discharge all the duties of his office.

This was an action in *quo warranto* and the defendant Tool pleaded that on the first Monday of June, 1855, he executed a bond with more than four freehold sureties, to the acceptance of the commissioners of the county, in the sum prescribed by the commissioners; that he then and there took the oath prescribed by law, subscribed the same and caused it to be endorsed on the bond according to law, and therefore that he lawfully exercised the duties of the office of county treasurer; that on the first Monday of June, 1855, he executed and delivered to the commissioners, for their acceptance, a bond conditioned according to law, in the penal sum of eighty thousand dollars, with twenty-four freehold sureties; that the commissioners on said first Monday of June, 1855, neither accepted nor rejected the bond, but continued their session until the next day after the said first Monday of June, 1855, and then and there accepted and approved the said bond, and that the said Tool then and there, on the same day, took and subscribed the oath required by the state and caused the same to be endorsed on the bond thus accepted by the commissioners. To this answer a demurrer was filed by the state.

It will be noted that the statute in this case provided that both the bond should be given and the oath taken on or before the first Monday of June next after the election. At p. 559, Kennon, J., says:

> "This bond was not accepted by the commissioners on the first Monday

of June next after the election, nor was the oath, required by the statute, taken and subscribed, nor was it indorsed on the bond, on or before the first Monday of June.

"The bond was executed and delivered to the commissioners, for their acceptance, within the time prescribed by law, but was neither accepted nor rejected on that day; but on the next day, and during the regular June session of the commissioners, was accepted and approved by them. * * *

"In such case, the doctrine of relation would apply, and the acceptance, by the commissioners, of the bond on the next day, would relate back to the time of the delivery of the bond to the *commissioners for their acceptance.*

"It is said, in 18 Viner's Abridgement, 290, that where there are divers acts concurrent to make a conveyance estate, *or other thing,* the original act shall be preferred, and to this the other acts shall have relation."

The court cites instances in which the doctrine of relation applies, and continues (p. 560):

"In the case supposed, the presentation of the bond on the first Monday of June, with the oath indorsed thereon, and the acceptance by the commissioners, are, in the sense in which the word concurrent is used by Viner, concurrent acts, and the acceptances shall relate back to the first Monday of June, and the whole be considered as having been done on that day; although, in point of fact, the acceptance was made and entered by the commissioners on the day after the first Monday of June."

So in the instant case, as far as the approval of the bond by the commissioners is concerned, I think the later acts of the commissioners all relate back to the filing with their secretary, and that the bond which was finally approved by the commissioners under the fiction of the doctrine of relation, was filed on the afternoon of February 9, 1917.

Having now determined that the bond was given and approved at the time of filing with the county auditor, as the secretary of the county commissioners on February 9, 1917, the remaining question is, did that fact constitute the giving of a bond by the probate judge, "before entering upon the discharge of his duties," as provided in section 1581 G. C.?

As I recall the conceded facts, Judge Dyson, prior to the time of the taking of the oath and presentation of the bond on February 9, 1917, performed certain duties of his office. A will was filed and application made for probate; two findings and orders of appraisement were issued; two accounts were filed, and two proofs of publication were also filed.

Strictly speaking, it would appear that inasmuch as it has been determined that any acts of the probate judge performed on February 9, 1917, were done under the new term, that as far as different parts of the day are concerned, the acts above referred to were performed before a bond had been given and approved. It is a well settled principle that the law does not regard parts or fractions of a day.

Black, Interpretation of Law, section 73.

Bouvier, speaking of the definition of "day" says:

"A day is generally, but not always, regarded in law as a point of time; and fractions will not be recognized."

Of course, although the law does not generally consider fractions of a day, it would do so when substantial justice requires it.

Taylor v. Brown, 147 U. S. 640.

Under the title of "Fraction of a Day," Bouvier says:

> "In computing the time for the performance of official duties, each fraction of a day is to be considered as a full day.
>
> "The doctrine applies chiefly, if not entirely, to judicial and other public proceedings, and not to transactions of parties whose priority of right becomes a question of fact: Maynard v. Esher, 17 Pa. 222."

So we have in the present case the performance of two acts on the same day—the performance of certain official acts and the giving of the required bond.

Were this a question of transaction between parties, it might be well to divide the day and determine which act was prior, that substantial justice might be done between the parties. But this is not a question of parties; nor does the same rule apply to the public and an officer as would apply between two contending parties with property rights.

I am inclined to a liberal view in this matter, by reason of the divers positions taken by the courts of the United States upon the question whether a statute prescribing time for a public officer to qualify is directory or mandatory. The adjudications vary according to the wording of the particular statute, but, as stated in an exhaustive note found in Annotated Cases, 1915, D., p. 412:

> "In the majority of the jurisdictions the rule has been laid down that in the absence of a provision expressly declaring that the failure to take the oath or give the bond required shall operate *ipso facto* to vacate the office, such a statute is merely directory and the officer may afterwards comply with the requirements of the statute, *unless a vacancy has actually been declared by the proper legal authority.*"

Section 7 G. C., providing what shall take place when one neglects to give the bond within the proper time, contains the following language:

> "Such office shall be considered vacant."

The following states, using similar or identical language, hold this provision to be merely directory:

Alabama,	Delaware,	Georgia,	Illinois,
Indiana,	Kentucky,	Michigan,	Mississippi,
Missouri,	New Hampshire,	New Jersey,	New York,
North Carolina,	Oregon,	Pennsylvania,	South Carolina,

Washington and Wisconsin.

The note maker includes Ohio in the list of states which construe such provisions as directory, citing as authority, State v. Tool, 4 O. S. 553, hereinbefore noted.

The following jurisdictions hold that the requirement is mandatory and that the timely taking of the oath or filing of the bond is a condition precedent to the right to entry on the office, so that the right is absolutely lost by a failure to perform the condition within the time limited:

Arkansas,	California,	Florida,	Kansas,
Louisiana,	Maryland,	Montana,	Nebraska,

Nevada, Texas and Virginia.

It might be noted here that Nebraska, Arkansas and possibly some of the other states last mentioned have statutes which are more far-reaching in their application than the Ohio statute. They provide for either a forfeiture of the office or that the office shall thereupon *ipso facto* become vacant.

As pointed out in the note referred to in 38 Amer. Ann. Cases, 415, it is generally held, both in jurisdictions declaring such statutes to be mandatory and in those declaring them to be directory, that where the failure to qualify within the time prescribed by the statute is due to default or hindrance of others, or to circumstances beyond the control of the officer, he will not be deprived of his office.

In Horton v. Parsons, 37 Hun. 42, the court was construing a similar statute to the Ohio statute. The New York statute provided that before the officer entered upon the duties of his office, and within ten days after being notified of his election, he shall take the oath of office, and that if he does not do so, &c., such neglect shall be deemed a refusal to serve, and if he shall refuse to serve, a special town meeting may be called to supply the vacancy.

At page 45 the court says:

> "There was no such meeting called; no new election had, and he proceeded and continued to perform the duties of his office. He was legally elected and sought to qualify by taking and filing his oath of office (which was defective), and making and filing the requisite bond. He became an officer by the election, and his title to it was defeasible. His *right* to continue to hold it depended upon the statutory conditions, one of which was the taking of the oath of office. He was in no sense a usurper of the office, but was legally inducted into it by election. * * * But it has been held in effect that the statute is not self-executing, and does not work a forfeiture for the cause it affords, but that it must come from some act, judicial for otherwise, which effectually ousts him and severs his relation to the office. And that until then he is practically an officer *de jure*, having a defeasible title to the office."

In State v. Ruff, 4 Wash. 234, the court, declaring the statute providing that on failure to qualify within the prescribed time the office "shall become vacant," to be directory, said:

> "It is the election which gives the right to the office and the qualification is only an incidental requirement for the protection of the public. If the provisions for such qualification are not timely complied with, the public can protect itself by declaring a vacancy and filling the same by appointment, but until such acts have been done, the force of the election has not been exhausted, and upon a compliance with the incidental duty of qualification is given full force."

To the same effect is People v. Benfield, 80 Mich. 265, wherein it was said:

> "The courts generally hold that even though the statute expressly provides that upon a failure to give a bond within the time prescribed the office shall be deemed vacant, and may be filled by appointment, the default is a ground for forfeiture only, and not a forfeiture *ipso facto*, and if, notwithstanding this default, the state or other power sees fit to excuse the delinquency by granting the officer his commission, the defects of his title are cured and it is the title *de jure* having relation back to the time of his election or pointment."

In Foot v. Styles, 57 N. Y. 399, it was said:

"The act resembles a cause of forfeiture of a franchise or corporate charter which is only enforceable by a proceeding in the nature of a *quo warranto.*"

In Minick v. The State, 154 Ind. 379, the court said:

"As the delay does not of itself amount to a rejection of the office but is only a ground of forfeiture, the party elected and in default may still be permitted to qualify after the prescribed time; and if he does so his default will be considered as waived."

I have said herein that the words "shall be considered," as used in the phrase "such office shall be considered vacant," have a definite, legal meaning, and it may not be amiss to call attention to one case wherein our supreme court was construing a somewhat similar statute.

In the case of Terrill v. Auchauer, 14 O. S. 80, the court had before it a section providing that:

"No sheriff or other officer making sale of property, either personal or real, nor any appraiser of such property, shall directly or indirectly purchase the same; and any purchase so made *shall be considered* fraudulent and void."

At pages 84 and 85 the court uses the following language:

"What is the precise idea which the legislature intended to express in the use of this language? Was it intended that such sales, and all conveyances made in pursuance of them, should be, as to all the world, and under all circumstances, as if they had never been made—however advantageous the sale may have been to all parties interested, and however desirous such parties might be to maintain and enforce it? Or was it intended only, that whenever a party interested in the sale should directly interpose, or institute a proceeding to avoid the sale, it should 'be considered,' that is to say, *adjudged* by the court, that the fact of the purchaser having been an appraiser was conclusive evidence of fraud, and that the sale should thereupon be 'considered' or adjudged void? This is the question.

"If the language of the statute were entirely unequivocal, we should be bound to follow it, to whatever consequences it might lead, short of a manifest absurdity. But this can hardly be said of the language of this clause of the statute. In common parlance, consideration means deliberation, thought; but in legal phraseology, the *consideration* of the court means the *judgment* of the court; and 'it is considered by the court,' as equivalent to 'it is adjudged by the court.' And the suggestion is, at least, not without plausibility, that this language of the statute indicates a rule prescribed as a guide to judicial action, when invoked for the purpose, rather than a legislative *fiat,* always and everywhere operative irrespective of judicial action."

So in the present case it strikes me it would not be a constrained construction to hold that section 7 G. C. indicates a rule prescribed as a guide to judicial action, rather than causing an *ipso facto* forfeiture.

In view of the weight of authority on the side of that line of decisions which hold provisions such as we have in our statute to be directory, it seems to me that I am not called upon to enforce the harsh and seemingly unfair, strict rule of interpretation, and while in some cases the rule of the indivisibility of a day might seem farfetched, and if the equity of a case demanded, would not be invoked, yet, under all

the circumstances of the instant case, I am inclined to the view that it should be given the fullest effect. Applying both the doctrine of relation and that of the indivisibility of a day, we do not have much difficulty in determining that, as a matter of law, Judge Dyson entered upon the discharge of his duties and gave his bond upon the 9th day of February, 1917, and since, under the circumstances of this case, that will be considered to have been done first which under the law should have been done first, the giving of the bond would relate back to the first instant of the beginning of the day of February 9, 1917, and the entering upon the discharge of his official duties by fiction of law would immediately follow the giving of the bond.

It is my opinion, then, that Judge Dyson as a matter of law, gave his bond before entering upon the discharge of his duties and that no vacancy exists in the office of Probate Judge of Guernsey county.

Although I have taken the liberal view just expressed, I do not wish to be understood as holding that the question is absolutely free from doubt. The inquiry made of this department is whether or not under all the particular and peculiar circumstances of this case a vacancy exists, which should be filled by appointment by the governor. The entire question is not free from doubt, for, as shown in the somewhat lengthy discussion herein, the courts of the different jurisdictions are diametrically opposed to each other on the question. But it strikes me that the matter is one of more local than general interest. The election of Judge Dyson was by the voters of Guernsey county. His duties and the functions of his office appertain to that county. It was the board of commissioners of Guernsey county that saw fit to make the approval of the bond at the time and in the manner shown in the conceded facts.

In consequence of all the foregoing, I do not think this department should declare that the state of facts shown in this case worked a forfeiture *ispo facto* of the office and thus warrants the filling of the vacancy. If the question is of sufficient local public interest, the courts are open and a suit by way of *quo warranto* would afford the Ohio courts an opportunity to pass upon the direct question.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

351.

APPROVAL—TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE OF THE COUNCIL OF CENTERBURG, OHIO.

COLUMBUS, OHIO, June 7, 1917.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

IN RE: Bonds of the Village of Centerburg, Knox County, Ohio, in the sum of $3,000, for the purpose of constructing sewers and sewage disposal works in said village.

I have carefully examined the transcript of the proceedings of the council and other officers of the village of Centerburg, Ohio, relating to the above bond issue. As a result of such examination I find such proceedings to be in conformity with the provisions of the General Code relative thereto.

I am, therefore, of the opinion that bonds of said village, when properly prepared and signed by the proper officers, will constitute valid and binding obligations of said village.

The transcript covering proceedings relating to the above bond issue is embodied in the transcript covering the proceedings relating to the bond issue of said village in the sum of $7,000 for the construction of a sanitary plant, which transcript is attached to opinion of even date herewith approving said last named issue.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

352.

BOND ISSUE FOR CONSTRUCTION OF SANITARY PLANT—WHEN COUNCIL SUBMITS QUESTION TO ELECTORS—NOT NECESSARY THAT RESOLUTION CONTAIN RECITAL THAT BOARD OF HEALTH RECOMMENDED SAID PLANT—NET INDEBTEDNESS OF TWO AND ONE-HALF MILLS ON TAX DUPLICATE VALUATION OF REAL AND PERSONAL PROPERTY IN MUNICIPALITY—HOW SAME ASCERTAINED.

Though it is advisable that the resolution adopted by the council of a municipal corporation submitting to the electors thereof the question of a bond issue for the purpose of constructing a sanitary plant under the provisions of Section 4471, *General Code, should contain the recital that the construction of such sanitary plant has been recommended by the board of health of the municipality, or of the officer or board having the powers of a board of health, such recital is not jurisdictional and the resolution is not invalid by reason of its omission.*

In ascertaining the net indebtedness of two and one-half mills upon the tax duplicate valuation of real and personal property in the municipality prescribed by sections 3941 *and* 3952 *General Code, beyond which indebtedness can not be created without a vote of the people, bonds theretofore issued on a vote of the people for a purpose authorized by section* 3939 *General Code are not to be considered.*

COLUMBUS, OHIO, June 7, 1917.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

IN RE: Bonds of the village of Centerburg, Knox County, Ohio, in the sum of $7,000.00, for the purpose of constructing a sanitary plant in the said village.

I am herewith enclosing to you transcript of the proceedings of the council and other officers of the village of Centerburg, Ohio, relating to the above bond issue.

The statutory provisions under which the officials of the village have been acting in matters relating to the construction of this proposed sanitary plant are those contained in sections 4467 et seq. of the General Code, and the issue of these bonds is provided for by ordinance of the village council passed pursuant to a majority vote on the proposition of such bond issue by the electors of the village at an election held pursuant to authority of section 4471, General Code.

From the transcript it appears that at a called meeting of the council of the village, which meeting seems to have been called by written notice served on the members in the manner provided by law, one W. O. Phillips, health officer and acting board of health in and for said village, submitted to the mayor and council of the village a recommendation in words as follows:

"I hereby recommend that council cause plans and estimates to be prepared and acquire by condemnation or otherwise, such land or lands,

within or without the corporate limits, as are necessary to provide for the proper disposal in a sanitary manner of the sewage of the village of Centerburg, Ohio.

"This recommendation is made to protect the health of the inhabitants of the village."

Thereupon a motion was made, which was properly seconded, that the recommendation be accepted. Upon this motion the roll was called, with the result that the motion carried by the votes of all five of the councilmen present.

After this motion was adopted a resolution was introduced declaring it necessary to issue and sell bonds in the fiscal year beginning January 1, 1917, for the purpose of constructing a sanitary plant, in the sum of $7,000.00, and that the question of issuing and selling the bonds of said village in the sum aforesaid be submitted to the vote of the qualified electors of said village at a special election to be held in said village for that purpose on the seventeenth day of March, 1917, at the regular place or places of voting in said village, and that the election should be conducted, canvassed and certified in the same manner as other general municipal elections. Upon a motion for the suspension of the rules, adopted on roll call by the yea vote of all five members present, the second and third readings of the resolution were waived and said resolution placed upon its passage, with the result that said resolution was adopted as read by the yea votes of all members present.

As will be noted, there was no recital in the resolution of council submitting the question of this bond issue to the electors of the village, that the construction of the proposed sanitary plant had been recommended by the health officer of the village; and inasmuch as municipal corporations under their general statutory powers have authority to construct sewage disposal works (Section 3647 G. C.) and under the provisions of Section 3939, Sub. 14, General Code, may likewise issue bonds for the construction of such sanitary disposal works, it would have been desirable if the resolution providing for the submission of the question of such bond issue had contained such recital showing affirmatively that the issue of such bonds and further proceedings relating to the construction of such sanitary plant were under the special provisions of Sections 4467 et seq. of the General Code, and not under the general statutory provisions authorizing municipal corporations to construct such works and issue bonds therefor. However, I see nothing in the provisions of the statutes under consideration which makes such recital a jurisdictional requisite to the submission to the electors of the municipality of the question of a bond issue under section 4471 General Code.

The resolution submitting the question of the issue of the bonds to the qualified electors of the village was not published in the manner provided by statute for the publication of ordinances and resolutions of a general nature or providing for improvements, but notice of the election was given by newspaper publication in the manner and for the time prescribed in section 3946, General Code.

Under the decision of the court of appeals of Huron county, in the case of Cleveland S. & C. Railway Company v. City of Norwalk, 22 C. C. n. s. 590, this publication of the notice of election was a sufficient compliance with the statutory provisions requiring the publication of resolutions and ordinances of a general character, or which provide for improvements.

From the certificate of the canvass made by the deputy state supervisors of elections of Knox county, it appears that the election on the bond issue was held on March 17, 1917, with the result that one hundred and six votes were cast in favor of the proposition and sixty-eight votes against the same.

From the transcript it appears, however, that three days before the election, to wit, on March 13, 1917, at a meeting called by the mayor, the council of the village, five of the six members thereof being present, adopted a resolution to amend the resolution submitting the bond issue proposition to a vote of the electors of the village.

In this resolution it was recited that the health officer of the village of Centerburg had recommended the preparation of plans for the construction of a sanitary plant for said village for the proper disposal of the sewage and waste matter of the village, and that said plans, approved by the state board of health, were then on file in the office of the village clerk; and after reciting further that said resolution was concurred in by two-thirds of all members elected to council, provided as the first section thereof as follows:

> "That it is necessary to issue and sell bonds in the fiscal year commencing January 1, 1917, for the purpose of constructing a sanitary plant, as defined in section 44677 of the General Code of Ohio, in an amount greater than one per cent. of the total value of all property in said village as listed and assessed for taxation, to wit: in the sum of $7,000.00; and that the question of issuing and selling the bonds of said village in excess of said one per cent., that is, in the sum aforesaid, be submitted to a vote of the qualified electors of said village at a special election to be held in said village for that purpose on the 17th day of March, A. D., 1917, at the regular place or places of voting in said village; and said election shall be conducted, canvassed and certified in the same manner as other general municipal elections."

Section 2 of this resolution directed the mayor to give public notice of the time and place of holding said election in the manner provided by law; while section 3 thereof directed the clerk to certify a copy of the resolution to the deputy state supervisors of elections for Knox county.

It thus appears that the resolution adopted by council March 13, 1917, covers all the ground covered by the resolution of February 12, 1917, and that if effect is given to the later resolution as a resolution legally adopted by council, it is to be considered as repealing by implication the former resolution, with the result that the subsequent proceedings relating to the bond issue are invalidated; for if the former resolution is to be considered as repealed by the later one, the election held on March 17, 1917, is not supported by the authority granted in the former resolution, while the later resolution could not be considered as authority for said election, for the reason that under said resolution sufficient time is not provided for the notice of the election.

I am of the opinion, however, that this second resolution was not legally adopted. In the first place, it does not appear from the transcript that the meeting of council of March 13, 1917, at which this second resolution was adopted, was called in the manner prescribed by law for the calling of special council meetings.

Again, though this resolution was one of a general nature (57 O. S. 374), it appears from the transcript that same was adopted on first reading without any suspension of the rule prescribed by section 4224, General Code, requiring ordinances or resolutions of a general nature to be fully and distinctly read on three different days before the same are passed.

For these reasons, I am inclined to the view that the resolution of February 12, 1917, was in no manner affected by the adoption of this later resolution, and that the subsequent proceedings of council relating to this bond issue are not invalidated thereby.

As a further consideration with respect to the question of the validity of this bond issue, I note from the financial statement attached to the transcript that the general bonded indebtedness of the village, as distinguished from indebtedness incurred in the issue of bonds in anticipation of special assessments, amounts to the sum of $37,650, with approximately $2,000 in the sinking fund to meet maturing

bonds. Inasmuch as the duplicate valuation of taxable real and personal property in the village is the sum of $1,085,200, it is apparent that the net bonded indebtedness of the village is in excess of two and one-half per cent. of the tax duplicate.

Of the bonded indebtedness of the village above stated it appears that $27,000 represents a bond issue voted by the electors for the construction of water works, and inasmuch as there is nothing in the transcript to indicate that the water works constructed in pursuance of this bond issue is self-sustaining within the provisions of paragraph "f" of section 3949 General Code, the question is suggested whether such issue of $27,000 for water-works purposes, issued on a vote of the people, is to be considered as within the two and one-half per cent. limitation prescribed by sections 3941 and 3952 General Code; for if this particular issue is to be considered in arriving at the two and one-half per cent. limitation prescribed by these sections, the further question is suggested whether, in view of the decision of the supreme court in the case of Henderson v. City of Cincinnati, 81 O. S. 27, the bond issue election held on March 17, 1917, was not required to pass by a two-thirds vote, notwithstanding the general provisions of section 4471 G. C. that such bond issue proposition might carry on a majority vote.

Doubt on the first question here suggested is created by the fact that the circuit court of Cuyahoga county, in the case of Cleveland v. Cleveland, 13 C.C. n. s. 436 (affirmed without report 83 O. S. 482), in its decision excluded bonds issued on a vote of the people from the then four per cent. limitation prescribed by section 3942, General Code, wholly upon consideration of the then provisions of section 3945 General Code, which section was construed to expressly exclude such bonds from said limitation.

Section 3945 General Code was repealed by the act of 1911 amending the Longworth act, and the question here suggested must be determined on a consideration of the present statutory provisions.

A sufficient clue to the legislative intent with respect to this question is found, I think, in the provisions of section 3941 General Code as compared with section 3942 as it stood before the enactment of the act of 1911. The then provisions of section 3942 provided that the net indebtedness incurred *by a municipal corporation* for the purposes designated in section 3939 "shall never exceed four per cent of the total value of all the property in such corporation, as listed and assessed for taxation, unless the excess of such amount is authorized by vote of the qualified electors of the corporation in the manner hereinafter provided."

Looking to section 3941 General Code, the corresponding section in the law as it now stands, it will be noted that it provides that the net indebtedness created or incurred by *the council* under section 3939 General Code, and under an act passed April 29, 1902, to amend sections 2835, 2836 and 2837 and to repeal section 2837-a of the Revised Statutes, together with its subsequent amendments, shall not exceed four per cent. (now two and one-half per cent.) of the total value of all property in such municipal corporation, as listed and assessed for taxation.

In view of the language of section 3941 General Code, as it now stands, when considered as an amendment of the provisions of the corresponding section in the Longworth law before the amendment of 1911, I am of the opinion that municipal bonds issued on a vote of the people under the provisions of the present Longworth law, so called, are not to be considered as within the two and one-half per cent. limitation prescribed by sections 3941 and 3952 General Code. This being true, it is not necessary to consider the question whether under any circumstances the proposition of a bond issue under section 4471 General Code, must carry by a two-thirds vote rather than the majority vote therein prescribed.

In the resolution above referred to which the council of the village attempted to pass under date of March 13, 1917, it was recited that the bond issue proposed in the sum of $7,000 was an amount greater than one per cent. of the total value of all property in said village as listed and assessed for taxation. If this recital was

true, it would raise the question suggested by the decision of the supreme court in the case of Henderson v. Cincinnati, supra, whether such bond issue was not required to pass by a two-thirds vote of the electors, notwithstanding the provisions of section 4471 General Code that the proposition might carry on a majority vote. However, from an inspection of the transcript I do not find the recital to be true. As before noted, the duplicate valuation of the taxable real and personal property in the village is $1,085,200; one per cent. of this amount is $10,852. The only other bond issues provided for by the village during the fiscal year 1917 are an issue of $8,973 under date of February 1, 1917, the same being bonds issued in anticipation of the collection of special assessments for the construction of sewers in the village, and the $3,000 issue for sewer purposes the proceedings as to which are set out in this same transcript.

Under section 3949 General Code, bonds issued in anticipation of the collection of special assessments are not to be considered in ascertaining any of the debt limitations of the Longworth act; while the $3,000 issue for sewer purposes, together with this issue aggregate the sum of $10,000, which is within the one per cent. limitation as to bonds issued during the fiscal year, even if we were required to consider this $7,000 issue as within the one per cent. limitation of section 3940 General Code, prescribing the amount of indebtedness that may be created in any one fiscal year.

The foregoing disposes of the questions which have suggested themselves to me in a consideration of the transcript relating to this bond issue; and finding the subsequent proceedings of council relating to the same to have been in all respects regular and the bond form submitted to be in proper form, said issue of bonds and the proceedings relating thereto are approved.

I am, therefore, of the opinion that said bonds, when signed by the proper officers of the village, will constitute valid and binding obligations of said village.

Very truly yours,
JOSEPH McGHEE,
Attorney-General.

353.

TAX MAP DRAFTSMAN—MUST BE FURNISHED AND PAID UNDER SECTIONS 5551 AND 5552—NEW ACT HAS NO EFFECT ON THESE SECTIONS.

Under the new Highway Act, which becomes effective on June 25, 1917, the assistants to the county Surveyor as tax map draftsmen must be furnished and paid under the provisions of Sections 5551 and 5552 G. C., the provisions of the new act having no effect upon this matter.

COLUMBUS, OHIO, June 7, 1917.

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

DEAR SIRS:—I have your communication of June 2, 1917, in which you ask my opinion in reference to a certain matter. Your communication reads as follows:

> "In view of the fact that Section 7181 General Code, as amended in Amended House Bill No. 300, now makes it the duty of the county Surveyor to act as tax map draftsman, does this repeal by implication all of the provisions of Sections 5551 and 5552 General Code? In other words, are the

assistant tax map draftsmen to be appointed under sections 5551 and 5552 G. C., or is this service now to be rendered by the regular assistants in the county Surveyor's office?"

Your request has to do with the comparison of certain sections of our statutes as they exist now and the same sections as they will exist after the taking effect of the new highway law and as modified by said law. The sections to which you particularly refer are 5551 and 5552 G. C., which have to do with the appointment of a tax map draftsman and assistants of the tax map draftsman. Said sections read as follows:

"Section 5551. The board of county commissioners may appoint the county surveyor, who shall employ such number of assistants as are necessary, not exceeding four, to provide for making, correcting, and keeping up to date a complete set of tax maps of the county. Such maps shall show all original lots and parcels of land, and all divisions, subdivisions and allotments thereof, with the name of the owner of each original lot or parcel and of each division, subdivision or lot, all new divisions, subdivisions or allotments made in the county, all transfers of property showing the lot or parcel of land transferred, the name of the grantee, and the date of the transfer, so that such maps shall furnish the auditor, for entering on the tax duplicate, a correct and proper description of each lot or parcel of land offered for transfer. Such maps shall be for the use of the board of equalization and the auditor, and be kept in the office of the county auditor."

"Section 5552. The board of county commissioners shall fix the salary of the draughtsman at not to exceed two thousand dollars per year. They shall likewise fix the number of assistants not to exceed four, and fix the salary of such assistants at not to exceed fifteen hundred dollars per year. The salaries of the draughtsman and assistants shall be paid out of the county treasury in the manner as the salary of other county officers are paid."

Your question arises by virtue of a provision found in the new highway act, which becomes effective on June 28, 1917. This provision reads as follows:

"The county surveyor shall be the county tax map draftsman, but still receive no additional compensation for performing the duties of such position."

From a careful study of this sentence it is evident that the legislature did not consider the duties of tax map draftsman to be performed by the county surveyor as county surveyor; but rather that the county surveyor, in addition to the position or office of county surveyor, should also hold the position of tax map draftsman. It does not say that the county surveyor shall do so and so in the way of preparing maps, but it says: "The county surveyor shall be tax map draftsman," that is, he virtually holds two positions. This construction is made clear from a consideration of the latter part of the sentence, which is "but still receive no additional compensation for performing the duties of *such position*." There are no duties mentioned in this section, or any provisions of any kind whatever made as to assistants. From this it is quite clear that this sentence has particular reference to the provisions of some other section or sections, and as the legislature did not repeal sections 5551 and 5552 G. C., the provision in the new law undoubtedly is to be read in connection with the provisions of said sections, but with particular reference to only one provision thereof, viz: "The board of county commissioners may appoint the county surveyor," etc.

These are the matters that are contrasted under the new and the old:

(1) Under the old the county commissioners may appoint the county surveyor as the tax map draftsman, while under the new the county surveyor shall be the tax map draftsman;

(2) Under the old the county commissioners shall fix the compensation of the draftsman at not to exceed two thousand dollars, while under the new he shall receive no additional compensation.

I am of the opinion that every other provision of sections 5551 and 5552 G. C. remains as it was before the enactment of the new law. The office or position of draftsman is still separate and distinct. His duties are still prescribed under the provision of section 5551 G. C.; and furthermore, I am of the opinion that the provisions for assistants as set forth in sections 5551 and 5552 G. C. apply, and that the same rule would apply to their selection and salary as applied before the enactment of the new law. That is, the same man holds two positions, and his assistants as county surveyor are provided for in one section of the statutes, while his assistants as tax map draftsman are fixed by the provisions of sections 5551 and 5552 G. C.

Hence, answering your question specifically, it is my opinion that the provisions of the new highway act to become effective on June 28, 1917, have no effect in the matter of providing assistants to the tax map draftsman; that they are still selected and paid under and by virtue of the provisions of sections 5551 and 5552 G. C.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General

354.

BID—THAT EMBRACES BOTH LABOR AND MATERIAL—MUST CONTAIN A SEPARATE STATEMENT OF LABOR AND MATERIAL AND THE PRICE OF EACH.

The provision of section 4222 G. C. requiring a separate statement of labor and material with the price of each, if the work bid on embraces both labor and material, is mandatory in character, and a bid on such class of work which does not contain a separate statement of labor and material with the price of each thereof is irregular and illegal and should be rejected.

COLUMBUS, OHIO, June 7, 1917.

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

GENTLEMEN:—Under date of April 27, 1917, you submitted for my opinion the following request:

"In a village in which the council, under the provisions of section 4222 General Code, required bids for improvements embracing both material and labor, which shall be separately stated with the prices thereof, and a contractor bids as follows:

" '2,000 cu. yds. of excavation, labor 50 cents per cu. yd., material 50 cents per cu. yd., labor and material 50 cents per cu. yd.

" '5-inch concrete base, labor 11 cents per sq. ft., material 11 cents per sq. ft., labor and material 11 cents per sq. ft.,'

"using this method on items of all nature, simply for the purpose of showing that he desired the work only on the condition that he receive the contract for both labor and material."

"*Question:* Is such a bid legal?"

Section 4222 G. C. reads as follows:

"Each such bid shall contain the full name of every person or company interested in it and shall be accompanied by a sufficient bond or certified check on a solvent bank that, if the bid is accepted, a contract will be entered into and the performance of it properly secured. If the work bid for embraces both labor and material, they shall be separately stated, with the price thereof. The council may reject any and all bids. The contract shall be between the corporation and the bidder, and the corporation shall pay the contract price in cash. When a bonus is offered for completion of contract prior to a specified date, the council may exact a prorated penalty in like sum for each day of delay beyond the specified date. When there is reason to believe there is collusion or combination among bidders, the bids of those concerned therein shall be rejected."

The portion of the foregoing section that is important with reference to the question in hand is that which requires that "if the work bid for embraces both labor and material they shall be separately stated with the price thereof." In enacting this provision it was evidently the aim and object of the legislature to require that bids should separately state the labor and material with the price of each for the purpose of obtaining for the municipality whatever benefits might arise by reason of such separate statement. When it is considered that this provision requires that there *shall* be a separate statement of labor and material with the price thereof and that such a statement is made necessary for the benefit of the public, the conclusion seems to follow clearly that such a provision is mandatory in character and that any bids which do not comply with it by stating separately labor and material and the price of each would be irregular and illegal and should be rejected.

An extended examination of the authorities has disclosed only one case in which the matter in question has been passed on by the courts. This case is Columbus v. Board of Public Service, et al., Vol. XIV, O. D., page 715. At page 720, Bigger, Judge, says:

"The bids were made upon four separate items: First, dry earth excavation; second, wet earth excavation; third, rock excavation; fourth, concrete masonry, excluding cement.

"The bid is in the following form: Under the item of dry earth excavation, material fifty-eight cents, labor fifty-eight cents; total, fifty-eight cents, in figures; total price in words fifty-eight cents. Each of the four items are in the same form, the same figures being given under the head material, labor and total. There is some dispute as to whether or not the first three items of dry earth excavation, wet earth excavation and rock excavation, embrace both labor and material, but whatever may be said as to that there can be no question that concrete masonry, exclusive of cement, contains material as distinguished from labor. Now this requirement of the statute is mandatory. If this form of bid may be adopted, of course it is clear that it defeats the object and purpose of the law, which was to require a separate statement of the price of labor and material wherever the bid embraced both; and I am therefore of the opinion that the board was en-

tirely justified in holding that all these bids which are in this form are irregular and illegal and cannot be considered. They are also indefinite, and under such a bid, if accepted, the claim might afterwards be made that the totals were a mere mistake and that the contract calls for just twice the amount contained in the total column."

In view of the foregoing, I am of the opinion that the provision of section 4222 G. C., requiring a separate statement of labor and material with the price of each, if the work bid on embraces both labor and material, is mandatory in character and that a bid on such last mentioned kind of work which does not contain a separate statement of labor and material with the price of each thereof is irregualr and illegal and should be rejected.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

355.

ORDINANCE—VIOLATION NOT MISDEMEANOR—ALTHOUGH DECLARED TO BE SUCH THEREIN—WOMEN MAY NOT BE SENT TO OHIO REFORMATORY FOR WOMEN FOR VIOLATION OF SUCH ORDINANCE.

Even though council, under section 3628 G. C., provides in an ordinance that a violation of it "shall be a misdemeanor," this does not make such violation a "misdemeanor" within the meaning of that word as used in the state penal code.

A woman convicted of the violation of such an ordinance cannot be sentenced to the Ohio reformatory for women.

COLUMBUS, OHIO, June 7, 1917.

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

GENTLEMEN:—I am in receipt of a letter under date of May 19, 1917, from Hon. W. S. McConnaughey, city attorney, Dayton, Ohio, as follows:

"My attention has been called to your opinion No. 49 rendered to Hon. Perry Smith, prosecuting attorney at Zanesville, Ohio, holding that women convicted of violation of city and local ordinances cannot be sentenced to the reformatory for women at Marysville.

"The municipal court here in Dayton believed that women convicted in that court of the violation of city ordinances had to be sentenced to the Marysville reformatory under the provisions of section 2148-7, but certain girls so sentenced have been returned and the auditor has refused to issue vouchers for costs in such cases, and this office has been asked to confer with you in reference to the matter.

"The opinion as published in the departmental reports does not inform us as to whether in reaching your conclusion you took into consideration any possible effect of section 3628 General Code, whereby it is provided among the enumerated powers of municipalites that they shall have power 'to make the violation of ordinances a misdemeanor and to provide for the punishment thereof by fine or imprisonment or both,' etc. This provision we find, was considered by the supreme court in the case of Townsend v.

Circleville, but not squarely decided, as the court found in that case that the city council had not attempted to make the violation of the ordinance a misdemeanor and therefore found it unnecessary to determine the effect of this provision of the municipal code in a case where there had been such a declaration in the ordinance.

"I should be very glad to know if this section was taken into consideration in reaching the conclusion expressed by you in your opinion or, if, having considered it, you are still of the same opinion.

"We know that your opinion is supported by authority but have been unable to find any authority which construes such a provision of the statute as we have referred to in connection with the question involved and should like to be sure as to whether this question has had your consideration."

In reply, beg to advise that in passing upon the question before me in my former opinion No. 49, dated February 23, 1917, to which reference is made in the above communication, I had in mind the provisions of section 3628 General Code, but did not consider this section in the opinion for the reason that I regarded the word "misdemeanor," as used in that section, as an expression used merely for convenience of general designation. This is the view frequently expressed by the courts in this and other states.

In the case of Townsend v. Circleville, 78 O. S., p. 122, to which reference is made, the court, while not really required to consider the question of the effect of section 3628 G. C. (formerly section 1536-100, subdivision 29 Revised Statutes) upon the character of an ordinance styled by council a "misdemeanor," did give the subject consideration. In that case it was urged by counsel for plaintiff in error that the city of Circleville had exceeded its lawful power in attempting to give to the mayor exclusive jurisdiction over offenses created by the ordinance. Counsel argued that a violation of a municipal ordinance was a misdemeanor under the statutes of Ohio because of the provisions of section 1536-100 Revised Statutes, to the effect that council had power "to make the violation of ordinances a misdemeanor and to provide for the punishment thereof." The court at page 136 said:

"Section 6795 Revised Statutes defines misdemeanors as follows: 'Offenses which may be punished by death, or by imprisonment in the penitentiary, are felonies; all other offenses are misdemeanors.' and section 610 Revised Statutes provides that a justice of the peace shall have jurisdiction of misdemeanors throughout the county in which he was elected. Section 7, subdivision 29 of the municipal code, supra, provides that the council may make the violation of ordinances a misdemeanor and the contention is that the effect of this is to give to justices of the peace jurisdiction of complaints for the violation of the ordinance. Prior to the adoption of the municipal code in 1902, section 1861, Revised Statutes, provided, 'By-laws and ordinances of municipal corporations may be enforced by the imposition of fines, forfeitures, and penalties, on any person offending against any such by-law or ordinance.' It did not provide that council may declare the violation of the ordinance a misdemeanor and so there was no claim that a justice of the peace had jurisdiction of complaints for the violations of penal ordinances, excepting by statute in townships in which a hamlet was situated. However, such violations were then just as much misdemeanors as they now are, and a justice of the peace now has no better claim to jurisdiction than he then had. The statutory definition was originally adopted as a part of the code of criminal procedure and it comprises only violations of statutes."

In the case of State v. Collingsworth, 82 O. S. 154, the court held that "the vio-

lation of a penal ordinance of a municipality, as a result of which violation death ensues, is not an unlawful killing within the provisions of section 6811, Revised Statutes, which defines the crime of manslaughter." In that case it was claimed that the plaintiff in error had driven a horse at a rate of speed in violation of an ordinance, in which ordinance it was recited that whoever should violate the same "shall be deemed guilty of a misdemeanor." Counsel for the state argued that because the ordinance had been declared to be a "misdemeanor," it was manslaughter to kill a person while engaged in the wilful violation of such ordinance. The court took the opposite view, however, that even though the ordinance was styled a misdemeanor, it was not a misdemeanor as defined in the penal code of the state.

In the case of Pillsbury v. Brown, 47 Calif., 477, the court had before it for consideration practically the same question as you present. In that case the court called attention to the fact that a misdemeanor is an act or omission for which punishment, other than death or imprisonment, is denounced by law; that is, by the law of the supreme power, expressed by statute (Pol. Code, sections 4, 466-7.) In that case the act of March 27, 1872, reincorporating the city of Stockton (Acts of 1871-2, p. 595), provided:

> "And every violation of any lawful order, regulation or ordinance of the city council of the city of Stockton is hereby declared a misdemeanor or public offense, and all procecutions for the same may be in the name of the people of the state of California."

The statute also provided that it should be the official duty of the district attorney to "institute proceedings before magistrates for the arresting of persons charged with, or reasonably suspected of, public offenses," (Pol. Code, section 4256, subdivision 2), which meant, under the statute, those charged with acts or omissions violative of law and amounting to felonies and misdemeanors. (Penal Code sections 15 to 18.) The statute also provided (acts of 1869-70) a fee of $15.00 for the district attorney upon each conviction for such misdemeanor, to be taxed against the offender and collected by him, and in cases where the same could not be so collected of the offender, then to be collected of the county in which said conviction was had and be paid to the district attorney out of the funds of the county treasury. In this case the district attorney prosecuted one Wentoby under an ordinance of the city of Stockton and the district attorney claimed a fee of $15.00 on the theory that the violation of an ordinance of the city of Stockton was a misdemeanor.

The court said at page 480:

> "A misdemeanor is an act or omission for which a punishment, other than death or imprisonment, in the state prison, is denounced by law—that is, by the will of the supreme power, expressed by statute.(Pol. Code, sections 4, 466-7.) There is no statute, at least none is called to our attention, under which the misconduct of Wentoby, of which he was convicted in the police court, amounts to a misdemeanor. * * * His offense was a breach of ordinance No. 4, passed by the municipal government of the city of Stockton—nothing more. It is true that he was prosecuted in the name of the people of the state of California, and that the prosecution was conducted by their local law officer, but, after all, the gravamen of the proceeding was the breach of the ordinance of the city, and had there been no such ordinance in force, when the fact occurred, the prosecution must have failed. But it is said that the offense of Wentoby was a misdemeanor, notwithstanding it has been declared to have been such by any statute directly constituting

it such and in support of this position we are referred to the act of March 27, 1872, reincorporating the city of Stockton (Acts 1871-2, p. 595), which, upon this point, is as follows:

" 'And every violation of any lawful order, regulation or ordinance of the city council of the city of Stockton is hereby declared a misdemeanor or public offense, and all prosecutions for the same may be in the name of the people of the state of California.'

"While there can be no doubt of the authority of the legislature to provide that penalties for the breaches of city ordinances may be enforced by proceedings against offenders in the name of the people of the state, a serious question might arise as to its authority to enact, that the breach of any ordinance of the city council thereafter to have passed should constitute a misdemeanor, since this would, in effect, be to delegate to the city council the power to enact laws, in the strict sense. But however this may be, we think that the statute of 1869-70, already referred to, in fixing the fees of district attorneys upon conviction had for misdemeanors committed, referred only to misdemeanors defined as such by the general public law of the state, and not to convictions for the breaches of mere local municipal ordinances, even though termed misdemeanors for convenience of general designation and prosecuted in the name of the people of the state."

From a consideration of these authorities, it is quite clear, I think, that even though council may style the violation of an ordinance a misdemeanor, such ordinance violation is not a misdemeanor within the meaning of the word as used in the penal code of the state, and that a woman convicted of a violation of such ordinance cannot, therefore, be sentenced to the Ohio reformatory at Marysville.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

356.

TAX BLANKS—QUESTIONS 28, 35, 36 AND 44 ARE REQUIRED THEREIN BY SECTION 5375-4 G. C.—COMMISSION MAY PRESCRIBE OTHER QUESTIONS—ALL QUESTIONS IN BLANK MUST BE ANSWERED.

Questions 28, 35, 36 *and* 44 *of the blank for listing personal property, as prescribed by the tax commission, are all required to be set forth therein by G. C. section* 5375-4, *as enacted in* 1917, *though the commission has power thereunder to prescribe questions other than those required by law.*

The tax law of 1917, *by several express provisions, requires all questions in the blank orm to be answered.*

COLUMBUS, OHIO, June 7, 1917.

HON. H. H. TIMBY, *Ashtabula, Ohio.*

DEAR SIR:—I regret that I was unable to immediately reply to your letter of May 14, 1917. Inasmuch, however, as you inquire therein concerning certain features of the tax listing blank prescribed by the tax commission of Ohio, and your inquiry was not made until after the time for the making of voluntary returns had elapsed, I felt obliged to postpone its consideration to that of other matters which had to be answered immediately.

Your inquiry directs my attention to questions No. 28, 35, 36 and 44 on the form of tax return of personal property for 1917, as prescribed by the tax commission.

You first question the authority of the tax commission to prescribe the form of a blank and to place therein a statement that in order to obtain the benefit of a return under oath the taxpayer must answer all the questions on the blank.

In this connection section 5366 of the General Code, as amended by the act of 1917, provides in part as follows:

> "Each person required by law shall correctly list all such property on such blanks giving the true value thereof in money, and answer all questions correctly, and give all information asked and required by the printed forms contained on such blanks."

Also section 5375-1 of the General Code, as last amended, provides that:

> "Each question in the blank form for listing personal property shall be answered fully and accurately and each item therein shall be filled out. Where the word 'none' truly and completely states the fact respecting any item or question in such blank forms, it may be given as the answer thereto."

Section 5375-4, which is very lengthy and which bears upon practically all of the questions submitted by you, provides in the first part thereof that:

> "The state tax commission shall cause to be printed on the blanks prepared for listing personal property in each taxing subdivision, questions to be answered by all persons required to list property, which will elicit a full disclosure of all property required by law to be valued for taxation. In addition to all others, questions shall be asked the answer to which will elicit the following information:"
>
> (Here follow numerous questions which *must* be asked, though the section plainly authorizes the commission to prescribe other questions.)

The last sentence of this same section provides as follows:

> "Each question so propounded shall be answered specifically, and no return shall be accepted by the auditor or assessor until full disclosures are made as required herein."

From the above provisions it is very clear that the tax commission has ample authority to prescribe the form of the personal property tax list and to print therein the admonition to property owners that all questions on the blank must be answered.

The special questions, the applicability of which you question, are as follows:

> "28. As shown by the books of the bank, how much money had you in bank on listing day,
>
> (a) Subject to check? $_____
>
> (b) On demand certificate of deposit? $_____
>
> "35. What was the cash value of all unsecured claims? $_____
>
> "36. What was the total amount of all your actual, legal, bona fide debts on listing day? $_____
>
> "44. What are the names, dates of purchase and amounts paid for same, in detail, of all nontaxable stocks and bonds purchased by you within the year ending April 3, 1917?

No. of shares.	No. of bonds.	Company or authority issuing same.	Amount paid.
			$
Total amount paid for such bonds and stocks			$

Section 5375-4 G. C. provides that the blank shall contain questions which will elicit a full disclosure as to "whether or not the person listing had any money in bank, how much subject to check and how much on certificates of deposit, both as disclosed by the books of the bank, and the amount in any other form, in bank or otherwise * * * ." Question 28 is nothing more or less than an exact compliance with the absolute requirement of the statute. The question itself is but a codification of what the courts of the state had previously held to be the criterion for determining the amount of "money" held by the person required to list on tax listing day. The mere fact that the taxing officers are prohibited by general statute from examining the books of a bank has nothing to do with this question. The depositors are at liberty to ask the bank what its books show and the law requires them to do this. The bank cannot refuse to answer.

Section 5375-4 also requires that the questions on the blank form shall elicit information as to "the amount of credits owing to such person secured by liens on real estate or personal property, and the amount of credits owing in form of notes, book accounts, and other claims or obligations, not so secured, together with the cash value of all claims secured by liens and unsecured." Of course question 35 is put into the blank because the above provision of law requires it to be put there. In order to arrive at taxable "credits" it is necessary, and always has been under our tax laws, for the taxpayer to ascertain the excess of the aggregate claims and demands owing to him over and above the credits of the legal bona fide debts owing by him. To do this, in turn he had in his own mind, at least, always to place a value upon his unsecured claims. Of course, this involved a considerable degree of estimation, or, as you put it, of "guess work," because a credit or a claim owing to the tax payer was to be valued not at its face value, but at the sum at which the person required to place the value thereon might think it reasonably to be worth. The only new thing in the present tax law is the requirement that the taxpayer put upon paper, i. e., upon the blank form the exact steps in the calculation which under the former law he was required or supposed to make in his own mind.

Section 5375-4 also provides that the questions to be asked shall elicit information as to the "total amount of all actual, legal, bona fide debts." Of course this provision accounts for question 36. In discussing question 35 I have, I think, sufficiently discussed the effect of and reason for this provision of statute. The same

section, section 5375-4, provides that the questions shall elicit information as to "whether such person has purchased any non-taxable stocks and bonds within such year, and if so the name, date of purchase and the amount thereof in detail." There is a somewhat similar provision in section 5376, as amended, which I shall not quote. The provision above quoted adequately accounts for question No. 44. It embodies no radical departure from that which has always been required to be stated in the tax listing blanks. It does change the policy of the law in the matter of degree, as it were. Formerly the tax payer was required to list the amount of money which he had converted into non-taxable bonds of the state of Ohio, or any of its municipalities, and he was taxed upon a proportionate amount determined by the period of time within the taxing year in which his property to that extent had been represented by taxable effects or securities. Now the provision is extended to all non-taxable bonds and stocks as well, thus including bonds of the United States, or its territories, and domestic and certain foreign corporations, whose stock is not taxable under the laws of Ohio.

Section 5376 G. C., in the provision thereof hereinbefore referred to, but not yet quoted, provides that the list shall set forth:

> "the monthly average amount or value for the time he held or controlled them within the preceding year, of all moneys, credits, or other effects, within that time invested in, or converted into bonds or other securities not taxed, to the extent he may hold or control such bonds or securities on tax listing day."

Question 16 requires this information to be given and really belongs with and supplements question 44. If there is any criticism of the blank in connection with this matter it is that the questions are not asked in a logical order.

You will see that the law contains ample authority for asking all the questions concerning which you inquire; and that in point of fact none of these questions are asked by the tax commission under its authority to prescribe questions other than those prescribed by the statute; that is to say, the questions are required to be asked by the law itself and not prescribed by the tax commission; also the requirement that full answers be given for all questions does not emanate from the tax commission, but from the law itself. Of course there is and can be no question as to the constitutionality of these provisions.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

357.

APPROVAL—BOND OF HENRY D. BRUNNING—DEPUTY HIGHWAY COMMISSIONER

COLUMBUS, OHIO, June 8, 1917.

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

DEAR SIR:—I have your communication of June 1, 1917, with which you enclose the bond of Henry D. Bruning, who has been appointed deputy highway commissioner.

I have carefully examined this bond and find the same correct in form and legal and am therefore returning the bond to you with my approval endorsed thereon.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

358.

STATE CIVIL SERVICE COMMISSION—POWER TO ESTABLISH DISTRICTS AND PURPOSE THEREOF.

The power of the state civil service commission to establish districts under section 20 of the "Moore-Barnes" law, is for purposes of their own administration, and not to establish such districts to coincide with districts established by other state departments for their administrative purposes.

There is no provision of the civil service law authorizing the civil service commission to district the state and require applicants for office in the different districts to be residents thereof.

COLUMBUS, OHIO, June 8, 1917.

The State Civil Service Commission, Columbus, Ohio.

GENTLEMEN:—You have submitted the following request for opinion from this department.

> "Several of the state departments have established districts for the purpose of administration and facilitating the work of their inspectional forces and field workers. The civil service commission in several instances has been requested to establish civil service districts which shall coincide with districts so established by the department making the request, and that examinations for positions having to do with the work in such districts, and certifications made for appointment, shall be confined to persons who are residents thereof.
>
> "We understand from section 486-20 of the civil service law that our commission has the right to divide the state into civil service districts for the purpose of administration, and establish an officer in each of such districts. We do not understand by this, however, that we are given authority to confine certification after competitive examination to persons who are residents of specified districts.
>
> "Section 486-10 of the civil service law says:
>
> " 'All applicants for positions and places in the classified service shall be subject to examination which shall be public, competitive, and free for all, within certain limitations to be determined by the commission as to citizenship, residence, age, sex, experience, health, habits, and moral character, etc.'
>
> "Will you please give us at the earliest possible moment, your opinion as to whether or not the civil service commission has authority under the law to district the state for purposes of examination and certification as set forth above?"

Your conclusion as to the effect of section 486-20 is correct, and the rule you have passed under authority of that section goes at least as far as you have any kind of authority to extend it. The authority of this section, as you express bears little, if any, relation to the power you inquire about. It is by its express terms "for the purpose of administration"—that means your administration. To apply it in the sense inquired about would require it to be distorted and perverted; that is, in place of having one set of districts in the state for the purpose of your own administration you would have to have different sets of districts for the purpose of the administration of different departments, or even the same department, for the industrial commission has the state districted for different purposes into different sets of districts.

The provision in section 486-10 that the examinations are free for all within cer-

tain limitations to be determined by the commission as to citizenship, residence, age, sex, experience, health, habits and moral character, cannot be construed as giving the commission authority to legislate upon these subjects. If, for instance, you were to do the thing about which you inquire, divide the state up into districts, say, for one of the state departments, and attempt to provide by rule that only residents of that district would be eligible to hold a position in that district, there being no legislative restriction on the subject, this would be an act of attempted legislation on your part and not a mere rule. It would rise to the dignity of law, and to so construe the section as to grant you that authority would be a delegation of power to you by the legislature which is against the express provision of the Constitution;

Article II, section 1;
Harmon v. State, 66 O. S., 249;
State ex rel. Allison v. Garver, 66 O. S., 555.

Where a statute is capable of two or more constructions, one of which would render it unconstitutional, it will always be given another construction whereby it will not contravene the constitution, and this section would, therefore, not be construed as giving you this power.

Reverting now to the first statement of your inquiry that some of the state departments have established districts for the purpose of administration and facilitating the work of their inspectional forces, and have requested you to establish districts accordingly: This, as already shown, and as you indicate, is not what you are authorized to do by section 486-20, and as that section is the charter of your authority upon the subject of districting, it not only gives you the power to establish districts in accordance with its terms, but it also limits your power in that respect to action in accordance with the provisions of the section itself. It would, therefore, afford no warrant for the complicated and commingled districting of the state required to accommodate your districts to those established by the other departments. Neither is it apprehended that this would be necessary. The establishment of your districts is administrative merely for your own purposes; that is, for the purpose of examinations, investigations, etc., and is more for the convenience of the public than of the commission in order that the benefits of your administration may be brought nearer within reach of the general public. An examination, therefore, when held in one of these districts, is just the same as an examination held by you at your own office if no such districts were established. It does not follow that the applicant for a position should be an inhabitant of that district. If he be required to be an inhabitant of the district established by some other department, and any one of your districts partly coincides with the territory of that district, he could take his examination at the place established by you in the district although his duties when appointed, or if appointed, would require him to act in a district of different boundaries, and neither would there be any objection so far as the civil service act is concerned, if he took his examination entirely out of his own district and in one of yours which was entirely separated from it, although it would be within your power under paragraph 1 of section 486-7 to establish rules on this subject, and such rule illustrates the difference above referred to between rules which are merely administrative and those which would assume to legislate.

Such rule as here supposed would be a mere administrative regulation adopted for the purpose of carrying out and effectuating legislative provisions.

It is not intended here to decide anything in reference to the power of other departments to establish districts for their own administration. Such power in each case would depend upon the language of the statute governing the particular department, or the absence of language on the subject. A number of the departments may have, and some of them certainly do have power to establish such districts. Taking

the industrial commission as an instance, section 984 authorized the appointment of twenty-five district inspectors in the department of workshops and factories. This section was repealed, but section 985, providing the qualification of such district inspectors was left in force. The appropriation made by the present general assembly appropriated the sum of $33,000.00 for 22 such district deputies, from which it would be inferred that this department has divided the state into twenty-two such districts. It is not here intended to question the power of the commission to do so, but merely to cite an instance in which it is done. The same act provides for twelve district deputies in the mining department, so that here you have a department with two different sets of districts in the state, and with authority presumably to require each district deputy to be a resident of the district. In such case, when there is a vacancy, your eligible list would necessarily be confined to inhabitants of that particular district, but it would not be necessary that your district have conterminous boundaries with that district in order for him to be subjected to the proper examination.

Your question, therefore, is answered in the negative.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

359.

COUNTY COMMISSIONERS—MUST BEAR EXPENSE OF REPAIR OR CONSTRUCTION OF BRIDGES, ETC., ON HIGHWAYS OF COUNTY—ALSO EXPENSE OF REPAIRING AND MAINTAINING COUNTY ROADS—TOWNSHIP TRUSTEES MUST BEAR COST OF REPAIRING AND MAINTAINING TOWNSHIP ROADS.

1. *Under the provisions of section* 7192 *G. C. it is the duty of the county commissioners to bear the cost and expense of the repair or construction of a bridge or culvert on the highways of the county.*

2. *Under the provisions of sections* 7464 *and* 7467 *G. C. it is the duty of the township trustees to bear the cost and expense of repairing and maintaining township roads; and the duty of county commissioners to bear the cost and expense of repairing and maintaining county roads.*

COLUMBUS, OHIO, June 11, 1917.

HON. ROY R. CARPENTER, *Prosecuting Attorney, Steubenville, Ohio.*

DEAR SIR:—I have your communication of May 3, 1917, in which you ask my opinion in reference to a certain matter. Your communication reads as follows:

> "The trustees of Ross township, this county, and the treasurer thereof, are at variance as to the legality of certain claims for road work, and the payment thereof, and wish to be guided in the matter by an opinion from you.
>
> "As I am informed, Howard Joyce, county surveyor, and thus county road superintendent of Jefferson county, in company with the three county commissioners, while on a trip of inspection of the roads through Ross township in June, 1916, passed along and over the road from the farm of one Lewis McClain to Mooretown; that they found a thirty-inch culvert washed away, making a slight detour necessary; that while making this detour they not only saw that the road was badly in need of repair, but their automobile was stalled in the detour, and they had to get out and help push

the machine; that the said county road superintendent called the township district road superintendent and asked him to repair the road; that said district superintendent did not give him a satisfactory answer as to when he would make such repairs; that recognizing from his own observation and experience the necessity of immediate repair, Mr. Joyce informed one Lewis McClain that if the district road superintendent did not repair the road in two or three days, that he (Lewis McClain) should have the road repaired, that is, do whatever was necessary, not only to this culvert, but at other points that were in need of repair.

"The township superintendent did not repair the road and Lewis McClain, carrying out the instructions of the county highway superintendent, secured the services of certain men and their teams and made the repairs to this road, as ordered by the county road superintendent. Later, claim, duly approved by the county highway superintendent, was made to the township trustees. The trustees signed their approval of the same and ordered vouchers drawn for the payment. The treasurer of the township refused, and still refuses to draw vouchers to pay the claims which amount to seventy some dollars. This is a township road and the county commissioners took no action in the matter.

"On January 18 I wrote the township trustees that if a majority of them approved the claims and the county road superintendent who ordered the work done approved the claims, said trustees could legally pay the same, and based my opinion on the following:

" 'The new road law, known as the "Cass road law," gives the county surveyor exceptional powers and authority over the roads within his county. Section 7181 G. C. provides, "that the county surveyor shall be the county highway superintendent." Section 7187 provides that county highway superintendents shall approve all estimates and accounts of money obtained from county or township funds for the repair of roads, etc. Section 7182 G. C. provides that the county highway superintendent shall keep the roads in good condition throughout the county. Section 7198 reads:

" 'The county highway superintendent may, with the approval of the county commissioners or township trustees, employ such laborers, teams, implements and tools, and purchase such material as may be necessary in the performance of his duties.' "

In answering your question it will be necessary for us to consider two propositions:

"1. Did the county highway superintendent have authority to do what he did in the matter of the improvement of the highway and the repair of the culvert?

"2. If so, who should pay for the same, the township trustees or the county commissioners?"

1. Let us first consider the question as to whether the county highway superintendent had the authority he assumed to have in the matter set out in your communication.

Section 7184 G. C. provides as follows:

"The county highway superintendent shall have general charge, subject to the rules and regulations of the state highway department, of the construction, improvement, maintenance and repair of all bridges and highways within his county, whether known as township, county or state highways,

and such county highway superintendent shall see that the same are constructed, improved, maintained, dragged and repaired as provided by law, and shall have general supervision of the work of constructing, improving, maintaining and repairing the highways, bridges and culverts in his county, * * *."

From this section we note that the county highway superintendent has genera charge of the repair of all highways within his county, whether township, county or state. Further, he has general supervision of the work of maintaining and repairing bridges and culverts in his county.

Section 7192 G. C. provides as follows:

"The county highway superintendent shall keep the highways of the county at all times in good and suitable conditions for public travel. He shall generally supervise the construction, improvement, maintenance and repair of the bridges and culverts on the highways of the county, the cost of which shall be borne by the county, unless otherwise provided by law."

From this section it is evident that the county highway superintendent not only has the authority, but it is his duty to keep the highways of the county in good and suitable conditions for public travel, this applying to culverts as well as to other parts of the highways.

Section 7198 G. C. provides as follows:

"The county highway superintendent may, with the approval of the county commissioners or township trustees, employ such laborers, teams, implements and tools, and purchase such material as may be necessary in the performance of his duties."

From this section we see the county highway superintendent has authority to employ such laborers, teams, etc., as may be necessary in the performance of his duties; but it is to be noted in this section that this must be done with the approval of the county commissioners or township trustees. Inasmuch as the county commissioners were with him at the time he engaged Lewis McClain, I am assuming that he had their approval, especially from the fact that they were compelled to substitute man power for gasoline power in the matter of getting their machine over this certain road. But if it were a township road, the county highway superintendent could not act without the approval of the township trustees.

As held in Opinion No. 202, rendered by me on April 19, 1917, this approval must be given before the superintendent acts. This he did not have. But as said in Opinion No. 202, if the township trustees place their O. K. upon the bills incurred by the county highway superintendent, this might be considered as an approval of the work done under the direction of the county highway superintendent; that is, it would be considered as a sort of a *nunc pro tunc* approval. So that in your case I think we could consider that the township trustees gave their approval to the work done by the county highway superintendent.

From all the above, I think it is quite evident the county highway superintendent had full authority to do what he did in the matter of the repair of said road and culvert, as set out in your communication.

2. Who is to pay for work done, the township trustees or the county commissioners? In order to answer this question, it will be well for us to note the provisions of section 7464 G. C., which section classifies the roads of this state as state roads, county roads and township roads. It further provides that the state highway depart-

ment shall maintain the state roads, the county commissioners shall maintain the county roads, and the township trustees shall maintain the township roads.

Section 7467 G. C. provides:

> "The state, county and township shall each maintain their respective roads as designated in the classification hereinabove set forth; * * * ."

These provisions would apply to the roads proper, but would not apply directly to the culvert in question.

Section 7192 G. C. provides that the cost of the construction, improvement, maintenance and repair of the bridges and culverts on the highways of the county shall be borne by the county, *"unless otherwise provided by law."*

I have searched the statutes in vain to find a provision which would make the township liable for the construction, improvement, maintenance and repair of a bridge or culvert on the highways of the county.

Section 7562 G. C. provided that the township trustees should build and keep in repair all bridges and culverts when the cost of the construction did not exceed fifty dollars; but this section has been repealed and nothing like it was enacted to take its place so far as I have been able to ascertain.

Hence, it is my opinion that the county commissioners are under obligation to pay for the construction, improvement, maintenance and repair of all culverts and bridges located in the county. There is an exception to this when the township trustees join with the state highway department in the construction of an inter-county highway or main market road, or when they construct such a road themselves, but this would not apply to the matter set out in your communication.

So answering your question specifically, it is my opinion that in so far as the repair of the said culvert is concerned, the county commissioners would be liable for the payment of that part of the cost and expense; and in so far as the repair of the highway is concerned, if it is a township highway under the provisions of section 7464 G. C., the township trustees would be under obligation to pay for the cost and expense of the repair; but if said highway is a county highway under the provisions of said section 7464, the county commissioners would be under obligation to pay for the cost and expense of the same.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

360.

COUNTY TREASURER—ACCEPTANCE OF CHECK IN PAYMENT OF LIQUOR TAX—IS NOT PAYMENT OF SAID ASSESSMENT—IF CHECK NOT HONORED—SECTION 8291 DOES NOT APPLY—WHEN SUCH CHECK TREATED AS CASH BY TREASURER WHEN MAKING HIS SETTLEMENT—HE IS LIABLE ON HIS BOND FOR AMOUNT OF SAME.

1. *Ordinarily, the receipt by a county treasurer of a check in payment of the liquor tax under section 6071 G. C. is not payment of such assessment, even if the officer, on receiving the check, marks the duplicate "paid" and issues a receipt therefor, if the check is not honored by payment.*

2. *County treasurers accepting checks in payment of taxes are not bound by the provisions of section 8291 G. C., providing that a check must be presented for payment within a reasonable time after its issue, or the drawer will be discharged from liability thereon, to the extent of the loss caused by the delay.*

3. *When a county treasurer, by an arrangement between himself and a person against whom a liquor assessment has been made, accepts a check therefor, holding said check, making his settlements with the auditor of state and county auditor, treating said check as cash and not presenting it for payment until after all of said settlements, the treasurer is liable on his bond for the amount of same.*

COLUMBUS, OHIO, June 11, 1917

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

DEAR SIR:—Under date of March 1, 1917, you write asking for my opinion on facts stated by you as follows:

> "On June 14, 1916, one Willis Ward, deceased, who had been engaged in the retail liquor business in this city for several years past, gave a check on one of the banks here to M. J. Caldwell, treasurer of the county. There are no indorsements thereon. The above check was given by Mr. Ward to Mr. Caldwell in payment of the liquor tax assessment (section 6071), June half 1916, and in accordance with the provisions of section 6072 of the Code as amended 104 O. L. 166. The treasurer stamped on his duplicate the assessment against Mr. Ward 'paid,' but issued him no receipt therefor.
>
> "The auditor's duplicate in accordance with section 6085 of the Code charged the treasurer with the amount of the liquor tax assessment to be collected from Mr. Ward, to wit: five hundred dollars.
>
> "That on or about the 21st day of June, 1916, the treasurer, Mr. Caldwell, made a settlement with the auditor for the liquor tax assessment relying upon the validity of said check above mentioned. The auditor's duplicate shows Ward's liquor license tax paid.
>
> "Later, however, check in question was presented to bank for payment which was refused. This check is now carried as cash on the treasurer's book.
>
> "In the meantime, however, Mr. Ward became sick and died on the 2nd day of December, 1916, intestate. His widow, Margaret Ward, on the 5th day of December, 1916, was appointed administratrix of the estate of said Willis Ward. The only assets of the Ward estate, as disclosed by the inventory, consisted of furniture and fixtures in his saloon at the time of his death, and with which furniture and fixtures he was conducting the saloon at the time he gave check in question and up until the time of his death.
>
> "On October 16, 1914, Mr. Ward executed a chattel mortgage for the

sum of twenty-five hundred dollars on the furniture and fixtures in his saloon. The furniture and fixtures will not sell for enough to satisfy the mortgage. Mr. Ward was the lessee of the premises wherein the saloon was located. This saloon was conducted by Mr. Ward a long time prior to June 1, 1916, without paying the Dow-Aiken tax for the last half of the year 1916.

"I think that I have stated herein all of the necessary facts. Mr. Caldwell, our county treasurer, now asks me if he cannot proceed to collect the tax under section 6078 of the Code.

"Under section 6072 of the Code, as amended 104 O. L. 166, would this tax become a lien on the real estate?"

Normally, the check given by Mr. Ward to the county treasurer not having been honored by payment, the situation presented with respect to the tax due on account of the business conducted by Mr. Ward would be the same as if the check had not been tendered or received, and this situation would not be altered by the fact that on receiving the check the tax for the amount of the assessment was marked "paid" by the treasurer and auditor of the county.

Fleig v. Sleet, 43 O. S. 53.
Hilsinger v. Trickett, 86 O. S. 286, 302.
Manck v. Frants, 4 W. L. B. 1043.

Section 8291 of the General Code, which is but declaratory of a rule of the law merchant or common law, provides that a check must be presented for payment within a reasonable time after its issue, or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay.

It was decided by the superior court of Cincinnati, in the case of Manck v. Frantz, that the rule declared by this statute had no application to checks received in payment for taxes; and if this section were to be considered as having application to checks given in payment of taxes there is nothing in the facts stated to indicate any damage sustained by the drawer of the check by reason of the delay in presentation of the same for payment. Ordinarily the only loss arising from delay in the presentment for which the holder of a check is responsible is that arising from the insolvency of the drawee.

Stewart v. State, 17 O. S., 83, 86.

With respect to the first question made by you, I note that section 7071 of the General Code provides that upon the business of trafficking in intoxicating liquors there shall be assessed yearly and paid into the county treasury by each person, corporation or copartnership engaged therein the sum of $1,000.00.

Section 6072 provides, among other things, that such assessment with any penalty thereon shall attach and operate as a lien upon the real property on and in which such business is conducted as of the fourth Monday of May of each year, and shall be paid at the time provided for the payment of taxes on real and personal property within this state, to wit: one-half on or before the 20th day of June, and one-half on or before the 20th day of December, of each year.

Sections 6077 and 6078 of the General Code provide as follows:

"Section 6077. If a person, corporation or copartnership refuses or neglects to pay the amount due under the provisions of this chapter within the time therein specified, the county treasurer shall forthwith collect such

amount with the penalties thereon, and four per cent. collection fees and costs, by distress and sale, as on execution, from any goods and chattels of such person, corporation or copartnership."

"Section 6078. The county treasurer shall forthwith call at the place of business of such person, corporation or copartnership, and, in case of the refusal to pay such amount so due, shall levy on the goods and chattels of such person, corporation or copartnership, wherever found in such county, or on the bar fixtures, furniture, liquors, leasehold and other goods and chattels used in carrying on such business. Such levy shall take precedence of all liens, mortgages, conveyances or incumbrances hereafter taken or had on such goods and chattels so used in carrying on such business; and no claim of property by a third person to such goods and chattels so used in carrying on such business shall avail against such levy by the treasurer. No property, of any kind, of any person, corporation or copartnership liable to pay such amount, penalty, interest and costs shall be exempt from such levy."

By the provisions of section 6078 G. C., the levy, when made as therein provided for, on the goods and chattels used in the conduct of the business, is made paramount to all liens, incumbrances or charges whatsoever taken or had on such goods and chattels by any act of the owner or otherwise.

It was the duty of the county treasurer, whenever a person, engaged in the business of trafficking in intoxicating liquors, failed to pay the assessment, to proceed forthwith and collect such assessment under the provisions of sections 6077 and 6078 G. C., and if a levy had been made, such levy would take precedence of all liens, mortgages, conveyances or incumbrances on such goods and chattels as were used in the carrying on of such business, and sales of such chattels would have been made under the provisions of section 6079 G. C.

Then, too, if a sufficient amount had not been made on the sale to pay the amount of the Dow tax assessment, the amount collected would have been reported to the auditor, and the county auditor, under the provision of section 6080 G. C., would have placed the amount due and unpaid on the tax duplicate against the real estate in which such traffic had been carried on, and said amount would have been collected as other taxes and assessments on such premises.

As I have said, this would have been the general rule, but from the facts stated in your communication it would appear that this is a case outside of the general rule. You state that Mr. Ward had been engaged in the retail liquor business prior to June 14, 1916, when he gave the check to the treasurer for the half year commencing on the fourth Monday of May, 1916, and which was payable under the provisions of section 6072 G. C. on or about the 20th day of June. The fact that the treasurer stamped on his duplicate the assessment against Mr. Ward as paid, but issued him no receipt therefor, is significant in itself.

You state that the treasurer made a settlement with the auditor for the liquor tax assessment on the 21st day of June, 1916, and that the auditor's duplicate shows Ward's liquor tax was paid. In your communication you further say:

"Later, however, check in question was presentenced to bank for payment which was refused. This check is now carried as cash on the treasurer's book."

You do not say at what date the check in question was presented to the bank for payment. I take it that your county treasurer, under the provisions of section 6096 G. C., on or before the 1st day of July, 1916, made a report to the auditor of state, of the amount of money paid into the treasury of the county under the provisions of

the intoxicating liquors sections, and that on or before the 10th of July of that year, by draft or otherwise, he remitted to the treasurer of state the money due the state as shown by such statement.

I further take it, although the facts stated contain no mention thereof, that your county treasurer and the county auditor had their regular August settlement that year; that the revenues derived from the intoxicating liquor assessment were distributed under the provisions of sections 6093 at seq. G. C.; that at the end of the semi-annual collection of taxes for that period, the county treasurer made the statement to the county auditor required by section 2643 G. C., and that the county treasurer's fees were figured on the moneys collected on the liquor duplicate, including the five hundred dollars of Mr. Ward.

If what I have assumed is true, then the check in question was not presented to the bank for payment until after the August settlement, or possibly later, and this must have been done under some arrangement between the maker of the check and the treasurer, for if the check had been presented earlier, no doubt the treasurer would have taken the steps for the collection of the assessment provided by the liquor statutes, and if this check was held under the arrangement between the parties as indicated, then it appears to me that the treasurer, having reported the assessment as paid, and having remitted the state's portion of this very assessment to the auditor of state, and the other portion having been distributed according to law, is personally bound for the amount of the check.

Even prior to the August settlement this check was evidently carried as a cash item. The amount of this very check entered into the gross amount on which the treasurer's fees were figured. When settlement time came, both with the county auditor and the state auditor, this check was reported as cash, and, as stated in your letter, it is now carried as cash on the treasurer's book.

I can come to no other conclusion, under all the circumstances, and I hold that as far as the county is concerned this check is cash, to be accounted for by the treasurer and for which he is liable on his bond. I think that it is too late, after all of the statutory settlements made, to make any claim that the county has a right against Mr. Ward's estate for the amount of this assessment.

As far as the county is concerned, on the repeated solemn assurances of the treasurer, it was paid. It was no longer a check. It was cash. What rights the treasurer might have against the estate of Mr. Ward I am not passing upon, as it is a matter in which the county is not concerned.

Answering your specific question, then, and assuming that this check was held under some arrangement between the treasurer and the maker thereof, it is my opinion that the treasurer cannot proceed to collect the tax now, under section 6078 G. C.

Further, if I am correct in the above conclusion, a tax would not now become a lien on real estate, by virtue of section 6072 G. C., because, as before stated, the county is no longer interested, having received the amount of the assessment.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

361.

COMPANY OPERATING RAILROAD CARS—MUST PROVIDE SEATS FOR MOTORMEN AND CONDUCTORS—COMPANY MAY MAKE REASONABLE REGULATIONS AS TO USE OF SAME.

1. *Under the provisions of the act "requiring persons, etc. to provide for the well being of their employes." the persons or company owning or operating railroad cars must provide separate seats for motormen and conductors.*

2. *Under the provisions of said act the persons or company owning or operating the cars may make reasonable regulations requiring the motormen and conductors to stand while passing through the congested districts of a city.*

COLUMBUS, OHIO, June 11, 1917.

HON. BERNARD M. FOCKE, *Prosecuting Attorney, Dayton, Ohio.*
Attention Hon. Sam. D. Kelly, Assistant Prosecuting Attorney.

DEAR SIR:—I have your communication of May 2, 1917, in which you ask my opinion in reference to a certain matter. Your communication reads as follows:

> "We would like to have your opinion as to the meaning of house bill No. 144, passed at the last session of the legislature, entitled 'An act requiring persons, associations and corporations owning or operating street or interurban electric railroad cars to provide for the well being of their employes.'
>
> Section 1 of this act reads as follows:
>
> 'It shall be unlawful to operate in Ohio any electric street or interurban railroad car unless it be provided at all times during operation with seats for the motorman and conductor.'
>
> "To comply with the law will it be necessary for street railroads to provide individual seats for the motorman and conductor and permit them to use these seats at all times?
>
> "It has been the policy on the street car lines in Dayton to provide stools for their motormen, permitting them to use these stools while running in the outskirts, but demanding that they stand while passing through the congested districts. It has been the policy to permit the conductors to use the rear seats in the cars when these seats were not occupied by passengers.
>
> "Will it be necessary for these companies to put in special and individual seats?"

The section upon which you ask me to place a construction is a part of an act the title of which is as follows:

> "An act requiring persons, associations and corporations owning or operating street or interurban electric railroad cars to provide for the well-being of their employes."

Section 1 of said act reads as follows:

> "Section 1. That it shall be unlawful to operate in Ohio any electric, street or interurban railroad car unless it be provided at all times during operation with seats for the motorman and conductor."

The question suggested in your communication naturally divides itself into two parts, namely:

"1. Is it necessary for street railroad companies to provide individual seats for their conductors and motormen?

"2. Is it necessary that they be permitted to use these seats at all times and under all circumstances?"

I will place a construction upon said statute with a view to answering your questions in the order given.

What does the section say as to providing individual seats?

"unless it be provided at all times during operation with seats for the motorman and conductor."

is the language used. What are the important provisions in this clause?

"at all times during operation with seats"

and

"with seats for the motorman and conductor"

are the important phrases in the clause; that is, the company must provide the car with seats at all times during operation, and these seats must be for the motorman and conductor. Hence, the company could not comply with the conditions of the statute in any manner other than by providing separate, distinct and individual seats for both the motorman and conductor. Merely permitting the conductor to use the rear seats in the car, when not occupied by passengers, would not be a compliance with the provisions of the statute.

What about the answer to the second question? The language of the statute is not so clear as to this matter, but it will be noted that there is no provision in the statute to the effect that the conductor and motorman must be permitted to use the seats at all times. In fact, there is nothing said about the using of the seats. This provision must be inferred from the other provisions of the statute. The seats are to be furnished for some purpose and with some object. That purpose and object are that the motorman and conductor might have them to use. But there is no provision in the statute that the motorman and conductor must be permitted to use the seats at all times while on duty, and it is not probable that they would so desire to use them.

Hence, it is my opinion that a reasonable regulation on the part of the street railway company, to the effect that the motorman and conductor stand while passing through the congested districts of the city, would not be a violation of the provisions of the statute. Such a provision would be with the object and purpose of protecting the passengers upon the car and persons using the streets of the city, and not for the advantage and gain of the company.

Furthermore, it must be kept in mind that this is a highly penal statute. It would therefore be strictly construed and nothing can be read into the statute other than that which is plainly within its terms.

Hence, answering your question specifically, it is my opinion that a street car company, under the act referred to by you, would be compelled to furnish separate seats for the motorman and conductor at all times during the operation of the car; further, that a company would not violate the provisions of said act by making a reasonable requirement that the motorman and conductor stand while passing through the congested districts of the city.

Very truly yours,

JOSEPH MCGHEE,
Attorney-General.

362.

RAILROAD COMPANY—NOT ALLOWED TO SELL INTOXICATING LIQUOR IN OHIO—TO SALVAGE SAME WHEN REFUSED BY CONSIGNEE—

A railroad company having left on its hands, in wet territory in Ohio, a stock of intoxicating liquors, by reason of the refusal of both the consignee and the consignor to receive or accept said goods, owing to the fact that the barrels containing said intoxicating liquors had been damaged in transit and a portion of the contents thereof had leaked out, and said railroad company desiring to sell such liquor to liquor dealers, in order to salvage such shipment and apply the proceeds upon the claim of the consignor, is not within the exceptions found in section 1261-63 General Code, and such proposed sales would be in violation of said section.

COLUMBUS, OHIO, June 11, 1917.

State Liquor Licensing Board, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your communication of June 1, 1917, enclosing letter from Messrs. Semple and Sherick, attorneys, with reference to the sale of certain liquors damaged in transit, and requesting an opinion upon the facts therein stated.

The letter of Messrs. Semple and Sherick reads in part as follows:

> "Some thirty days ago Klein Brothers, of Cincinnati, Ohio, consigned to Anton Ujhelyi, of Lorain, Ohio, a carload shipment of liquor, consisting of twenty-eight barrels of brandy, eleven barrels of whiskey and ten barrels of rum. Such shipment was delivered to The Lorain, Ashland and Southern railroad company at Custaloga, Ohio, and was by the Lorain, Ashland and Southern railroad company transported to Lorain, Ohio. When such shipment arrived at Lorain, Ohio, it was found that six barrels had been damaged in transit and a portion of the contents of such barrels had leaked out in such car. The consignee refused to accept the six barrels and the consignor refused to permit the return of such barrels and remaining contents and has already filed claim for the total amount and value of such damaged barrels.
>
> "The Lorain, Ashland and Southern railroad company has had such damaged barrels gauged by an experienced gauger and his report is that four of the damaged barrels now contain approximately fifty-eight gallons of California brandy, one of the damaged barrels now contains approximately ten gallons of Jamaica rum and one of the damaged barrels now contains approximately thirty-seven and one-half gallons of Trester brandy. The Lorain, Ashland and Southern railroad company desires to sell such liquors to liquor dealers in the city of Lorain, Ohio, in order to salvage such shipment and to apply the proceeds upon the claim presented by the consignor. * * * ."

The attorneys representing the railroad desire to know whether or not they can sell such liquors as in the communication set forth, without violation of the liquor license law.

For the purpose of this inquiry, it is only necessary to call attention to the provisions of section 1261-63 G. C., which is section 48 of the state liquor license law, and is the penalty section for selling intoxicating liquors without a license.

Section 1261-63 G. C. reads as follows:

> "Whoever sells intoxicating liquors without having been duly licensed as provided herein shall be guilty of a misdemeanor, and shall be fined not less than two hundred dollars nor more than five hundred dollars for the first

offense and for a second or subsequent offense, not less than five hundred dollars nor more than one thousand dollars, or imprisoned in the county jail for a period of not less than one month nor more than three months, or both.

"Sales of intoxicating liquor by other than dealers therein, in quantities of forty gallons or more, where said liquors are taken by way of payment of a debt or by way of collateral security on a loan, or are acquired for investment solely and sold en bloc, and sales under provisions of law requiring an executor, administrator, guardian, receiver or other officer of the court to sell, where such sales are made of a stock of liquors en bloc or a sale by a person, firm or corporation previously licensed but whose license is not renewed, or is revoked, forfeited, surrendered or otherwise lost, where such sales are made of a stock of liquors en bloc, are not included within the meaning of this section. Nor shall this section include the manufacturer of native wine, cider or other intoxicating liquors from the raw material and the sale thereof by the manufacturer in quantities of one gallon or more at one time at the factory or the sale thereof in said quantities by the manufacturer from the wagon or other vehicle of said manufacturer to the holder of a liquor license, or in said quantities to individual consumers where said liquors are delivered to the homes of said individual consumers in territory wherein the sale of intoxicating liquors is not prohibited by law. Nor shall this section include the sales made by a registered pharmacist upon a prescription issued in good faith by a reputable physician in active practice, or for exclusively known mechanical, pharmaceutical or sacramental purposes."

Inasmuch as it is stated in the inquiry that the railroad company desires to sell such liquors to liquor dealers in the city of Lorain, Ohio, it is evident that such acts would be entirely without the exceptions contained in section 1261-63 G. C. I do not think there is any necessity of pointing out how the proposed plan would fail to come within the exceptions. It is perfectly clear upon a mere reading of the section and comparing that part, that in any way might be claimed to be applicable, with the manner of sale set out in the communication. Nor do I feel that I am called upon to call attention to the provisions of the liquor tax laws or other statutes that might be applicable to the situation arising from making sales of intoxicating liquors in the manner proposed. Suffice it to say that it would be a clear violation of section 1261-63 G. C.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

363.

JUVENILE COURT—MAY SEND DELINQUENT GIRL OVER SIXTEEN TO OHIO REFORMATORY FOR WOMEN, THE GIRLS' INDUSTRIAL SCHOOL, OR OTHER INSTITUTION FOR JUVENILE DELINQUENCY.

When the juvenile court finds a girl over 16 years to be delinquent, such court is not required to send her to the Ohio Reformatory for Women, but may, if it sees fit, send her to such institution or to the Girls' Industrial School, or other institution for juvenile delinquency.

COLUMBUS, OHIO, June 11, 1917.

HON. LEWIS D. SLUSSER, *Probate Judge, Akron, Ohio.*

DEAR SIR:—I have your letter of April 12, 1917, as follows:

"Under section 2148-7, as amended in 105-106 Ohio Laws, pp. 130, 131, is the juvenile court at this time required to send females convicted of a misdemeanor or delinquency, when the time is over thirty days, to the Ohio State Reformatory for Women?"

Section 1644 General Code reads as follows:

"For the purpose of this chapter, the words 'delinquent child' includes any child under eighteen years of age who violates a law of this state, or a city or village ordinance, or who is incorrigible; or who knowingly associates with thieves, vicious or immoral persons; or who is growing up in idleness or crime; or who knowingly visits or enters a house of ill repute, or who knowingly patronizes or visits a policy shop or place where any gambling device or gambling scheme is or shall be operated or conducted; or who patronizes or visits a saloon or dram shop where intoxicating liquors are sold; or who patronizes or visits a public pool or billiard room or bucket shop; or who wanders about the streets in the night time; or who wanders about railroad yards or tracks, or jumps or catches on to a moving train, traction or street car, or enters a car or engine without lawful authority, or who uses vile, obscene, vulgar, profane or indecent language; or who is guilty of immoral conduct; or who uses cigarettes, cigarette wrapper or substitute for either, or cigars, or tobacco; or who visits or frequents any theater, gallery, penny arcade or moving picture show where lewd, vulgar or indecent pictures, exhibitions or performances are displayed, exhibited or given, or who is an habitual truant; or who uses any injurious or narcotic drug. A child committing any of the acts herein mentioned shall be deemed a juvenile delinquent person, and be proceeded against in the manner hereinafter provided."

Sections 2148-1, 2148-5, 2148-6 and 2148-7 provide:

"Section 2148-1. The Ohio Reformatory for women shall be used for the detention of all females over sixteen years of age, convicted of a felony, misdemeanor, or delinquency as hereinafter provided, and for the detention of such fenale prisoners as shall be transferred thereto from the Ohio penitentiary and the girl's industrial school as hereinafter provided.

"Section 2148-5. As soon as the governor shall be satisfied that suitable buildings have been erected and are ready for use and for the reception of women convicted of felony he shall issue a proclamation to that effect,

attested by the secretary of state, and the secretary of state shall furnish printed copies of such proclamation to the county clerks of courts and from the date of said proclamation all portions of this act except those relating to the commitment of misdeameanants and delinquents shall be in full force and effect. Whenever additional buildings have been completed so as to care for misdemeanants and delinquents a proclamation shall be issued and published in the same manner and copies furnished to county clerks of courts and to all judges and magistrates having authority to sentence misdemeanants and delinquents and from and after the date of this proclamation all portions of this act relating to the commitment of persons to said reformatory shall be in full force and effect.

"All female persons convicted of felony, except murder in the first degree without the benefit of recommendation of mercy, shall be sentenced to the Ohio reformatory for women in the same manner as male persons are now sentenced to the Ohio state reformatory. And in so far as applicable, the laws relating to the management of the Ohio state reformatory and the control and management thereof, shall apply to the Ohio reformatory for women.

"Section 2148-6. Female persons over sixteen years of age found guilty of a misdemeanor by any court of this state shall be sentenced to the Ohio reformatory for women and be subject to the control of the Ohio board of administration, but all such persons shall be eligible to parole under the provisions of this act.

"Section 2148-7. After the issuance of the first proclamation hereinbefore referred to, it shall be unlawful to sentence any female convicted of a felony to be confined in either the Ohio penitentiary or a jail, workhouse, house of correction or other correctional or penal institution, and after the issuance of the second proclamation it shall be unlawful to sentence any female convicted of a misdemeanor or delinquency to be confined in any such place, except in both cases the reformatory herein provided for, the girls' industrial school or other institution for juvenile delinquency, unless such person is over sixteen years of age and has been sentenced for less than thirty days, or is remanded to jail in default of payment of either fine or costs or both, which will cause imprisonment for less than thirty days, provided that this section shall not apply to imprisonment for contempt of court."

It will be noted that section 1652 General Code authorizes the commitment of delinquent females (under eighteen years) to the Girls' Industrial School at Delaware. Section 2148-1 G. C. provides that the Ohio Reformatory for Women shall be used for the detention of females over sixteen who have been "convicted of delinquency." Section 2148-7 G. C. makes it unlawful for females under sixteen years, or those over sixteen years sentenced or committed for over thirty days, to be imprisoned in any penitentiary, jail, workhouse, house of correction or other correctional or penal institution other than the Ohio Reformatory for Women, the Girls' Industrial School or other institution for juvenile delinquency.

Under the provision of section 2148-7 G. C. it is plain that so far as that section is concerned females under sixteen years, and those over sixteen years sentenced or committed for more than thirty days, may be sentenced to the Girls' Industrial School at Delaware or the Ohio Reformatory for Women at Marysville. Section 2148-1 provides that the Ohio Reformatory for Women shall be used for the detention of all females over sixteen years of age convicted of delinquency. So it is clear that female delinquents under sixteen should not be sent to the Ohio Reformatory for Women.

The next question is, to what institution should female delinquents over sixteen be committed when their commitment requires an imprisonment of over thirty days?

Section 1644 General Code provides that a female under 18 years of age may be

found to be "delinquent" and section 1652 G. C. authorizes the commitment of such female delinquents under 18 years to the Girls' Industrial School at Delaware. Section 2148-1 G. C., as above noted, provides that the Ohio Reformatory for Women "shall be used for the detention of all females over 16 years of age convicted of a felony, misdemeanor, or delinquency as hereinafter provided." This does not mean that all girls over 16 years of age, found to be delinquent, shall be sentenced to the Ohio Reformatory for Women, but only means that that institution may be used for all such females if found to be delinquent. In other words, section 2148-1 G. C. aims rather to open the Ohio Reformatory for Women to all such persons as may be sent there by the court rather than to make it compulsory upon the court to sentence such persons to such institution. That this is the intention of section 2148-1 is, I think, evident from the fact that the legislature in section 2148-5 provided that "all female persons convicted of felony, except murder in the first degree without the benefit of recommendation of mercy, shall be sentenced to the Ohio Reformatory for Women." And it also provided in section 2148-6 G. C. that "female persons over sixteen years of age found guilty of a misdemeanaor by any court of this state shall be sentenced to the Ohio Reformatory for Women." The above shows clearly that when the legislature wanted certain classes of females (for instance those convicted of felonies and misdemeanors) sentenced exclusively to the reformatory for women, it did not rely upon section 2148-1 to accomplish this purpose, but thought it necessary to make separate and additional provision in order to compel the courts to sentence such females to the Ohio reformatory for women exclusively.

For the above reasons it is my opinion that section 2148-1 G. C., while authorizing courts to imprison delinquent females over 16 in the Ohio reformatory for women, does not prevent the juvenile court from sentencing such delinquent females to other institutions as provided by law, and therefore, in direct answer to your question, I advise you that the juvenile court is not required to commit females found to be delinquent to the Ohio reformatory for women when the sentence is over thirty days, but may commit such females to such institution when such delinquent females are over sixteen years of age.

I note also that you ask as to females convicted of misdemeanors. This department has heretofore ruled that females over sixteen years of age, convicted of misdemeanors, are to be committed to the Ohio reformatory for women when the imprisonment is in excess of thirty days. However, it was held in a subsequent opinion that the word "misdemeanor," as used in these statutes, did not include the violation of a municipal or local ordinance and that females convicted of the violation of local ordinances could not be committed to the Ohio reformatory for women. This holding, to the effect that female violators of local ordinances cannot be sentenced to the Ohio reformatory for women, does not in any way conflict with our holding in this opinion that females over sixteen, found to be delinquent, may be sentenced to that institution, for the reason that although section 1644 General Code classifies a female under eighteen, who violates a city or village ordinance, as a delinquent, yet such female when found to be delinquent and committed has not been convicted of a violation of the city or village ordinance, but has simply been found to be incorrigible. See In re Frank Januszewski, 10 O. L. Rep., page 151.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

364.

CANDIDATES FOR ASSESSOR—NOT REQUIRED TO PAY FEE WHEN FILING DECLARATION OF CANDIDACY.

Candidates for assessors are not required to pay a fee at the time of filing their declaration of candidacy for nomination under section 4970-1 G. C. Assessors do not come within the purview of said section.

COLUMBUS, OHIO, June 14, 1917.

HON. WILILAM D. FULTON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your communication of June 12, 1917, asking whether or not a fee is to be charged for the filing of declaration of candidacy for nomination of assessors.

Section 4970-1 G. C. provides:

> "At the time of filing the declaration of candidacy for nomination for any office, each candidate shall pay a fee of one-half of one per cent. of the annual salary for such office, but in no case shall such fee be more than twenty-five dollars. All fees so paid in the case of candidates for state offices, office of United States senator and congressman-at-large, shall forthwith be paid by the officer receiving the same into the treasury of state. All other fees shall be paid by the officer receiving the same into the treasury of his county to the credit of the county fund. No fee shall be required in the case of candidates for committeeman or delegate or alternate to a convention or for president or vice-president of the United States, nor for offices for which no salary is paid."

Section 3364 G. C., as enacted by the last general assembly and found in S. B. No. 177, passed as an emergency measure March 21, 1917, approved March 21, 1917, and filed in the office of the secretary of state, March 23, 1917, reads as follows:

> "Section 3364. The compensation of assessors and assistant assessors, which shall be paid out of the county treasury, shall be four dollars per day for each day of not less than eight full hours of actual service they are necessarily engaged in the performance of their duties. Each assessor and assistant assessor shall make and file with the county auditor a statement giving in detail the date of each day on which he was necessarily engaged in the performance of his duties, the number of hours he worked each such day and verify it by oath, which oath the county auditor may administer. If the county auditor is satisfied that such statement is correct he shall draw his warrant on the county treasurer for the amount thereof. No such warrant shall be drawn until such assessor or assistant assessor has filed with the county auditor all the statements and returns of property listed by him, the lists of the owners of property, the statistics and enumerations required of him by law, and the county auditor is satisfied that the same are as full and accurate as could be made. The county auditor shall fix the time within which such officers shall complete their work and they shall not receive compensation for a longer period, unless the county auditor, for good cause shown, shall extend the same."

It will be noted that the fee required of the candidate at the time of filing his declaration of candidacy for nomination for any office is based upon "the annual salary" for the office. and while a maximum fee is stated in the section, there is no provision for a minimum fee.

Section 4970-1 G. C. excepts certain candidates from the required fee, namely. committeeman or delegate or alternate to a convention, president or vice-president of the United States, and "officers for which no salary is paid."

It will be noted from a reading of section 3364 G. C. that a per diem compensation is provided for the assessors and assistant assessors for as many days of actual service that they are necessarily engaged in the performance of their duties.

Section 5366-1 G. C., as passed March 21, 1917, provides for the listing of personal property between the second Monday of April and the first Monday in June annually.

Section 5367 G. C., as passed by the last legislature, provides for a meeting of the assessors of each county on the first Monday of May, while section 5368 G. C. requires the assessors to return all lists taken by them or their assistants to the county auditor on or before the first Monday in June.

So it will be seen that the time of service of the assessors and assistant assessors is not fixed, nor is their compensation, being dependent upon the number of days they are necessarily engaged in the performance of their duties. The filing fee is based on the annual salary for the office for which the person is a candidate. There is no annual salary for assessors. As stated before, they are on a per diem basis.

As the compensation the assessors receive is not to be determined until the completion of their work, it would be an impossibility to figure a filing fee, even if the compensation they are to receive should be deemed a salary. It is my opinion that assessors are not required to pay a fee at the time of filing their declaration of candidacy for nomination, both because assessors do not receive an annual salary and because it would be impossible to figure the amount of a filing fee, since the per diem compensation of assessors cannot be determined until long after the time of filing their declaration of candidacy.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

365.

APPROVAL—FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN PERRY, MUSKINGUM AND ROSS COUNTIES.

COLUMBUS, OHIO, June 15, 1917.

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

DEAR SIR:—I have your communication of June 12, 1917, enclosing certain final resolutions for highway improvements. These final resolutions are as follows:

"Perry county—Section 'O-1,' Logan-New Lexington road, I. C. H. No. 355.

"Muskingum county—Section 'M-1,' Zanesville-Dresden road, I. C. H. No. 344. Type 'A.'

"Muskingum county—Section 'M-1,' Zanesville-Dresden road, I. C. H. No. 344. Type 'B.'

"Muskingum county—Section 'M-1,' Zanesville-Dresden road, I. C. H. No. 344. Type 'C.'

"Ross county—Section 'd,' Dayton-Chillicothe road, I. C. H. No. 29."

I have examined these resolutions carefully and find them correct in form and legal, and am, therefore, returning the same to you with my approval endorsed thereon.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

366.

GREEN SKUNK PELT—UNLAWFUL TO HAVE SAME IN POSSESSION—PRIOR TO JULY 1, 1917—WILL NOT BE UNLAWFUL AFTER JULY 1, 1917—WHEN SKUNK RAISED IN CAPTIVITY.

Prior to July 1, 1917, it is unlawful to have in possession the green pelt of a skunk propagated and raised in captivity except from November 15th to February 1st.

After July 1, 1917, *when H. B.* 109 (107 *O. L.* 182) *becomes effective, it will not be unlawful.*

COLUMBUS, OHIO, June 15, 1917.

HON. SUMNER E. WALTERS, *Prosecuting Attorney, Van Wert, Ohio.*

DEAR SIR:—Under date of May 2, 1917, you inquire as follows:

"Referring to the following provisions of the General Code of Ohio:

" 'Section 13413. * * * whoever during the period when it shall be unlawful to kill such animal shall have in his possession the green pelt of a skunk unless such person can show by the original invoice signed by the shipper that such pelts were shipped from without the state shall be fined not less than ten dollars nor more than twenty-five dollars.

" 'This section shall not prevent the owner of a farm or anyone authorized by him in writing from killing a skunk when doing an injury upon his premises. The provisions of this section shall be enforced by the commissioners of fish and game.

" 'Section 1464. A justice of the peace, mayor or police judge shall have final jurisdiction within his county in a prosecution for a violation of any provision of the laws relating to the protection, preservation or propogation of birds, fish and game and shall have like jurisdiction in a proceeding for the condemnation and forfeiture of property used in the violation of any such law. (99 v. 380-75.)

" 'Section 13559. * * * the grand jury shall proceed to inquire of and present all offenses committed within the county in and for which it was impaneled and sworn. (R. S. 7194; 66 v. 298-72; S. & C. 753.)'

"I would be pleased to have you answer the following questions:

"1. Is it an offense under section 13413 for a man to have in his possession the green pelt of a skunk from an animal propagated and raised in captivity by himself?

"2. Does section 1464 of the Code *require* a magistrate to hear and finally determine offenses charged under section 13413? Or may the magistrate in his discretion bind the accused over to the grand jury when the accused himself demands that that be done?

"3. When an accused under section 13413 has been bound over to the grand jury by a magistrate, is it the grand jury's duty under section 13559 to inquire into the case and determine whether or not to charge the accused with an offense?"

You first inquire whether it is an offense under section 13413 G. C. for a man to have in his possession the green pelt of a skunk from an animal propagated and raised in captivity by himself.

Section 13413 G. C. (103 O. L. 112) provides as follows:

"Whosoever shall catch, kill or injure a skunk, or pursues it with such

intent, except from the fifteenth day of November to the first day of February both inclusive, or whoever shall at any time or place dig out, or smoke out with fumes or gases, any skunk or in any manner destroy the den or burrow of any skunk, or whoever during the period when it shall be unlawful to kill such animal shall have in his possession the green pelt of a skunk unless such person can show by the original invoice signed by the shipper that such pelts were shipped from without the state shall be fined not less than ten dollars nor more than twenty-five dollars.

"This section shall not prevent the owner of a farm or any one authorized by him in writing from killing a skunk when doing an injury upon his premises. The provisions of this section shall be enforced by the commissioners of fish and game."

Said section is an amendment to section 13413 as found in the original General Code. Section 13413 as it appeared on codification is as follows:

"Whoever catches, kills or injures a skunk, or pursues it with such intent, except between the first day of November and the first day of February inclusive, shall be fined not less than five dollars nor more than fifteen dollars. This section shall not prevent the owner of a farm or enclosure, used exclusively for the breeding and raising of polecats or skunks, from catching or killing them therein; and a farmer or tenant may kill a skunk or polecat when doing an injury upon his premises.

It appears, therefore, that the last quoted section distinctly recognizes the right of an owner of a farm or enclosure, used exclusively for the breeding and raising of skunks, to catch and kill them therein. However, in the amendment of said section found in 103 O. L. 112, the provision that the section should "not prevent the owner of a farm or enclosure, used exclusively for the breeding and raising of polecats or skunks, from catching or killing them therein" was eliminated and there is therefore no exception now found in section 13413 G. C. to the inhibition against catching, killing, injuring or pursuing with such intent a skunk except from the 15th day of November to the 1st day of February. Section 13413 as it now is likewise makes it unlawful during the period that it is unlawful to kill such animal, to have in possession the green pelt of a skunk unless the person so having such pelt in possession can show "by the original invoice signed by the shipper that such pelts were shipped from without the state." There is, therefore, no exception in the statute in favor of a person who has raised a skunk in captivity having in his possession the green pelt of such skunk except during the period between November 15th and February 1st, inclusive.

A skunk is a fur bearing animal and fur bearing animals are considered in the same catagory as game and the legislature has the same right to protect the same as it has to protect game animals. Skunks are animals *ferae naturae*. The right to the possession and ownership of animals *ferae naturae* is considered on an entirely different plane from the possession of ordinary personal property.

In the case of Roth v. State, 51 O. S. 209, it was decided that "it is an offense, under section 6964, Revised Statutes, to sell quail in this state, except between the tenth day of November and the fifteenth day of December, though such quail were killed outside of the state, and where it was lawful to kill the same. The section is constitutional." Under the police power of the state authorizing the protection of game animals, the legislature has the right to determine that the possession of such animal, or any part thereof, at least during the time when it is unlawful to kill the same in this state, renders the person so in possession guilty of a crime.

A good discussion of the question of the ownership of game animals and the ques-

tion of possession thereof by an individual, is found in the case of Fitton v. State, 1 O. N. P. 133, being the decision of Judge Brown of the common pleas court of Butler county. In the opinion of Judge Brown are cited many cases bearing upon the question in hand. During the course of his opinion, on page 135 of the report, he states as follows:

> "The authorities agree that the ownership of all game animals and birds is in the people in their sovereign capacity, that is, in the state, and no individual has any property rights in game other than such as the state may permit him to acquire, and even where game has been captured and reduced into possession by the individual with the permission of the state, his ownership in it may be regulated and restrained by appropriate legislation enacted for considerations of state or for the benefit of the community. In other words the cases hold that the question of enjoyment in this field is one of public policy and not of private right."

Further on in the opinion of Judge Brown he refers to the case of Magner v. People, 97, Ill., 320, and quotes from the opinion of that court on page 331 as follows:

> "We think it obvious that the prohibition of all possession and sales of such wild fowls or birds during the prohibited seasons would tend to their protection, in excluding the opportunity for the evasion of such law by clandestinely taking them when secretly killed or captured here, beyond the state and afterwards bringing them into the state for sale, or by other subterfuges and evasions.
>
> "It is quite true that the mere act of allowing a quail netted in Kansas to be sold here does not injure or in any wise affect the game here; but a law which renders all sales and all possessions unlawful, will more certainly prevent any possession or any sale of the game within the state, then will a law allowing possession or sales here of the game taken in other states. This is but one among many instances to be found in the law where acts, which in and of themselves alone are harmless enough, are condemned because of the facility they otherwise offer for a cover or disguise for the doing of that which is harmful."

It would seem, therefore, that the state has the undoubted right to prohibit or regulate the possession of game animals in this state in such manner as it sees fit and I do not think that it can be argued that the fact that the animal mentioned was propagated in captivity would grant to the breeder thereof any better right in such animal than it would to any other person who had reduced an animal to possession from the wild state.

The syllabus of the case of Commonwealth v. Gilbert, 160 Mass., 157, as found in 22 L. R. A. 439, is as follows:

> "The penalty for selling or offering for sale, or having in possession, any trout which is not alive during the close season, which is imposed by statute 1884, chapter 171, section 53, extends to trout artificially propogated on one's own premises, in view of section 26, which declares that such trout may be sold at all times for purposes of culture and maintenance, but not for food during close seasons.
>
> "The legislature may forbid the sale, offering for sale, or possession during the close season of trout which are not alive, although they were artificially propogated on one's own premises, if such close season is not unreasonable."

In the case of State of Missouri v. Anton Weber, 205 Mo., 44, 10 L. R. A. (n. s.) 1155, the facts were that the defendant had in his possession and was offering for sale in Kansas City on December 14, 1905, the carcasses of eight deer, from which the natural evidences of their sex had been removed; that the deer in question had been raised in captivity upon a stock farm in Missouri and were killed and their carcasses sold and shipped to defendant. The statute prohibited the killing or attempting to kill any deer under the age of one year and further made it unlawful to kill any deer of any age between the first day of January and the first day of November in each year, and for the purpose of preventing the extinction of the species, unlawful to kill any doe. It was further made unlawful "to have in possession or transport at any time the carcass of any deer, or any portion of such carcass, unless the same has thereon the natural evidence of its sex."

The question was raised in that case by the defendant that the deer in question were not game animals in the ordinary and accepted meaning of the term, and were not embraced in, or germane to, the subject of the game law, as expressed in its title and were not therefore within the provisions of said law. During the course of the opinion the court says:

> "No owner of deer raised in captivity has a better title thereto than has the hunter at common law to the deer captured or killed by him, and it has always been held that the state has authority to regulate the sale of such game, or prohibit it altogether." Citing the case of Commonwealth v. Gilbert, 160 Mass., 157, herein-before referred to."

Further on the court says:

> "The end and object of the law, as expressed in the title, is the preservation and protection of game animals, and the provision, inhibiting the possession by any one of the carcass of any deer which has not thereon the natural evidence of its sex, is a means to that end. As we have said, the deer in question come within the meaning of the term 'game' which means animals *farae naturae*, or wild by nature. It makes no difference that said deer were raised in captivity, and had become tame. They are naturally wild."

The court further says:

> "The provisions of the section are clearly embraced within the police power of the state, under which rights in private property must, to a reasonable extent, yield to the public welfare."

The court affirmed the judgment of conviction.

Turning now to the statutes of this state under consideration—the statute makes the catching, killing or injuring of a skunk or pursuing it with such intent, except between November 15th and February 1st, unlawful and likewise makes it unlawful except during said period, to have in possession the green pelt of a skunk, unless there is evidence by original invoice that the pelt was shipped from without the state. This is undoubtedly a reasonable exercise of the police power. After the animal has been killed there is no way to determine whether or not the green pelt came from an animal raised in captivity or one which had been running at large, and the legislature has seen fit to provide that the possession of a green pelt, unless accompanied by an original invoice showing that the pelts were shipped from without the state, should constitute an offense.

I am therefore of the opinion that it is an offense under section 13413 G. C. for a

man to have in his possession the green pelt of a skunk from an animal propagated and raised in captivity by himself.

Before concluding this opinion, however, I desire to call your attention to H. B. No. 109, found in Vol. 107 O. L., page 182, which law will go into effect about July 1st. Said bill in section 2 thereof amends original section 1415 and repeals section 13413. Said amended section 1415 and section 1415-1 are as follows:

> "Section 1415. No person shall catch, kill, injure or pursue with such intent a raccoon, muskrat, skunk, mink or opossum, except from the 15th day of November to the first of February, both inclusive; but nothing in this section shall prevent the owner of a farm or enclosure, used exclusively for the breeding and raising of polecats or skunks, from catching or killing therein, or prohibiting the killing of the animals named herein or any of them, in any manner or at any time except on Sunday by the owner, manager or tenant of the premises or by his bona fide employes or persons having such owner's permission when such animals or any of them are found injuring or destroying property."
>
> "Section 1415-1. No person shall at any time or place dig out, or smoke out with fumes or gases, any skunk or in any manner destroy the den or burrow of any skunk, and no person during the period when it shall be unlawful to kill such animal shall have in his possession the green pelt of a skunk, unless such person can show by the original invoice signed by the shipper that such pelts were shipped from without the state. This section shall not prevent the owner of a farm or any one authorized by him in writing from killing a skunk when doing injury to his premises."

Section 1415, as amended, makes it unlawful to kill a skunk except between November 15th and February 1st, but excepts therefrom the owner of a farm or enclosure used exclusively for the breeding and raising of skunks from catching or killing them therein, and section 1415-1 makes it unlawful "during the period when it shall be unlawful to kill such animal" to have in possession the green pelt of a skunk.

Since under the provisions of section 1415, as amended, it is not unlawful for the owner of a skunk farm to kill a skunk raised by him at any time during the year, it would likewise not be unlawful to have in his possession the green pelt of such skunk so killed.

Fully answering your question, then, I am of the opinion, as before stated, that it is an offense under section 13413 G. C. for a man to have in his possession the green pelt of a skunk from an animal propagated and raised in captivity by himself, but that after July 1st, when said section 13413 is repealed and amended section 1415 and new section 1415-1 are in force, it will not be unlawful.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

367.

COMMON PLEAS JUDGE—POWER TO APPOINT COURT CONSTABLES AND CRIMINAL BAILIFFS.

In a county which has but one common pleas judge, such judge may appoint one or more court constables when in the opinion of the court the business thereof so requires.

Such court may appoint one regular criminal bailiff who shall be a deputy sheriff and on application of the sheriff may appoint additional criminal bailiffs for particular cases.

COLUMBUS, OHIO, June 16, 1917.

HON. CALVIN D. SPITLER, *Prosecuting Attorney, Tiffin, Ohio.*

DEAR SIR:—In your communication of May 29, 1917, which was previously acknowledged, you submit for my opinion the following statement of facts:

> "I have been asked whether or not Seneca county, which has but one common pleas judge, is entitled to more than one court bailiff or court constable?
>
> "After considering the provisions of sections 1692, 1693, 1541 and 1544 of the General Code, I have rendered an opinion to the effect that the provisions of the latter part of section 1693 contemplates the appointment of one court constable only where one judge holds court. * * *
>
> "I would like to have your opinion on this question."

You refer to General Code section 1541, which provides in part as follows:

> "The judge of the court of common pleas of a county, * * * may appoint * * * the following: * * * a criminal bailiff, who shall be a deputy sheriff and hold his position during the pleasure of the judge * * of such court. He shall receive compensation to be fixed by such judge * * * at the time of his appointment, not to exceed the amount permitted by law to be allowed court constables in the same court, which shall be paid monthly from the county treasury upon the warrant of the county auditor."

There is also another section of the General Code which is numbered 1541 and which contains the same language above quoted, and which was held in State ex rel v. Sayre, 12 Ohio N. P. (n. s.) 13, not to have been repealed, but the language therein not being in conflict with the language above quoted, the same, as far as our question is concerned, need not further be considered in this opinion.

Section 1543 G. C. provides that:

> "The criminal bailiff shall act for the sheriff in criminal cases and matters of a criminal nature in the common pleas and probate courts of such county. Under the direction of the sheriff he shall be present during trials of criminal cases in such courts, and during such trials perform all the duties as are per-

formed by the sheriff. The criminal bailiff shall conduct prisoners to and from the jail of such counties, and for that purpose shall have access to the jail and to the court room whenever ordered by such courts, and have care and charge of such prisoners when so doing. Under the direction of the sheriff the criminal bailiff shall convey to the penitentiary all persons sentenced thereto. He shall receive and collect from the state treasurer all costs in such criminal cases in the same manner as the sheriff by law is required to do, and pay the amount so collected to the sheriff of such county."

Section 1544 G. C. provides:

"On the application of the sheriff, in a criminal case, if a court is satisfied that the administration of justice requires an additional bailiff to execute process, it may appoint such additional bailiff as in its discretion may be necessary. His powers and duties shall cease when such case is determined."

Section 1545 G. C. provides in part:

"Before entering upon the discharge of his duties the criminal bailiff shall give bond to the sheriff in the sum of five thousand dollars * * *."

The above sections and part sections provide when and how *criminal bailiffs* may be appointed by the judge of the court of common pleas of a county, and if such bailiff is appointed as a regular criminal bailiff he is by the provisions of said sections a deputy sheriff, and must give bond to the sheriff, and acts in said court in the place of the sheriff, or, in other words, as far as the criminal work of such court is concerned, he is in the same position as any other deputy sheriff; that is, he stands in the place of the sheriff. But, if such criminal bailiff be appointed for a single case only, then his appointment is made on the application of the sheriff, and in such case his powers to act shall cease when the particular case in which he was appointed is determined.

I anticipate, however, that your inquiry is not meant to cover the above class of bailiffs, but that you really intend to inquire in relation to the appointment of court constables who are frequently referred to as court bailiffs, and who attend the court in both its civil and criminal branches.

I gather the above from the reason that you refer to section 1692 G. C. upon a part of which said section it is necessary for me to place construction in considering your question. Said section provides in part:

"When in the opinion of the court, the business thereof so requires, each court of common pleas, * * * in each county of the state, and, in counties having at the last or any future federal census more than seventy thousand inhabitants, the probate court may appoint one or more constables to preserve order, * * * and discharge such other duties as the court requires. When so directed by the court, each constable shall have the same powers as sheriffs to call and impanel jurors, except in capital cases."

If the punctuation of the above quotation were modified or changed, the construction of same would be comparatively easy. To illustrate, if the comma were removed from its location following the word "inhabitants" and placed after the words "probate court," then said section would read in part as follows:

"* * * Each court of common pleas * * *, and in counties

having at the last or any future federal census more than seventy thousand inhabitants the probate court, may appoint one or more constables * * *."

That is to say, when in the opinion of the court the business of such court so requires it to be done, each court of common pleas may appoint one or more constables. and in counties having more than seventy thousand inhabitants each probate court may appoint one or more constables, in each case for the purposes mentioned in said section. As the section stands, the punctuation seems to indicate that only the probate court is empowered to appoint constables. I do not believe that that is what the legislature intended when said section was enacted, and I believe the punctuation should be so changed that the section will be given such effect that all of the words mean that which was reasonably intended for them by the legislature. Such change in the punctuation is perfectly permissible, for in Lewis' Sutherland Statutory Construction, 2d edition, section 361, the author says:

"The questions in court relating to punctuation or affecting construction have generally arisen on the presence, omission or misplacing of commas.

"In Ewing v. Burnet, the court say: 'Punctuation is a most fallible standard by which to interpret a writing. It may be resorted to when all other means fail; but the court will first take the instrument by the four corners in order to ascertain its true meaning. If that is apparent on judicially inspecting it, the punctuation will not be suffered to change it.'

"*Where effect may be given to all the words of a statute by transposing a comma, the alternative being the disregard of a material and significant word, or grossly straining and perverting it, the former course is to be adopted.* Courts, in the construction of statutes, for the purpose of arriving at or maintaining the real meaning and intention of the lawmaker, *will disregard the punctuation or transpose the same* or substitute one mark for another, or repunctuate."

Following, then, the said rule of construction and transposing the comma after the word "inhabitants" and placing it after the words "probate court,"the section is given its reasonable and intelligent meaning. That is to say, when in the opinion of the judge of the court of common pleas the business of the court requires the same, such court may appoint *one or more* constables to preserve order or to discharge any other duties required by the court.

My attention is also called to the last sentence of section 1693 G. C., a part of which section reads as follows:

"Each constable shall receive the compensation fixed by the judge * * * of the court making the appointment. * * * In counties where only one judge holds court, the constable provided for herein, when not attending the common pleas court, shall, upon order of the judge of such common pleas court, and without additional compensation, attend the probate court or the court of appeals of such county."

The words "provided for herein" refer to the act of which said section 1693 was a part when the same was enacted and the fact that the singular number is used in speaking of the court constable will not, in my opinion, have the effect of limiting the language of section 1692 above quoted, where the court is given the power to appoint one or more constables.

I therefore advise you that the judge of your court of common pleas may appoint

one regular criminal bailiff who shall be a deputy sheriff, and upon application of the sheriff it may appoint an additional bailiff for a particular criminal case, and that said court may appoint one or more court constables to perform such duties as the court requires.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

368.

COUNTY BOARD OF EDUCATION—MAY CREATE NEW DISTRICT FROM RURAL AND VILLAGE DISTRICT—UNNECESSARY TO FILE MAP OF NEW DISTRICT WITH AUDITOR—MAJORITY OF ELECTORS OF ENTIRE NEW DISTRICT NECESSARY TO PREVENT SUCH AN ARRANGEMENT—WHO HAS RIGHT TO APPOINT BOARD OF EDUCATION FOR SUCH NEW DISTRICT.

1. *A county board of education may create a new school district from a rural and a village district over which it has jurisdiction.*

2. *It is not necessary to file a map of such newly created district with the county auditor. The filing of a map applies to a transfer of territory from one district to another.*

3. *The entire territory of the newly created district is considered the territory "affected" and a majority of the qualified electors of the territory affected is necessary to prevent such arrangement from being carried into effect.*

4. *The county board of education may appoint a board of education for a district created by it, but if it fails to do so, or if for any other reason there exists a district without a board ofeducation, then the board of county commissioners of the county shall appoint such board of education.*

COLUMBUS, OHIO, June 16, 1917.

HON. PHIL H. WEILAND, *Prosecuting Attorney, Mt. Gilead, Ohio.*

DEAR SIR:—I acknowledge receipt of your communication in which you submit for my opinion the following statement of facts:

"At a joint session of the Sparta village board of education and the South Bloomfield township board of education, together with the county board of education, at Sparta, Ohio, May 20, 1916, the following resolution was passed and signed by the members of the Sparta board of education and the South Bloomfield board of education and presented to the county board.

" 'WHEREAS, it seems necessary to unite the South Bloomfield township school and the Sparta village school districts into one district in order to secure a tax duplicate sufficient to maintain a second grade high school, Therefore,

" 'BE IT RESOLVED, that the county board of education disband the

above named school districts and appoint a board of education for a new district out of the two old boards of education.

" '(Signed) K. E. PARMER,
" 'J. U. LLOYD,
" 'E. D. FROST,
" 'RAY CHALFANT,
" 'GEORGE HARROD,
" 'W. D. MITCHELL,
" 'J. R. KELLER,
" 'C. S. STINEMETZ,
" 'J. B. LARRIMORE.

"The county board of education met in called session at the call of Jenkins and Hindman to create a district out of the South Bloomfield township and Sparta village school districts, and to transact other necessary business on August 25, 1916. All members were present but Haldeman.

"RESOLUTION

" 'WHEREAS, the Sparta village school district does not have a tax duplicate sufficient to maintain a good second grade high school and,

" 'WHEREAS, we believe that such a school should be provided for and maintained in that community, not alone for the boys and girls of the village, but for those of South Bloomfield township as well, and

" 'WHEREAS, the board of education of said village realizing the situation did some weeks ago petition the county board to create one district out of the Sparta village and South Bloomfield township school districts, and

" 'WHEREAS, later, after a thorough discussion of the situation in a joint meeting with the county board of education, said boards jointly petitioned the county board to create a new district from the two districts; therefore be it

" 'RESOLVED, That we hereby, in accordance with section 4736 of the Ohio School Laws, abolish the Sparta village and South Bloomfield township school districts and create therefrom a new district to be known as the South Bloomfield rural school district, the same to include all the territory composing the two said districts; and furthermore be it

" 'RESOLVED, That we hereby appoint the following men members of the board of education of the newly created district to serve until their successors are elected and qualified.

" '(Signed) DR. H. B. LARRIMORE,
" 'K. E. FARMER,
" 'J. KELLER,
" 'EDWARD PROST,
" 'RAY CHALFANT.'

" 'Be it furthermore

" 'RESOLVED, That the clerk be hereby directed to notify the boards of education of the Sparta village and South Bloomfield school districts of the above action and direct the treasurer-clerk of each board to audit their books

at once, have the same O.K.'d by their boards, or by the county auditor and turn the same over to the treasurer-clerk of the newly created board, together with all money in their treasuries. And furthermore be it

" 'RESOLVED, That our clerk be directed to file a copy of these resolutions with the county auditor and that the latter is hereby authorized to transfer the funds coming to the two abolished districts to the treasurer-clerk of the newly created district. And furthermore be it

" 'RESOLVED, That the newly created board be authorized to settle such outstanding bills as have been incurred by the two abolished boards and to meet the other obligations of said boards.'

" 'Moved by Levering and seconded by Hindman, that the above resolutions be adopted.

" 'Levering yea; Hindman yea; Jenkins yea; Babcock yea.

" 'Moved by Jenkins and seconded by Levering that we authorize the clerk of the township board to notify the newly elected board to meet Monday evening, May 29, 1916, at the township hall to organize, take the oath of office and make out the levy and transact any other necessary business.

" 'Jenkins yea; Levering yea; Hindman yea; Babcock yea.'

"Question 1. Under the above proceedings, is the new district a legally constituted district? And has the law been complied with in making this creation?

"Question 2. Must a map be filed with the auditor, showing the change of boundary of the new district? And is there a legal transfer or creation until a map is filed with the county auditor?

"Question 3. If a map must be filed with the county auditor, may a majority of the qualified electors of the territory, affected by such order, file a written remonstrance with the county board against the arrangement of the school district so proposed?

"Question 4. Has the county school board, under section 4736, power and authority to appoint the board of education of the newly created district, or does this power vest in the county commissioners?

"Question 5. Are the transactions already performed by this newly created board of education regular and legal?

"Question 6. In case this creation of the new district is illegal, i. e., that all the provisions of the law regarding such creation have not been complied with, what further steps are necessary to make it regular and legal?

"Question 7. In case a map must be filed with the county auditor, what effect—after this map is filed, or before this map is filed—would it have if a remonstrance signed by a majority of the electors of the original South Bloomfield township district of the Sparta village school district were filed?

"In conclusion I might state that no map has been filed with the county auditor showing any transfer of territory, and that the county auditor refuses to place the funds in one budget until such map has been filed. I might also add that the village school district of Sparta, Ohio, has a tax duplicate of practically $300,000.00."

You mention in your inquiry that the tax duplicate of the Sparta village school

district is practically $300,000 and my answer herein has been delayed that I might determine the effect that matter would have upon your situation in lieu of former opinions heretofore rendered by this department.

It was held by my predecessor, Hon. Edw. C. Turner, in opinion No. 1847, and found in Opinions of the Attorney-General for 1916, page 1398, that when a village district has a tax valuation of less than $500,000, such district ceases to be a village district unless the electors thereof vote to organize such territory into a village district. It was also held in opinion No. 145, rendered March 27, 1917, following the reasoning of said opinion No. 1847, of my predecessor Hon. Edward C. Turner, that when the tax valuation of a village school district falls below $500,000, such district fails to be a village district. This question has been reconsidered by me, in opinion No. 341, rendered June 6, 1917, and I h ld that a village school district which once existed and whose tax valuation falls below $500,000 is not by that act alone dissolved. So that when the county board of education of your county united the Sparta village school district and the South Bloomfield township rural school district, and thereby created a new school district, it was acting within the scope of its authority, as provided in General Code section 4736, that the county board of education is authorized to create a school district from one or more school districts or parts thereof.

General Code section 4736 under which said county board acted, reads as follows:

> "The county board of education shall arrange the school districts according to topography and population in order that the schools may be most easily accessible to the pupils and shall file with the board or boards of education in the territory affected, a written notice of such proposed arrangement; which said arrangement shall be carried into effect as proposed unless, within thirty days after the filing of such notice with the board or boards of education, a majority of the qualified electors of the territory affected by such order of the county board, file a written remonstrance with the county board against the arrangement of school districts so proposed. The county board of education is hereby authorized to create a school district from one or more school districts or parts thereof. The county board of education is authorized to appoint a board of education for such newly created school district and direct an equitable division of the funds or indebtedness belonging to the newly created district. Members of the boards of education of the newly created district shall thereafter be elected at the same time and in the same manner as the boards of education of the village and rural districts."

You are advised at the outset that the resolution passed by the joint boards of education of said township and village districts had no effect in law. It was nothing more than an expression of an opinion as to an existing condition. So that when the county board of education created the new district, its act was the initial step in the proceedings as provided by law, and when the written notice of such proposed arrangement was filed with the boards of education in the territory affected, that is, with the boards of education of both Sparta village and the South Bloomfield township rural boards, said district was a legally constituted district unless by the further provisions of section 4736 a majority of the qualified electors of said territory should file a written remonstrance with the county board against such proposed arrangement. The territory in both districts was equally affected. The fact that the new district was named the South Bloomfield rural school district instead of some other name would make no difference in law. When General Code section 4735 was enacted, it created the South Bloomfield township school district into the South Bloomfield township rural school district and when the county board united said rural and

said village school districts and created a new district, it could give said new district one of the old names for that matter, or an entirely new one. Said section 4736 G. C. does not provide for the filing of a map showing the extent of the boundary line of said district and therefore it was not necessary for the said county board to file such map. The provision with reference to the filing of a map is contained in General Code section 4692 and only applies where territory is transferred from one school district to another, but does not apply where a new district is created under section 4736 G. C.

The question as to whether the county board of education has a right to appoint a board of education for such new school district is not so easily determined. The language of section 4736, in relation thereto, seems clear and explicit. It provides that "the county board of education is authorized to appoint a board of education for such newly created school district," but section 4736-1 G. C. provides:

> "In rural school districts hereafter created by a county board of education, a board of education shall be elected as provided in section 4712 of the General Code. When rural school districts hereafter so created, or which have been heretofore so created, fail or have failed to elect a board of education as provided in said section 4712, *or whenever there exists such school district which for any reason or cause is not provided with a board of education, the commissioners of the county to which such district belongs shall appoint such board of education* * * *."

Said section 4736 was enacted May 20, 1915, and approved by the governor May 27, 1915, and filed in the office of the secretary of state May 28, 1915. Said section 4736-1 was enacted May 20, 1915, approved by the governor June 4, 1915, and filed in the office of the secretary of state June 5, 1915, being, therefore, the later of the two acts.

It is somewhat difficult to ascertain whether or not the language of said acts is so contradictory that the latter will repeal the former by implication, or whether effect can be given to both. Effect must be given to both if the same can be done, and I am of the opinion that if at the time the county board of education creates a new district it appoints a board of education for such district, said board of education thereby becomes the legally constituted board for such district, but if, for any reason or cause, the county board of education fails to appoint a board of education for such newly created district, then I am of the opinion that the board of county commissioners have the right to appoint such board, thus giving effect to both of the above mentioned sections.

Answering your questions, then, in the order in which they are asked, I advise you:

> "*First:* Under the proceedings a new district was legally constituted and the law has been in substance complied with.
>
> "*Second:* It is not necessary, when acting under section 4736, to file a map with the auditor, showing the boundary line of the new district.
>
> "*Third:* If a majority of the qualified electors of the territory contained in said newly created district file a written remonstrance with the county board of education against the arrangement so proposed, then said proposal will not become effective, but if such remonstrance is not so filed, said district will stand.
>
> "*Fourth:* The county board of education, under section 4736 G. C. has authority to appoint a board of education for the newly created district,

but if they fail or neglect to do so, the county commissioners may then act under section 4736-1.

"*Fifth:* The board being a legally constituted board of education, its transactions are therefore regular and legal."

Your sixth and seventh questions are answered in the above. My attention has been called to the cases of Klein v. Martin, 95 O. S. and board of education v. DeTray, 95 O. S. in which some reference is made to the appointing power of the board of county commissioners in relation to a rural school board. In the first case the court uses the following language:

"If the county board of education were, in effect, mistaken as to Nashville being a village school district, then the new district it created is a rural district and under the provisions of section 4736-1 General Code the county board of commissioners is authorized to appoint the members of its board of education."

In the second case the board of county commissioners appointed the board of education in the newly created McCutchenville rural school district and said acts were held valid by the court of appeals. The supreme court, in affirming the judgment of the court of appeals, affirmed same, however, on other grounds, so that my opinion follows in substance both the above cases.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

369.

PLANS, ESTIMATES AND SPECIFICATIONS—FOR HIGHWAY CONSTRUCTION—CANNOT BE CHANGED AFTER CONTRACT HAS BEEN AWARDED.

Where a contract for the construction of a highway is let under competitive bidding, and the bids are made under certain plans, estimates and specifications, there is no authority in law for changing the plans and specifications after the contract has been awarded.

COLUMBUS, OHIO, June 16, 1917.

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

DEAR SIR:—I have your communication of May 24, 1917, in which you set out copy of a letter received by you from the Engineering Service Company, and ask my opinion in reference to the matters set out in the letter received by you. Your letter, together with said copy, reads as follows:

"I respectfully direct your attention to a request received by me from Engineering Service Company, which company has a contract with this department for the improvement of section 'L' of the Athens-Marietta road, I. C. H. No. 157, in Washington county. The request of Engineering Service Company is as follows:

" 'COLUMBUS, OHIO, May 21, 1917.

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

" 'SIR:—Pursuant to and in accordance with our conversation of May 19th, we beg to submit for your consideration the following facts:

" 'On April 28, 1916, Engineering Service Company were awarded a contract for the construction of section "L," Marietta-Athens road, I. C. H. No. 157, in Washington county.

" 'Construction operations were begun June 17th, shortly after the contract was received. Grading was completed about one month after this time and we were then ready to begin placing the foundation material.

" 'After careful examination of the geological formations in this section and after discussing the matter with a number of the towns people, it appears that there were only two available sites from which a suitable sand stone for foundation purposes could be obtained. Whereupon, Engineering Service Company selected samples of the sand stone, one sample from the property of a Darl Ellis and the other from the property of a Mr. White.

" 'After due time for the completion of the test, the manager of the Engineering Service Company called at your laboratory, secured a copy of the report on the tests of the stones and submitted these copies to your division engineer, Mr. R. N. Waid, who is in charge of the work.

" 'After careful comparison of the results of these tests, and the requirements of the specifications, your engineer acquiesced that we proceed to quarry stone on the Ellis property until he could get down there, providing such material was the best that could be found. Of this, we gave him every assurance that we had made a thorough and conscientious effort to locate a stone of better quality. Probably on account of other duties not permitting, your engineer did not arrive until the lapse of a couple of weeks, during which time we had proceeded to quarry the sand stone in a rather large way, as our time

for the completion of the highway was drawing near, and as we then supposed we were quarrying a stone which was thoroughly suitable for the porpose mentioned.

" 'In the meantime, it appears that a number of the local men who were not on the friendliest terms with this Darl Ellis, had decided among themselves, that if it were in their power to do so, they would prevent the use of the Ellis stone in the construction of the highway.

" 'Your Mr. Waid, together with the county highway superintendent, Mr. Weeks, and the county commissioners, visited the quarry and examined same. It was then decided that they did not care to have this material used for foundation purposes. We immediately requested a suggestion on their part as to where we might open a quarry. One of the body of commissioners, a Hr. Henry, who lives near this road, stated that he knew of no better quarry than the one on Mr. White's property which had already been rejected by the test of your laboratory. Your department then suggested that the type of construction be changed radically, in that a limestone foundation be used instead of the sand stone and that the thickness be reduced to four inches. This proposition was rejected by the board of commissioners, who in the meantime had learned that there was silicious formations on the property of Mr. Calendine, about one mile west of the improvement. Your engineer, a member of the body of commissioners, and the contractor, viewed this formation which was found to be a thoroughly hard, apparently durable stone.

" 'It was then suggested that as Engineering Service Company, working under the directions of the highway department had quarried considerable stone on the Ellis property, that they be indirectly compensated for their work by being required to place six inches of this hard stone instead of eight inches of the other. This was generally known among the abutting property owners and at that time met with their approval.

" 'Engineering Service Company was told by your engineer, Mr. Waid, that as soon as the county commissioners signified their acquiescence in the proposal, your official sanction would likely be given. Whereupon your county highway superintendent placed his stakes and in the presence of an inspector the foundation was placed to a depth of six inches except between stations 1068+50 to 1078+50, where it was determined that seven inches should be used.

" 'Engineering Service Company now stands ready to place the limestone top course with the bituminous binder as originally agreed, and they do hereby respectfully pray that you give your official sanction to the substitution which was suggested by the officials and executed in accordance with their wishes by Engineering Service Company.

" 'Yours respectfully,

" 'ENGINEERING SERVICE COMPANY,

" 'Per (Signed)

Clifford Shoemaker, Manager.'

"I am also attaching hereto copy of an interview between Mr. Shoemaker of Engineering Service Company, Mr. Waid, the division engineer, and myself on May 21, 1917.

"I am also transmitting herewith a copy of our contract with Engineering Service Company which I would be pleased to have you return and respectfully ask your opinion as to whether or not I may legally comply with the request of Engineering Service Company.

"I shall be glad to deliver to you our entire file for examination should you desire it."

You also attach transcript of a certain interview between yourself and Mr. Shoemaker, together with Mr. Waid, the division engineer in your office. This interview is too lengthy to quote, but I shall make a note of the same in certain respects. You also enclose a copy of your contract with Engineering Service Company, but this is also too lengthy to quote only in certain parts which are vital in respect to the question you ask.

In short, your question has to do with this:

> May the plans, specifications and estimates for the construction of a highway be modified after the bid has been submitted and the contract let and the work under the contract partially completed?

In answering this question I desire, first, to call your attention to an opinion rendered by my predecessor, Hon. Edward C. Turner, on September 5, 1916, found in Opinions of Attorney General, 1916, volume II, page 1504. The syllabus of this opinion is as follows:

> "Where a contract for a bridge is required to be let at competitive bidding and is so let, there is no authority for changing the plans and specifications after the contract is awarded."

On page 1505 of the report Mr. Turner uses the following reasoning:

> "It should first be observed that the contractor is entitled to complete the work according to the original plans and specifications and to receive therefor the agreed price. His rights under his contract cannot be violated by the county and if he were to refuse to accede to any change in plans or to agree to an omission of certain parts of the work in consideration of a reduction in compensation, there would be no necessity for a further discussion of the matter. I am satisfied, however, that even should the contractor agree to a change of plans and to the construction of another and more expensive railing in consideration of an increased compensation, or should he agree to waive his right to construct the railing and to accept a reduced compensation with the idea that a separate contract might thereafter be let for the construction of the railing, there is no method by which such contract might be so made between the county and the contractor as to preserve the requirement of competitive bidding."

Mr. Turner held that even though the parties interested might desire to change the plans and specifications, yet this could not be done because of the fact that it would destroy the requirement of competitive bidding. In other words, the taxpayers and those assessed for the making of the improvement have a right to demand that the contract be let to the lowest and best bidder. In order that the contract may be let to the lowest and best bidder the bid must have been made with a view to certain plans, estimates and specifications. Those who bid upon the work rely upon the fact that the road will be constructed in the manner set out in the plans and specifications, and they bid accordingly.

In the contract entered into by and between the state of Ohio and Engineering Service Company there is a definite specification as to the matter of the sandstone foundation, which is in words and figures as follows:

"Sandstone shall meet the following requirements:
"It shall be clean, sound, durable, and of uniform quality.
"When tested in accordance with the methods described in the Appendix of Material Specifications No. 5 the stone shall show in the abrasion test a loss of not more than twenty-five per cent., and a toughness of not less than three (3)."

The specifications, which are a part of the contract, further provide as follows:

"Depth of sandstone foundation, 8 inches at center, 8 inches at sides."

The Engineering Service Company now asks that the specifications be changed to read "6 inches" instead of "8 inches." Why is this requested? In a way to repay them for stone quarried on the farm of Darl Ellis, which stone so quarried was not used. If the stone quarried on this farm came up to the standard set out in the plans and specifications, the contractor should have used the same, and no one could have prevented his using the same. If the stone did not come up to the standard set out in the specifications, then the contractor could not use the same, and would be compelled in order to fulfill his contract to go elsewhere to get his foundation course of stone. It is not clear just why the contractor left this stone and went elsewhere, but in the interview above mentioned Mr. Cowen asked this question:

"State why. Was it a personal matter or the quality of the stone?"

Mr. Shoemaker, answering for Engineering Service Company, said:

"Well, it was a personal matter, but they jumped behind the quality of the stone and I can substantiate this statement by saying that their suggestion of another quarry was one that had been tested and showed a stone of far inferior quality."

In another part of this interview Mr. Shoemaker says:

"The suggestion to change from a soft stone which has been quarried on the property of Darl Ellis was made by the board of county commissioners. They stated it was their desire to have 6 inches of the harder stone in preference to 8 inches, and to quote them literally 'or even 18 inches in depth of a material from the property of Darl Ellis' "

Mr. Shoemaker says he really did get a better material by going elsewhere to quarry it; but, as said before, the contractor was compelled to get a material that would come up to the specifications made a part of the contract, and no better than provided for in the specifications.

It is suggested that the state highway commissioner in a way acquiesced in the quarrying of stone on the Darl Ellis farm, but, like all other matters that are carried on verbally, just what was said and done by the highway department is uncertain. It is also uncertain as to what the county commissioners said and did. To obviate this liability to a misunderstanding, written contracts are made, and both parties should be held to the terms of the written contract. It would be a most dangerous principle to hold that the written contract can be modified by oral communications, and further, such a principle is contrary to law.

Any taxpayer would have the right to enjoin the payment of money for the construction of this work with a six-inch foundation. This for the reason that the plans

and specifications call for an eight-inch foundation of sandstone, and for the further reason that the work might have been let for a much less sum had the specifications provided for a six-inch foundation instead of an eight-inch foundation.

It is true the copy of the letter sets forth that the county commissioners are agreeable to a change to six inches; that the abutting property owners in a way are agreeable to a change; but even if this might be taken as true it does not take into consideration the rights of the taxpayers in the matter of the construction of this road.

Hence answering your question specifically, I am of the opinion that, in a case where the specifications call for an eight-inch foundation of sandstone of a certain quality and grade, and bids are received thereunder and the contract let, the specifications can not afterwards be changed so as to provide for a six-inch foundation.

Further, I concur in the opinion of my predecessor above mentioned.

I am returning herewith copy of your contract submitted with your letter.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

370.

APPROVAL—FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN BROWN, BELMONT, CHAMPAIGN, HOCKING, MORGAN, PREBLE, SHELBY AND WARREN COUNTIES.

COLUMBUS, OHIO, June 16, 1917.

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

DEAR SIR:—I have your communication of June 9, 1917, enclosing certain final resolutions in reference to the construction of highways, upon which you ask my approval. Said resolutions are as follows:

"Brown county—Section 'A,' Ripley-Hillsboro road, I. C. H. No. 177.

"Belmont county—Section 'C,' National road, I. C. H. No. 1.

"Champaign county—Section 'q,' Urbana-West Jefferson road, I. C. H. No. 188. Type 'A.'

"Champaign county—Section 'q,' Urbana-West Jefferson road, I. C. H. No. 188. Type 'B.'

"Champaign county—Section 'q,' Urbana-West Jefferson road, I. C. H. No. 188. Type 'C.'

"Hocking county—Section 'A-1,' Logan-McArthur road, I. C. H. No. 397 (also duplicate).

"Morgan county—Section 'H,' McConnelsville-Athens road, I. C. H. No. 162.

"Preble county—Section 'B,' Eaton-Greenville road, I. C. H. No. 210 (also duplicate).

"Shelby county—Section 'A-1,' Urbana-Sidney road, I. C. H. No. 192.

"Warren county—Section 'D,' Cincinnati-Chillicothe road, I. C. H. No. 8."

I have examined these final resolutions carefully and find them correct in form and legal, and am therefore returning the same to you with my approval endorsed thereon.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

370½.

ALIEN ENEMIES—MAY BE LICENSED AS STATIONARY ENGINEER—INDUSTRIAL COMMISSION MAY TAKE ALLEGIANCE INTO CONSIDERATION WHEN DETERMINING THE FITNESS OF APPLICANTS.

1. *Alien enemies peacefully resident in the United States are entitled to be licensed as stationary engineers upon equal terms with other persons.*

2. *Such persons are likewise not disqualified by their allegiance alone from being licensed as boiler operators; but the industrial commission may take such fact into consideration, with other facts, in determining the fitness of a particular applicant to operate a steam boiler.*

COLUMBUS, OHIO, June 18, 1917.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I acknowledge receipt of your letter of May 19th, requesting my opinion upon the question

> "whether or not alien enemies are entitled to take examinations for the positions of stationary engineer and boiler operator, and whether or not licenses may be granted to them if they successfully pass such examinations."

In a recent opinion to the industrial commission I endeavored to deal somewhat carefully with the principles which should govern its action upon claims arising under the workmen's compensation law and asserted by subjects of Germany and others. The principles therein applied were developed from the root principle upon which is predicated the disability of an alien enemy to sue in the courts of a belligerent country, which disability is established by and is a part of the municipal common law of this country and this state.

I pointed out in the course of that opinion that at the foundation of all the rules which had been worked out through the adjudicated cases bearing upon the subject is the idea that as a matter of public policy the enrichment of the resources of or commercial intercourse with the enemy country during the war must be prevented; that hence all acts and contracts, the direct or indirect effect of which is to produce such enrichment or intercourse, are illegal and proscribed; and that even the assertion of the remedial right of enforcement of contracts or property rights vested prior to the outbreak of the war is likewise prevented or suspended during the continuance of the war.

It was also pointed out therein that because of the foundation principle above referred to the persons against whom the rules described are operative are not those who are merely citizens or subjects of the enemy country, but rather those who, regardless of their nationality in the sense of citizenship or technical allegiance, actually reside within the territorial boundaries of the enemy's civil jurisdiction or military control, or otherwise by their voluntary acts have effected such a *de facto* adherence to the enemy or subjection to his power as that the enrichment of the individual's resources will bring property or funds within the potential reach of the enemy's exactions. Therefore, though upon the theory of implied license, subjects of the enemy country peacefully resident within the territory of the belligerent country, are really not treated as alien enemies at all, but rather as alien friends; and even those who actually reside within the territory of friendly or neutral states cannot be said to have the status of alien enemies, but are rather to be treated as alien friends for the purpose of the rule discussed in the said opinion.

In short, all the conclusions at which I arrived in the opinion referred to were based upon the fundamental principle which denounces the aggrandizement of the enemy's pecuniary resources.

It is obvious that this principle has no application to the question now under consideration. If subjects of the enemy country who reside in the state of Ohio and here apply for licensure in the respects referred to in your letter are to be denied the privilege of obtaining such licenses upon meeting the conditions which are exacted of all others who similarly apply for like licenses, it is clear that such denial cannot be predicated upon any of the principles or rules actually applied to the solution of the question answered in the previous opinion. Rather, such denial, if it is to be made, must be grounded upon some notions as to the status of the subjects of an enemy country peacefully residing within the territory of the belligerent country.

What is that status? Clearly such persons are "aliens" and if alienage *per se* constitutes a disqualification for the purpose now under consideration, as it might possibly, the question is answered. However, it is clear that unless the statutes providing for the issuance of such licenses themselves require that the recipient thereof shall be a citizen, such requirement does not exist, for it cannot be implied.

The purpose of laws like those under consideration is to regulate the conduct of certain occupations with a view to the preservation of the public safety by insuring the possession of certain technical or empirical qualifications on the part of those who are to be permitted to carry on such occupations. The class of persons to whom such laws are intended to apply includes those who, in the absence of such legislation, would be permitted by the policy of the common law to engage therein—or more exactly, those who but for such reasonable exercise of the police power would have a right to pursue such lawful occupation. On this point the law makes no discrimination between aliens as such and citizens. The natural right to carry on lawful occupations is, I think, conceded to aliens as such, and no authority need be cited in support of this principle.

Without pursuing the subject further I may say that I am of the opinion that alienage in and of itself is no natural disqualification against licensure of the kind mentioned by you. Indeed, I assume that this has been the understanding and practice of the commission in time of peace.

We may, therefore, lay on one side all peculiar attributes of status which result from alienage in and of itself and address ourselves to the consideration of the question as to whether and to what extent enemy character fastens itself upon aliens of the class under consideration by reason of the existence of the state of war.

In the earlier opinion referred to it was pointed out that such enemy character undeniably exists for some purposes and has certain significance even as to those persons who reside peacefully within the territory of the belligerent state. Thus, in theory, the property of such persons is subject to confiscation—though as a principle of living law this consideration may be disregarded as the rule is virtually, if not entirely, obsolete. Again, such persons may be required to register their names and addresses, may be excluded from certain residential areas, and may even be held prisoners or detained in definitely appointed places; but when such restrictive measures are applied and have been complied with by the persons affected thereby the result seems to be an implied safe-conduct which entitles such persons to maintain virtually the status of alien friends for the time being.

(Porter v. Freudenberg (1915), 1 K B., 857; and other authorities cited in the opnion referred to.)

In this country at the present time since the issuance of the president's proclamation under and by favor of permanent statutes of the United States, coupled with the enrollment of all aliens under the registration law put into effect since the former opinion was written, together with the more fundamental principle that in the absence of any positive political action the acquiescence of the government in the continued presence of resident "alien enemies" is to be presumed and safe-conduct may be in-

ferred therefrom, all lead to the conclusion that subjects of Germany who reside in this state and have complied with all the regulations prescribed by the federal government for the conduct of such persons are entitled to be regarded as under safe-conduct and for many purposes at least as "friends" and not as "enemies."

In spite of these principles, does enough "enemy character" adhere, so to speak, to such persons as to disqualify them from being the recipients of licenses which may be regarded as privileges emanating from the state? As broadly stated, this question is of tremendous and far-reaching importance. It, however, can be as broadly answered, I think, by careful consideration of the real foundation of the rules last above referred to respecting "safe-conduct."

What is it that *may* affect the liberty of subjects of an enemy country residing within the territory of the belligerent? And what is it that when put into effect and even when withheld entirely, results in an implied safe-conduct? The answer in both cases may be summed up in the phrase "political action."

A subject of Germany residing in the United States may be imprisoned, possibly his property may even be confiscated, but if either of these things occurs it will be because of political action. At the present time subjects of Germany residing in this country do so under an implied and even express safe-conduct, provided they conduct themselves in accordance with the regulations prescribed for them; but these regulations, and the safe-conduct itself, are the result of political action.

The principle then must be, I think, stated thus:

Subjects of an enemy country residing in a belligerent state are susceptible to such repressive measures as the state in the exercise of its police power may choose to take respecting them; but in the absence of the exertion of such police power through repressive measures, and particularly when the measures that have been taken in effect guarantee safe-conduct, the common law visits upon them no inimical consequences and virtually regards them as "friends."

The answer to your question, then, must be sought not in the common law, but in the statutes themselves through which the police power of the state in this particular has been exercised. I quote the following sections of the General Code:

> "Section 1048. Each person who desires to act as a steam engineer shall make application to the district examiner of steam engineers for a license, upon a blank furnished him, and shall pass an examination in the construction and operation of steam boilers, steam engines and steam pumps, and in the subject of hydraulics. The examination shall be conducted under the rules and regulations adopted by the chief examiner which shall be uniform throughout the state. The district examiners, assistant chief examiner and chief examiner may administer all oaths or affirmations to any applicant whenever the same is made necessary by the rules and regulations adopted by the chief examiner."
>
> "Section 1049. If, upon such examination, the applicant is found proficient in such subjects, a license shall be granted him to have charge of and operate stationary steam boilers and engines of the horse power required by law, for one year from the date on which it is issued. Upon written charges after notice and hearing, the district examiner may revoke the license of a person guilty of fraud in obtaining such license, or who has become insane, or is addicted to the liquor or drug habits to such a degree as to render him unfit to discharge the duties of a steam engineer."
>
> "Section 1050. Upon application, the person to whom a license is issued under the provisions of this chapter shall be entitled to a renewal thereof annually, unless the district examiner for a cause named in the preceding section and upon notice and hearing shall refuse such renewal."

"Section 1052. A person dissatisfied with the action of a district examiner in refusing or revoking a license or renewal thereof, may appeal to the chief examiner of steam engineers, who shall investigate the action of the district examiner. If the chief examiner finds that such action of the district examiner was justified under the requirements of this chapter, he shall sustain him in his action; if he finds that the district examiner was not so justified, he shall require him to issue a license to the person making the appeal."

"Section 1058-1. Any person who desires to operate or have charge of a stationary steam boiler of more than thirty horse power, except boilers which are in charge of a duly licensed engineer, shall make application to the district examiner of steam engineers for a license so to do, upon a blank furnished by the examiner, and shall successfully pass an examination upon the following subjects: the construction and operation of steam boilers, steam pumps and hydraulics, under such rules and regulations as may be adopted by the chief examiner of steam engineers, which rules and regulations and standard of examination, shall be uniform throughout the state. If, upon such examination, the applicant is found proficient in said subjects a license shall be granted him to have charge of and operate stationary steam boilers of the horse power named in this act. Such license shall continue in force for one year from the date the same is issued, and upon application to the district examiner may be renewed annually without being required to submit to another examination. Provided, however, the district examiner may, on written charges, after notice and hearing, revoke the license of any person guilty of fraud in passing the examination, or who for any cause has become unfit to operate or have charge of stationary steam boilers, provided, further, that any person dissatisfied with the action of any district examiner in refusing or revoking a license or renewal thereof, may appeal to the chief examiner who shall review the proceedings of the district examiner."

"Section 871-11. On and after the first day of September, 1913, the following departments of the state of Ohio, to wit: commissioner of labor statistics, chief inspector of mines, chief inspector of workshops and factories, chief examiner of steam engineers, board of boiler rules, and the state board of arbitration and conciliation, shall have no further legal existence, except that the heads of the said departments, and said boards, shall within ten days after the said date submit to the governor their reports of their respective departments for the portion of the year 1913 during which they were in existence, and on and after the first day of September, 1913, the industrial commission of Ohio shall have all the powers and enter upon the performance of all the duties conferred by law upon the said departments."

"Section 871-22. It shall also be the duty of the industrial commission and it shall have full power, jurisdiction and authority:

"(1) To appoint advisers, who shall without compensation, assist the industrial commission in the execution of its duties; to retain and assign to their duties any or all officers, subordinates and clerks of the commissioner of labor statistics, the chief inspector of mines, the chief inspector of workshops and factories, the chief examiner of steam engineers, the board of boiler rules, chief inspector of steam boilers, the state board of arbitration and conciliation, and the state liability board of awards.

* * * * * * * * * * *

"(11) On and after September 1, 1913, to examine and license persons who desire to act as steam engineers, and persons who desire to operate

steam boilers and persons who desire to act as inspectors of steam boilers; to provide for the scope, conduct and time of such examinations, to provide for, regulate and enforce the renewal and revocation of such licenses, to inspect and examine steam boilers and to make, publish and enforce rules and regulations and orders for the construction, installment, inspection and operation of steam boilers and all appliances connected with steam boilers and to do and require and enforce all things necessary to make such examination, inspection and requirement efficient. * * *"

"Section 871-24. All duties, liabilities, authority, powers and privileges conferred and imposed by law upon the * * * chief examiner of steam engineers, assistant chief examiner of steam engineers, district examiners of steam engineers, the board of boiler rules, head of the department of the board of boiler rules and the chief inspector of steam boilers, assistant chief inspector of steam boilers, general inspectors of steam boilers, special inspector of steam boilers, * * * are hereby imposed upon the industrial commission of Ohio and its deputies on and after the first day of September, 1913.

"All laws relating to the * * * chief examiner of steam engineers, assistant chief examiner of steam engineers, district examiners of steam engineers, the board of boiler rules, head of the department of the board of boiler rules and the chief inspector of steam boilers, assistant chief inspector of steam boilers, general inspector of steam boilers, special inspectors of steam boilers, * * * on and after the first day of September, 1913, shall apply to, relate and refer to the industrial commission of Ohio, and its deputies. Qualifications prescribed by law for said officers and their assistants and employes shall be held to apply, wherever applicable, to the qualifications of the deputies of the commission assigned to the performance of the duties now cast upon such officers, assistants and employes."

In the first place, I do not believe that under the group of sections last above quoted the industrial commission has any power to add to or subtract from the qualifications which an applicant for either of the kinds of licenses mentioned in your letter must have in order to receive a license. It is true that the commission has very broad powers, but in this particular its powers are clearly limited to enforcing and administering the statutes as it finds them. For this purpose, therefore, the existence of discretion in the Commission is to be determined by the sections of the General Code relating to examinations for steam engineers licenses and examinations for boiler operators licenses.

The statutes are not exactly alike. Section 1048 applicable to steam engineers licenses, requires that each person desiring such license to pass an examination in certain subjects conducted under the rules and regulations adopted by the chief examiner which shall be uniform throughout the state. If the applicant is found proficient in the subjects in which he is examined his license must be granted to him; but such license may be revoked for fraud, insanity or addiction to the liquor or drug habits to such a degree as to render the licensee unfit to discharge the duties of a steam engineer.

I have no hesitancy in advising that the authority of the chief examiner (the industrial commission) to prescribe rules and regulations goes at least as far as indicated by the causes of revocation in section 1049. That is to say, for obvious reasons I think the commission by rule may refuse to grant a license or even an examination to a person guilty of fraud in making his application, or who is insane, or who is addicted to the liquor or drug habit to such a degree as to render him unfit to discharge the duties of steam engineer. It would be idle in such cases to require a license to be issued and then to cause it to be revoked immediately.

The question, then, arises as to whether or not the commission by its rules may add a personal disqualification other than those mentioned in section 1049 General Code. That is to say, suppose that in the opinion of the commission a man might be unfit to discharge the duties of steam engineer for some reason other than because of his lack of technical proficiency as subject to be ascertained by examination, and likewise other than insanity or addiction to liquor or the drug habit, has the commission under its inherited power to adopt rules and regulations for the conduct of examinations authority to add such qualification?

In the face of the decision in Harmon v. State, 66 O. S. 249, this question would appear to be answered in the negative. This decision, however, has been very much discredited, and there is grave doubt as to whether it states correct principles of law.

In Theobald v. State, 10 C. C. N. S. 536, the present law for licensing stationary engineers was considered and held to be constitutional, all the objections alleged in Harmon v. State under the old law having been removed. Of the provision for rules and regulations for the conduct of examinations the court, per Marvin, J., says, at page 539:

> "The same provision is found in the old act in this regard, but in the present statute there is found what is not found in the old, that the rules and regulations under which examinations shall be held shall be uniform throughout the state, and that these rules and regulations shall be adopted by the chief examiner. Now it is said that practically the objections to the old statute exist as against the new.
>
> "The court said, in the case referred to, that a district examiner could in fact make the law for his district, limited only by his will as to what shall constitute the standard of the qualification of engineers, and that this was granting legislative authority to this examiner.
>
> "Under the provisions of the present statute, as has already been shown, the rules and regulations for the examination are fixed by the chief examiner and are to be uniform throughout the state, and that seems to us clearly to make him not a legislative but an administrative officer with power only execute the statutes enacted by the general assembly. * * *"

It did not seem to occur to the court in this case that by "rules and regulations" qualifications other than those enumerated in the statute or by necessary inference therefrom could be prescribed; for the court goes on in the remainder of the opinion to point out that the very enumeration of subjects in which an examination should be had saved the amended statute from the criticism leveled at the old in Harmon v. State, supra.

In view of the history of the law providing for the licensing of steam engineers, I am of the opinion that the law is not to be so interpreted as to vest in the chief examiner, or the industrial commission as his successor, any power by rule or regulation to add to the qualifications of the applicant anything not expressed in or implied from the statute.

I might come to another conclusion were it not for such history, but that history precludes the discussion of the problem of delegation of legislative power in general, and I therefore conclude with respect to the statutes relative to the licensing of steam engineers, that the industrial commission may not refuse to grant a license to a person who has by his examination been found proficient in the subjects in which he has been examined, though, in the opinion of the commission, he may be a person "unfit to discharge the duties of a steam engineer," unless such "unfitness" arises from fraud in obtaining a license, insanity, or addiction to the drug or liquor habits.

In short, in the case of steam engineers' licenses the political action necessary to

withdraw the privileges of residents generally from the subjects of Germany who are law-abidng residents of this country is not embodied in the law in question, and authority to take it is not thereby delegated to the industrial commission.

Coming now to boiler operators I note that section 1058-1 General Code is strikingly similar in phraseology to sections 1048 and 1049 General Code, except in one point. It is therein provided that the district examiner (i. e. the industrial commission) may revoke the license of a person "who for any cause has become unfit to operate or have charge of stationary steam boilers." It will be observed that this difference is, for the purposes of this opinion, a very material one. In the case of steam engineers the only unfitness which would justify revocation of a license—and upon the reasoning of this opinion would justify refusing to issue it in the first instance—is such unfitness as would result from insanity or from the liquor or drug habits; in the case of boiler operators, however, the commission as the successor of the chief examiner may revoke —and hence refuse to issue—a license when the licensee or applicant is for any cause unfit to operate or have charge of stationary steam boilers.

The constitutionality of this provision might be seriously questioned in view of the state of the Ohio law on the general subject hereinbefore referred to, and especially in view of Harmon v. State, supra; but for our present purposes the constitutionality of this provision will be assumed, with the qualification only that the word "unfit" is not to be regarded as vesting in the commission any arbitrary power; and that the phrase "for any cause" in the same connection must be taken to mean for some cause bearing relation to the public safety the protecton of which is the great object of the law.

This being the case, the question arises as to whether the industrial commission must or may lawfully determine, if it finds such to be the fact, that a resident alien enemy is, on account of his allegiance to the enemy country and on that account alone, unfit to operate a steam boiler.

In King v. London County Council (1915) 2 K. B., 466, mandamus to compel the issuance of a moving picture license to a company a majority of whose shareholders were non-resident alien enemies was refused on the ground of *discretion* by the same court which in The Continental Tyre and Rubber Company v. Dailer (1915) 1 K. B., 893, referred to in my previous opinion to the commission, had held that the enemy character of an English corporation could not be predicated on the character of its shareholders or managers. In other words, the English court of appeals held that though the company in question was not technically an alien enemy company, yet the London County Council might in the reasonable exercise of a discretion to be exercised for the protection of the public safety refuse it a license on the ground of stock control by alien enemies.

This is the only case either in England or in this country which I have been able, in a somewhat limited research, to find upon the question. Of course the constitutional question as to the delegation of legislative power could not arise in England, but once that question is gotten over and the problem is reduced to what is the exercise of a reasonable discretion it would appear that the decision might be of some service here.

It is at least clear from the case, however, that it can not be held as a matter of law that a peaceful resident of this country who happens to be a subject of Germany is, on account of his technical allegiance, an unfit person to operate a steam boiler. The conclusion involves a weighing of evidence and the determination of facts in each individual case which the commission must make.

It is my opinion, therefore, that as to boiler operators the industrial commission is without authority to consider the fact of the German allegiance of a resident of this country as conclusively establishing the unfitness of the applicant to operate steam boilers; that the commission is of course not prohibited, as a matter of law, from determining that such allegiance does not render a person "unfit;" and that in a case where the commission is considering the fitness of a particular individual, i. e., whether or

not he may, with due regard to the public safety, be entrusted with the operation of a steam boiler, you may take his enemy allegiance into consideration, with all other facts bearing thereon.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

371.

CLASSIFIED CIVIL SERVICE—HEALTH OFFICER MAY BE SELECTED AS EXEMPT FROM SAME—SANITARY POLICEMAN MAY NOT BE SO SELECTED.

The health officer appointed by the municipal board of health is as "assistant" to such board, and may be selected as exempt from the classified civil service under paragraph "8" of section 8 of the civil service law.

The sanitary policemen appointed by such board are not "assistants" in contemplation of the provision of said section and may not, therefore, be selected as exempt from the classified service under favor of the provision of said paragraph.

COLUMBUS, OHIO, June 16, 1917.

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

GENTLEMEN:—On April 27th you addressed the following inquiry to this department:

> "In a non-charter governed city, has the board of health the legal power to exempt the health officer and sanitary policemen from the classified service of the civil service laws of the state?"

It is presumed by your inquiry that you desire to know whether the board of health has the right to select the officers in question under favor of paragraph 8, of section 8 of the Moore-Barnes law, General Code, section 486-1 et seq. The provision in question is as follows:

> "Section 486-8. * * * (a) * * * The unclassified service shall comprise the following positions which shall not be included in the classified service, and which shall be exempt from all examinations required in this act.
>
> * * * * * * * * * * *
>
> "8. Three secretaries, assistants or clerks and one personal stenographer for each of the elective state officers; and two secretaries, assistant or clerks and one personal stenographer for other elective officers and each of the principal appointive executive officers, boards or commissions, except civil service commissions, authorized by law to appoint such secretary, assistant or clerk and stenographer. * * *"

This section applies not only to state officers, but to those of the county and municipality. The appointive state officers and other elective officers than state officers are comprised in the latter division of the paragraph, as are also boards and commissions. It is seen, therefore, that this provision includes appointive state officers and state boards and also elective officers and boards and commissions whether they be properly designated as state boards and commissions or not.

That municipal boards are within the act is shown by the exception of the civil

service commission, which being in the plural must include the municipal civil service. It therefore follows that without this exception the municipal civil service commissions would be able to avail themselves of the privilege given by the act, and as such municipal civil service commissions are excepted from the term "boards and commissions" it follows in like manner that such municipal boards and commissions are likewise within the privilege of the act, from which it is demontrated that the board of health alluded to in the inquiry is within the contemplation of the act and entitled to the exemption, so that it only remains to consider whether the officers mentioned are such officers as may be so taken out of the classified service. In order that this be so they should come under the exceptions in the paragraph itself,—that is, they should be either secretaries, assistants, clerks or stenographers. By elimination, they are not stenographers, they are not secretaries or clerks. Therefore, unless they may properly be described as assistants they are not within the provisions of the act.

An assistant is one who assists, and an assistant of an officer is one who would assist such officer in the prosecution of the duties of his office. In like manner, an assistant of a board would be one who assists such board in the prosecution of its lawful duties. The assistant may not possess all the powers or have all the authority or fulfill all the requirements of his principal. This is especially true of a board, as no one but the board, properly speaking, can do the things done by it in the sense or in the manner in which it does them itself. The board acts as a body through its members and by resolutions or motions spread upon its minutes and adopted by a majority of its members in accordance with law and with lawful and proper bylaws. This is true of every organization known as a board, and in as much as the statutes permit such board to have an assistant, it follows that the assistant must do different things and act in a different manner from the board itself, which things, however, must be confined to the objects of the existence of the board. Such objects in the case of a board of health are universally known, and the health officer and the sanitary policeman are chosen by the board, under power given them by statute to select and employ them for the purpose of carrying out the duties of the board.

The health officer undoubtedly comes within the above description of an "assistant." He acts largely in an advisory capacity to the board; is generally, although not universally, a doctor; and is in respect to some matters, and in a varying degree as to different boards and different circumstances, practically almost independent in his authority in furthering the purposes for which the board exists. He stands in a confidential relation to them, and in every view and for every reason is in as high a degree an "assistant" as it is possible for a board to have.

The case of a policeman is different. His duties are entirely executive. He is entrusted with some discretion in carrying out some of the details; that is to say, if he finds premises, alleys, etc., in an unsanitary condition he issues orders and enforces them to have such matters corrected; but as to his general duties, they consist in carrying out the general regulations and specific orders of the board, and entirely in accordance with the instructions of the board and generally, also, he accepts instructions from the health officer. So that his duties are not of the same character as those of the health officer, but have a distinction therefrom that is plainly discernible.

You are, therefore, advised that the board of health may select their health officer under favor of the provisions above quoted without receiving him upon an eligible list, but as to the sanitary policeman he is in the classified civil service and must be obtained from such list or in accordance with the civil service law.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

372.

COUNTY AUDITOR—UPON INFORMATION TRANSMITTED FROM BOARD OF REVIEW—HAS NO AUTHORITY TO REVALUE REAL ESTATE ON DUPLICATE LESS THAN ITS TRUE VALUE IN MONEY —UPON SUCH INFORMATION AUDITOR MAY MAKE REVALUATION OF BETTERMENTS AND IMPROVEMENTS ON LANDS.

When the board of revision, acting under section 5604 G. C., as amended in 1917, calls to the attention of the county auditor the fact that a parcel of real estate, as such, has for a number of years been assessed upon the tax duplicate at very much less than its true value in money, the county auditor is without power to act in any respect directly upon such information; the provisions of section 5604, which assumes that he has power to take such action, not being effective in themselves to give him such power, and there being no such power under other sections of the General Code.

The county auditor has power to act upon information transmitted to him under section 5604 in the revaluation of improvements and betterments on lands, in which event his action affects only the current duplicate; and in case taxable land has been entirely omitted from the duplicate, in which event his action may affect not only the current duplicate but also any of the five preceding years unless during that time the property has changed ownership.

COLUMBUS, OHIO, June 16, 1917.

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

DEAR SIR:—I acknowledge receipt of your letter of May 12th requesting my opinion upon the following question:

> "Where a parcel of real estate has, for a number of years past, been assessed upon the tax duplicate at very much less than its true value in money, can the county auditor, under the provisions of General Code, sections 5604, 5573 and 5576, as amended, by having the matter called to the attention of the board of revision and upon the report of that board to him, and notice by him to the owner, proceed to ascertain the true value in money of such real estate for each of the preceding five years and thereupon make a subsequent addition for such preceding five years, to the amount of such portion of the true value as shall have escaped taxation during such previous years?"

The sections referred to by you as amended by legislation of 1917, now in effect, are as follows:

> "Section 5604. When the county board of revision discovers or has its attention called to the fact that, in a current year or in any year during the five years next preceding, any taxable land, building, structure, improvement, minerals, mineral rights, personal property or other taxable property in the county, has escaped taxation or been listed for taxation at less than its true value in money, the board may investigate the same and report to the county auditor all facts and information in its possession relating to the same. The county auditor shall make such inquiries and corrections as he is authorized and required by law to make in other cases in which real and personal property has escaped taxation, or has been improperly listed or valued for taxation."
>
> "Section 5573. If the county auditor discovers that any tract of land

or any lot or part of either, has been omitted, he shall add it to the list of real property, with the name of the owner, and ascertain the value thereof and place it opposite such property.

"In such case he shall add to the taxes of the current year the simple taxes of each and every preceding year in which the property has escaped taxation, not exceeding, however, five years, unless in the meantime the property has changed ownership, in which case only the taxes chargeable since the last change of ownership shall be added; or the owner thereof, if he desires, may pay the amount of such taxes into the county treasury, on the order of the auditor."

"Section 5576. Such county auditor, if he ascertains that a mistake was made in the value of an improvement or betterment of real property, or that the true value thereof was omitted, shall return the correct value, having first given notice to the owner or agent thereof, of his intention so to do."

Section 5604 G. C. expressly authorizes and directs the county board of revision, under the circumstances therein named, to report to the county auditor any facts and information in its possession to the effect that any "taxable *land*" as well as any "building, structure, improvement, minerals, and mineral rights" has "been listed for taxation at less than its true value in money." The county auditor is then authorized to make "such inquiries and corrections as he is authorized and required by law to make in other cases in which real and personal property has escaped taxation, or has been improperly listed or valued for taxation." That is to say, so far as section 5604 is concerned, it would appear that the legislature in enacting it assumed that the county auditor would be authorized to make inquiries and corrections in cases where real property, consisting of land only, or of land and buildings together, had been improperly listed or valued for taxation.

However, neither of the other two sections referred to by you gives to the county auditor any power to revalue land as such. Under section 5573 he may place a valuation upon any tract of land, etc., which has been omitted from the duplicate, going back five years, unless the property has in the meantime changed ownership. Under section 5576 he may correct a mistake in the valuation "of an improvement or betterment of real property," or supply by original valuation an omission in the assessment of such improvement or betterment; but he may not under this section revalue real estate itself as a whole, i. e., the land irrespective of the improvements or betterments.

I know of no other sections of the General Code at present in force which give the county auditor power to revalue land as such except when it has been omitted from taxation entirely. Section 5604 can not be given such effect. It is true that it purports to confer independent power upon the county auditor in that it requires him to "make such inquiries and corrections as he is authorized and required by law to make in other cases." That is to say, this form of expression might seem to imply that the power of the county auditor to act upon information furnished him by the board of revision is separate and distinct from the power which he has to act upon his own initiative "in other cases." This inference would be justified if the clause in question should stop with the phrase "in which real and personal property has escaped taxation" but it does not do so. In the form in which it stands it merely authorizes the auditor, upon the instigation of the board of revision, to make such inquiries and corrections as he is authorized to make in other cases in which (for present purposes) real and personal property has been improperly listed or valued for taxation, but he is not authorized by law to make any inquiries and corrections in other cases where real property, as distinguished from improvements and betterments thereon, has been improperly valued for taxation.

I am of the opinion therefore that the power of the county auditor under the sections quoted by you is limited to the revaluation of improvements and better-

ments, as to the valuation of which he finds that a mistake was made at the last assessment thereof. Under this section his action can affect only the current duplicate. If the property has escaped taxation altogether then under section 5573 he may go back for five years, or until the last change of ownership, as suggested by your question.

That the power of the auditor extends thus far is, I think, reasonably clear when it is taken into account that in original section 5576 the power to correct a mistake in the value of an improvement or betterment was vested in the personal property assessor. It is clear under this section that the power extended virtually to every valuation, i. e., the correction of fundamental errors as distinguished from clerical errors; the reasons for this change are, I think, sufficiently plain. By amending section 5576 in 1917 the general assembly, consistently with its policy respecting other sections, has merely transferred this power to the county auditor, the nature of the power remaining unchanged.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

373.

ENGINEER—HOW TO BE EMPLOYED UNDER SECTION 2411 TO ASSIST COUNTY SURVEYOR—SECTION 2411 G. C. DOES NOT AUTHORIZE EMPLOYMENT OF ENGINEER TO SECURE DATA TO ENABLE HIM TO TESTIFY AS EXPERT WITNESS IN CONSERVANCY COURT.

Section 2411 G. C. authorizing the employment of an engineer to assist the county surveyor, contemplates employment in such manner as will make the engineer and his assistant engineer, rodmen, inspectors, etc., employes of the county, and does not authorize a contract with an independent contractor whereby such contractor is to furnish his own assistants and execute the work entirely in accordance with his own ideas, without being subject to the orders of the county commissioners.

Neither does such section authorize the employment of an engineer for the purpose of securing data to enable him to testify in a conservancy court concerning the advisability of adopting plans outlined by the conservancy board for flood protection in the district.

COLUMBUS, OHIO, June 16, 1917.

HON. R. A. KERR, *Prosecuting Attorney, Troy, Ohio.*

DEAR SIR:—On May 14, 1917, I rendered you an opinion No. 243 in connection with the contract of the county commissioners of Miami county with John W. Hill for engineering services. In that opinion I held that because no certificate was filed by the auditor under section 5660 G. C, the contract was void and the engineer could not compel the commissioners to pay the balance of $545.00 due. In that opinion I stated:

> "From these authorities it is clear that inasmuch as the county auditor did not file the certificate under section 5660 G. C at the time the commissioners entered into this contract with Mr. Hill, they (the county commissioners) did not enter into a legal agreement and the balance of $545.00 cannot, therefore, be legally paid Mr Hill.
>
> "The above being true, discussion of whether or not county commissioners might have had the power to enter into said contract, as set out herein, is unnecessary."

I am in receipt of a communication from George T. Poor, attorney for Mr. Hill, in which he calls my attention to section 2413 G. C. and states that the auditor's certificate to this contract was not necessary; this upon the theory that the contract was made under section 2411 G. C.

It was my view at the time opinion No. 245 was written that the contract could not be made under section 2411 and that inasmuch as it had to be made under other authority, if it could be made at all, the auditor's certificate was necessary, and not being filed its omission was fatal.

Since the receipt of Mr. Poor's letter I feel that a consideration of his objections call for an opinion and I wish to address to you, therefore, this communication upon the question of whether or not a contract could have been made under section 2411 G. C.

Section 2411 G. C. reads:

> "When the services of an engineer are required with respect to roads, turnpikes, ditches or bridges, or with respect to any other matter, and when on account of the amount of work to be performed, the board deems it necessary, upon the written request of the county surveyor, the board may employ a competent engineer and as many assistant engineers, rodmen and inspectors as may be needed, and shall furnish suitable offices, necessary books, stationery, instruments and implements for the proper performance of the duties imposed on them by such board."

Section 2413 G. C. reads:

> "The board of county commissioners shall fix the compensation of all persons appointed or employed under the provisions of the preceding sections, which, with their reasonable expenses shall be paid from the county treasury upon the allowance of the board. No provisions of law requiring a certificate that the money therefor is in the treasury shall apply to the appointment or employment of such persons."

From a reading of section 2411 it is at once apparent that the employment contemplated therein is such as will give the county commissioners a continuing jurisdiction over those employed. In other words, it intended that those employed under its provisions should be employes of the county and not independent contractors.

An independent contractor is defined in 26 Cyc., page 970, as follows:

> "One who contracts to do a specific piece of work, furnishing his own assistants and executing the work entirely in accordance with his own ideas, or in accordance with the plan previously given to him by the person for whom the work is done, without being subject to the orders of the latter in respect to the details of the work, is an independent contractor."

Surely this is not the kind of employment furnished by section 2411 G. C. Attention is called to the following provisions of the act:

> "The board may employ a competent engineer and as many assistant engineers, rodmen and inspectors as may be needed, and shall furnish suitable offices, necessary books, stationery, instruments and implements for the proper performance of the duties imposed on them by such board."

Section 2413 G. C., originally a part of the same act, provides in part:

> "The board of county commissioners shall fix the compensation of all

persons appointed or employed under the provisions of the preceding sections, which, with their reasonable expenses shall be paid from the county treasury upon the allowance of the board."

These provisions make it plain that the engineer contemplated by these sections is not an independent contractor who may furnish his own assistants and execute the work entirely in accordance with his own ideas, without being subject to the orders of the county commissioners, but that these sections authorize the appointment of such an engineer as will be a county employe, performing such duties as the county commissioners see fit to impose upon him from time to time, aided, if necessary, by assistant engineers, rodmen and inspectors also appointed or employed by the county commissioners, and doing the work under the supervision of the county commissioners from an office furnished by the commissioners and with instruments, etc., provided by the commissioners as well. No where in the act can any authority be found for an agreement with an independent contractor whereby such contractor furnishes his own assistants and executes the work entirely in accordance with his own ideas.

Neither do I think the subject matter of the contract falls within the terms of section 2411. Section 2411 G. C. provides in part: that an engineer may be employed by the county commissioners "when the services of an engineer are required with respect to roads, turnpikes, ditches or bridges or with respect to any other matter."

In Lewis' Sutherland Statutory Construction, volume II, page 814, section 422, it is stated:

"When there are general words following particular and specific words, the former must be confined to things of the same kind."

This doctrine has been accepted by the courts of this state in many decisions which may be cited.

"General words, following particular and specific words, must, as a general rule, be confined to things of the same kind as those specified." Shultz v. Cambridge, 38 O. S., 659.

See State v. Johnson, 64 O. S., 270.

The plain effect of these authorities on section 2411 G. C. is to make us view it as though it read as follows:

When the services of an engineer are required with respect to roads, turnpikes, ditches or bridges, or with respect to any other SIMILAR matter.

The question then is, do services, such as were contracted for in this instance, come within this description? The language of the section would indicate that the legislature meant to authorize the employment of an engineer for services in connection with the construction or improvement of roads, turnpikes, ditches, bridges or other similar work within the county. It further indicates that it has reference to such work as the county surveyor will ordinarily be compelled to do but is unable to perform because of the amount of the work to be done.

Work to be done in this case was not construction or repair work within the county but engineering work to be done in connection with two other counties for the purposes of opposing the plan of the Miami conservancy district. A reading of the resolution and the contract clearly shows that the whole object of the employment was to gather information upon which to base arguments for the substitution of a flood prevention plan without dams for that with dams adopted by the Miami conservancy

board. It was not such county work as would come within the scope of the official duties of the surveyor but was work to be done in connection with the question of flood prevention, not as a county, but as a district proposition, and upon a scale and in a manner surely not dreamed of by the legislature that enacted section 2411 General Code.

From these considerations I am of the opinion that the county commissioners were without authority to make this contract under section 2411 General Code and that if they had any authority at all to make the contract, such contract was subject to the provisions of section 5660 General Code and the auditor's certificate not being furnished under this section the omission was fatal to the legality of the contract.

Yours very truly,
JOSEPH MCGHEE,
Attorney-General.

374.

COUNTY BOARD OF EDUCATION—MAY CREATE NEW DISTRICT BY UNITING VILLAGE AND RURAL DISTRICT—A REMONSTRANCE FILED AGAINST SUCH ACTION—SHOULD CONTAIN NAMES OF MAJORITY OF ELECTORS OF ENTIRE NEW DISTRICT.

Where a county board of education created a new school district and a remonstrance is filed against such action, such remonstrance must contain the name of a majority of the qualified electors of the entire new district.

A county board of education may create a new district by uniting a village and a rural district.

COLUMBUS, OHIO, June 16, 1917.

HON. FRANK B. PEARSON, *Superintendent of Public Instruction, Columbus, Ohio.*

DEAR SIR:—You submit for my opinion the following statement of facts:

> "The county board of education in Marion county, Ohio, acting under the authority of section 4736 G. C., created a new school district by uniting a village school district and a rural school district. In accordance with a clause of section 4736 'said arrangement shall be carried into effect as proposed, unless, within thirty days after the filing of such notice with the board of education, a majority of the qualified electors of the territory affected by such order of the county board, file a written remonstrance with the county board against the arrangement of such districts so proposed.'
>
> "In order to nullify the action of the county board, is it necessary that a remonstrance be signed by a majority of the electors residing in the newly created district as a whole; or will a majority of the electors residing in either of the original school districts nullify said action?"

In addition to the above I have also ascertained that the village district referred to in your communication had, at the time the new school district was created, a tax valuation of less than $500,000 and it was therefore necessary to delay answering your inquiry until the question as to whether such village school district was dissolved according to law, was decided for from that fact other questions in the case will be determined.

This department held in opinion No. 341, rendered June 6, 1917, "that a village district which once existed and whose tax valuation falls below $500,000, is not by that fact alone dissolved." So that when the county board of education of Marion county, acting under authority of section 4736 G. C., created a new school district by uniting a village school district and a rural school district, it was acting within the scope of its authority.

Said section 4736 G. C. provides in part:

> "Said arrangements shall be carried into effect as proposed unless within thirty days after the filing of such notice with the board or boards of education a majority of the qualified electors of the territory *affected* by such order of the county board file a written remonstrance with the county board against the arrangement of the school district so proposed."

You inquire just what is meant by the territory affected. But one thing, it seems to me, can be meant by said language. The territory in the village district was just as much affected as the territory in the rural district. It was not a transfer of one district to another, but a creating of a new district out of the two and that this can be done under the above section was decided by the court of appeals of Fairfield county, Ohio, April 26, 1917, in the case of Dillon Fisher v. J. W. Whittus, et al., in which case the county board of education created the Liberty Union village school district from the Basil village school district and the Baltimore village school district, and injunction was asked to prevent such action. The plaintiffs claim that the county board of education was wholly without authority or power, statutory or otherwise, to create a new school district out of two village school districts and contended that the county board of education had no jurisdiction to dissolve village districts and create a new district therefor. But the court held:

> "The county board of education has full and complete power and authority to create a new district from the territory embraced in them. No claim is made in the amended petition that advantage was taken by the electors of the new school district of the provisions of General Code section 4736, 'which said arrangements shall be carried into effect as proposed unless within thirty days after the filing of such notice with the board or boards of education a majority of the qualified electors of the territory affected by such order of the county board file a written remonstrance with the county board against the arrangement of the school district so proposed.' From a careful examination of section 4736 General Code, which further provides 'the county board of education is hereby authorized to create a school district from one or more school districts or parts thereof.' we are fully convinced that the county board of education has full power and authority over village districts and may create a new district by consolidating two village districts. This language is clear, plain and explicit and certainly gives to the county board full and complete power in the premises."

It is determined from the above language quoted from said decision that the county board not only has a right to create a new school district from two districts over which it has jurisdiction, but it is also suggested that the electors of the new school district failed to take advantage of the remonstrance proposition which is provided for in said section 4736 G. C. and the conclusion is clear that all the territory of the new district is "territory affected by such order of the county board" and that the limits of the entire district must be taken into consideration in ascertaining a majority of the qualified electors of the territory. Whatever construction is made applicable in relation to village districts over which a county board of education had

jurisdiction would, of course, apply to a village and a rural district over which the county board has jurisdiction as in your case.

Answering your question specifically, then, I advise you that it is necessary that a remonstrance be signed by a majority of the electors residing in the newly created district as a whole in order to nullify the action of the county board in the creation of a new district.

Yours very truly,
JOSEPH MCGHEE,
Attorney-General.

375.

CITY COUNCIL—MAY PROVIDE FOR CREATION OF BOND FUND—AND MAY PROVIDE IN BOND ORDINANCE HOW SAME SHALL BE EXPENDED—MEMBERS OF COUNCIL ELECT ALL OF THE EMPLOYES THEREOF.

A city council may authorize the creation of a bond fund for the purpose of extending, enlarging and improving a municipal water works system and may provide in the bond ordinance that such fund shall be expended only for the purpose of paying the cost and expense of constructing such water lines as council may specifically provide by resolution.

Under the provisions of section 4210 G. C. the members of council elect all of the employes thereof no matter whether they are called assistants to the clerk of council or designated by some other name.

COLUMBUS, OHIO, June 16, 1917.

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

GENTLEMEN:—Under date of May 9, 1917, you submitted for my opinion the following propositions:

> "(1) When council by ordinance has authorized bond issues for the purpose of extending, enlarging and improving the water works system, such ordinance of authorization containing the following clause:
>
> " 'Section 5. That the proceeds of the sale of said bonds shall be placed in the city treasury to the credit of the water works fund and shall be disbursed upon proper vouchers for the payment of the cost and expense of constructing water lines as authorized by resolution of council and for no other purpose whatever,'
>
> "may council later, by such resolution, restrict the laying of water pipe to certain streets and alleys, the cost thereof being paid from the proceeds of the bond sale authorized by ordinance, first mentioned, or has the director of public service the discretion as to the streets and alleys in which water pipe may be laid?
>
> "(2) In view of the provisions of section 4210 G. C., has council the authority to select the assistants to the clerk of council, or may said clerk select his own assistants?"

The first question which you submit has reference to a situation in which a city council has created a general bond fund for the purpose of extending, enlarging and improving the water works system thereof but has provided in the ordinance authorizing the issue of bonds that said fund shall be expended only for paying the cost and expense of constructing such extensions of the water lines as the city council may

specifically authorize by resolution. You are desirous of knowing, therefore, whether the council or the service director of a city has the authority to determine on what particular streets water pipes shall be laid.

Section 3956 G. C. provides:

> "The director of public service shall manage, conduct and control the water works, furnish supplies of water, collect water rents, and appoint necessary officers and agents."

Section 3961 G. C. provides in part:

> "Subject to the provisions of this title, the director of public service may make contracts for * * * the enlargement and repair * * * manufacture and laying down of pipe * * * and for all other purposes necessary to the full and efficient management and construction of water works."

Section 4328 G. C. provides:

> "The director of public service may make any contract or purchase supplies or material or provide labor for any work under the supervision of that department not involving more than five hundred dollars. When an expenditure within the department, other than the compensation of persons employed therein, exceeds five hundred dollars, such expenditure shall first be authorized and directed by ordinance of council. When so authorized and directed, the director of public service shall make a written contract with the lowest and best bidder after advertisement for not less than two nor more than four consecutive weeks in a newspaper of general circulation within the city."

Section 4240 G. C. provides:

> "The council shall have the management and control of the finances and property of the corporation, except as may be otherwise provided, and have such other powers and perform such other duties as may be conferred by law."

Section 4211 G. C. provides:

> "The powers of council shall be legislative only, and it shall perform no administrative duties whatever and it shall neither appoint nor confirm any officer or employe in the city government except those of its own body, except as is otherwise provided in this title. All contracts requiring the authority of council for their execution shall be entered into and conducted to performance by the board or officers having charge of the matters to which they relate, and after authority to make such contracts has been given and the necessary appropriation made, council shall take no further action thereon."

Section 3956 supra vests in the city service director the authority to manage, conduct and control its water works system. Section 3961 supra authorizes him to make contracts with reference to the management and construction of said water works system, subject to the provisions of law relating to the entering into of agreements by the director of public service of a city. Section 4328 supra provides that the director of public service may make any contract or purchase supplies or material

or provide labor for any work under the supervision of his department not involving more than $500.00, but requires that before he shall make an expenditure, other than for the compensation of persons employed in his department, in excess of $500.00, he shall first be authorized and directed by ordinance of council, and when so authorized and directed, shall make a contract only with the lowest and best bidder after proper advertisement. Section 4240 supra places in the city council the management and control of the finances and property of the corporation except as may be otherwise provided. Section 4211 supra makes the powers of council legislative only and forbids it performing any administrative duties except as is specifically provided. Said section also goes on to state that after council has authorized the making of a contract for a city and has made the necessary appropriation therefor, the board of officers having charge of the matters to which said contract relate shall execute same and conduct them to performance and that council shall take no action further than the authorization and appropriation of funds therefor.

From the foregoing provisions of the General Code it can be gathered that it is necessary for the council of a city to make an appropriation of funds before a valid contract can be entered into by the administrative officials of a city having charge of the matter or matters to which said contract relates and that when the expenditure which will be made in pursuance of said contract is in excess of $500.00, said council must specifically authorize and direct the particular officer or board having charge of same to enter into said contract.

The particular facts that you state do not disclose whether or not the expenditure for the water lines in question will involve the expenditure of an amount in excess of $500.00 and hence it is impossible to determine from them whether it is necessary for the director of public service to be authorized and directed to make a contract for said water mains extension. However, the facts do show that the moneys received from said issue of bonds were ordered placed in a general water works fund to be used for the extension, enlargement and improvement of the water works system by constructing such water lines as the council might authorize by resolution. I see no reason why the council might not provide that this bond fund could only be expended for paying the cost and expense of constructing such specific extensions to the water works system as it might see fit to authorize by resolution. The council of a city is vested with the lawmaking power of such municipality, and the management and control of the finances and property of such city is placed in its control except in so far as administrative duties with respect to same are in the hands of the executive officers of the city. The council provides the funds that are necessary to take care of the expenditures of the city and it is right and proper that it should exercise control over the purposes for which the money is to be spent, and the mere fact that it had decided to authorize the director of public service to spend this bond fund for the making of only such water extensions as it might specifically provide for would not mean that the council had gone beyond its lawmaking power and was endeavoring to exercise some of the executive authority of the director of public service.

The following language from the opinion of Summers, Judge, in The City of Akron v. Dobson, 81 O. S. 66, at page 77, sustains the conclusion that I have reached with respect to the power of the city council in regard to its control over appropriations:

> "The council provides the money for carrying on the government, either by a levy of taxes or an issue of bonds, and it is proper that it should have some control over the expenditures, but considering these sections in the light of the purpose of the code we think their requirements are met by an ordinance making an appropriation and stating generally the purpose for which it is made, and authorizing the directors to enter into contracts to effect that purpose. *If the directors do not have or retain the confidence of the council, it is in the power of the council to be more specific.*"

Answering your first question specifically, then, I am of the opinion that where a city council has created a bond fund for the purpose of extending, enlarging and improving its water works system, it may provide in the bond ordinance that such fund shall be expended only for the laying of water lines in such streets and alleys as council may provide by resolution, and that the city council is vested with the authority to determine what specific water lines shall be constructed.

Your second inquiry is whether under the terms of section 4210 G. C. the city council or the clerk of council select the assistants to the clerk of council.

Section 4210 G. C. reads as follows:

> "Within ten days from the commencement of their term, the members of council shall elect a president pro tem, a clerk, and such other employes of council as may be necessary, and fix their duties, bonds and compensation. The officers and employes of council shall serve for two years, but may be removed at any time for cause, at a regular meeting by a vote of two-thirds of the members elected to council."

It seems clear from the provisions of the foregoing section that the members of council themselves elect such employes as are necessary for the needs of council. Specific provision is made for the election of a clerk and a president pro tem, but nothing is said as to any other specific positions. Hence, we must presume that the determination of what other employes are needed is left to the discretion of council. I cannot see that it makes any difference whether these employes are called assistants to the clerk of council, or whether they are called by some other names in so far as their selection is concerned, as the plain wording of the statute shows clearly that the power of selecting them is vested in the members of council.

Answering your second question specifically, then, I am of the opinion that the members of council elect all of the employes thereof no matter whether they are called assistants to the clerk of council or whether designated by some other name.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

376.

VILLAGE COUNCIL—POWER TO SEPARATE LABOR AND MATERIAL REQUIRED FOR STREET IMPROVEMENT—AND HIRING EMPLOYES DIRECT.

A village council has no right to separate the labor and material required in the improving of a street, where the cost of the improvement will exceed $500.00, and let the contract for the material needed at public bidding and then do the labor part of some by hiring the necessary employes directly, since such a procedure would violate the purpose and intent of section 4221 and 4222 G. C., which contemplates a public letting in such cases.

COLUMBUS, OHIO, June 16, 1917.

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

GENTLEMEN:—Under date of May 8, 1917, I received a communication from Hon. Thomas Eubank, village solicitor of New Madison, Ohio, requesting my opinion on the following question:

"The engineer's estimate for resurfacing, repairing, and improving one of our streets in about $1,100 for materials and $1,000 for labor.

"The council wants to do the work directly (section 3939 General Code as amended, vol. 106, page 538, clause 22).

"Can they do this, letting out the contract for materials alone, or does section 4221 require them to let out contract for both labor and materials?"

Inasmuch as the request submitted by Mr. Eubank has reference to a question of public and great general interest I am taking the liberty of setting forth my views with respect to same in an opinion addressed to your bureau.

Section 4221 G. C. reads as follows:

"All contracts made by the council of a village shall be executed in the name of the village and signed on behalf of the village by the mayor and clerk. When any expenditure other than the compensation of persons employed therein, exceeds five hundred dollars, such contracts shall be in writing and made with the lowest and best bidder after advertising for not less than two nor more than four consecutive weeks in a newspaper of general circulation within the village. The bids shall be opened at twelve o'clock noon on the last day for filing them, by the clerk of the village and publicly read by him."

The above section provides in effect that when any expenditure of a village exceeds five hundred dollars, except the compensation of persons employed by it, it shall only be made after a contract has been entered into with the lowest and best bidder after proper advertising therefor.

This section contemplates, then, that there are two classes of expenditures in excess of five hundred dollars as far as the powers of the village are concerned, one being expenditures for personal services and the other expenditures for other than personal services. No difficulty arises in determining the power and authority of the village council, which represents the village of course, in entering into contracts in excess of five hundred dollars where the thing contracted for its personal services sure and simple, for it is clear that in such a case no advertising is required nor is it necessary to contract with the lowest and best bidder. However, where the work or thing contracted for embraces both labor and material, the question then arises as to whether or not the village council may separate the labor and material and consider the labor necessarily involved in the doing of the work in question under the head of personal services and thereby insist that it is not necessary for it to advertise for bids for the doing of the labor part of the work.

Section 4222 G. C., which throws some light upon this question, reads as follows:

"Each such bid shall contain the full name of every person or company interested in it and shall be accompanied by a sufficient bond or certified check on a solvent bank that, if the bid is accepted, a contract will be entered into and the performance of it properly secured. If the work bid for embraces both labor and material, they shall be separately stated, with the price thereof. The council may reject any and all bids. The contract shall be between the corporation and the bidder, and the corporation shall pay the contract price in cash. When a bonus is offered for completion of contract prior to a specified date, the council may exact a prorated penalty in like sum for each day of delay beyond the specified date. When there is reason to believe there is collusion or combination among bidders, the bids of those concerned therein shall be rejected."

It is noted from an examination of the provisions of the last mentioned section that the law makes provision for public bidding on work which embraces both labor and material and that it requires that bids for work of such character shall separately state the labor and material embraced in said work with the price bid therefor. Such a requirement, which is apparently mandatory in character, indicates to my mind the intention of the legislature to require the letting at public bidding of all contracts in excess of five hundred dollars for the doing of work that embraces both labor and material, and negatives any idea that the village council might have the right to separate the labor and material and let a contract for the material at public bidding and then do the actual labor required by the hiring of the persons required, although their compensation would be in excess of five hundred dollars.

The provisions of the General Code which require the letting of contracts in excess of five hundred dollars at public bidding were enacted for the purpose of protecting the taxpayer and preventing fraud and collusion in the expenditure of public funds and with the view also to having public work done on a competitive basis which would insure the doing of public work at the lowest price possible and give all persons interested a chance to bid on same.

I am therefore of the opinion that the village council would have no right to separate the labor and material required in the improving of a street, where the cost of the improvement will exceed five hundred dollars, and let the contract for the materials needed at public bidding and then do the labor part of same by hiring the necessary employes directly, since I feel that such a procedure would be a violation of the purpose and intent of sections 4221 and 4222, supra, which contemplate a public letting in such cases.

In rendering this opinion I am invoking the same principles which caused one of my predecessors, Hon. Timothy S. Hogan, to reach a similar conclusion with respect to the power and authority of a city under a like state of facts, in an opinion rendered under date of July 9, 1913, to Hon. W. S. Jackson, city solicitor of Lima, Ohio, found in vol. II of the annual report of the attorney-general for the year 1913, page 1520.

I have forwarded a copy of this opinion to Hon. Thomas Eubank, village attorney, at New Madison, Ohio.

Very truly yours,
JOSEPH McGHEE,
Attorney-General.

377.

UNSALARIED INTERNE SERVICE—RESOLUTION OF STATE MEDICAL BOARD IN REGARD THERETO—NOT IN CONFLICT WITH SECTION 1236.

Resolution of state medical board in regard to unsalaried interne service not in conflict with section 1286 *G. C.*

COLUMBUS, OHIO, June 16, 1917.

HON. HOWELL WRIGHT, *Member Ohio Senate, Cleveland, Ohio.*

DEAR SIR:—I am in receipt of your communication of April 17th, 1917, as follows:

> "As a member of the legislature interested in proposed legislation, I desire to ask the opinion of the attorney-general relative to a resolution adopted by the state medical board, and the interpretation of certain terms contained in the same by the state medical board.

"The resolution and the questions are contained in the enclosed copy of my letter to the state medical board, under date of January 12, 1917. The interpretation of the terms in accordance with the questions asked is contained in the enclosed copy of a letter from the secretary of the state medical board, under date of January 19th. The approval of the interpretation as given by the secretary of the board in this letter is contained in the enclosed copy of a letter from the secretary under date of April 6th.

"I desire to address to you the same questions as contained and explained in my letter of January 12th, and to ask your interpretation of the terms "salaried" and "unsalaried" interne service. In explanation I might add, can board and lodging or board and lodging plus any one of the items enumerated in my letter of January 12th, given to an interne in exchange or return for his services rendered in a hospital as such, be properly considered a fee or compensation of any kind, direct or indirect? This quotation is from section 1286 of the medical practice act."

Your letter of January 12, 1917, to the state medical board is as follows:

"DR. GEORGE H. MATSON, *Secretary, State Medical Board, Columbus, Ohio.*

"DEAR DR. MATSON:—The state medical board has adopted the following resolution:

"WHEREAS, the state medical board considers hospital interneship as furthering the better medical education of prospective practitioners.

"BE IT RESOLVED—That unsalaried interne service shall be considered as a part of the medical education course, and holders of such interne appointments shall not be required to be licensed in Ohio during their term of service, provided such internes at the time of their appointment file with the secretary of this board their respective preliminary and medical qualifications, the date and term of the service and the name of the hospital,

"BE IT FURTHER RESOLVED—That salaried interne service shall be considered as the practice of medicine and the holders of such interne appointments shall be required to secure licenses in Ohio, and

"BE IT FURTHER RESOLVED—That all previous rulings of this board in conflict with these resolutions are hereby rescinded.

"The executive committee of the Cleveland hospital council has considered this resolution and instructed its secretary to address the following communication to the state medical board. As the hospitals are seriously concerned with the action taken the board is urged to reply to the questions asked at the earliest possible moment—if possible before the next regular meeting of the board, which I understand takes place in February.

"In its resolution the board makes the distinction between unsalaried interne service and salaried interne service and requires that holders of unsalaried interne appointments shall not be required to be licensed, but that holders of salaried interne appointments must be licensed. In general the question as raised by the resolution referred to and upon which the council seeks further light is, How are we to interpret "salaried" and "unsalaried?" What shall be the basis of distinction between these two classifications of interne service?

"As you undoubtedly know, hospitals have different plans for compensating internes for service rendered. Practically all hospitals give board and lodging and laundry. In addition some provide a stipulated number of white uniforms each year. Some make cash allowances for incidental expenses, while certain others given in addition to board and lodging certain instruments such as a stethoscope, hammer, scissors, etc.

"The question of grave concern to the hospitals, as raised by your resolution, is this, Does the state medical board consider these items, individually and collectively, given by hospitals to internes in exchange or return for their services rendered in the hospitals as such, as salary, fee or compensation of any kind, direct or indirect? It may be stated in another way: In what class of service, salaried interne service or unsalaried interne service shall the hospital place an interne who receives board and lodging or board and lodging plus any one of the items enumerated above in exchange or return for his services rendered in the hospital as such? You will probably note at once that the resolution of the board has raised a very important hospital question and will appreciate the necessity of an early reply. In addition may I say that the interpretation requested is likely to have important bearing upon proposed legislation now under consideration."

Your question resolves itself into this, can the receipt of board, lodging, laundry, uniform, instruments, and allowance for incidental expenses from a hospital by holders of interne appointments be considered as a practice of medicine within the meaning of section 1286 G. C.

Section 1286 G. C. provides as follows:

"A person shall be regarded as practising medicine, surgery or midwifery, within the meaning of this chapter who uses the words or letters 'Dr.,' 'Doctor,' 'Professor,' 'M. D.,' 'M. B.,' or any other title in connection with his name which in any way represents him as engaged in the practice of medicine, surgery or midwifery, in any of its branches, or who examines or diagnoses for a fee or compensation of any kind, or prescribes, advises, recommends, administers or dispenses for a fee or compensation of any kind, direct or indirect, a drug or medicine, appliance, application, operation or treatment of whatever nature for the cure or relief of a wound, fracture or bodily injury, infirmity or disease. The use of any such words, letters or titles in such connection or under such circumstances as to induce the belief that the person who uses them is engaged in the practice of medicine surgery or midwifery, shall be prima facie evidence of the intent of such person to represent himself as engaged in the practice of medicine, surgery or midwifery."

It will be necessary here to determine just what is meant by a fee or compensation. Bouvier's Law Dictionary defines fee as follows:

"A reward or wages given to one for the execution of his office or for professional services, as those of a counsellor or physician."

19 Cyc., 462, defines fee as follows:

"A charge or emolument; a compensation for particular acts or services; the term is distinguished from wages or salary in that it refers to compensation for particular acts, whereas wages or salary refer rather to compensation for work during a definite period of time."

The court in the case of Winona & St. Paul R. R. v. Denman, 10 Minn., 267 defines compensation as follows:

"The primary significance of the word compensation is equivalence and the second or more common meaning something given or obtained as an equivalent."

The court in the case of State v. Sheldon, 111 N. W. 372 (Neb.), held:

> "To compensate is to make a suitable reward for services. The word as used by the makers of the constitution relating to officers means a compensation or reward paid in return for the performance of an official duty."

The court in the case of Frizzell v. Holmes, 115 S. W. 246 (Ky.), held:

> "Compensation in its ordinary acceptation applies not only to salaries but to compensation by fees for specific services, etc."

Do any of the items mentioned in your communication come within these definitions of the words "compensation" or "fee"? Are any of these items furnished to the interne given to him to compensate him for his labor, or as a recompense for his services? I think not. There is a different reason, it seems to me, why the hospitals furnish these items to their internes; for instance, board and lodging is furnished, not as compensation, but is given so that the interne will be at the hospital at all times. The very nature of his duties requires this so that he may be there to attend to any emergency that may arise. Other items are given him to save him from the extraordinary expense he would be put to by reason of his employment. A fee or compensation, to my mind, implies something more than merely repaying one for the expense he has been put to in the service of another, or given to him with a view of saving him from expense while in the service of another. A fee or compensation implies a net gain of something of value, money, over and above such expense.

Answering your question specifically, I am of the opinion that board, lodging laundry, instruments, uniforms and allowance for incidental expenses, given to holders of interne appointments, cannot be construed to be salary under the resolution of the state medical board, herein quoted, or the receipt of the above mentioned items cannot be considered as a practice of medicine within the meaning of section 1286 G. C.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

378.

WHEN STATE ACQUIRES TITLE TO PROPERTY UPON WHICH THERE IS A LIEN FOR TAXES—LIEN BECOMES MERGED IN LARGER TITLE —COUNTY AUDITOR NOT AUTHORIZED TO PUT PROPERTY ON DELINQUENT LIST WHEN TITLE IS IN STATE.

1. *The lien imposed by section* 5671 *G. C. upon real property for taxes thereon is that of the state, and when thereafter the state acquires the fee simple title to such property the lien for such taxes is merged in the larger title of the state and thereby becomes lost.*

2. *The county auditor is not authorized to put upon the delinquent land list property the title to which is in the state, and a tax sale made by him of such property is wholly void and confers no rights upon the purchaser against the state.*

COLUMBUS, OHIO, June 16, 1917.

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

DEAR SIR:—I am in receipt of a letter from you under date of May 9, 1917, with

which you enclosed a communication received by you from Messrs. Hedges, Hoover & Tingley, attorneys at law, Columbus, Ohio, apparently making some claim on behalf of Mr. T. B. Miller by reason of the purchase by him of a tax title on the south half of inlot No. 152 in the village of Spencerville, Allen county, Ohio, after the property had been conveyed to the state of Ohio by Michael Connaughton and wife. The letter of the attorneys is as follows:

> "On the 11th day of February, 1913, Mr. T. B. Miller purchased the south half of inlot No. 152 in Spencerville, Allen county, Ohio, for taxes for the year 1911 and simple taxes for the year 1912; this property was purchased for the full amount of the taxes $28.35.
>
> "We understand from the auditor of Allen county, that this property was purchased by the state of Ohio from Michael Connaughton on July 15, 1911, and that the deed was filed and recorded April 19, 1912. As far as third persons are concerned, this transfer took effect on the 19th day of April, 1912, and for that reason the taxes for the years 1911 and 1912 are a lien on the property from the day preceding the second Monday of April. After the recording of this deed there would be no taxes, but prior to that time the taxes would be a lien.
>
> "We would be glad to take this matter up with you at your earliest convenience."

In your communication, after stating the facts with reference to the conveyance of this property to the state of Ohio and the transfer and record of the deed therefor, you set out the warranty clause of said deed, in part, as follows:

> "that the title so conveyed is clear, free and unincumbered and further that he will warrant and defend the same against all claim or claims of all persons whomsoever, save and except the taxes and assessments coming due and payable in December, 1911, and thereafter. Those are assumed by the grantee in addition to the consideration hereinbefore mentioned."

From the facts above stated it appears that at the time this property was conveyed to the state of Ohio, to wit, on July 15, 1911, said property was subject to the lien of the state for the undetermined taxes for the year 1911.

With respect to this question section 5671 General Code provides as follows:

> "The lien of the state for taxes levied for all purposes, in each year, shall attach to all real property subject to such taxes on the day preceding the second Monday of April, annually, and continue until such taxes, with any penalties accruing thereon, are paid."

It is obvious that this lien is none the less the lien of the state by reason of the fact that such taxes are collected by local county officials, nor of the further fact that such taxes when collected are distributable in part to local subdivisions, whether county, township, school district or municipality.

Wasteney v. Schott, 58 O. S., 410, 415.

The court in its opinion in this case says:

> "Revenues are essential to the maintenance of the state and the execution of its governmental functions. Taxation is a recognized constitutional and lawful means of raising such revenues for most, if not all public needs;

and the courts will take notice that general taxes levied by the state directly, or through local agencies to which it has delegated that power, constitute a source of revenue for use in the due performance of the functions of the state government. Whether voluntarily paid, or collected by suit, they go partly to the general funds of the state for its disbursement in the administration of public affairs, and are in part disbursed in the due course of local administration by officers exercising the delegated powers of the state, deemed necessary and proper for that purpose. In the latter case, as well as the former, the fund belongs to the state's revenues, and the disbursement is for the public benefit, although local advantages may also result. Through county, township, municipal, and other organizations, they are paid out in the administration of public justice, the maintenance of the public order and security, the support of the public schools and other purposes of a public nature pertaining to the state government. Hence, for all such taxes levied on real property the lien thereon provided by statute is declared to be in favor of the state."

The lien and claim possessed by the state for the undetermined taxes on this property at the time the same was conveyed to it by Michael Connaughton and wife was an interest inferior in nature and quality to the fee simple title which it took by said conveyance, and said lien and claim were by operation of law merged and lost in said conveyance.

Reid v. State, 74 Ind., 252;
Smith v. Santa Monica, 162 Cal., 221;
Foster v. City of Duluth, 120 Minn., 484.

The lien and claim of the state on this property for the undetermined taxes for 1911 being merged and lost in the fee simple title acquired by the state by this conveyance, and no taxes having thereafter accrued against this property while the same was owned by the state, nothing was purchased by Mr. Miller which can be the subject of any claim against the state. Moreover, it appears that at the time Mr. Miller purchased this tax title not only had the title to this property vested in the state of Ohio, but also—if it be a matter of any significance here—the deed therefor had been transferred, filed and recorded.

The title to this property being in the state, the auditor thereafter had no authority to put this property upon the duplicate for taxation, and still less had he authority to put the same upon the delinquent land list, and the tax sale made by him of this property to Miller was wholly void and conferred no rights upon the purchaser.

State of Ohio v. Griftner, 61 O. S., 203, 214.

It is obvious that the conclusion above indicated is not affected by the fact that the state, in the deed delivered to it by Michael Connaughton and wife, assumed the taxes on this property payable in December, 1911, and thereafter. It is impossible to disassociate this agreement from the deed in which it is found, and inasmuch as by the delivery of the deed taxes which were then a lien upon the property were merged in the conveyance, and no taxes thereafter accrued against the property while the same was owned by the state, it follows that there was nothing upon which the agreement with respect to the assumption of such taxes could operate.

For the above reasons, I am of the opinion that Mr. Miller has no claim which you are required or authorized to adjust on behalf of the state.

Very truly yours,
JOSEPH McGHEE,
Attorney-General.

379.

INTANGIBLE PERSONAL PROPERTY—WHEN SAME MUST BE LISTED FOR TAXATION IN OHIO.

1. *A person who moved into Ohio, intending to make a place therein his permanent home, more than six months prior to the day before the second Monday in April,* 1917, *must list his intangible personal property, including notes secured by mortgage in foreign real estate, in Ohio in* 1917.

2. *The fact that such mortgage-secured obligations are not taxable in the state wherein the real estate is located does not affect their taxability in Ohio; there was and is no provision of Ohio law, whereby, by the payment of a registration fee or otherwise, such obligation may be made exempt from taxation in Ohio against the creditor mortgagee.*

COLUMBUS, OHIO, June 16, 1917.

HON. C. A. WILMOT, *Prosecuting Attorney, Chardon, Ohio.*

DEAR SIR:—Your letter of May 25, 1917, encloses a formal request for an opinion upon the following facts:

> "Mr. M. was a resident of Michigan and owned a farm in Michigan; in August, 1916, he moved from Michigan to Geauga county, and purchased a farm in Chardon and Hambden townships in this county. The farm which he owned in Michigan was sold by Mr. M. a short time prior to August, 1916, Mr. M. receiving as part payment of the purchase price of the farm in Michigan a mortgage in the sum of thirteen thousand dollars. The laws of Michigan provide that on the filing of a mortgage for record the owner of the mortgage may pay one-half of one per cent. of the amount of the mortgage, and on the payment of the sum of one-half of one per cent. the mortgage is not subject to taxation. Mr. M. filed his mortgage and paid to the recorder the sum of sixty-five dollars, and there is endorsed on the mortgage the receipt showing the payment of the sixty-five dollars and that the mortgage is exempt from taxation in Michigan.
>
> "The assessor called on Mr. M. for a list of his personal property and Mr. M. exhibited to the assessor this mortgage of thirteen thousand dollars, but claimed that he should not be required to list it for taxation in Ohio. Mr. M. will not have resided in the state of Ohio one year until about the middle of August, 1917, having lived in Michigan until the middle of August, 1916.
>
> "The question which I desire to have your opinion on is: 'Shall this mortgage be listed for taxation in the state of Ohio before Mr. M. has resided one year in the state of Ohio?'
>
> "Second. 'Is there any provision of law by which Mr. M. upon the payment of a fee similar to the Michigan registration fee escape the listing of this mortgage for taxation in Ohio?' "

It is clear, of course, upon your statement that the present legal residence of the gentleman inquired about is in the state of Ohio; of course he has not acquired a voting residence in the state, but it appears that he has moved into Ohio with the intention of making a place therein his permanent home. Ohio is, therefore, his domicile of choice, and any reasonable legislation of Ohio respecting the taxation of his personal property would have to be sustained.

The Ohio legislation which covers the subject is as follows:

> "Section 5373. A person who has had his actual or habitual place of

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

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

If Mr. M. moved into Ohio in August, 1916, he must have resided in Ohio for a period between seven and eight months next preceding the second Monday of April, 1917. Therefore he had established a residence in Ohio for the purpose of taxation and his personal property, money and credits held by him in Ohio must be listed for taxation here.

The foregoing comments constitute an answer to your first question.

Your second question may be answered by the short statement that there is no provision of law by which Mr. M., upon the payment of fees similar to the Michigan registration fee, may escape the listing of his mortgage for taxation in Ohio.

A law has been enacted and passed providing for a registration on the Michigan plan. This act did not go into effect so as to in any way influence the result of the 1917 assessment and, indeed, is not yet in effect. Moreover, it applies only to mortgages on Ohio property and does not in any way assume to exempt from taxation mortgages owned and controlled in Ohio by a resident of Ohio on property located in another state.

Of course, it will make for clearness to observe that Ohio laws do not tax "mortgages" as such at all, but rather the credit. Mr. M. is taxed because somebody owes him money.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

380.

APPROVAL—TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE OF THE COUNCIL OF CLEVELAND HEIGHTS.

COLUMBUS, OHIO, June 16, 1917.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:——

IN RE: Bonds of the village of Cleveland Heights, in the sum of $12,000.00, for the purpose of improving highways leading into said village.

I have examined the transcript of the proceedings of the council and other officers of the village of Cleveland Heights relative to the above bond issue, and find the same to be in accordance with the provisions of the General Code relating thereto.

I am, therefore, of the opinion that bonds of said village, properly prepared in accordance with bond form submitted, will, when signed by the proper officers, constitute valid and binding obligations of the village of Cleveland Heights.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

381.

STATE BOARD OF EMBALMING EXAMINERS—CONSTRUCTION OF HOUSE BILL No. 224.

1. *H. B. 224 goes into effect on July 2, 1917.*

2. *The provision of section 1342 requiring 26 weeks of study does not necessarily mean 26 consecutive weeks.*

3. *The word "practical" as used in section 1342 means actual knowledge of the science of embalming gained from training or practice.*

4. *The board has power, within the limitations of section 1339 G. C., to pay expenses of member to investigate curriculum of the different schools, provided it can not be determined in any other manner.*

5. *The phrase "admittance to a high school" used in section 1342 requires evidence of elementary education as would admit to a high school.*

6. *It is discretionary with the state board of embalming examiners whether or not reciprocal licenses shall be issued and such license may be issued to licensed embalmers of another state whether or not said license was issued prior to the time H. B. 224 goes into effect.*

COLUMBUS, OHIO, June 16, 1917.

HON. B. G. JONES, *Pres. State Board of Embalming Examiners, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your communication of April 16, 1917 as follows:

"The last general assembly passed a new law regulating the practice of embalming in this state, and as it will be the duty of this board to place this law in operation, we respectfully ask your construction upon the following question, to wit:

"1. When does this law go into effect?

"2. Regarding the requirement that the applicant has to complete 26 weeks of study, can the board construe this 26 weeks to be consecutive or not?

"3. Regarding the word "practical" under the head of two years of practical experience, we would like your construction upon this word.

"4. Has this board the power to pay the expenses of a member to investigate the curriculum of the different schools? this we believe should be done in order that we may be sure that these schools are complying with the law.

"5. We would like your construction regarding what you would construe under the title 'admittance to a high school.'

"6. Should our board, under the reciprocal clause, issue a license to embalmers of other states, whose requirements are the equal of ours, who secured their licenses previous to the enactment of this present law?"

Your first question inquires when this law goes into effect. This law was passed March 21, 1917, and filed in the office of the secretary of state April 3, 1917.

Section 1-c of article II of the constitution provides, in part, as follows:

"* * * No law passed by the general assembly shall go into effect until ninety days after it shall have been filed by the governor in the office of the secretary of state. * * *"

Under the above provision of the constitution this law goes into effect ninety days from April 3, 1917. Therefore, I advise you, in answer to your first question, that this law goes into effect July 2, 1917.

Your second question is as follows:

"Regarding the requirement that the applicant has to complete 26 weeks of study, can the board construe this 26 weeks to be consecutive or not?"

Section 1342 G. C. as amended by the last general assembly, provides:

"Every person desiring to engage in the practice of embalming or the preparation of the dead for burial, cremation or transportation, in the state of Ohio, shall make a written application to the state board of embalming examiners for registration, giving such information as the said board may, by regulation, require for such registration. Each application must be accompanied by a fee of one dollar with the certificates of three reputable citizens (one of whom shall be a licensed embalmer), that the proposed applicant is of good moral character and stating his age and general education which shall be such as to entitle him or her to admittance to high school. If the said board shall find the facts set forth in the application to be true, the said board shall issue to said applicant a certificate of registration. Before a registered applicant can apply for and take an examination in the practice of embalming or preparing for burial, cremation or transportation, the body of any dead person in the state of Ohio, said applicant shall have completed to the satisfaction and approval of the said board a course consisting of at least twenty-six weeks of studies in the science of embalming, disinfection and sanitation in a regular school of embalming, recognized by said board or shall have had at least two years of practical experience under a licensed embalmer in this state, during which time he or she shall have embalmed (arterially) at least twenty-five dead adult human bodies. All applications for a license to practice embalming and the preparation of the dead for burial, cremation or transportation in this state, must be made

to the state board of embalming examiners in writing and contain the name, age, residence and the person or persons with whom employed, the name of the school attended together with a certificate from two reputable citizens that the applicant is of legal age and of good moral character, also a certificate under oath when required by the said board from the president or dean of the embalming school or college he or she has attended, that the applicant has complied with the requirements of said school or college or a certificate under oath, when required by said board, from the licensed embalmer under whom he or she has worked as an apprentice, that he or she has worked as an apprentice, that he or she has complied with the requirements of apprenticeship as set forth in this section. Each application must be accompanied by a fee of ten dollars and the certificate of registration. If after the state board of embalming examiners are satisfied that the applicant has qualified as set forth in this section, the said board shall cause the said applicant to appear before them and be examined in the subjects as set forth in the preceding section, and he must pass said examination with an average grade of not less than seventy-five per cent."

The above quoted section of the General Code simply provides for a course consisting of at least 26 weeks of study, etc. This section does not provide that the 26 weeks shall be consecutive, and there is nothing in the section to indicate that it was the intention of the legislature that the 26-week period therein should be construed to be consecutive. Under this provision of section 1342 it is necessary only for the board to satisfy itself that the applicant has studied the required branches of the science of embalming for a period of time covering 26 weeks, regardless of whether or not the said 26 weeks are consecutive. If this rule were otherwise, it would in many instances work a hardship upon a student; for example, a student starts his course, and before he has completed the same, he may have to give it up because of sickness or other reason. I do not think that it was the intention of the legislature that upon the removal of the disability he should be required to start his course anew. It would under these circumstances be only reasonable and fair to the student that he be given credit for the work he has completed, and that he be permitted to take up his course at the point where he left off, and which would not and could not be the case if this provision of the statute were interpreted to mean 26 consecutive weeks.

The statute being silent on this point, I advise that your board cannot construe this provision of section 1342 to mean 26 consecutive weeks.

Your third question is as follows:

"Regarding the word 'practical' under the head of two years of practical experience, we would like your construction upon this word."

The above quoted section of the statute provides that an applicant shall either take a course in the science of embalming in a school or "shall have had at least two years of practical experience under a licensed embalmer in this state, during which time he or she shall have embalmed (arterially) at least twenty-five dead adult human bodies. The legislature in this section not only provided that such applicant should have a certain amount of practical experience, but in the same sentence set forth what this practical experience should, in part, consist of, to wit: arterially embalming dead human bodies.

Now the only conclusion that can be drawn from the above quotation from section 1342 G. C. is that the legislature meant by practical experience that the applicant should actually engage in the work of embalming human bodies under the direction of a licensed embalmer. This view is strengthened by another clause in the same section which provides that the board may require a certificate under oath from a

licensed embalmer under whom he, or she, worked as an apprentice, that he, or she, complied with the requirements of this section. This part of the section clears up all doubt as to the meaning of the word "practical," as used herein. It can have no other meaning than that applicant should have two years of experience in the science of embalming human bodies.

I, therefore, advise you, in answer to your third question, that the word "practical" as used in this section means actual knowledge of the science of embalming gained from training or practice.

Your fourth question is as follows:

> "Has the board the power to pay the expenses of a member to investigate the curriculum of the different schools; this we believe should be done in order that we may be sure that these schools are complying with the law."

Section 1342 G. C. provides in part as follows:

> "* * * said applicant shall have completed * * * a course * * * in the science of embalming, disinfection and sanitation in a regular school of embalming, recognized by said board."

This section of the above statute, above quoted makes no mention of what shall be recognized by the board, nor does it point out the standard required for these schools before they can be recognized by the board as provided in said section. The statute being silent on these points, there is only one conclusion at which we may arrive, and that is, the board must ascertain for itself the schools that are teaching a course in the science of embalming that would fit a graduate therefrom to perform the duties that will be required of him in actual practice in a proper manner, and that the school teaches the branches of the science of embalmimg required by this section of the statute.

The board must further determine the method of arriving at these conclusions.

Section 1339 G. C. provides that the members of said board shall receive "their reasonable and necessary traveling expenses while discharging the actual duties of their office."

If in the opinion of the board it is impracticable to determine the fitness of an embalming school by other means than by a personal examination of the same, then your board has the right to make such inspection. If, however, it is possible for the board to determine the qualification of these various schools from other evidence than a personal examination, it would be the duty of the board to use such evidence in determining whether or not such schools should be recognized. For instance many of these schools publish a catalogue showing the courses taught, the number of hours such subjects are taught a week, the number of professors and associate professors, etc., teaching at said school. In many instances an examination of these catalogues might satisfy the board as to the qualifications and standing of such schools. There are probably other ways for your board to determine whether or not these schools are up to the standard, without making a personal examination. However, it is a question of fact for your board to determine whether it is necessary to make a personal examination of these schools, or whether an examination of other evidence before the board is sufficient to enable you to pass upon the fitness of said school.

Therefore, I advise you that in cases where the board finds that it is absolutely necessary to make a personal examination to determine the qualifications of said school, the expenses incurred in such investigation may be paid under section 1339, I might, however, in this connection call your attention to another provision of section 1339, viz:

"The salaries and expenses incurred by the board and the members thereof in the discharge of their duties shall be paid by the state auditor on vouchers countersigned by the secretary-treasurer, and the state of Ohio shall not be liable for same or be at any expense in this connection beyond the amount received as fees."

Your fifth question is as follows:

"We would like your construction regarding what you would construe under the title 'admittance to a high school.' "

Section 7655-7 G. C. provides as follows:

"After September 1st, 1915, the holder of a certificate of graduation from any one room rural school of the first grade or from any consolidated rural school which has been recognized shall be entitled to admission to any high school without examination. Graduates of any elementary school shall be admitted to any high school without examination on the certificate of the district superintendent."

This is the only section of the General Code that provides for the admission of pupils from elementary schools to high schools. In other cases, admission of pupils from elementary schools to high schools is fixed by rules of the various boards of education. The general rule for admission of pupils from elementary schools to high, however, seems to be that any pupil who has successfully completed the entire course of a first grade elementary school is entitled to admission to high school.

Therefore, I advise you, in answer to your fifth question, that any applicant for examination must forward to the board of embalming examiners evidences of such elementary education as would, under the above quoted section of the statute, admit him to a high school; or evidence that he has successfully completed the course of any first grade elementary school or its equivalent.

Your sixth question is as follows:

"Should our board, under the reciprocal clause, issue a license to embalmers of other states, whose requirements are the equal of ours, who secured their licenses previous to the enactment of the present law?"

Section 1343-1 G. C., provides as follows:

"The state board of embalming examiners may grant without examination an embalmer's license to a duly licensed embalmer of another state, who shall have been examined by a regular board of embalming examiners on substantially the same subjects and requirements demanded by the board of this state, and shall have obtained an average grade of not less than seventy-five per cent in such examination. Such license shall be known as a reciprocal license, applications for which shall be made on a form containing a certi-

fied statement from the board which granted the original license in the other state, stating the grade and result of examination. Each applicant for a reciprocal license shall pay a license fee of twenty-five dollars, which shall accompany the application for such license. Such reciprocal license shall be renewed annually upon payment of a renewal fee of one dollar as provided above."

This section does not make it the duty of your board to issue licenses without examination to embalmers of other states who are within the provisions of this section. The section is not mandatory; it is directory only. It provides that "the state board of embalming examiners *may* grant without examination * * * ." It does not state that the board shall grant a license to such embalmers, but leaves it to the discretion of the board.

The question of whether or not an applicant receives his license from a board of embalming examiners of another state previous to the time this act takes effect has nothing whatever to do with granting a reciprocal license by your board. The law does not say that said applicant for reciprocal license must have been licensed previous to the time this law goes into effect.

Therefore, I advise you, in answer to your sixth question, that it is discretionary with your board whether or not you shall issue such reciprocal license, and that you may issue such a license to a licensed embalmer of another state who has successfully passed an examination, as provided in this section regardless of whether or not said license was issued prior to the time this law goes into effect.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

382.

CONTRACT FOR CONSTRUCTION OF HIGHWAY—UNLAWFUL TO INSERT IN SPECIFICATIONS ALTERNATE PROVISIONS RELATING TO THE HAULING OF MATERIALS.

It would not be legal, either under the law as it now is, or as it will be from and after June 28, 1917, to insert in specifications and plans, or in a contract for the construction of a highway, alternative provisions, one providing that the material should be hauled by team and wagon, and the other that it should be hauled by truck.

COLUMBUS, OHIO, June 16, 1917.

HON. D. M. CUPP, *Prosecuting Attorney, Delaware, Ohio.*

DEAR SIR:—I have your communication of May 27, 1917, in which you submit certain questions for my opinion. Your communication reads as follows:

"1. Would a provision in the specifications for the improvement of a county road by the county commissioners providing for alternative bids, one for team hauling, and the other for truck hauling, of the material necessary for such road improvement, be valid?

"2. Can the county commissioners insert in a contract for the improvement of a county road a provision that the material necessary for such improvement be team hauled and thus prohibit the use of a truck or other kind of vehicle for that purpose?"

In your communication you submit two different questions, which naturally resolve themselves into one, for I am of the opinion that the county commissioners could not validly include such a provision as you suggest, in a contract in a case in which the plans, profiles, estimates and specifications do not include such a provision. If a contractor bids for the construction of a certain highway, and plans, etc., under which he bids, specify nothing as to the manner in which the material for the construction is to be hauled, and he is awarded the contract under his bid, the county commissioners could not legally specify in the contract that the material be hauled in some particular way, for the reason that such a provision might radically modify the price at which the contractor could complete the work, due to his particular kind of equipment for hauling material; and, vice versa, if it is legal to place such a provision in the plans, profiles, specifications and estimates, then it would be legal to place it in the contract entered into between the county commissioners and the contractor.

So your questions resolve themselves into this:

> Can the county commissioners provide alternative plans, profiles, specifications and estimates, one specifying that the material for the construction of a road shall be hauled by truck, and another that the said material shall be hauled by wagons and teams?

The law as it now stands says nothing whatever as to alternative plans, profiles, etc., for the construction of highways; but section 6911 of the act which becomes effective on June 28, 1917, provides for alternative plans, profiles, etc., which section reads as follows:

> "Section 6911. * * * The county commissioners may order the county surveyor to make alternate surveys, plans, profiles, cross-sections, estimates and specifications, providing therein for different widths of roadway, different materials or other *similar* variations, and approve all or any number of such alternate surveys, plans, profiles, cross-sections, estimates and specifications. The county surveyor may, without instructions from the county commissioners, prepare alternate surveys, plans, profiles, cross-sections, estimates and specifications, providing therein for different widths of roadway, different materials, or other similar variations. * * * ."

From a reading of this section it is quite evident that there is no provision made for alternate plans, etc., along the lines suggested in your communication. The provisions apply merely to different kinds of material, different widths of road, etc.; that is, something which pertains directly to the work itself, and not in reference to something that is entirely collateral to the work.

But I do not feel that your question needs necessarily to be decided as to whether alternate plans, profiles, etc., may be provided for, or not. Let us look into the general plan and scope of the law in reference to the matter of plans and specifications and bidding on and letting of contracts.

Section 6911 G. C. provides that the county commissioners shall determine:

> "* * * the route and termini of such road, the kind and extent of the improvement, and at the same time shall order the county surveyor to make such surveys, plats, profiles, cross-sections, estimates, and specifications as may be required for such improvement, * * *";

that is, his plans and specifications are to be made in reference to the improvement itself, and not in reference to matters collateral thereto.

Section 6945 G. C. provides that the contract shall be awarded to the lowest and best bidder. The parties who pay for a road have a right to demand that the contract shall be let to the lowest and at the same time the best bidder.

If the county commissioners were permitted to go outside of the construction of the highway to matters merely collateral thereto, they might make such provisions that the work could not be done at nearly as low a figure as it otherwise could be done, and this would be indirectly violating the provisions of this section. Further, I believe it would be a dangerous proposition to hold that the county commissioners could have inserted in the plans all kinds of matters that are collateral to the work itself. It would open up a field upon which it would be dangerous to enter.

So that under the law as it now is, I am of the opinion that it would not be legal to embody in the plans and specifications such a provision as suggested in your communication, and under the law as it will be after June 28, 1917, the statute itself seems to preclude such alternative provisions as you suggest.

Therefore, answering your question specifically, it is my opinion that it would not be legal for the county commissioners to have inserted, either in the plans and specifications or in the contract for the improvement of county roads, alternative provisions, one providing that the material for the construction of the road should be hauled by team, and the other providing that it be hauled by truck.

Very truly yours,
JOSEPH McGHEE,
Attorney-General.

383.

COUNTY COMMISSIONERS—NOT LIABLE FOR DAMAGES ARISING FOR WANT OF PROPER OBSTRUCTION WHEN HIGHWAY CLOSED.

Under the provisions of section 1225 *General Code the county commissioners are not liable for damages arising from the fact that proper obstructions were not erected and proper notices were not posted to warn the public that a highway is closed to travel.*

COLUMBUS, OHIO, June 16, 1917.

HON. CALVIN D. SPITLER, *Prosecuting Attorney, Tiffin, Ohio.*

DEAR SIR:—I have your communication of June 2, 1917, in which you ask my opinion in reference to certain matters, which communication reads as follows:

> "In the month of October, 1915, a part of the Portland road in Seneca county was being macadamized and improved under the authority of the state highway commission, which had let the contract to Knepper, Burr and Jeakle for macadamizing the same and to rebuild a certain bridge thereon.
>
> "The traveled portion of the highway was open and while there was a sign which extended approximately half way across the road, yet in the darkness it was difficult to see. The bridge had been taken out and the planks therefrom piled in the highway.
>
> "F. A. Vickery in the darkness of the evening drove his automobile past the sign without seeing it and over the pile of planks. There was no light or other signal near the obstruction to give him warning of the danger.
>
> "Soon thereafter he filed a claim for damages with the board of county commissioners of Seneca county, Ohio, asking them to pay to him the sum of $23.00 which he claims it cost him to have his machine repaired.

"This morning I was asked for my opinion as to whether the commissioners can pay this bill. I am of the opinion that they cannot, inasmuch as it seems to me that there was no negligence on the part of the county commissioners. I have advised the commissioners that the contractors were primarily liable because of their negligence; but they are in bankruptcy and the claimant does not want to file his claim against their estate.

"After looking at the provisions of section 1208 of the General Code, I am of the opinion that no suit can be brought against the state of Ohio, and that the only way in which the claimant can proceed against the state is to go before the legislature. This he does not want to do on account of the small amount involved.

"Will you be good enough to advise me whether or not in your opinion the county commissioners are liable for this claim? I realize that the amount involved is small, yet the principle established may be far reaching."

The answer to your question I think will be found in sections 1225 and 1208 of the General Code.

Section 1225 G. C. provides as follows:

"The state highway commissioner shall, if he deems it advisable, close a highway or a section thereof which is being constructed, improved or repaired under this act, in order to permit a proper completion of such work. * * * The contractor or other person acting under authority of said highway commissioner or engineer, shall thereupon close the same to the public by erecting suitable obstructions, and posting conspicuous notices to the effect that the highway is closed. * * *"

Further on in this section we find the following language:

"* * * When a road is so closed the state highway commissioner or chief highway engineer shall cause to be erected suitable signs or barricades warning the public that the highway or a part thereof is closed to traffic, and the temporary routes to be used shall be conspicuously marked by proper signs at all proper road crossings and forks. The state highway commissioner shall have full power and authority to open to traffic at any time any portion of the highway closed as heretofore provided."

It will be seen from the provisions just quoted that the state highway commissioner has complete authority over the matter of closing roads being improved to public travel. Also has full authority to erect suitable obstructions and to post conspicuous notices to the effect that the highway is closed.

While the county commissioners, in said section, are given authority to erect temporary highways to be used by the traveling public in lieu of the closed highway, yet they are given no authority or duty whatever in reference to the matter of obstructions to be placed and notices posted to warn the public that the highway is closed.

From the provisions of this section I think we are safe in drawing the conclusion that the county commissioners would not be liable for any accident which occurred because of defective obstructions or defective notices. Having eliminated the county commissioners in the matter of liability, the next question arising is as to whether the state of Ohio might be held provided the state highway commissioner or those acting under him did not comply with the law in reference to the matters under consideration.

As you state in your communication, the state cannot be sued. So the only remedy open to Mr. Vickery is the general assembly.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

384.

JUVENILE COURT—HAS JURISDICTION OVER CHILD WHEN IT HAS BEEN COMMITTED TO BOARD OF STATE CHARITIES.

Where a minor child is committed to the juvenile court to the board of state charities, the said court continues to have jurisdiction over said child for the purposes of discipline and protection.

COLUMBUS, OHIO, June 16, 1917.

HON. H. H. SHIRER, *Secretary Board of State Charities, Columbus, Ohio.*

DEAR SIR:—In your letter of May 26, 1917, you ask my opinion upon the following proposition:

> "A part of section 1352-3 of the General Code, enacted in 1915, provides that when a minor child is committed by the juvenile court to the board of state charities, 'the board shall thereupon, ipso facto, become vested with the sole and exclusive guardianship of such child.'
>
> "Does the general provision of section 1643, notwithstanding the language of section 1352-3, permit the committing judge to recall the child previously committed to the board of state charities, unless it be with the consent of the board of state charities?"

The first section of the General Code referred to in your communication, to wit, 1352-3, provides as follows:

> "The board of state charities shall when able to do so, receive as its wards such dependent or neglected minors as may be committed to it by the juvenile court. County, district, or semi-public children's homes or any institution entitled to receive children from the juvenile court may, with the consent of the board, transfer to it the guardianship of minor wards of such institutions. If such children have been committed to such institutions by the juvenile court that court must first consent to such transfer.
>
> *"The board shall thereupon ipso facto become vested with the sole and exclusive guardianship of such child or children.* The board shall, by its visitors, seek out suitable permanent homes in private families for such wards; in each case making in advance a careful investigation of the character and fitness of such home for the purpose. Such children may then be placed in such investigated homes upon trial, or upon such contract as the board may deem to be for the best interests of the child, or proceedings may be had, as provided by law, for the adoption of the child by suitable persons. The board shall retain the guardianship of a child so placed upon trial or contract during its minority, and may at any time, if it deems it for the best interest of the child, cancel such contract and remove the child from such home. The board, by its visitors, shall visit at least twice a year all the homes in which children have been placed by it. Children for whom

on account of some physical or mental defect it is impracticable to find good, free homes, may be so placed by the board upon agreement to pay reasonable board therefor not to exceed $3.50 per week, which shall be paid out of funds appropriated to the use of the board by the general assembly. When necessary any children so committed or transferred to the board may be maintained by it in a suitable place until a proper home is found."

"So far as practicable children shall be placed in homes of the same religious belief as that held by their parents."

General Code section 1643 provides:

"When a child under the age of eighteen years comes into the custody of the court under the provisions of this chapter, such child shall continue for all necessary purposes of discipline and protection, a ward of the court, until he or she attain the age of twenty-one years. The power of the court over such child shall continue until the child attains such age."

In the first section above quoted, the guardianship is placed, under the conditions therein mentioned, in the board of state charities, but in the second section above quoted the child shall continue for all necessary purposes of discipline and protection a ward of the court. That is to say, while the board of state charities has the control and custody of the child and stands, so to speak, in the place of the parent, yet such guardianship and custody is limited to the continuing jurisdiction of the juvenile court for the purposes of discipline and protection.

General Code section 1643, above quoted, was construed in the case of children's home of Marion county, et al. v. Fetters, et al., 90 O. S. 110, in which case habeas corpus was asked to gain the custody of a child which the juvenile court had placed with said children's home. The court on page 127 held:

"The legislature in the exercise of its police power, in order to protect children and to remove them from evil influences, has established the juvenile court. When proceedings are regularly had in that court and there is a finding that the child is delinquent, it becomes a ward of the court. In the interest of the child and in the interest of society the court can commit its custody to strangers or to an institution for its moral training and education over the objection of the parents. * * * It is in the power of that court, if it deem it advisable, to restore the child to its parents. *But there is no authority for any other court to interfere in an independent proceeding, with the custody of the child thus entrusted by law to the jurisdiction of the juvenile court.*"

The language above quoted from General Code section 1352-3, and especially that part which gives the board of state charities the sole and exclusive guardianship of such child or children, is very similar to the language of General Code section 3093, which reads in part as follows:

"All inmates of such home (children's home) who by reason of abandonment, neglect or dependence have been admitted, or should have been by the parent or guardian voluntarily surrendered to the trustees, *shall be under the sole and exclusive guardianship and control of the trustees during their stay in such home* * * *."

The last above mentioned section was construed in opinion No. 969 of my pre-

decessor, Hon. Timothy S. Hogan, found on page 754 of the annual reports of the attorney-general for 1914, volume 1, in which he used the following language:

> "It is apparent that although under section 3093 the trustees of the children's home are given the 'sole and exclusive guardianship' of the children admitted to the home by reason of neglect or dependence, there is a continuing jurisdiction vested in the juvenile court, which such court retains 'for all necessary purposes of discipline and protection' until the child attains the age of twenty-one years. The words 'sole and exclusive guardianship' in section 3093 are limited in their meaning by these other sections of the Code, which plainly indicate that the protecting arm of the juvenile court remains about the child until it has attained the age of twenty-one years."

What, therefore, applies to the trustees of children's homes in relation to the sole and exclusive guardianship of the children in the custody of such trustees would also apply to the board of state charities when it becomes vested with the sole and exclusive guardianship of children; and following the reasoning of both my predecessor and of the court in the case above mentioned, I advise you that section 1643 G. C., above quoted, does permit a continuing jurisdiction by the juvenile court over a child which is committed to the board of state charities and without the consent of such board.

Yours very truly,
JOSEPH MCGHEE,
Attorney-General.

385

SURETY COMPANY—LIABLE WHEN TIME FOR COMPLETION OF CONTRACT EXTENDED—WHERE IT AGREES THAT A CHANGE IN TERMS OF CONTRACT SHALL NOT AFFECT ITS OBLIGATION.

Where a surety company agrees that no changes in the terms of the contract shall in any wise affect the obligation of said surety on its bond, the time in which the contract was to have been completed may be extended without releasing the surety from its obligation.

COLUMBUS, OHIO, June 16, 1917.

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

DEAR SIR:—I have your communication of June 5, 1917, in which you ask my opinion about a certain matter therein set out. Your communication reads as follows:

> "I am attaching hereto for examination by you copy of contract between this department and Richard Conway for the improvement of section "D" of the Wauseon-Napoleon road, I. C. H. No. 296, in Henry county. A copy of the bond given by Mr. Conway with the Illinois Surety Company, as surety, is also attached to the contract.
>
> "As you know, the Illinois Surety Company has been in the hands of a receiver for some time and this department is, of course, holding estimates due Mr. Conway for work on the above improvement until the consent of the surety can be obtained to an extension of time on this work.
>
> The retention of these estimates by this department is seemingly working

a hardship on Mr. Conway and he has made application to us for the release of same. Mr. Conway claims that he cannot proceed with his work until an estimate is given him by this department.

For your information, Hon. Edward C. Turner, when attorney-general, rendered an opinion under date of September 30. 1915, being opinion No. 876 found at page 1887 of the Opinions of the Attorney-General for that year, which opinion deals with the question of extension of time for the completion of work covered by our contracts.

"Mr. Conway has stated to this department that he has been in communication with the receiver for the Illinois Surety Company, or his representative, and that since the company is in the hands of a receiver, it cannot consent to an extension of time and there is no person authorized to act for it in the premises.

"Our best information from our division engineer and other sources is that Mr. Conway will be able to complete this job if granted an extension and allowed his estimates.

"With reference to the following statement in Mr. Turner's opinion:

" 'Whether or not the bondsmen or surety company could be held where there has been an extension of time without first obtaining their consent, would depend upon the facts of each particular case,'

"I beg to direct your attention to the following provision of the bond submitted by Mr. Conway:

" 'And the said surety hereby stipulates and agrees that no changes, extensions, alterations, deductions or additions, in or to the terms of the said contract, or in or to the plans and specifications accompanying the same shall in any wise affect the obligation of said surety on its bond.'

"In view of the expressed stipulations by the surety in the contract bond as quoted above to the effect that no changes, extensions, etc., in or to the terms of the contract shall affect the obligation of the surety on its bond, and in view of the further fact, as appears, that the surety company is in the hands of a receiver, and that no one is authorized to act for it in a matter of this kind, and either consent to an extension of time or refuse the same, I respectfully request your opinion as to whether this is one of the cases where an extension of time would not release the surety and as to whether, in view of the above, I may lawfully grant Mr. Conway an extension of time for the completion of his contract.

"If this request can have your earliest possible attention, it will be appreciated by this department and those who are interested in the early completion of the contract."

Inasmuch as your question arises as well from an opinion rendered by my predecessor, Hon. Edward C. Turner, as from anything else, I desire to note the opinion rendred by Mr. Turner, found in Opinions of Attorney-General, 1915, volume II, page 1884. Mr Turner found in the syllabus of said opinion as follows:

"In no case should an extension of time be allowed without securing from the bondsmen of the contractor a written agreement consenting to the extension."

Of course, if this were exactly what Mr. Turner found in his opinion it would be impossible for me to find that you could extend the time for the completion of the contract by Mr. Conway unless I saw fit to overrule Mr. Turner; but I find, on page 1887, the following reasoning:

"It should be the uniform practice of your department to grant no ex-

tensions of time without the written consent of the bondsmen or surety company. This will avoid many complications which would be bound to follow any other course."

With this language and with this principle I heartily concur, and I feel that the uniform practice should be as suggested therein.

But Mr. Turner further sets forth the following principle:

"Whether or not the bondsmen or surety company could be held where there has been an extension of time without first obtaining their consent, would depend upon the facts of each particular case."

That is, of course, the facts which would have to do with this matter would be found mainly in the bond. So let us, with the finding of Mr. Turner in mind, note what the provisions of the bond are in reference to the liability of the surety company. It contains the following provision:

"And the said surety hereby stipulates and agrees that no changes, extensions, alterations, deductions or additions, in or to the terms of the said contract, or in or to the plans and specifications accompanying the same shall in any wise affect the obligation of said surety on its bond."

There could hardly be stronger language used than that which is used in the bond as to the liability of the surety company under the circumstances therein set out.

It is true the matter of time is generally considered to be of the essence of the contract. Yet it is not one of the most vital elements of a contract, especially in reference to a contract of the nature of the one under consiseration. So, that, when the surety company stipulates that no *changes* in the terms of the contract shall in any wise affect the obligation of said surety on its bond, I feel that the said surety company could not take advantage of the fact that the time for the completion of the contract has been extended.

With this principle of law in mind, let us consider the facts in this case: You suggest that the Illinois Surety Company is in the hands of a receiver, and therefore its ability to perform the obligations of its contract is very uncertain. Further, you state it is your opinion that Mr. Conway will be able to complete the work according to his contract, provided the time for the completion of the same is extended and he be given the estimates now due and the estimates as they become due.

So that when we consider the law in this case and the facts in connection with the law, it is my opinion that you have authority to extend the time for the completion of the contract, if you should deem this best under all the circumstances, and that by so doing you would not release the surety company from its obligation.

In rendering this opinion, I am not in any way overruling the opinion rendered by my predecessor, as I feel that he set out in said opinion a most salutary rule for your department to follow, but under all the facts and circumstances as found in this case and the law which would apply to the same, I am of the opinion as hereinbefore set out. Of course, you will from time to time retain fifteen per cent. as is provided for by law.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

386.

APPROVAL—FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN HANCOCK COUNTY.

COLUMBUS, OHIO, June 16, 1917.

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

DEAR SIR:—I have your communication of June 7, 1917, enclosing a final resolution in reference to the construction of a certain highway in Hancock county, as follows:

> "Hancock county—Sec. 'b-1' Findlay-Kenton road, Pct. No. 2428, I. C. H. No. 221 (also duplicate)."

I have examined this resolution carefully and find the same correct in form and legal and am therefore returning it to you with my approval endorsed thereon.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

387.

CONTRACT—FOR FEEDING PRISONERS IN COUNTY JAIL—CHARGED WITH VIOLATION OF CITY ORDINANCE—SHOULD BE MADE WITH COUNTY COMMISSIONERS.

County commissioners are the proper parties to make the arrangements with the proper city authorities for the keeping and feeding of prisoners committed to the county jail, pending a hearing before the proper city officials, in those cases in which the prisoners are charged with a violation of a city ordinance.

COLUMBUS, OHIO, June 18, 1917.

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

GENTLEMEN:—I have your communication of April 5, 1917, in which you ask my opinion in reference to certain matters set out therein. Your communication reads as follows:

> "We respectfully request your written opinion upon the following question:
> "Have the county commissioners legal authority under the provisions of section 2850 and section 2997, General Code, to make a contract with the proper authorities of a city for the feeding of city prisoners in the county jail, confined there pending hearing in the municipal court, or is it necessary for the city authorities to make such contract with the sheriff direct?"

Your communication has to do only with those cases in which the accused is charged with the violation of city ordinances. But in answering your question it will be well to keep in mind that there are two classes of offenses which may come before the proper magistrates of a city, namely, those cases in which the accused is charged with the violation of a state law, and those cases in which the accused is charged with the violation of a city ordinance.

The first class of cases comes before the magistrate for a preliminary examination, merely for the purpose of ascertaining as to whether the accused should be bound over, or whether he should be released. In this class of cases the magistrate has no jurisdiction to hear the matter, except in those cases in which the statutes so provide. But in the matter of violation of ordinances, the magistrate sits as a court and has jurisdiction to hear and determine.

Your communication has to do with only those cases in which the accused is charged with the violation of city ordinances. But in answering your question, I desire to note an opinion rendered by Hon. Timothy S. Hogan, having to do with the class of cases in which the accused is charged with the violation of a state law. This opinion was rendered by Mr. Hogan on January 15, 1912, and is found in Vol.I, p. 135 of the Annual Report of the Attorney-General for 1912. The question submitted to Mr. Hogan for his opinion read as follows:

> "Should the city reimburse the county for amount paid to sheriff for keeping prisoners in jail in cases wherein the defendant has been *committed* to the county jail from the mayor's court (there being no police court) for violation of state laws? If defendants in state cases are remanded to the county jail, *pending* a trial before the mayor's court, should the city or the county pay for maintenance?"

Mr. Hogan, in answering the question submitted to him, found as follows, as set out in the syllabus:

> "The city is not liable to reimburse the county for money paid for keeping prisoners in jail in cases wherein defendants have been committed to jail from a mayor's court for violation of state laws.
>
> "The county should pay for the maintenance of prisoners confined in the county jail pending a trial before a mayor's court for an offense committed or charged in violation of a state law."

On p. 139 Mr. Hogan uses the following language:

> "Both the city and the county are important factors in the government of the state. The city has jurisdiction of local affairs while the county has more general duties and performs more of the functions of the state.
>
> "The statutes do not charge the city with liability for keeping prisoners in the county jail who have been charged or convicted of offenses in violation of state laws. The county, as the representative of the state, pays for the keeping of these prisoners in the first instance, and without statutory authority the county cannot place the liability therefor upon the city.
>
> "The city, therefore, is not liable to reimburse the county for money paid for keeping prisoners in jail in cases wherein defendants have been committed to jail from a mayor's court for violation of state laws.
>
> "The county should pay for the maintenance of persons confined in the county jail pending a trial before a mayor's court for an offense committed or charged in violation of a state law."

From this opinion we see that Mr. Hogan arrived at the conclusion that the same principles must apply whether the accused is committed to the county jail after a conviction, or whether he is committed to the county jail pending a trial or examination before the magistrate. In this finding I believe Mr. Hogan is correct.

Coming now directly to your question, I am of the opinion that the same principle should apply to it, namely, that whatever arrangements should be made for the care of

persons convicted of a violation of a city ordinance and committed to the county jail, must be made in cases where the accused is committed to the county jail, pending a hearing before the magistrate. There can be no reason given why such a conclusion should not be reached, and it is the natural inference to be deduced from the statutes, as hereinafter set out. With this principle in mind, let us proceed to note what the statutes provide in reference to the matter under consideration.

Sections 4564 and 4565 G. C. read as follows:

> "Section 4564. Imprisonment under the ordinances of a municipal corporation shall be in the workhouse or other jail thereof, if the corporation is provided with such workhouse or a jail. Any corporation not provided with a workhouse, or other jail, shall be allowed, for the purpose of imprisonment, the use of the jail of the county, at the expense of the corporation, until it is provided with a prison, house of correction, or workhouse. Persons so imprisoned in the county jail shall be under the charge of the sheriff of the county, who shall receive and hold such persons in the manner prescribed by the ordinances of the corporation, until discharged by due course of law."
>
> "Section 4565. The county commissioners, at their discretion, on giving ninety days' written notice to the council of any corporation, may prohibit the use of the county jail for the purpose authorized in this chapter."

The language used in section 4564 G. C., to wit:

> "Any corporation not provided with a workhouse or other jail shall be allowed, for the purpose of imprisonment, the use of the jail of the county,"

would apply to committing the accused to the county jail, pending a hearing, as well as committing him to the county jail after he had been found guilty before the magistrate.

These sections clearly show also that the question, as to whether the municipality shall have the right to continue the committing of prisoners to the county jail, rests with the county commissioners, for they can compel a discontinuance at any time by giving a ninety day written notice to the council of the municipality. Thus we see that this matter of committing city prisoners to the county jail concerns the city on the one hand and the county commissioners on the other.

The next thing to consider is this: Who takes charge of the prisoners when they are committed to the county jail by the proper city magistrate?

Section 3157 G. C. provides:

> "The sheriff shall have charge of the jail of the county and all persons confined there, keep them safely, attend to the jail, and govern and regulate it according to the rules and regulations prescribed by the court of common pleas."

Thus we see that the county commissioners give their consent, either tacit or otherwise, to the municipality, to commit prisoners to the county jail, but when they are so committed it becomes the duty of the sheriff to take charge and have custody of the prisoners confined therein. No other person or official has any business or concern with the prisoners in jail.

The question now arises as to how the sheriff is to be compensated for keeping and feeding the prisoners so committed to jail by the proper magistrates of the city. This is provided for in section 2997 G. C., which reads in part as follows:

> "Section 2997. In addition to the compensation and salary herein pro-

vided, *the county commissioners shall make allowances quarterly to each sheriff for keeping and feeding prisoners, as provided by law.* * * *"

Section 2850 G. C. also provides:

"The sheriff shall be allowed by the county commissioners not less than forty-five nor more than seventy-five cents per day for keeping and feeding *prisoners in jail,* * * *."

It is quite evident that persons committed to jail, pending a hearing before the proper official of the city, are persons in jail, and that they would come under the provisions of section 2850 G. C.

Let us recapitulate:

1. The county commissioners have it within their power either to permit the city to commit its prisoners to the county jail, or not, just as the county commissioners see fit to do.

2. After the prisoners are committed to the county jail the sheriff has complete care and custody of said prisoners in jail, which would include their keeping and feeding.

3. The county commissioners must make an allowance to the sheriff of not less than forty-five nor more than seventy-five cents per day for each prisoner for keeping and feeding the same.

4. Hence, if the county commissioners permit the municipal authorities to commit their prisoners to the county jail and thus compel the sheriff to take custody of the same and to keep and feed them, they are under obligation to pay the sheriff, for their keeping, the amount which they have allowed him under the provisions of section 2850 for keeping and feeding prisoners in jail.

From all the above, what is the answer to your question? There is but one answer and that is, the county commissioners are the proper parties to enter into the contract with the proper city authorities for the care and keeping of the prisoners, and not the sheriff. The sheriff has nothing whatever to do with the contract of the city officials.

Hence, answering your question specifically, it is my opinion that any arrangements entered into for the keeping and feeding of prisoners committed to the county jail, pending a hearing before the proper city official, in which the prisoner is charged with the violation of a city ordinance, must be entered into between the county commissioners and the proper city authority, and not between the sheriff and such city authority.

In passing I might call attention to sections 4125 and 4126 G. C. which might at first sight seem to be in conflict with the above opinion, but the provisions of said sections have to do with municipal prisons or station houses and not with county jails.

I desire also to make a suggestion in reference to a case reported in volume 15 N. P. Rep. (N. S.) 505, styled The State of Ohio ex rel. Frank F. Gentsch v. A. J. Hirstius. There is language used in the opinion rendered in this case which might seem to be in conflict with the opinion rendered herein. We might infer from the language used in said cause that the contract ought to be entered into between the city and the sheriff, rather than between the city and the county commissioners; but this language is purely obiter and is not at all called for in the matter decided by the court. The court used this language due to the fact that it was talking of federal prisoners and city prisoners confined in jail, and applied the same language to city priosners that it applied to federal prisoners.

The court was construing section 3179 G. C., which provides for the committing of federal prisoners to the custody of the sheriff. This section specifically provides that the sheriff shall receive certain compensation and that the prisoners shall be supported at the expense of the United States. The language of this section evi-

dently implies that the contract for the care and support of the federal prisoners is to be entered into between the United States government on one side and the sheriff of the county on the other, since the provision of said section 3179 is as follows:

> "No greater compensation shall be charged by a sheriff for the subsistence of such prisoner, than is authorized by law to be charged for the subsistence of state prisoners."

Section 3179 has nothing to do with city prisoners. Neither is there any provision in the statute for the sustenance of city prisoners, other than those set out in the opinion rendered herein.

Hence, from the above I do not feel that the opinion rendered herein by me should be controlled by the *obiter dicta* used in said above styled cause, but that it should be based rather upon the provisions of the statutes as above set forth.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

388.

TAX COMMISSION—METHOD TO BE FOLLOWED BY SAID COMMISSION FOR THE PURPOSE OF APPORTIONING WHOLE VALUE OF RAILROAD AMONG DIFFERENT TAXING DISTRICTS OF STATE.

For the purpose of apportioning among different taxing districts in this state the whole value of a railroad in this state, as determined by the tax commission of Ohio, the commission must proceed as follows:

1. *The value of all real estate not used in daily running operations, as assessed for taxation by the local authorities, must be deducted (in the case of an interstate railroad this should be done before the apportionment between states.)*

2. *The commission should separately ascertain the value of all real estate other than main track, roadbed and power houses, all structures and all stationary personal property of the company, and also separately ascertain the value of the rolling stock, main track, roadbed, power houses, poles, wires, supplies, moneys and credits of the company. Of these two classes of property, the former must be localized in the taxing districts where such property is situated, and the values as so localized must be equalized by the commission. The latter value is to be apportioned in the proportion that the length of the road in each taxing district bears to the entire length of the road in the state.*

In determining such values for the purpose of apportionment, the commission is not bound by the assessments of any local officers; but the commission is bound by such assessments for the purpose of making deductions of the value of the real estate not used in operation.

Whether the value of terminal facilities is to be localized or apportioned on the mileage basis, depends upon whether such terminal facilities constitute "roadbed" or not. All ground covered by tracks and actually used for trackage purposes constitutes such roadbed. Structures other than those upon which tracks actually rest do not constitute roadbed and must be localized.

COLUMBUS, OHIO, June 18, 1917.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I have your letter of May 22, 1917, in which you request my opinion as follows:

> "Under the provisions of sections 5429 and 5430 of the General Code is

it the duty of the commission to apportion the value of the roadbed, stations and real estate necessary to the daily running operations of a railroad to each county and to each taxing district therein in like proportion that the length of the road in such county bears to the entire length thereof in all the counties and to each city, village and district or part thereof therein, or should the commission determine the true value in money of such real estate in each county and taxing district and place such value in the taxing district in which the real estate is situated regardless of the length of the road in such district?"

The sections of the General Code to which you refer are in part as follows:

"Section 5429. The commission shall ascertain all of the personal property, roadbed, stations, power houses, poles, wires, water and wood stations and real estate necessary to the daily running operations of the road, moneys and credits of each railroad company and each suburban or interurban railroad company, having any line, or road, or part thereof in this state and the undivided profits, reserved or contingent fund of the company, whether in moneys, credits, or in any manner invested, and the actual value thereof in money, and also locomotives, motors and cars not belonging to the company, but hired for its use or run under its control on its road by a sleeping car company or other company. * * *"

"Section 5430. The value of such property, moneys and credits of each of such street, suburban and interurban railroad and railroad companies, as found and determined by the commission, shall be apportioned by the commission among the several counties through which the road, or any part thereof, runs, so that to each county and to each taxing district therein, shall be apportioned such part thereof as will equalize the relative value of the real estate, structures and stationary personal property of such company therein, in proportion to the whole value of the real estate, structures and stationary personal property of the company in this state; and so that the rolling stock, main track, roadbed, power houses, poles, wires, supplies, moneys and credits of the company shall be apportioned in like proportion that the length of the road in such county, bears to the entire length thereof in all the counties, and to such city, village and district or part thereof therein."

Section 5445 G. C. should also be considered in this connection. It provides as follows:

"Section 5445. When a street, suburban or interurban railroad or railroad company has part of its road in this state and part thereof in another state or states, the commission shall take the entire value of such property, moneys and credits of such public utility so found and determined, in accordance with the provisions of this act, and divide it in the proportion the length of the road in this state bears to the whole length thereof, and determine the principal sum for the value of the road in this state accordingly, equalizing the relative value thereof in this state."

The catalogue of sections applicable to the subject at hand would not be complete without referring to the fact that section 5422 G. C., which is lengthy and which prescribes the form of the report or statement to be made annually by each public utility, including railroad companies, itself sets forth certain information applicable solely to railroad companies and street, suburban and interurban railroad companies

(see paragraph 13), and without quoting sections 5423 and 5424 G. C., which immediately follow the section last above referred to. They are as follows:

> "Section 5423. On the second Monday of June of each year, the commission shall ascertain and assess, at its true value in money, all the property in this state of each such public utility, subject to the provisions of this act, other than express, telegraph and telephone companies.
>
> "Section 5424. In determining the value of the property of each such public utility to be assessed and taxed within the state, the commission shall be guided by the value of the property as determined by the information contained in the sworn statement made by the public utility to the commission and such other evidence and rules as will enable it to arrive at the true value in money of the entire property of such public utility within this state, in the proportion which the value of such property bears to the value of the entire property of such public utility."

It is necessary also to call attention to section 5428 G. C., which is as follows:

> "Section 5428. The commission shall deduct from the total value of the property of each of such public utilities in this state, as assessed by it, the value of the real property owned by such public utilities, if any there be, as otherwise assessed for taxation in this state, and shall justly and equitably equalize the relative values thereof."

It is clear that sections 5423, 5424 and 5428 G. C. apply to railroad companies. As a matter of legislative history, however, these sections and those immediately preceding them were first incorporated in the statute law of Ohio by the so-called Langdon law of 1910 (101 O. L. 399). Prior to that time the assessment of railroad property had been committed to boards of county auditors, and was governed by sections of the Revised Statutes, and for a time the General Code, similar in purport to sections 5429 et seq.

The first or new group of sections to which I have referred, has been many times described as the application, on the part of the legislature, to the assessment of public utility property generally, of the principles of what was known as the "Nichols law," originally applicable to express, telegraph and telephone companies, the controlling idea of which was to authorize and require the valuation of the properties of such public utilities as going concerns, by what was described as the "unit rule."

The old railroad statutes on the other hand, did not at least perfectly embody the unit rule, but required a partial distributive valuation of railroad property to be made; that is to say, the property of a railroad was to be valued by classes. All personal property, including certain things, all the real estate, all the moneys and credits, all the locomotives and rolling stock, etc., were to be valued; but there was no authority to value the railroad as a whole.

The exact meaning of the statutes in their present form, for the purposes of your question, must be arrived at by determining just how these two original inconsistent schemes of legislation were fitted together in the legislation of 1910 and that of 1911 which revised the former. An exhaustive discussion of this theme would consume too much space. Suffice it to say that my opinion is that sections 5423 and 5424 G. C., as applicable to railroads, require that the initial determination of the tax commission be with respect to the value of the entire road or property as a unit and as a going concern; but that under section 5429 G. C. the commission is also required to place separate values upon the different classes of property therein mentioned.

The question thus arises as to what was the purpose of the general assembly in retaining substantially so much of the old law applicable to railroad companiesas

is now found in section 5429 G. C., in the face of the application of the unit rule to the valuation of property of such companies. The answer to this question is, I think, found in section 5430 G. C. and succeeding sections, including section 5445. These sections require that certain subsidiary valuations be apportioned among taxing districts and as between the state and other states, in proportion to the length of the road; whereas other subordinate values are not to be distributed on the mileage basis, but are to be assigned to the several taxing districts in which the property they represent has its natural taxable situs and the valuations so assigned are to be equalized by the commission.

The foregoing interpretation of the sections read together is the only one which will give proper effect to each of them. It is true that such interpretation gives to present section 5429 G. C. an effect different from that which language almost identical with that at present found in it had in sections 2772 et seq. R. S., later sections 5423 et seq. G. C. Nevertheless, I am satisfied that my conclusion is correct for the two following reasons:

1. Present section 5429 G. C. is not word for word the same as section 2772 R. S. That section required the board of county auditors to

> "proceed to ascertain all the personal property *which shall be held to include* roadbed, water and wood stations" etc.

Present section 5429 G. C. omits the language underscored in the above quotation. This difference is very material. Formerly, all that a railroad had and used in operation constituted its personal property, moneys and credits. This was the qualified or imperfect unit rule to which I have referred. Now, however, the unit rule is brought about by the clearer and more positive provisions of sections 5423 et seq., above quoted. And so it was not only not necessary to have the above underscored language in the statutes any longer, but it would have been redundant to leave it there.

Hence, when the substance of section 2772 R. S. was put into the Langdon law of 1910, this language was left out because what are now sections 5423 et seq. G. C. had been put in; and by leaving the underscored language out of what is now section 5429 G. C., the legislature clearly manifested an intent different from that which was embodied in original section 2772 R. S. The difference is obviously this: Section 2772 R. S. with the language which has been quoted in it describes the procedure of the only valuation or valuations of railroad property which were authorized and required to be made; section 5429 G. C. with the underscored language of section 2772 R. S. left out, and with sections 5423 et seq. G. C. incorporated into the statutes *in pari materia*, no longer refer to the only assessment of railroad property nor even to the initial and primary determination to be made by the tax commission with resepct thereto.

Inasmuch as section 5430 G. C. manifestly requires certain apportionments to be made on the basis of the distributive values arrived at under section 5429 G. C., the only purpose which can be assigned to section 5429 G. C. in its present form, its original purpose having been thus changed, is that the distributive valuations, which it requires to be made, shall be for the purpose of apportionment and for no other purpose.

2. To hold any other way would be to bring section 5429 G. C. into sharp conflict with all that precedes it; whereas, to hold as above indicated brings all the sections into harmonious relations with each other and makes the scheme of valuation and apportionment of railroad property, for the purpose of taxation, though somewhat complicated, at least consistent and workable as an entirety.

It is not necessary to pursue this subject further. It is enough to repeat the conclusion already expressed, namely, that under section 5424 G. C. the tax commission must first determine the unit value of a railroad in this state as a going concern; that

under section 5429 G. C. it must at the same time divide up this unit value, after deducting the value of real estate not used in operation, into values representing certain classes of property, and that under section 5430 G. C. the real estate, structures and stationary personal property of the company, exclusive of main track, roadbed and power houses (if any), are to be localized in the taxing districts in which they belong and their value equalized with that of similar property elsewhere, and the rolling stock, main track, roadbed, power houses (if any), supplies, moneys and credits are to be apportioned in proportion to track mileage.

In this connection my attention is called to one inaccuracy in the commission's statement of its question. In referring to the property to be apportioned on the mileage basis, you speak of it as:

> "The roadbed, stations and real estate necessary to the daily running operations of a railroad."

Section 5430 G. C. on its face does not justify this reference, as it requires all real estate, excepting roadbed and all structures, including stations, whether necessary to the daily running operations of the road or not, to be localized along with "stationary personal property," and extends the mileage rule of apportionment only to "rolling stock, main track, roadbed, etc."

It is my opinion that the commission is in error if it has been assumed that stations and other real estate necessary to the daily running operations of a railroad, other than its roadbed, main track, power houses, poles and wires, are subject to apportionment among taxing districts on the mileage basis. I find no decisions under original sections 5429 and 5430 G. C. which would be in point for this purpose and which militate against the conclusion which I have reached.

The reasoning of the court in Railway v. Hynicka, 4 N. P. (N. S.) 345; 77 O. S. 628, is in accord with it. The question there was whether a bridge spanning the Ohio river was to be regarded as a "structure" and "localized," or as a part of the "main track" or "roadbed" and "averaged." The court held that the bridge was a part of the roadbed.

It is true that for the purpose of apportionment as between *states*, in the case of an interstate railroad, under present section 5445 G. C., all property used in operation is to be distributed on the mileage basis, except insofar as the implied limitation on the taxing power of the state, which prohibits the taxing of property having a situs beyond its territorial jurisdiction, may restrain the operation of the statute. But the apportionment *among taxing districts* is upon a different basis, as above stated.

With this exception I am ready to answer your question as follows:

It is the duty of the commission, under the sections considered, to apportion the value of the roadbed, main track, including all side tracks and terminal tracks as such (Railway v. Hynicka, supra), together with the movable personal property, rolling stock, moneys and credits, to each county and each taxing district therein, through which the line of the road runs, in like proportion that the length of the road therein bears to the entire length thereof in the state; and it is the duty of the commission to determine the true value in money of all real estate other than that above specified, including stations, land and buildings necessary to the daily running operations of the railroad; and to appraise the value of each tract of real estate and each such structure, together with the value of stationary personal property, in the taxing district in which it is found or situated, regardless of the length of the road in such district, equalizing, however, the value so assigned with the value of other such property of the railroad and of other railroads and public utilities in the other taxing districts in the state.

This conclusion is arrived at without thus far considering section 5428 G. C., which has been quoted. This section was not a part of the scheme of things embodied

in the old Revised Statutes. As I have pointed out, all real estate necessary to the daily running operations of the railroad were under those laws to be considered as "personal property." Property owned by but not used in the daily running operations of a railroad company was therefore not considered personal property and hence not subject to assessment by the board of county auditors under the old law. Therefore, the imperfection of the old statute, considered as an attempt to approximate the unit rule. But under sections 5423 and 5424 G. C., which do clearly require the unit rule as to railroad property, it necessarily follows that the initial determination of the commission will include the value of all the property of the company, which, as its assets, is reflected in its earning power, or in its capitalization or in any other criterion of the value of the whole as a unit.

Therefore, the commission in the first instance values more property than the county auditors under the old statute could value, viz.: property not used in the daily running operations. This property of course is "otherwise assessed for taxation" because under section 5429 G. C., requiring specific valuations by the commission, the commission is limited to the valuation of such real estate as is "necessary to the daily running operations of the road."

In other words, to say that under section 5429 G. C. the unit value for the state, arrived at by the commission, under section 5424 G. C., must be subdivided, would be an inaccuracy of expression; for in point of fact before the determinations required by section 5429 G. C. are made, the deductions required by section 5428 G. C. must be made. That is to say, the first thing for the commission to do, after it has determined the unit value of the property of the railroad in the state, is to deduct from that value the assessed value of any real estate owned by the company, but not necessary to the daily running operations of a road, justly and equitably equalizing the value so deducted. It is the remainder that is to be subdivided into parts in accordance with section 5429 G. C.

Another way of stating the same thing is to say that by virtue of section 5429 G. C. the commission is to make the controlling assessment of all property necessary to the daily running operations of the road, whether real or personal. If local taxing authorities have assessed such property, there is no doubt that the commission may, for purposes of convenience and in the spirit of co-operation, ratify such assessments and adopt them as their own for the purposes of sections 5429 and 5430; but the commission is not bound by such assessments, but only bound by local assessments of property not used in the daily running operations of the road.

In point of fact I am sure that a careful historical study of the statutes involved would show that real estate used in the daily running operations of a railroad was never intended to be subject to local appraisement at all. The statutes in their present form, however, leave doubt as to this and I do not care to go further than to hold that whether or not local taxing officers have the power to appraise real estate used in the daily running operations of a railroad, in the first instance, such appraisement is not binding upon the tax commission.

In this connection I note that my predecessor, Hon. Edward C. Turner, in an opinion to Hon. Henry W. Charrington, prosecuting attorney at Gallipolis, Ohio, rendered February 28, 1916, and found in Opinions of the Attorney-General for 1916, volume I, page 351, held in effect that section 5428 G. C. makes it the duty of the tax commission to deduct from the total value of the property of any public utility the value of the real property owned by the public utility and assessed for taxation by the local authorities. He did not expressly pass upon the question as to whether the valuations of the local authorities are binding upon the commission, as to real estate used in the operation, although it is rather clear from his statement that in his opinion a negative answer should be given to this question.

The opinion which I have expressed is in apparent but not real conflict with that of Mr. Turner. Mr. Turner was considering the case of a public utility other than

a railroad, viz., a gas company. As to such public utilities, there is no provision like that of section 5429 G. C., which applies exclusively to suburban and interurban railroad companies and railroad companies. In short, as to other public utilities, the commission is not required or authorized to make any separate appraisement of real property used in operation, though under section 5422 G. C. the value of that used in operation is to be furnished to the commission for its convenience in making its initial determination. But under section 5429 G. C., as to the classes of utilities therein enumerated, the commission is expressly authorized to do precisely what in this respect the old board of auditors was required to do (though, as we have seen, for a different purpose), namely, to determine the value of the real estate used in daily operations.

It follows that section 5428 G. C. may, and possibly does, have a different effect as applied to a public utility other than a suburban or interurban railroad company or railroad company, than that which it may have with respect to public utilities other than those enumerated. In the one case I am of the opinion, as hereinbefore stated, that it requires and authorizes the deduction at the assessed value of the real estate not used in operation only. In the other case Mr. Turner held—and I am not prepared to disagree with him—that it requires the deduction from the unit value of all the real estate, whether used in operation or not, as assessed for taxation by the local authorities. The difference in the application of section 5428 G. C. arises as has been seen, because of the provisions of section 5429 G. C.

In connection with your question you mention the fact that certain real estate, which you characterize as "terminal facilities," is alleged by certain county auditors and other local authorities to be worth much more than the sum which the commission has heretofore determined to be its proper valuation; yet the commission finds in the cases of the railroads involved that as a whole they are not greatly more valuable than they heretofore have been. If the commission, therefore, is obliged to accept a local assessment of such terminal facilities, or is obliged to assess them at what the commission may in candor be satisfied to be their true value in money, and localize such assessments in the taxing district where the facilities are located, the result necessarily would be that the remainder of the unit value attributable to movables, moneys and credits and roadbed, and which is subject to apportionment elsewhere in the state, on the track mileage basis, will be correspondingly less; so that the commission can not increase the value of the terminals, if that value must be localized, without either putting a false value on the road as a whole, or decreasing the value apportioned to the taxing districts through which the main line runs.

It is conceivable that a case may arise or may have arisen in which, because of the peculiar requirements of the law and exceptional developments of fact, the commission may actually have, in the discharge of its duty, to reduce the per mile apportionment of some railroads. Such a result would not show that the law had been improperly administered and would not in point of fact work any injustice to any one, however disagreeable it may be to be obliged to reduce the tax valuation of any given taxing district. In fact the law, as I interpret it, may require such a result in a conceivable case.

However, the commission is advised:

That terminal facilities used in daily running operations are to be valued by the commission, and that the determinations of local officers are not binding on the commission; that land and structures purchased with a view to converting them into terminal facilities, but not actually used for that purpose, are subject to local assessment, and the value thereof, as so appraised, must be deducted by the commission from the unit value of the road under section 5428 G. C.

The commission is therefore advised that as to "terminal facilities" used in daily running operations, the value thereof as determined by the commission may enter into the aggregate sum which is to be apportioned on the track mileage basis, if such

"terminal facilities" represent a part of the "roadbed." The roadbed of a railroad may be defined for this purpose as any land actually covered by its tracks, whether main tracks, side tracks or terminal tracks, including enough land on the sides thereof as may be reasonably necessary for normal right of way purposes (Railway v. Hynicka, supra.) This is true whether the tracks are actually located on the ground or are placed upon some structure such as a bridge or a pier or dock.

All other "terminal facilities" such as warehouses, docks not covered with tracks, ground used for storage purposes, &c., though subject to valuation by the commission, must, when valued and equalized, be assigned, as to such valuation, to the taxing district in which they are located, and may not be distributed over the route of the railroad on the mileage basis.

The commission is further advised that the valuation placed by the commission upon terminal facilities, which on the principles above laid down must be localized in the taxing district, must be equalized with the valuation of other real property, structures and stationary personal property of the railroad in other counties and taxing districts, and with similar property of other railroads elsewhere in the state.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

389.

TAX COMMISSION—MUST VALUE REAL PROPERTY OF A RAILROAD USED IN ITS DAILY RUNNING OPERATIONS—COUNTY AUDITOR HAS NO AUTHORITY TO MAKE SUCH VALUATION—DEDUCTIONS UNDER SECTION 5429 INCLUDE ANY REAL ESTATE NOT USED IN OPERATION.

A county auditor, acting under section 5548 G. C., has no authority to value the real estate of a railroad, used in its daily running operations. The tax commission, acting under section 5429 G. C., must assess such property. The deductions required by section 5428 G. C., as applied to railroads, include only real estate not used in operation. The commission may enlist the aid of local taxing authorities in discharging its duty under section 5429 G. C., but it must make the final assessment.

COLUMBUS, OHIO, June 18, 1917.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I acknowledge receipt of your letter of June 12, 1917, supplementing your earlier letter of May 22, 1917, and requesting my opinion as follows:

> "If a county auditor proceeds under the provisions of section 5548 et. seq. to assess the real estate in a subdivision or subdivisions in a county, should such assessment include the real estate and buildings of a railroad company used in its daily running operations in so far as the same is located in such subdivision or subdivisions? If so, may the railroad company complain as to such assessment to the board of revision and appeal from the decision of that board to the tax commission? In the past the practice of county auditors has not been uniform in this regard. In some counties such real estate has been assessed locally, but the value has not been placed upon the tax list except through the certificate of the tax commission issued in accordance with section 5458 of the General Code.

"If, in answer to the commission's letter of May 22, 1917, it is your opinion that its duty is to determine the true value in money of the real estate necessary to the daily running operations of a railroad and place such value in the taxing district in which the real estate is situated, regardless of the length of the road in such cases, is the commission bound to use the values placed upon such real estate by the county auditor proceeding under section 5548 et seq. (if it is your opinion that he may place values on the same), or may it determine the value regardless of the county auditor's assessment?"

These questions are, I think, in substance covered by an opinion which has already been prepared and will doubtless reach the commission before this opinion is placed in your hands. However, for the sake of clearness and because these questions were not very exhaustively discussed in the other opinion, I will restate my conclusions thereon and elaborate briefly upon my reasons therefor.

I said in the other opinion that a careful historical review of the railroad property tax appraisement sections would show that never since they had been in force had the real property assessors, locally selected, had any authority to appraise such property of a railroad company used in its daily running operations. This is true, I think, upon the short ground that section 2772 R. S., commented upon in the other opinion, made all such property "personal property" for the purpose of appraisement, and specifically imposed upon boards of county auditors the duty of valuing the same.

The duty of a real property assessor under general sections such as what is now section 5548 G. C., is limited to the appraisement of "real property," i. e., that which is "real property" for purposes of taxation. Because the property used in the daily running operations of a railroad was not real property for purpose of taxation—at least for purpose of appraisement—it was not subject to assessment or appraisement by the real estate assessors.

This state of affairs continued to be the law until the act of 1911, revising the Langdon law of 1910, was passed; for the Langdon law itself retained the phrase "which shall include" and gave rise to the very conflict and contradictions in terms commented upon in my other opinion (see section 75, 101 O. L. 418). The elimination of this no longer necessary language was one of the refinements introduced into the act by the Hollinger law of 1911. By that time, however, the tax commission had taken over the appraisement of real property of railroads, used in daily running operations, and there had been no such change in the law as would restore the jurisdiction over such property to the real property assessors; on the contrary, the state of the law, with respect to the withdrawal of this subject matter from the field of the exercise of the powers of local assessment, was continued, and all that was done was to transfer to the tax commission the specific duty, formerly imposed upon the county auditors, to value such property as a part of the "personal property" of railroads.

In 1911, and for the reasons stated in the other opinion, a change was made. No longer was real property, used in daily running operations, to be considered strictly as "personal property;" yet it specifically was required that it should be valued for taxation by the tax commission.

For two distinct reasons this change did not have the effect of restoring jurisdiction over real property used in daily running operations, to the local assessing officer. Those reasons are:

1. In this respect I think it is clear that the act of 1911 was a mere revision of that of 1910 and the object of the changes made therein was merely to make for clearness of expression and to do away with inconsistencies. Under such circumstances the familiar and well established rule is that such verbal changes are not to be regarded as having changed the substance of the law.

2. Even if there had been no legislative history behind section 5429 G. C., in its relation to sections like present section 5548 G. C., we would have this situation:

One section gives one officer power to appraise all real property. Another section, specific in its character, gives to another officer or tribunal power to appraise a particular kind of real property, i. e., that used in the daily running operations of the railroad. The maxim which governs in such cases is that the specific provision is to be regarded as an exception to the general provision.

Reading the two sections together, therefore—and this is necessary and proper, as both relate to the assessment of real estate—sections like section 5548 G. C. are to be understood as authorizing the local assessing officer to assess and value for taxation all real estate excepting that, the value of which is to be specifically determined as such by the tax commission; and by consulting section 5429 G. C., and related sections, it turns out that real estate used in the daily running operations of a railroad or an interurban or suburban railroad is to be specifically and finally valued for taxation by the commission.

As pointed out in the other opinion, it is otherwise with respect to real estate owned by railroad companies, but not used in daily running operations. The tax commission is under no duty and indeed has no power to value such real estate as such. The unit value at which it may arrive, under section 5424 G. C. and similar sections, may include, as an element thereof, so to speak, the value of such real estate not used in operation. But in arriving at the unit value the commission presumably has not valued the real estate as such, but merely the railroad as a whole. Therefore, section 5428 G. C., as applied to railroad companies, requires the deduction, at the assessed value thereof, of real estate otherwise assessed for taxation, i. e., real estate not used in the daily running operations of the railroad.

It was also pointed out in the other opinion that section 5428 G. C., as applied to public utilities other than railroads and suburban or interurban railroads, has a broader meaning because as to such other public utilities the commission is not authorized and required, as it is by section 5429 G. C., specifically to assess and value real estate as such. Therefore, the deductions to be made under section 5428 G. C. comprehend all the real estate of public utilities other than railroads and suburban or interurban railroads; but as to the latter they include only real estate not used in the daily running operations of the road.

Under section 5428 G. C. the commission is of course bound by the local appraisement, which indeed is the only one made of the real estate to which it applies as such.

Under section 5429 G.C. the local officials are bound by the commission's appraisement, which indeed is the only authorized assessment of real estate used in daily running operations, as such.

As suggested in the other opinion, there is no impropriety in the commission, under its general powers, enlisting the aid of local taxing officials, to enable it more effectually to appraise real estate used in daily running operations. Nevertheless, the result is the appraisement of the tax commission and not that of the local officers, and the commission is not bound by the opinions of such local officers with respect to such real estate.

You say that in the past the practice has varied, but I take it from your letter that in no county has any assessment finally gone upon the duplicate with respect to real estate used in the daily running operations of a railroad, except upon the certificate of the tax commission issued in accordance with section 5458 G. C. It appears, therefore, that the practice in this essential respect, while not uniform in detail, has been in accordance with the view of the law which I have expressed.

I think the foregoing statement, which indeed is, as observed, but a restatement of the conclusions more generally expressed in the other opinion, fully answers the questions in your letter of June 12, 1917.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

390.

COURT OF DOMESTIC RELATIONS—MAHONING COUNTY—JURISDICTION—RECORDS—JUVENILE COURTS—JURISDICTION—CLERK OF COMMON PLEAS COURT—MAHONING COUNTY—DUTIES IN REFERENCE TO DIVISION OF DOMESTIC RELATIONS.

The act of the general assembly of March 20, 1917, providing an additional common pleas judge for Mahoning county, who shall be disignated as a judge of the court of common pleas division of domestic relations, simply provides for an additional judge for said court in said county, and furnishes a designation of the particular part of the jurisdiction and duties to be exercised by him.

Juvenile courts have jurisdiction in a manner different from the other or general jurisdiction of the courts designated to act as such juvenile court, and are required by law to have kept by the clerk an appearance docket and journal for the business of such juvenile court alone.

The said division of domestic relations of the court of common pleas of Mahoning county, as provided in said act, is among its other duties, to constitute such juvenile court, and the clerk of the court of said county will be required to keep such appearance docket and journal for the business of such court of domestic relations coming under the head of juvenile court work, while the entries, notations, etc., of such courts, in the exercise of their ordinary jurisdiction as courts of common pleas will be made upon the regular dockets, journals and records of the court of common pleas.

Mothers' pension cases, so called, in Mahoning county, are before this court of common pleas, division of domestic relations and under its authority as a juvenile court.

COLUMBUS, OHIO, June 18, 1917.

HON. JARED P. HUXLEY, *Prosecuting Attorney, Youngstown, Ohio.*

DEAR SIR:—On May 31, 1917, you forwarded to this office a request for an opinion as follows:

> "I am enclosing to you herewith letter just received from J. Arthur Ferris, county clerk, in which he asks me to secure a ruling from you as to the duties, jurisdiction, etc., of the new court of domestic relations created for this county by the last legislature. His letter is self-explanatory as to what rulings we desire.
>
> "I would ask that you let us have this opinion at as early a date as possible in order that the clerk may place his order for such records and office supplies as may be necessary to handle this new work."

The letter referred to and enclosed is as follows:

> "If possible I wish that you would secure for me a ruling of the Attorney-General as to what jurisdiction and duties are conferred on the new court of domestic relations for Mahoning county as per bill of last session.
>
> "It is of course obvious that this court hears divorce and alimony cases and all cases affecting domestic relations that have heretofore been tried in common pleas court, but what of juvenile cases? And if they are heard in this court how are they to be taken care of by the clerk? Are they to be entered on the criminal or on a separate appearance docket? Also do the mothers' pension cases come to this court? And if so, are they to be kept separate from the other common pleas cases?
>
> "Briefly, if these two classes of cases are by this legislation brought to

this court are they still to be kept separate and apart from other common pleas cases in the manner they are now kept in the probate court (in this county), or are they to be kept in the usual manner and form and in the same records as other common pleas cases?

"As this judge will assume his duties the first week in July it is important that we have this information at once, so that time may be had for making the necessary books and supplies. * * *"

The act of the legislature to which your inquiry relates is as follows:

(House Bill No. 532.)

"To provide for an additional judge of the court of common pleas for Mahoning county, and providing for his election as a judge of said court, division of domestic relations.

"Section 1. From and after the passage and taking effect of this act, there shall be one additional judge of the court of common pleas in and for Mahoning county, who shall reside therein. Such additional judge shall be elected in 1918, and every six years thereafter, for a term of six years, commencing on the first day of January next after his election. Until such additional judge of the court of common pleas is so elected and qualified, the governor shall fill such position by appointment. Vacancies occuring in the office of such additional judge in Mahoning county shall be filled in the manner prescribed for the filling of vacancies in the office of judge of the court of common pleas. He shall have the same qualifications, and shall receive the same compensation as is provided by law for the judges of the court of common pleas in Mahoning county. He shall exercise the same powers and have the same jurisdiction as is provided by law for judges of the court of common pleas. He and his successors shall, however, be elected and designated as a judge of the court of common pleas, division of domestic relations. To such judge shall be assigned all juvenile court work arising under title four, chapter eight of the General Code, and all divorce and alimony cases, and cases involving the care and custody of children in said county. Whenever said judge of the court of common pleas, division of domestic relations, shall be sick, absent or unable to perform his duties, the same shall be performed by another judge of the court of common pleas of said county, assigned for said purpose, according to law."

This act provides for an additional judge of the court of common pleas in your county. No new jurisdiction or duty for the common pleas court is provided in the act; that is, nothing is therein provided but what already may be the duty of a judge of the court of common pleas. The juvenile court is provided for in section 1639 of the General Code, which in part is as follows:

"Courts of common pleas, probate courts, and insolvency courts and superior courts, where established shall have and exercise, concurrently, the powers and jurisdiction conferred in this chapter. The judges of such courts in each county, at such times as they determine, shall designate one of their number to transact the business arising under such jurisdiction. When the term of the judge so designated expires, or his office terminates, another designation shall be made in like manner.

"The words juvenile court, when used in the statutes of Ohio, shall be understood as meaning the court in which the judge so designated may be

sitting while exercising such jurisdiction, and the words 'judge of the juvenile court' or 'juvenile judge' as meaning such judge while exercising such jurisdiction. * * *"

This is followed by a special provision for Hamilton county substantially the same as that provided above for Mahoning county, the only difference, after the court is organized and in operation, being that in Mahoning county the jurisdiction of the court includes "cases involving the care and custody of children in the said county," otherwise the language is borrowed from the Hamilton county act.

As to your first inquiry as to the jurisdiction and duties conferred on the new court of domestic relations, it seems to be sufficiently answered in the act itself, as it provides only for an additional judge of the court of common pleas, but instead of having the judges of the court designate one of their number to transact these particular duties, the statute itself selects and designates one particular judge, who with his successor in office, is to perform these particular duties, so that the duties to be performed by the new court of domestic relations are in no manner different from those devolving upon the court already having jurisdiction of the subjects embraced under this title.

Under the general laws including all counties except Hamilton and Mahoning other courts than the court of common pleas may be designated as juvenile courts, including the probate court, which may be so designated in the manner provided by statute, and so far as those duties are concerned they are to be performed precisely in the same manner as already done by the juvenile court. In so far as the new court of domestic relations has given it other jurisdiction than that of juvenile court, it is jurisdiction already possessed by the court of common pleas exclusively, so far as divorce and alimony are concerned, and concurrently with other courts so far as cases involving the care and custody of children are concerned. No distinction is made as to such divorce and alimony cases; they will be brought and proceeded in and determined exactly as they are now, being placed upon the same dockets, journals, records, etc., as before the organization of the new court, there being no difference whatever in that branch of the business, except that the new judge is the one who is designated to hear and determine the cases as they arise.

As to cases involving the care and custody of children, these usually arise in three ways:

1st. By habeas corpus.

2nd. In divorce and alimony cases. What has already been said as to procedure in divorce and alimony cases applies equally to cases involving the care and custody of children arising in such divorce and alimony cases and in habeas corpus cases; in one case they arise in cases already upon the docket and make no difference whatever in the *modus operandi* in conducting and docketing such cases or recording the proceedings of the court in reference thereto.

3rd. In juvenile court cases. These cases come up in the same form and are conducted and disposed of in the same manner in this court of domestic relations as in any other juvenile court, and in respect to such juvenile court alone is there occasion to consider the connection of the clerk of the court therewith as to such docketing and recording and as to the books to be kept by him in which entries and references to such cases are to be made.

In this respect the juvenile court has a species of identity of its own, whether its duties be devolved upon the court of common pleas, probate, insolvency or superior court, and whichever of those courts be assigned as such juvenile court they proceed in the same manner, exercising the juvenile jurisdiction as a sort of addition or adjunct to its ordinary jurisdiction. Certain books are required to be kept by the clerk of the juvenile court. Of course, when this is the court of common pleas he is the clerk of the courts of the county; when as the probate court in the ordinary counties,

he is the probate judge himself, and so on. Now, as each of these courts which may be designatd as juvenile courts is required by law to keep certain designated books which are different in each case, it is apparent that something additional would be required by whichever one acts as such juvenile court; consequently we have section 1641 General Code, which is as follows:

> "The clerk of the court or the judge exercising the jurisdiction shall keep an appearance docket and a journal, in the former of which shall be entered the style of the case and a minute of each proceeding and in the latter of which shall be entered all orders, judgments and findings of the court."

The clerk of the court of common pleas is already required to keep an appearance docket. (Section 2878 General Code.) The probate court is not so required. (Section 1594 General Code.) This latter section provides twelve different records or books to be kept by the probate court and not including an appearance docket, so that the probate court when designated as a juvenile court is compelled to keep an appearance docket upon which, of course, is entered the juvenile court matters alone. The matter to be entered on the appearance docket in the juvenile court is the "style of the case and a minute of each proceeding." The present juvenile court, however, is a court of common pleas which must already keep an appearance docket. The provision as to the entry on the appearance docket is as follows: (Section 2879 General Code.)

> "The clerk shall enter upon the appearance docket at the time of the commencement of an action or proceeding, the names of the parties in full, with names of counsel, and forthwith index the case direct and reverse in the name of each plaintiff and defendant. In like manner and at the time it occurs, he shall also index the name of each person who may thereafter become a party to such action or proceeding. At the time it occurs and under the case so docketed, he shall also enter the issue of the summons or other mesne process or order and the filing of each paper, and he shall record in full the return of such writ or order with the date of its return to the court, which entry shall be evidence of such service."

It will be observed that this appearance docket requires different entries from the appearance docket in the juvenile court, that this docket provided for in section 2879 is one appropriate for use in civil actions, and not at all adapted to the peculiar and somewhat summary business of the juvenile court. It therefore appears, that as this court will be required to keep an appearance docket, such appearance docket will not be separate from that of other branches of the common pleas court in the county. There is but one common pleas court in each county, although there may be a number of judges; there is one clerk and one set of books, and that set of books will be the books of this proposed court of domestic relations, and the appearance docket will be the appearance docket of this court—that is, of the court of common pleas of which this is simply a division, and on this appearance docket will go all the divorce and alimony cases and habeas corpus cases just the same as they do at the present time, but as to the juvenile business it will be necessary for the clerk to keep a separate appearance docket, which will be used by the division of domestic relations, and by that division only in its capacity as juvenile court; also a separate journal will be kept in the same manner and for the same purpose upon which will be entered all orders, judgments and findings of the juvenile court. It will be necessary for the clerk to distinguish when this particular judge presiding in the court of domestic relations is acting under his ordinary jurisdiction as a judge of the court of common pleas and when he is acting under the statutes providing for the duties of a juvenile

court. In the former case all entries will be made on the ordinary books, in the latter case upon this appearance docket and this journal.

An order touching the custody of children might be one or the other. In cases where the court of common pleas, not being a juvenile court now, makes such orders, to wit: in habeas corpus cases and in divorce and alimony cases, the entry, notations etc., will be upon the general books of the court of common pleas; but when making orders touching the care and custody of children only in the jurisdiction of his duties as a juvenile court, the entry will be upon this special appearance docket and journal.

Inquiry is made as to whether mothers' pension cases come to this court. This is plainly answered by the statutes providing for such pensions, which are found in the chapter on the juvenile court (Sections 1683-2 et seq. General Code.) It plainly appears from these sections that the juvenile court is one having cognizance of all such cases, therefore the new court of domestic relations as such juvenile court will have said jurisdiction, and entries, etc., will be in its capacity as such juvenile court and upon the same dockets and records. This seems to answer all the inquiries made by your clerk.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

391.

COLLATERAL INHERITANCE TAX MATTERS—ITEMS ALLOWED IN PROBATE JUDGES COST BILL THEREIN.

Items allowed in probate judge's cost bill in collateral inheritance tax matters.

COLUMBUS, OHIO, June 18, 1917.

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

GENTLEMEN:—I have a communication from John W. Davis, probate judge of Mahoning county, as follows:

"I am enclosing a copy of a cost bill, as taxed against the estate of Eliza A. Bushnell, for proceedings had under the collateral inheritance tax law.

"According to the contention of the state examiner, the only item entitled to be taxed is that in line No. 14, being a charge of 25 cents, or in other words, a charge of 10 cents per 100 words for the certifying to the county auditor of the decree or order of the court as to what property is subject to the collateral inheritance tax. Therefore, the court is allowed nothing for the performance of his judicial act nor for making a journal of his order or decree, nor for the making up of his collateral inheritance record; or in other words, if the contention of the examiner is supported by your department, the probate court is allowed nothing whatever to pay his deputy clerks or stenographers for journaling his order or decree and for making up the record of proceedings.

"The state examiner has been basing his contention on his construction of circular letter from attorney-general's department dated April 8, 1914, being No. 176; also circular letter to the county auditors under date of July 16, 1914.

"Hoping to have a ruling at your earliest convenience as to whether or not we are entitled to tax fees, as in other matters, to make our office self-

supporting for work done under the collateral inheritance act, or whether we are entitled to compensation only for the certifying to the auditor of the court's order or decree, * * *."

I am addressing this opinion to your department because you have indicated to me that you are very much interested in the subject matter of same and are desirous of having this department advise you just what items may be properly included in the probate judge's cost bill in collateral inheritance tax cases. Because of this latter reason I am giving attention in this opinion not only to the items taxed by the probate judge of Mahoning county on the cost bill attached to his letter, but also to all of the items set forth in such cost bill so that your department may be advised of what fees may be allowed probate judges for their services in connection with collateral inheritance tax matters.

The cost bill submitted reads as follows:

1.	Docketing cause, each	$0.10	$0.10
a.	Indexing cause in the docket, each name	.05	.05
2.	Filing (--) praecipes, pleadings, subpoenas, cost bill and other necessary documents, each	.05	.10
a.	Noting the filing of same, except subpoena and praecipe therefor, on the docket (--), each	.05	.05
3.	Taking (--) affidavits, including certificate and seal (including certifications to pleadings), each	.25	------
4.	Taking (--) undertakings or bonds, each	.25	------
5.	Issuing (--) writs, orders or notices, except subpoenas, each	.30	------
a.	Noting the issue of same on docket (--), each	.10	------
6.	Certificate of deposit on foreign writ	.10	------
7.	Certificate of opening deposition	.10	------
8.	Entering each cause on the trial or motion docket and indexing same (--) terms, each	.10	.10
9.	Issuing subpoenas, (--) names, each	.05	------
10.	Swearing (--) witnesses, each	.05	------
11.	Entering attendance of (--) witnesses, each	.10	------
12.	Certifying fees of (--) witnesses, each	.05	------
13.	Each entry (-- entries) on journal—per 100 words or fraction thereof	.10	.60
a.	Indexing same (--)	.05	.05
b.	Posting same on docket (--)	.10	.10
14.	Making (--) copies of pleadings, process, record, or files, in. certf. and seal (-- words), per 100 words	.10	.25
15.	Noting on docket (--) papers mailed, each	.05	------
16.	Writing advertisement required to be published (posted up, only 25 cents)	.37½	------
17.	Hearing and deciding each application in assignments	2.00	2.00
18.	Execution	.50	------
19.	Making complete record in cause (-- words) per 100 words	.10	1.10
a.	Indexing same, each cause	.10	------
b.	Recording plat not exceeding six lines	1.00	------
c.	For (--) additional lines, each	.10	------

20.	Receiving and disbursing money $———, a commission of one per centum on the first $1,000, $———, and one-fourth of one per centum on $———, all exceeding $1,000	-----	------
21.	Making cost bill, taxed but once	.40	.40
22.	Entering on cash book costs received in each cause	.25	.25

Sections 5340, 5343, 5345 and 5347 General Code read:

"Section 5340. Within ten days after the filing of the inventory of every such estate, any part of which may be subject to a tax under the provisions of this subdivision of this chapter, the judge of the probate court, in which such inventory is filed, shall make and deliver to the county auditor of such county a copy of the inventory; or, if it can be conveniently separated, a copy of such part of the estate, with the appraisal thereof. The auditor shall certify the value of the estate, subject to taxation hereunder and the amount of taxes due therefrom, to the county treasurer, who shall collect such taxes, and thereupon place twenty-five per cent. thereof to the credit of the county expense fund, and pay seventy-five per cent. thereof into the state treasury, to the credit of the general revenue fund, at the time of making his semi-annual settlement.

"Section 5343. The value of such property, subject to said tax, shall be its actual market value as found by the probate court. If the state, through the prosecuting attorney of the proper county, or any person interested in the succession to the property, applies to the court, it shall appoint three disinterested persons, who, being first sworn, shall view and appraise such property at its actual market value for the purposes of this tax, and make return thereof to the court. The return may be accepted by the court in a like manner as the original inventory of the estate is accepted, and if so accepted, it shall be binding upon the person by whom this tax is to be paid, and upon the state. The fees of the appraisers shall be fixed by the probate judge and paid out of the county treasury upon the warrant of the county auditor. In case of an annuity or life estate, the value thereof shall be determined by the so called actuaries' combined experience tables and five per cent. compound interest.

"Section 5345. Each probate judge, at least once in six months, shall render to the county auditor a statement of the property within the jurisdiction of his court that has become subject to such tax during such period, the number and amount of such taxes as will accrue during the next six months, so far as they can be determined from the probate records, and the number and amount thereof due and unpaid. Each probate judge shall keep a separate record, in a book to be provided for that purpose, of all cases arising under the provisions of this subdivision of this chapter.

"Section 5347. A final settlement of the account of an executor, administrator or trustee shall not be accepted or allowed by the probate court unless it shows, and the judge of that court finds, that all taxes imposed by the provisions of this subdivision of this chapter, upon any property or interest therein, belonging to the estate to be settled by such account, have been paid. The receipt of the county treasurer shall be the proper voucher for such payment."

On February 15, 1914, this department rendered an opinion to Hon. A. V. Donahey, auditor of state, in which it was held that the probate judge "may lawfully charge and collect from the county treasury, as provided in section 5346, the sum of ten cents

per hundred words for making the copy required to be made by section 5340, but is not entitled to any fees whatever for performing the act of delivery required by the section."

ITEM-1 —DOCKETING CAUSE.

1A—INDEXING SAME.

Section 1594 G. C. provides:

> The following books shall be kept by the probate court:
> * * * * * * * * * *
> "2. An administration docket, showing the grant of letters of administration or letters testamentary, the name of the decedent, the amount of bond and names of sureties therein, and containing a minute of the time of filing each paper, and a brief note of each order or *proceeding relating to the estate* with reference to the journal or record in which the order or proceeding is found. * * * "

It is my view that the proceeding relative to the collateral inheritance tax is a "proceeding relating to the estate" within the meaning of the above section and that this proceeding should be docketed in the administration docket and not in a separate docket. This being so it follows that no fee can be allowed the probate judge for docketing and indexing, as included in the above item.

ITEM 2 —FILE NECESSARY DOCUMENTS.

2A—NOTING SUCH FILING EXCEPT SUBPOENAS AND PRAECIPES ON THE DOCKET.

Section 2900 G. C., above referred to, provides:

> "For filing each praecipe, pleading, subpoena, cost bill and other necessary document, five cents; for noting the filing of same, except subpoena and praecipe therefor, on the appearance docket, each, five cents."

I am not quite clear as to just what papers were filed by the probate judge in the specific cause before me, but assuming that they were papers such as return of appraisers, etc., the fee set out in the cost bill should be allowed for the filing of such papers and the noting of the filing on the docket.

ITEMS 3, 4, 5, 6, AND 7 INCLUDE THE TAKING OF AFFIDAVITS, TAKING OF UNDERTAKINGS OR BONDS, ISSUING WRITS, ORDERS OR NOTICES, EXCEPT SUBPOENAS, NOTING THE ISSUE OF SAME ON DOCKET, RECORDING RETURN OF SAME ON DOCKET, CERTIFICATE OF DEPOSIT ON FOREIGN WRIT AND CERTIFICATE OF OPENING DEPOSITION.

When it is necessary for the probate judge to do any of these things in connection with collateral inheritance tax matters, he may be paid the fee allowed by law therefor, the same as though the collateral inheritance tax matter was a separate and distinct proceeding.

ITEM 8—ENTERING CAUSE ON THE TRIAL OR MOTION DOCKET.

Section 1594 G. C. provides what books may be kept by the probate court and provides for the keeping of four dockets, to wit: an administration docket, and guardian's docket, a civil docket and an execution docket. There is no authority in law for the probate judge to keep a trial and motion docket and it is therefore my opinion that this item should be disallowed.

ITEMS 9 AND 10—ISSUING SUBPOENAS AND SWEARING WITNESSES.

The probate judge is entitled to these fees in collateral inheritance tax proceedings the same as in administration of estates and other matters.

ITEMS 11 AND 12—ENTERING ATTENDANCE OF WITNESSES AND CERTIFYING FEES OF WITNESSES.

Section 5346 G. C. provides for the "fees of officers having duties to perform" in connection with the collateral inheritance tax law, but provides no fees for witnesses. This being the case it will be unnecessary for the probate judge to enter the attendance of witnesses or certify their fees in collateral inheritance tax cases and no fees for such services should be allowed.

ITEMS 13, 13A AND 13B—ENTRY ON JOURNAL, INDEXING SAME AND POSTING SAME ON DOCKET.

Section 2900 General Code provides:

> "for each entry on journal per hundred words or fraction thereof, ten cents; for indexing same, five cents; for posting same on appearance docket, ten cents."

ITEM 14—MAKING COPIES OF PLEADINGS, PROCESS, ETC.

Section 2901 G. C. provides:

> "for making copies of pleadings, process, records or files, including certificate and seal, ten cents per hundred words."

This section relates to probate judges' fees, the same as section 2900, when the fees of the probate judge for such service are not enumerated in sections 1601 and 1602 Section 5340 provides:

> "The judge of the probate court, in which such inventory is filed, shall make and deliver to the county auditor of such county copy of the inventory."

By authority of the section just quoted, the probate judge is entitled to receive the fees charged in this item.

ITEM 15—NOTING ON DOCKET PAPERS MAILED.

It is not necessary in collateral inheritance tax proceedings in the probate court to mail any papers, neither are there any defendants in such proceedings. Therefore there will be no occasion for this charge and the item should not be allowed.

ITEM 16—WRITING ADVERTISEMENTS REQUIRED TO BE PUBLISHED (POSTED UP ONLY 25 CENTS.)

No advertisements are required to be published in the collateral inheritance tax proceedings by the probate court, therefore this item should not be allowed.

ITEM 17—HEARING AND DECIDING EACH APPLICATION IN ASSIGNMENTS.

Section 5343 G. C. requires the probate judge to hear the application of the prosecuting attorney or other persons interested for the appointment of appraisers and to appoint the same. I can find no statute authorizing any fee to be charged by the probate judge for hearing an application or for the appointment of appraisers and therefore conclude that this item should not be allowed.

ITEM 18.—EXECUTION.

The probate court itself has nothing to do with the collection of the collateral inheritance tax and therefore item 18 should not be allowed.

ITEMS 19, 19A, 19B AND 19C. MAKING COMPLETE RECORD IN CAUSE; INDEXING EACH CAUSE; RECORDING PLAT NOT EXCEEDING SIX LINES; FOR ADDITIONAL LINES.

The only fees enumerated in this item which should be allowed are 19 and 19a, for making complete record in cause and for indexing same, each cause. Section 5345 G. C. provides:

> "Each probate judge shall keep a separate record in a book to be provided for that purpose, of all cases arising under the provisions of this subdivision of this chapter."

Section 2901 G. C., heretofore referred to, provides for making complete record in each cause, ten cents per hundred words; for indexing same, each cause, ten cents.

ITEM 20.—

No authority for any charge of this kind.

ITEM 21.—MAKING COST BILL, TAXED BUT ONCE.

Inasmuch as section 5346 G. C. provides that "seventy-five per cent. of the cost of collection and other necessary and legitimate expenses incurred by the county in the collection of such taxes, shall be charged to the state," it is necessary for the probate judge to make up a separate cost bill relating to collateral inheritance tax matters, and the charge for making the cost bill in this item is, therefore, a proper one.

ITEM 22.—ENTERING ON CASH BOOK COSTS RECEIVED IN EACH CAUSE.

Section 2901 General Code provides for entering on cash book costs received in each case, 25 cents. This charge is, therefore, a proper one.

Yours very truly,
JOSEPH MCGHEE,
Attorney-General.

392.

COURT CONSTABLES—THEIR RIGHTS AND DUTIES IN COUNTIES THAT HAVE BUT ONE COMMON PLEAS JUDGE.

A court of common pleas of a one-judge county cannot lawfully require a court constable to attend to the assignment of cases.

Court constables of such counties cannot be allowed "further compensation" as provided for constables who attend to the assignment of cases, in addition to their regular compensation for preserving order and discharging such other duties as the court requires.

COLUMBUS, OHIO, June 18, 1917.

HON. JOHN P. BAILEY, *Common Pleas Judge, Ottawa, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your communication in which you ask my official opinion covering the following statement of facts:

> "1. May the court of common pleas of a one-judge county lawfully require a court constable to attend to the assignment of cases?
>
> "2. If so, may such court allow such court constable further compensation, that is, compensation in addition to his allowance as court constable?"

Your inquiry deals with a construction of sections 1692 and 1693 G. C., with which sections you are thoroughly familiar, and it is therefore unnecessary to quote same herein except as the different parts are referred to from time to time.

It is provided in section 1692 G. C. that when in the opinion of the court the business of such court so requires it to be done, each court of common pleas of a county in this state may appoint one or more court constables to preserve order. It is further provided in said section that each court of common pleas, in counties where *more than two* common pleas judges regularly hold court at the same time, may appoint one or more constables to attend the assignment of cases, and it is further provided that each court of common pleas may require such constable or constables to discharge such other duties as the court directs, except that when the court directs the constables to call and impanel jurors, such direction shall not be made in capital cases.

At first thought it would seem as though the right of a court in directing a court constable to discharge "such other duties" would mean that if in the opinion of the court the business of such court would so require it to be done, the court might direct such constable or constables to attend the assignment of cases, but from a history of the legislation which affects said section, I question if the above conclusion could follow. Said section 1692 G. C. was originally enacted March 27, 1875, and was a part of "an act to facilitate the administration of justice," in which act it was provided that the court of common pleas had a right to appoint a bailiff who shall be under the direction of the court, "preserve order and perform such other duties as shall be required of him by the court." Said section was amended numerous times between the time of its first enactment and the date hereinafter mentioned, but each amended section contained the above quoted phrase in substantially the same form in which it was originally enacted. While the section remained in that form I have no doubt but that a court might direct a bailiff or constable in the performance of "such other duties" to attend the assignment of cases. But in 103 O. L., 417, said section was amended to read as it now stands; that is to say, the phrase "attend the assignment of cases in counties where more than two common pleas judges regularly hold court at the same time" was inserted between the phrases "to preserve order" and "and discharge such other duties as the court requires." While the same is set off in said section by commas, yet I cannot see how it can be considered to be a paren-

thetical expression any more than would any other language be so considered which is set off by commas, and the punctuation is used to assist in conveying the legislative intent or meaning. Such intent must be gathered from a reading of the whole section, each part of the same in connection with every other part, and if the original meaning of the section is changed by the use of certain language in the amendment or by the place where such language is used, it will be presumed that the same was so intended by the legislature when it so amended said section to read as it now does.

What, then, can the said section as amended mean? But one thing, it seems to me, and that is that whatever construction might have been given to said language as it was originally enacted, or as it stood for practically thirty years, the same now must mean that the court of common pleas, when in its opinion the business of such court so requires it to be done, may appoint one or more constables to preserve order, and in counties where more than two common pleas judges regularly hold court at the same time such court may require such constable or constables to attend the assignment of cases. I believe the effect of said amendment, last mentioned, was to limit the authority of the court in that one particular; that is to say, whatever authority the court may have had to order court constables to attend the assignment of cases under the general authority of requiring such constables to "discharge such other duties as the court requires," it is my opinion that from and after the time said section was amended in 1913, the court of common pleas could only require constables to attend the assignment of cases in those instances where more than two common pleas judges regularly hold court at the same time. To give said section any other interpretation would be to fail to give effect to the plain ordinary language used.

My opinion in this matter is in accord with the opinion of Kyle, J., rendered May 1, 1917, in the matter of a court constable for the common pleas court of Green county, Ohio, in which the following language is used:

> "From that phrase (more than two) in the section it would seem to me that constables could only be directed to attend the assignment of cases in counties where *more than two* common pleas judges regularly held court, and in my opinion in all counties where one or two common pleas judges regularly hold court there can be no assignment by the court directing the court constable or constables to attend the assignment of cases.
>
> "The reason of the statute is probably that where more than two common pleas judges hold court at the same time the duties of so assigning cases are such—in order that attorneys may not have their cases conflict in the assignment—that it may become necessary to have one or more persons to especially attend to that duty."

This conclusion also follows Opinion No. 1613 of my predecessor, Hon. Edward C. Turner, rendered May 23, 1916, and found in Opinions of the Attorney-General for 1916, page 908, in which opinion that official used the following language:

> "A judge of the court of common pleas in a county where only one judge holds court cannot legally appoint a court constable to attend the assignment of cases, and fix an additional compensation for so doing."

From the above, then, I advise you that the court of common pleas of a county in which there is only one common pleas judge cannot require the court constable to attend to the assignment of cases.

My answer to your first question being as above indicated, it follows, of course that no further compensation can be made to such court constable in addition to his allowance for his services as such.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

393.

TOWNSHIP HIGHWAY SUPERINTENDENT—TOWNSHIP TRUSTEES MAY APPOINT WHEN WHITE-MULCAHY LAW TAKES EFFECT.

Upon the taking effect on June 28, 1917, of the White-Mulcahy law, the township trustees may, under the provisions of section 3370 G. C. of said act, appoint a township highway superintendent, and the term for which township highway superintendents were appointed under the law as it now is will cease upon the taking effect of said act.

COLUMBUS, OHIO, June 18, 1917.

HON. JARED P. HUXLEY, *Prosecuting Attorney, Youngstown, Ohio.*

DEAR SIR:—I have your communication of June 2, 1917, in which you ask my opinion in reference to a matter therein set out. Your communication reads as follows:

> "The township trustees of Green township, this county, acting under the authority given them by section 3370 of the General Code, did on January last appoint two township highway superintendents, who were appointed for one year each and have given the required bond.
>
> "Under house bill No. 300 an act was passed amending said section 3370, which goes into effect, as I understand, some time the latter part of this month, changing the above mentioned manner and permits the control of township roads in three different ways. The third method therein set forth provides for the appointment of 'some competent person,' which on its face means one person.
>
> "The township trustees now desire a determination of their status as to their retaining the two township highway superintendents so hired for one year each."

The question about which you ask arises under the provisions of section 3370 G. C. of what is known as the Cass highway law, which is now in force and effect, and the provisions of the same section, as found in the White-Mulcahy law, which will become effective on the 28th day of June, 1917. The section as it now stands reads as follows:

> "For the purposes of this act there shall be in each township not less than one nor more than four road districts, as the township trustees may determine. The district or districts shall include all the territory in such township. The trustees of the township shall appoint for each road district a superintendent who shall be known as township highway superintendent and who shall serve until his successor is appointed and qualified. Under the direction of the township trustees he shall have control of the roads of his district and keep them in good repair. He may be removed by the township trustees or the county highway superintendent for incompetence or gross neglect of duty."

The section as amended by the White-Mulcahy law, reads as follows:

> "The township trustees shall have control of the township roads of their township and shall keep the same in good repair. The township trustees may, with the approval of the county commissioners or state highway commissioner, as the case may be, maintain or repair a county road or inter-county highway or main market road within the limits of their township. In the main-

tenance and repair of roads the township trustees may proceed in any one of the following methods as they deem for the best interest of the public, to wit:

"1. They may designate one of their number to have charge of the maintenance and repair of roads within the township, or

"2. They may divide the township into three road districts, in which event each trustee shall have charge of the maintenance and repair of roads within one of such districts, or

"3. They may appoint some competent person, not a member of the board of trustees, to have charge of the maintenance and repair of roads within the township which person shall be known as township highway superintendent, and shall serve at the pleasure of the township trustees. The method to be followed in each township shall be determined by the township trustees by resolution duly entered on their records."

It will be noted that under the old law the township is divided into not less than one nor more than four road districts, as the township trustees may determine, and provision is made that the trustees of the township shall appoint for each road district a superintendent who shall be known as township highway superintendent and who shall serve *until his successor is appointed and qualified.* Under the provisions of this section, as amended, there are three methods provided to take care of the maintenance and repair of the roads of the township, any one of which may be adopted by the township trustees. (1) one of the township trustees may have complete charge of the maintenance and repair of the roads in the whole township, or (2) the township may be divided into three road districts, and each trustee have charge of the maintenance and repair of the roads within one of such districts, or, (3) the township trustees may appoint some competent person to have charge of the maintenance and repair of the roads, who shall be known as township highway superintendent and shall serve *at the pleasure of the township trustees.* Hence under the old law the township highway superintendents serve until their successors are appointed and qualified, while under the new they serve at the pleasure of the township trustees. For all practical purposes there is possibly but little difference between these two provisions.

You state that under the law as it is, the township trustees of a certain township last January appointed two township highway superintendents for one year and that under the provisions of the new law they desire to follow the third method set out in said section. Your question now is as to whether the appointment of the two township highway superintendents for one year will interfere with the rights of the township trustees, upon the taking effect of the new act, to appoint one township highway superintendent for their township.

The present law does not make provision for the appointment of township highway superintendents for a definite term. But let us suppose that the township trustees had authority in law to appoint said township highway superintendents for a period of one year, what then would be their rights in and to their office on and after June 28, 1917? I am of the opinion that the same principle will control whether the township trustees decide to follow one method set out in said section 3370 or whether they decide to follow another method. Suppose the township trustees would decide that they would divide the township into three road districts and each of the three trustees take jurisdiction of the maintenance and repair of the roads within a district. What, then, would be the rights of the two persons appointed last January for the period of one year? The answer to this question will decide the question submitted by you. The mere fact that the person appointed under the new act has the same name as the person appointed under the old cannot vary the answer. The fact is that there is a completely different scheme for the maintenance and repair of highways under the new than there is provided under the old law.

The courts of our state have been uniform in holding that a person appointed

to an office has no vested rights in and to the office and that the legislature may at any time modify the law so as to do away with the office and end the term of those who may have been appointed or elected to office.

In Knoup v. Piqua Bank, 1 O. S., 603, at page 616 of the opinion the court, in discussing this matter, reasons as follows:

> "There are some offices, also, which are said to be estates for a term of years, or for one year. And ministerial offices may be granted in reversion, or to commence at a future period. Some offices are even assignable by deed. But, in America, a public officer is only a public agent or trustee, and has no proprietorship, or right of property, in his office. It is true that in The State v. McCollister, 11 Ohio Rep. 50, Judge Hitchcock said, that an officer had 'a vested right' in his office, but that *dictum* is opposed to many and well considered authorities.
>
> "It is true, that an officer elected by the legislature, or the people, cannot be expelled from his office, arbitrarily, by a resolution, or act, because the constitution prescribes an impeachment, or other mode of trial for such cases, but if the office be created by the legislature, it may, in the absence of express constitutional restriction, be abolished or suspended; and yet the officer cannot claim compensation, for the loss of his office. He has no property, or individual right in it. He is but a trustee for the public; and whenever the public interest requires that the office should be abolished, or the duties of the office become unnecessary, the incumbent cannot object to the abolition of the office."

In the same volume, at page 622, in a case styled Toledo v. Bond, the court, in the opinion at page 655, reasons as follows:

> "It is true, that Judge Hitchcock, in delivering the opinion of the court in the case of The State v. McCollister, 11 Ohio R., 49, says, that the incumbent of an office 'has a vested right in his office' from which he cannot be 'ousted by direct legislation.' I do not understand the learned judge to mean anything more than that the incumbent has an existing right in the office, from which the legislature has no power to dismiss him by any direct act, or to divest him by a law prospectively adding new qualifications, for the office. If anything more than this was intended or expressed, it is clearly not law; for it is well settled in this country, that the incumbent may be deprived of an office by its abolishment, or repeal."

In State v. Wright, 7 O. S., 333, the court states in its syllabus the following principle:

> "The constitution of the state has not limited the power of the general assembly to abolish courts created by the legislature, nor its power to vacate the office of judges of such courts."

In this case it was claimed by the relator that the repealing act, in so far as it attempted to abolish the office of the judge prior to the expiration of the time for which he was elected and commissioned, is contrary to the constitution of the state, and therefore inoperative; that his office continued in being notwithstanding the repealing act; and he now seeks, by this motion, to compel the auditor of state to issue his warrant on the treasurer of state for his salary accruing subsequently to the time fixed for the taking effect of the repealing act. But the court held that the contention of the relator was not well taken and the relator was not entitled to the relief for which he prayed.

From these cases I think it is well established in Ohio that the legislature may, at any time, modify a law under which a person is appointed or elected to an office so as to defeat him in the exercise of the duties of his office for the full length of time for which he was appointed or elected. Therefore, I am of the opinion that the township trustees may at any time, after the taking effect of the White-Mulcahy law, appoint a person to act as township highway superintendent under the provisions of the new law and that the term of those appointed last January will end upon the taking effect of said law.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

394.

COMMISSIONER OF SECURITIES—APPOINTMENT THEREOF CREATES NEW DEPARTMENT—TAKES OVER DUTIES OF BLUE SKY AND LOAN SHARK DEPARTMENT—STATUS OF PRESENT EMPLOYES OF SAID DEPARTMENT.

The act of March 21, 1917, *providing for the appointment of a commissioner of securities, etc., creates a new state office and a new state department to which is confided the duties of the bureaus of the banking department heretofore popularly known as the "Blue Sky Department" and the "Loan Shark Department."*

The present employes of the banking department who are performing the duties of the said bureaus do not become officials or employes of the new department upon its organization unless they be selected de novo *for such positions under the provisions of the civil service law.*

COLUMBUS, OHIO, June 18, 1917.

HON. PHILIP C. BERG, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—On May 31, 1917, the following inquiry was received from your department:

> "Will you please advise whether or not employes who are rendering services as blue sky and loan shark employes will continue their employment when the new department becomes operative under the law.
>
> "The employes of the blue sky department are at present known as: assistant commissioner, inspectors, expert accountant, bookkeeper, filing and license clerk, clerk-stenographer and stenographer.
>
> "Those in the loan shark department are known as: Chief examiner loans, inspector-examiners and stenographer.
>
> "The employes in the new department to be known as the securities department, which, under the law, is to take over the work of the blue sky and loan shark employes, are to be known according to the appropriation in the budget as: Commissioner, deputy commissioner, grade three bookkeeper, stenographer and filing clerk, chief examiner, examiners, grade three stenographer, examiners, license clerk and assistant examiners."

The act creating the new department mentioned by you, to be known as the "Securities Department," was passed March 21, 1917, approved by the governor on March 30th, and filed in the office of the secretary of state on March 31st, and will,

therefore, become a law, unless prevented by referendums, about July 1. It creates an entirely new department, at the head of which is a state officer whose office has heretofore never been in existence.

Section 1 of the act is as follows:

> "There shall be a commissioner of securities, who shall be appointed by the governor for a term of three years."

Section 2 of the act, among other things, provides:

> "* * * Neither the commissioner of securities, nor his deputy, nor any of his employes, shall be interested directly or indirectly in any firm or corporation which is a dealer in securities * *."

Section 4 provides for the salary of the office, the bond and the oath, as follows:

> "* * * The deputy commissioner of securities shall give bond to state in the sum of ten thousand dollars. * * *"

Section 6 provides:

> "The commissioner of securities shall appoint a deputy commissioner of securities. * * *"

Section 7 makes the deputy a deputy by giving him power to represent his principal.

Section 8 provides:

> "Subject to the provisions of the legislative budget as to standardization and compensation, the commissioner of securities may employ necessary examiners, clerks, accountants and stenographers, to assist in the performance of the duties imposed upon him by law, and fix the salaries or compensation of such employes. Upon vouchers approved by the commissioner of securities, such salaries or compensation shall be paid semi-monthly by the treasurer of state upon the warrant of the auditor of state."

The foregoing are all the provisions bearing upon the subject of the employes of the new department. The duties of the office are provided for in section 11, as follows:

> "The commissioner of securities shall execute all the laws enacted to regulate the sale of bonds, stocks and other securities and of real estate not located in Ohio, and to prevent fraud in such sales, heretofore executed by the superintendent of banks; and shall also execute all laws enacted to regulate and license the loaning of money, without security, upon personal property, and the purchasing or making loans upon salaries or wage earnings, heretofore executed by the superintendent of banks, and shall have such other powers and duties as may be provided by law."

The balance of the act points out the manner in which the duties of the department are to be performed.

The appropriation act for the ensuing year provides for the following officers and employes for the department:

> "Commissioner,
> Deputy commissioner,

Grade three bookkeeper,
Stenographer and filing clerk,
Chief examiner,
Three examiners,
Grade three stenographer,
Two examiners,
Examiner,
License clerk."

These positions, or most of them at least, are not recognizable in the provisions for the banking department in the last appropriation act. It therefore follows that the present employes of the banking department would not by reason of their employment be continued as such employes in the new securities department. The effect of the new law is to abolish the positions, and being separated from the service without cause or fault on their part they are thereby entitled to be placed upon an eligible list for similar employment in the state departments, including, of course the new department in question, in which event if they avail themselves of such privilege they will not be different from other persons upon such eligible list, though some or all of them might be selected for such service.

Your inquiry is, therefore, answered in the negative.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

395.

TEACHER—EMPLOYED IN OHIO BY BOARD OF EDUCATION—MAY NOT ACT AS AGENT IN ANOTHER STATE FOR COMPANY WHOSE SCHOOL BOOKS ARE FILED WITH SUPERINTENDENT OF PUBLIC INSTRUCTION.

A teacher employed by a board of education in Ohio shall not act as a sales agent, in the state of Missouri, for any person, firm or corporation whose school books are filed with the superintendent of public instruction as provided by law.

COLUMBUS, OHIO, June 18, 1917.

HON. EUGENE WRIGHT, *Prosecuting Attorney, Logan, Ohio.*

DEAR SIR:—In your letter of May 3, 1917, you request my opinion upon the following:

> "If an Ohio teacher should act as sales agent directly or indirectly for a person, firm or corporation whose school text books are filed with the superintendent of public instruction of Ohio, as provided by law, in the state of Missouri, would the fact that his employment was in the state of Missouri work a forfeiture of his certificate to teach in the public schools of Ohio, under section 7718 General Code of Ohio?"

General Code section 7718 provides in part:

> "A * * * teacher employed by any board of education in the state shall not act as sales agent, either directly or indirectly, for any person, firm or corporation whose school text books are filed with the superintendent of public instruction, as provided by law, or for school apparatus or equip-

ment of any kind for use in the public schools of the state. A violation of this provision shall work a forfeiture of their certificate to teach in the public schools in Ohio."

The above section was unquestionably enacted to prevent fraud in the recommending or in the using of text books in the schools of this state; that is, to prevent those persons whose duty it is to use text books in the schools from having any pecuniary interest in having certain text books adopted by the various boards of education.

Section 7718 provides that when a teacher who is employed by any board of education in the state, acts whether directly or indirectly for any person, firm or corporation, whose text books are filed with the superintendent of public instruction as provided by law, he shall forfeit his certificate. The section does not say that such teacher must act as such sales agent *in this state*, but if he is employed by a board of education in this state he shall not act as a sales agent. In principle what is the difference whether he should act within or without the state? Could he have any greater or less interest as such agent without the state than within? If acting in good faith could he be more or less loyal to his employer without than within the state? The prohibition is from acting and I can see no difference whether such employment would be without or within the state. If such teacher would teach within this state he must secure employment other than from book companies who have filed their books in this state while he is not so engaged in teaching.

I therefore advise you that if a teacher employed by any board of education in Ohio acts as sales agent for a person, firm or corporation who has filed text books in Ohio, and such teacher acts as such agent in Missouri, he will forfeit his certificate to teach in Ohio the same as though he were acting as such agent in Ohio.

Very truly yours,
JOSEPH McGHEE,
Attorney-General.

396.

CITY BOARD OF PARK COMMISSIONERS—DUTY OF SAID BOARD IN REFERENCE TO BALANCE OF FUND COLLECTED FROM PROPERTIES PURCHASED WITH FUNDS DERIVED FROM ISSUE OF BONDS.

Where a city board of park commissioners, under the provisions of section 3704 *G. C. has been transferring annually to the trustees of the sinking fund the balance of the rents collected from properties purchased with funds derived from the issue of bonds, part of which bonds are still outstanding and unpaid, after deducting the cost of the maintenance and operation of such property, but recently, apparently to circumvent the provisions of this law, has employed laborers at the rate of* $2.25 *per day, and given them the use of such property, when it had formerly paid said laborers* $2.50 *per day without the use of said property, and has not collected any rents at all since such new arrangement was instituted, the said board of park commissioners as an official board is liable to the trustees of the sinking fund of said city for the amount of such rent that it has applied to the current expenses of running said parks and which was over and above the cost of maintaining and administering said property, and such amount that has been wrongfully diverted from the sinking fund should be transferred from the park fund and placed to the credit of the sinking fund.*

COLUMBUS, OHIO, June 21, 1917.

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

GENTLEMEN:—I have your communication in which you submit for my opinion the following request:

"Under the provisions of section 3704 G. C. the board of park commissioners of a city of this state has been transferring annually to the trustees of the sinking fund the rents collected on properties acquired by bond issue, part of which bonds are still outstanding and unpaid. However, recently, apparently to circumvent the provisions of this law, said board of park commissioners, under resolution, have been following this practice: Laborers, who have been regularly employed at $2.50 per day by resolution of the board, are permitted to use these properties but are then paid only $2.25 per day and given the use of such property. In this manner, while the city pays a little less for the labor, the employe has the use of the property and no rents are collected.

"Question: Is the board of park commissioners liable to the sinking fund trustees in any amount under such arrangement?"

Section 3704 G. C. reads as follows:

"Money arising from the sale or lease of real estate, or a public building or from the sale of personal property, belonging to the corporation, shall be deposited in the treasury in the particular fund by which such property was acquired, or is maintained, and if there be no such fund it shall be deposited in the general fund. If the property was acquired by an issue of bonds the whole or a part of which issue is still outstanding, unpaid and unprovided for, such money, after deducting therefrom the cost of maintenance and administration of the property, shall on warrant of the city auditor be transferred to the trustees of the sinking fund to be applied in the payment of the principal of the bond issue."

The foregoing section provides in part that if real property of a municipality is acquired by an issue of bonds, the whole or a part of which issue is still outstanding, unpaid and unprovided for, any moneys received from the lease of such real estate, after deducting therefrom the cost of maintenance and administration of the property, shall be transferred to the trustees of the sinking fund to be applied in the payment of the principal of the bond issue.

It seems clear, therefore, that the object and purpose of the legislature in making such a provision was to require that after the current running expenses of maintaining and administering said property had been paid any surplus should be transferred to the sinking fund and utilized in the retirement of the bonds from the issue of which the funds were derived to purchase said property. When the purpose of such provision is considered in connection with the phraseology of said section the conclusion seems evident that such provision is mandatory in character.

Section 4057 G. C. provides in part:

"The board of park commissioners shall have the control and management of parks, park entrances, parkways, boulevards, etc."

Section 4061 G. C. provides:

"The board (of park commissioners) may employ a secretary, general superintendent, engineer, clerks and such other necessary employes for carrying into effect the purposes of its creation, and shall fix the rate of compensation and term of service of its employes."

The two foregoing sections vest in the board of park commissioners the authority to control and manage the parks, etc., of a municipality, to employ such employes as may be necessary and to fix their compensation.

I am informed through your request and through supplemental information received from you that the board of park commissioners has endeavored to fix the compensation of laborers under its employ by providing that such laborers shall receive $2.25 per day and in addition shall be permitted to reside in and use certain property owned by said municipality and acquired for park purposes but not as yet applied to that use; also that prior to this arrangement these employes had been receiving $2.50 per day. Under such procedure, then, the board of park commissioners is receiving twenty-five cents per day for the use of said premises by its employes.

It is evident that the park board has acted on the presumption that it was authorized to fix the compensation of its employes in part by providing that they might use certain premises. As the term "compensation" is ordinarily used with respect to public employes it means the amount of money said employes receive or are entitled to receive for their services and it is in this sense that the legislature uses the word "compensation" when it provides that a certain board shall be authorized to fix the compensation of its employes; and especially is this true when the statute provides that a particular board shall fix the rate of compensation. However, there are exceptional cases no doubt in which the word "compensation" might have a broader meaning and would cover matters other than the actual amount of money to be paid employes for their services. But such exceptions have no application in my opinion to the present case wherein the park board has endeavored to provide that compensation shall include not only wages or salary for services rendered, but the use of public property as well.

Sections 3698 and 3699 G. C. provide for the lease or sale of corporate property and read as follows:

> "Section 3698. Municipal corporations shall have especial power to sell or lease real estate or to sell personal property belonging to the corporation, when such real estate or personal property is not needed for any municipal purpose. Such power shall be exercised in the manner provided in this chapter."
>
> "Section 3699. No contract for the sale or lease of real estate shall be made unless authorized by an ordinance, approved by the votes of two-thirds of all members elected to the council, and by the board or officer having supervision or management of such real estate. When such contract is so authorized, it shall be made in writing by the board or officer having such supervision or management and only with the highest bidder, after advertisement once a week for five consecutive weeks in a newspaper of general circulation within the corporation. Such board or officer may reject any or all bids and readvertise until all such real estate is sold or leased."

The last mentioned sections of the General Code authorize a municipal corporation to lease real estate that belongs to it, when such real estate is not needed for municipal purposes. It is provided, however, that no lease of real estate shall be made unless it is authorized by an ordinance of council passed by a two-thirds vote and approved by the board or officer having supervision or management of such real estate, and further, the law goes on to say that such lease shall only be made after proper advertisement with the highest bidder.

No exception is found to this general provision that the lease of real estate of a city shall be made only in the above mentioned way. Consideration does not seem to have been given by the legislature to the matter of whether the real estate is worth a great deal or very little or whether the rental to be received is large or small in providing for the procedure of a municipality in leasing same. No doubt these very stringent provisions were made to cover the leasing of all municipal real property so that there would be no favoritism shown in leasing same and the interests of the public would be protected at all times.

However, I can appreciate a situation wherein it would not be possible to comply with the provisions of the above section when the leasing of real estate is considered from a practical standpoint, since it might be possible only to lease the property for a very short time or the property might be of such a character that a person who could use same would not be in position to bid on it or to make a lease for any length of time. Hence, as a practical matter it would seem that any arrangement that might be made to lease property of such a character without following the above mentioned procedure would, in the absence of objection by a taxpayer or citizen of the municipality and if reasonable in character, be unobjectionable. However, I am not attempting in this opinion to pass on the legality of the lease of such property but have merely quoted the provisions of law with respect to the leasing of municipal real estate for the purpose of showing that the board or officer having supervision or management of same is authorized only in the manner provided by law to lease same to the highest bidder and that such provisions apply to leases of municipal property regardless of value. It is my opinion that such provisions indicate clearly that a park board would have no right to provide that part of the compensation of its employes should consist of the right to use public property not needed for park purposes.

Having arrived at such a conclusion, then, I am of the opinion that the board of park commissioners in attempting to make such an arrangement as stated in your request, would be circumventing the provisions of section 3704 which require the transfer to the sinking fund of a certain portion of the rentals of municipal real estate.

Answering your question, then, specifically, I am of the opinion that where a city board of park commissioners, under the provisions of section 3704 G. C. , has been transferring annually to the trustees of the sinking fund the balance of the rents collected from properties purchased with funds derived from the issue of bonds, part of which bonds are still outstanding and unpaid, after deducting the cost of the maintenance and operation of such property, but recently, apparently to circumvent the provisions of this law, has employed laborers at the rate of $2.25 per day and given them the use of such property when it had formerly paid said laborers $2.50 per day without the use of said property, and has not collected any rents at all since such new arrangement was instituted, the said board of park commissioners as an official board is liable to the trustees of the sinking fund of said city for the amount of such rent that it has applied to the current expenses of running said parks and which was over and above the cost of maintaining and administering said property, and such amount that has been wrongfully diverted from the sinking fund should be transferred from the park fund and placed to the credit of the sinking fund.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

397.

TOWNSHIP TRUSTEES—NO AUTHORITY TO TRANSFER MONEY FROM ONE TOWNSHIP FUND TO ANOTHER—COUNTY COMMISSIONERS —METHOD OF PROVIDING FUNDS TO TAKE CARE OF COMPENSATION—DAMAGES—COSTS AND EXPENSES OF A ROAD IMPROVEMENT.

1. *There is no provision in sections* 5649-3d *and* 5649-3e *G. C. authorizing the township trustees to transfer money from one township fund to another, the unexpended balances remaining at the end of any fiscal year reverting to the fund from which it was appropriated at the beginning of the year.*

2. *When the county commissioners select one of the methods set out in section* 6919 *G. C., for providing the funds to take care of the compensation, damages, costs and expenses of a road improvement, said method must be followed exclusively and can not be taken in connection with other methods.*

COLUMBUS, OHIO, June 21, 1917.

HON. J. W. WATTS, *Prosecuting Attorney, Hillsboro, Ohio.*

DEAR SIR:—I have your communication of June 5, 1917, in which you ask my opinion on the following, as therein set out:

> "1. At the beginning of the fiscal half year, can the township trustees appropriate and transfer from the general fund of the township, moneys to the road and bridge funds, under authority of sections 5649-3d and 5649-3e, without applying for such authority to the court of common pleas under sections 2296 to 2302, inclusive, of the General Code?
>
> "2. Can the trustees of the township donate from its funds money toward the construction of a county road being constructed under sections 6906 to 6948 inclusive, wherein the road is petitioned to be constructed and paid for under and in the manner provided by subdivision 4 of section 98 (section 6919) of the laws of Ohio, 105-106 (1914-1915), pages 600 and 601, the said road petitioned for as above specified having been granted by the county commissioners?
>
> "3. If your answer to question 2 herein is that the township trustees can make a donation, please advise from what fund of the township the money can be donated."

In your communication you ask for an opinion upon three different questions and I shall take them up in the order in which you set them out.

1. You ask whether the township trustees may, at the beginning of a fiscal half year, transfer money from the general fund to the road and bridge funds, under authority of sections 5649-3d and 5649-3e G. C.

Section 5649-3d G. C. reads as follows:

> "At the beginning of each fiscal half year the various boards mentioned in section 5649-3a of this act shall make appropriations for each of the several objects for which money has to be provided, from the moneys known to be in the treasury from the collection of taxes and all other sources of revenue, and all expenditures within the following six months shall be made from and within such appropriations and balances thereof, but no appropriation shall be made for any purpose not set forth in the annual budget nor for a greater amount for such purpose than the total amount fixed by the budget commissioners, exclusive of receipts and balances."

Section 5649-3e G. C. provides as follows:

> "Unexpended appropriations or balances of appropriations remaining over at the end of the year, and the balances remaining over at any time after a fixed charge shall have been terminated by reason of the object of the appropriation having been satisfied or abandoned, shall revert to the general fund, and shall then be subject to other authorized uses, as such board or officers may determine."

It will be noted that section 5649-3d G. C. provides that the township trustees, with certain other boards, must, at the beginning of each fiscal half year, namely, March 1 and September 1 of each year, make appropriations for each of the several objects for which money has to be provided. These appropriations must be made from moneys known to be in the treasury, and all expenditures within the following six months shall be made from and within such appropriations and balances thereof. There is no provision whatever in this section authorizing the transfer of money from one fund to another. In fact the spirit of these provisions is against such a principle.

Your communication likely arises from the language found in section 5649-3e G. C. as follows:

> "Unexpended appropriations or balances of appropriations remaining over at the end of the year, * * * shall revert to the general fund, and shall then be subject to other authorized uses, as such board or officers may determine."

especially the words "shall then be subject to other authorized uses."

This might be construed as meaning that the balances remaining in any fund at the end of a fiscal year might be used by the township trustees for any authorized use for which it might be needed, thus giving the township trustees and other boards the authority practically to transfer the unexpended balances in any one fund to any other fund.

In considering your question and the construction to be placed upon this section, I desire to note an opinion rendered by my predecessor, Hon. Timothy S. Hogan. The opinion is found in Vol. I of the Report of the Attorney-General for 1912, p. 285, under date of June 22, 1912. In this opinion Mr. Hogan was considering among other things the very matter that you seem to have in mind, and in the last paragraph of the syllabus he lays down the following proposition:

> "Section 5649-3e of the General Code provides 'that balances remaining over shall revert to the general fund.' From the primary meaning of the word 'revert' and also from the fact that the general fund is treated as a thing already existing and is not defined as a new creation such language should be construed to require such balances to revert to the funds from which they were taken."

On page 294 he reasons as follows:

> "I am, therefore, of the opinion that the phrase 'shall revert to the general fund' means, in effect, 'shall revert to the funds from which they were taken; and, further, that the phrase 'and shall then be subject to other authorized uses as such board or officers may determine' means 'and they shall be subject to such other uses as are authorized *to be made of such funds:*' so that in order that a balance of an appropriation thus reverting may be expended for a purpose or use to which the original fund is not properly applicable, such balance

must first be transferred in accordance with the law authorizing such transfers to the fund from which it is desired to make the new appropriation before being subject to expenditure in such matter."

It will be noted that Mr. Hogan held in this opinion that the unexpended balances remaining in any fund at the end of any fiscal year revert to the same fund from which it was appropriated at the beginning of the year, and that such balances must first be transferred in accordance with the law authorizing such transfers to the fund from which it is desired to make the new appropriation before being subject to expenditure in such matter. That is, Mr. Hogan held there is no provision in this section warranting the transfer of the unexpended balances from one fund to another, but such a transfer, if made at all, must be done in accordance with the law authorizing such transfers. This law, as you suggest in your communication, is found in sections 2296 to 2302 inc. G. C.

I am of the opinion that Mr. Hogan was correct in his opinion and in his reasoning, and I therefore approve the same.

Hence, answering your first question specifically, it is my opinion that there is no provision in sections 5649-2d and 5649-3e G. C. that would authorize the township trustees to transfer money from one township fund to another, whether or not the money transferred is the balance remaining unexpended at the end of any fiscal year.

2. In answering your second question, it is my opinion that there is no provision of law whereby the township trustees could donate money to assist in the construction of a highway under the conditions suggested by you. It is true section 6921 G. C. provides that the county and township may enter into an agreement whereby they may each pay such part of the cost and expense of an improvement as may be agreed upon between them. Section 7467 G. C. provides that the township trustees may contribute to the maintenance and repair of roads under the control of the county commissioners. But the provisions of neither of these sections would apply to the conditions suggested by you.

In your case there was a petition filed under the provisions of sections 6907 et seq. G. C. This department has held that a petition filed under the provisions of this act must specify which method of paying compensation, damages, costs and expenses thereof shall be used.

Section 6919 G. C. provides eight different methods of paying compensation. The petition filed in the case suggested by you, and which has been allowed by the county commissioners, specified the fourth method, which reads as follows:

"4. The county commissioners may assess against the real estate within one mile of said improvement in proportion to the benefits thereto, such part of the costs and expenses thereof as they may determine, and the balance shall be paid out of the county treasury from any funds available therefor."

With this in mind, let us note the provisions of the first part of section 6919 G. C., which reads as follows:

"The board of county commissioners shall at the time said improvement is granted, whether upon a petition or by unanimous vote of the board without a petition, determine by resolution, the method of paying the compensation, damages, costs and expenses thereof, and such compensation, damages, costs and expenses shall be apportioned and paid in the manner specified in the petition, when the board is acting upon a petition, which shall be in one of the following methods, to wit: * * * ."

This language is emphatic and certain. Not only is there no provision for such a

procedure as you suggest, but the language is emphatic that one of these methods must be followed absolutely in the matter of raising the funds to provide for the payment of the compensation, damages, costs and expenses of an improvement, and that the "compensation * * * *shall be* apportioned and paid in the manner specified in the petition, when the board is acting upon a petition, which *shall be* in one of the following methods."

Hence, as your county commissioners have selected the fourth method set out in section 6919 G. C., this method must be used exclusively. As it makes no provision for the township trustees assisting in providing the compensation, damages, costs and expenses, they can not donate money for this purpose.

Therefore, answering your second question specifically, when the county commissioners select one of the methods set out in section 6919 G. C. for providing the compensation, damages, costs and expenses of a road improvement, said method must be used exclusively and not in connection with some other method.

3. The answer I have given to your second question makes it unnecessary to answer the third.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

398.

COMMON PLEAS JUDGE—TAKING OFFICE JANUARY 1, 1910—SALARY BASED ON CENSUS OF 1900—SALARY OF SAID JUDGE WHEN HE HOLDS OVER BEYOND EXPIRATION OF HIS TERM—FINDINGS OF EXAMINER OF BUREAU OF INSPECTION NOT CONCLUSIVE.

Under section 2232 G. C., as in force in 1909, the additional salary of a common pleas judge was computed on the basis of the federal census next preceding his assumption of the duties of his office. A judge who took office in January 1, 1910, was governed in this respect by the census of 1900. A judge who assumes to hold over after the expiration of his term under the mistaken belief that such term has been extended, is entitled to receive no more additional salary than that to which he was entitled during his regular and lawful term.

The findings of an examiner of the bureau of inspection and supervision of public offices are not conclusive. Money paid to a public officer under a finding of such examiner, erroneous in law, may be recovered back.

COLUMBUS, OHIO, June 21, 1917.

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

GENTLEMEN:—You have submitted for my opinion the following question:

> "By an act found in 100 O. L. 62, an additional common pleas judgeship for Mahoning county was created, the first term of office under which began on January 1, 1910, and the first election for which was to take place in November, 1909. Subsequently in 103 O. L. 673, this act was repealed and it was provided in the last named act that in Mahoning county, in 1916, one judge should be elected whose term should begin January 1, 1917. It seems to have been assumed that the last named act had the effect of extending the term of office created by the first named act. At any rate, a person was elected to the additional judgeship created by the first act in November,

1909, took office January 1, 1910, and served continuously until January 1, 1917, when the judge who was elected under the provisions of the second act took office.

"(1) Upon what census should the additional compensation of the above described judge be based from January 1, 1910, to December 31, 1915, inclusive?

"(2) Upon what census should such additional compensation be based from January 1, 1916, to December 31, 1916, inclusive.

"(3) An examiner of the bureau of inspection and supervision of public offices, at a previous examination covering the period of service of the above described judge up to April 1, 1915, was of opinion that the salary should have been based upon the census of 1910; and finding that compensation had been drawn on the basis of the census of 1900, made a finding in favor of the incumbent for the difference, Mahoning county having increased in population at the 1910 census. The amount embraced in the examiner's finding was paid to the judge. If this was an error, can the same be corrected through an examination now being conducted and, if so, how?"

The original act above referred to need not be fully quoted, as its essential terms are set forth in the above statement of facts. It will be noted that the above abstract of the law seems at first blush to be violative of the spirit and intent, at least, of article 17 of the constitution, as enacted in 1905, and in force when the act was passed. This section in effect requires all regular elections for common pleas judges to be held in the even numbered years. However, the initial election provided for by the act was not a regular election and it was expressly provided by section 5 of said act that:

"The election of the successors of said additional judge shall be held at the general election on the first Tuesday after the first Monday in November in the even numbered years immediately preceding the expiration of the term of office of said additional judge, and his successors in office, and the successors of said additional judge shall be elected for terms of six years each."

Thus it will be seen that the original act contemplated the election of the successor of the additional judge thereby created in November, 1914, the term to begin January 1, 1916, or more than thirteen months after the election.

The second act, above mentioned, provided *inter alia* that the times for the next election of common pleas judges in Mahoning county, and the beginning of their terms, should be as follows:

"* * * In Mahoning county, in 1916, one judge, term to begin January 1, 1917, and in 1918, one judge, term to begin February 9, 1919."

In an elaborate repealing clause, designated as section 2 of the act, many if not all of the acts of the general assembly, providing for judgeships and the election of additional judges in different judicial districts in the state, were repealed. There was an express repeal therein of the act of 1909 (see page 680.) The act contained no saving clause nor did it express any intention to extend the term of the incumbent of the position, above described. In form the whole act was an amendment of section 1532 of the General Code, save for the repealing clause above referred to. In 1914, 104 O. L., 243, the act last above described was amended, but nothing in this amendatory clause affects the question under consideration.

At the outset of my investigation of this question I may say that I am impressed

with the conviction that the act of 1913 did not have the effect of extending the term of the judge in question. On the contrary, by repealing the act creating the addition a judgeship without qualification, and by providing for the election of the judge in Mahoning county whose term was not to commence until a year after the expiration of the term provided for by the original act, I think the act of 1913 abolished the position. In fact, had it not been for the schedule to section 3 of article XIV of the constitution, as amended in 1912, there would be great doubt, in my opinion, as to whether or not the *de jure* existence of this position was not terminated when the act of 1913 went into effect. The schedule in question provides that:

> "If the foregoing amendment shall be adopted by the electors, the judges of the courts of common pleas in office or elected thereto, prior to January 1, 1913, shall hold their offices for the term for which they were elected * * *."

Moreover, the general assembly, in 1913, was wholly without power to extend beyond six years the term of office of any common pleas judge, either expressly or by implication. That term was fixed at the time of the election of the judge by article XVII, section 2 of the constitution, and subsequently by Section 12 of Article IV of the Constitution, as amended September 3, 1912. There was a time when the general assembly might have extended beyond six years the term of office of the common pleas judge; article XVII, adopted in 1905, provided that:

> "The general assembly shall have power to so extend existing terms of office as to affect the purpose of section 1 of this article."

and section 3 of the article provided:

> "Every elective officer holding office when this amendment is adopted shall continue to hold such office for the full term for which he was elected and until his successor shall be elected and qualified, as provided by law."

So that, for the purpose of putting into effect the provisions of article XVII, terms might be extended and officers might hold over after the expiration of their terms, if not extended, until their successors were elected and qualified, in spite of the rule laid down by the supreme court in State ex rel. v. Brewster, 44 O. S., 589, and applicable generally, to the effect that the general assembly may not extend the term or tenure of an officer beyond that which is fixed in the constitution. (See State ex rel v. Pattison, 73 O. S., 305).

But this special power of the general assembly was limited to "existing terms," i. e., terms existing in 1905, and to officers "holding office when this amendment is adopted," i. e., in 1905.

The result of all these considerations is that the repeal of the act of 1909, and the simultaneous enactment of a law providing for a judgeship in Mahoning county, the first term of office of which would begin a year after the term of office provided for in the act of 1909 would otherwise have expired, did not have the effect of extending the term of office of the incumbent of the judgeship, under the act of 1909, but, on the contrary, worked an abolition of that position upon the expiration of that term, there being no similar position which would then exist and take the place of the former office; and even if it was the intention of the general assembly to perpetuate the office, as such, and not to create the one-year hiatus, which I think in point of law was created, yet that intention could not constitutionally go to the extent of extending the term of the incumbent to cover the one-year period.

If I understand your statement of facts correctly, however, this conclusion is important only to the extent of determining the character of the tenure of the judge

in question during the year 1916. He seems to have held on without any appointment or re-appointment. All parties concerned acquiesced in the supposition that his term had been extended. Undoubtedly he held court and pronounced judgments and decrees, as well as received his compensation.

For the purpose of this opinion, the judge in question will be treated as a *de facto* officer, holding under color and claim of an extension of his original term. I do not understand that his tenure during this period is referable to any claim of title other than that his term had been extended.

As such *de facto* officer, having drawn the additional salary payable to a common pleas judge, I do not think he should be obliged to re-pay into the public treasury the entire compensation which he thus received for the year, although he had no legal title to the office; but if the amount which he drew was in excess of the amount payable to the incumbent of such office, had such an office existed and been properly filled, then it is clear that he should refund such excess amount, and the *de facto* character of his tenure would not be a defense to a demand for such a refunder.

With the way cleared of these difficulties, then, the solution to the main question is not difficult. Section 2252 of the General Code provides for the additional salary of common pleas judges and, as the same existed when the judge in question assumed the duties of his office, it provided as follows:

> "In addition to the salary allowed by the preceding section, each judge of the court of common pleas and of the superior court shall receive an annual salary equal to sixteen dollars for each one thousand population of the county in which he resided when elected or appointed, as ascertained by the federal census *next preceding his assuming the duties of such office,* if in a separate judicial subdivision. Such additional salary shall be paid quarterly from the treasury of the county upon the warrant of the county auditor. If he resides in a judicial subdivision comprising more than one county, such additional salary shall be paid from the treasuries of the several counties of the subdivision in proportion to such population thereof upon the warrants of the auditors of such counties. In no case shall such additional salary be less than one thousand dollars or more than three thousand dollars."

In the opinions of former attorneys-general is found elaborate discussions of the date to which a federal census is referable. The exact question as to the date of promulgation of the census of 1910 does not arise in this case. It is obvious that it did not take place before January 1, 1910, on which date the judge in question "assumed the duties of his office." The federal census "next preceding" that date was the census of 1900. Therefore, the census of 1900 is the proper basis for the computation of his additional salary at the outset of his term; and by virtue of the provisions of section 2252-2, as enacted 104 O. L., 250, together with the restrictive application of article IV, section 14 of the constitution. that census continued to be the basis of the computation of his salary, at least until the end of his regular term.

The second question requires me to consider whether the same basis of computation continued to obtain during the period of one year, the status of the judge's service during which has been discussed herein. In my opinion it did. It is true that we encounter here the difficulty of determining the legal compensation of an officer holding without any authority of law whatsoever. However, this difficulty must be solved, I think, by measuring the right of the incumbent with respect to compensation by the claim and color of title which he was asserting. As I have pointed out the incumbency of the judge must have been referable to a claim that his original term had been extended by the act of the legislature. Therefore, though I have also pointed out that it was impossible for the legislature to extend his term and that in point of fact and law the legislature did not extend his term, yet in view of all the

circumstances the judge should receive such salary as he would have been entitled to receive if it had been possible for the legislature to extend his term and if his term had actually been extended.

If this period of one year was an extension of his term, then, to begin with, it must be regarded as a part of his term for the purpose of the provisions of article IV, section 14, which provides that the compensation of the judges of the court of common pleas "shall not be diminished or increased during their term of office." This limitation is not of clear application here because it might be argued that it applies to a legislative change and does not restrain the legislature from passing a prospective law providing that when a new census is promulgated, the salary of the judge, then in office, shall be automatically changed and adjusted to the newly ascertained population. But the spirit of this provision seems to have been otherwise interpreted by the legislature in providing for the additional compensation under consideration; and section 2252 of the General Code, as above quoted, makes it very clear that the promulgation of a new census during a term shall not affect the salary of the incumbent, which continues to be measured by the census promulgated "next preceding his assuming the duties of such office."

Therefore, section 2252 of the General Code, which is the sole source of such authority to pay any salary to the judge in question for the year described as may be predicated upon his *de facto* incumbency of the position, clearly does not authorize an increase of salary during the extension of the term, if such extension were possible.

From another point of view, the judge in question "assumed the duties of his office" but once—on January 1, 1910. When he began the year's service, now under discussion, he did not again "assume" his duties. What the legislature had in mind, in using the language employed by it in section 2252, was undoubtedly the commencement of a service under a new election or appointment and not a mere holding over under a hypothetical extension of term.

For all these reasons, then, I am of the opinion that the census of 1900 is the basis of the salary of the judge inquired about by you for both the periods of time mentioned in your first two questions.

As to your third question, I have no hesitancy in advising that the excess salary received by the judge in question, for the period of time preceding April 1, 1915, may be recovered from him. The findings of an examiner of the bureau of inspection and supervision of public offices, in spite of their force as prima facie causes of action by virtue of section 286 and succeeding sections of the General Code, do not, in my opinion, have the effect of estoppels in case they are mistaken in point of law to the advantage of officers or third parties receiving payments of public funds. While it was held in Vindicator Printing Company v. State, 58 O. S., 362, that the doctrine denying recovery of money paid under mistake of law naturally applies when the public is the plaintiff, yet for reasons pointed out in that decision and others, it has no application here. In the first place, section 286, and succeeding sections, themselves reverse this rule; and in the second place, the rule itself does not apply to excessive fees or compensation drawn by a public officer from the public treasury, which constitute one of its exceptions.

Walker v. Dillonvale, 82 O. S., 149.

In short, through the examiner's error, the judge in question has received excessive salary to which he was not in law entitled, unless a finding of the bureau of inspection and supervision of public offices has some unusual force, there is nothing to restrain the bureau from making a corrected finding for a recovery and rectifying the mistake.

I am unable to conclude that these sections have such effect. The functions

of the bureau are in no sense judicial and its findings do not constitute *res judicata*. The department does not act in a proprietary capacity and it is difficult to see how an estoppel can be built up against it.

There certainly would be no difficulty in enforcing recovery if the mistake had been one of fact instead of one of law; and inasmuch as the rule of no recovery, in case of mistake of law, does not apply for the reasons above stated, I am of the opinion that a finding for a recovery should be made against the judge in question, covering his entire term, in spite of the fact that the compensation received by him for the period of time ending on April 1, 1915, was paid in accordance with the previous erroneous finding of the bureau.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

399.

MEMBER OF GENERAL ASSEMBLY—ACCEPTANCE OF OFFICE IN SERVICE OF UNITED STATES FORFEITS OFFICE AS SUCH MEMBER OF GENERAL ASSEMBLY—ACCEPTANCE OF EMPLOYMENT IN SERVICE OF U. S. DOES NOT WORK SUCH FORFEITURE.

If a member of the general assembly should accept office either in the civil or military service of the United States, he would thereby forfeit his office as a member of the general assembly. If he accepts a mere employment either in the civil or military service of the United States, he would not forfeit his office as a member of the general assembly.

COLUMBUS, OHIO, June 21, 1917.

HON. JOHN COWAN, *Member of the General Assembly, Ottawa, Ohio.*

DEAR SIR:—I have your communication of June 7, 1917, in which you ask me for certain information. Your communication reads as follows:

> "Can a member of the legislature enter the federal service, either civil or military, without forfeiting his seat in the general assembly?"

Your communication, while very brief, is rather broad and comprehensive in its nature. You ask whether a member of the legislature can enter the federal service, either civil or military, without forfeiting his seat in the general assembly.

In considering this question we will be compelled to subdivide federal service into those positions which may be termed offices and those which are mere employments. We will have to do this by virtue of the provisions of section 4 of article II of the constitution of Ohio, as this is the section which controls in the matter about which you ask. This section reads as follows:

> "Section 4. No person holding office under the authority of the United States, or any lucrative office under the authority of this state, shall be eligible to, or have a seat in, the general assembly; but this provision shall not extend to township officers, justices of the peace, notaries public, or officers of the militia."

It will be seen that the provisions of this section have to do merely with the holding of an office under the authority of the United States. Let us first consider the

matter of the civil service of the United States. The courts of our state always have drawn a distinction between those positions which might be considered as mere employments and those which are strictly termed offices.

The court in State ex rel. v. Brennan, 49 O. S. 33, on p. 39 of the opinion distinguishes between offices and mere employment as follows:

> "From these definitions and illustrations it is clear that the position created by the act in question is an office, and that the defendant, if selected in the manner prescribed by law, is an officer. Upon him is imposed the right to exercise an employment in the purchase and control of property of the public, not as a temporary, casual act, but as a continuous duty. He is to exercise public functions in the supposed interest of the people. These he exercises independently, for others, and with-out their leave. He is given by the act itself the title or designation of 'stationary storekeeper,' and it is not without significance that he is also denominated an 'officer.' He is to give bond for the faithful performance of his duties, and is entitled to the yearly salary affixed by the act. The office is an independent one. Its duties are not devolved upon the occupant by a superior, as ministerial duties may be devolved upon a deputy, but are imposed by the statute. True, the statute does not provide for an oath of office. But this is not important, for, if by other tests, he is an officer, then the constitution, section 7, of article 15, prescribes the oath, and its injunctions surely cannot be less obligatory than if directed by statute.
>
> "It is equally clear that, if an officer at all, he is a county officer. The office of 'stationary storekeeper' is created for the county of Hamilton. The duties relate to the purchase and custody of the property of the county, and the salary is to be paid by the treasurer of the county from the general fund of the county."

In State v. Kendle, 52 O. S. 346, the court, in the opinion at p. 356, in discussing this same question, uses the following language:

> "The case of State v. Brennan, 49 Ohio St. 33, is relied on. In that case the act, held invalid, created the office of 'stationary storekeeper' for Hamilton county, to be filled by the appointment of the clerk of the court of the county. It was a separate and distinct office provided for that county. The power of the legislature to provide for the appointment of persons to act as assistants in an office filled by election has not, and cannot well be questioned. It is on this principle that the appointment of deputy clerks, deputy sheriffs, and so forth, are made and recognized, each of whom perform many, and in some cases all, the duties of the office in which he acts as deputy. So as to these jury commissioners: They are appointed by the common pleas judges to assist in the administration of justice, as are master commissioners and court constables: They are but handmaids of the court in the selection of judicious and discreet persons to serve on such juries as are required in the trial of causes, and the presentment of indictments."

In State ex rel. Allen v. Mason, 61 O. S. 62, the court uses the following language in reference to this matter (p.72):

> "Since the relator performs no duties except such as by law are charged upon his superior, the pension agent, his position is not an office but merely an employment."

From all the above it is readily seen that if a member of the legislature should enter the federal civil service in such a capacity as that it would be denominated a mere employment, he would not forfeit his office as member of the general assembly under and by virtue of said section 4 of article II of the Constitution of Ohio, but if he should enter the federal civil service in such a capacity as to be denominated an office, he would then forfeit his office as a member of the general assembly.

The above discussion is very general in its nature, but it is impossible for me to make it specific for the reason that you do not suggest any particular position in your communication.

The question arises now as to service in the United States army. The provision of the Constitution is:

> "No person holding office under the authority of the United States."

As there is no provision either in the law or in the Constitution in reference to members of the general assembly, to the effect that they must reside in the county from which they are elected during the term for which they are elected, and inasmuch as the above provision refers merely to officers, I am of the opinion that a member of the general assembly could enlist as a private in the United States army and not forfeit his office as a member of the general assembly; and this especially in view of the fact that the session of the general assembly as provided for by law is now at an end.

So that the question you submit resolves itself into this, as to whether the inhibition that—

> "No person holding office under the authority of the United States shall have a seat in the general assembly,"

would include an office in the United States army.

Let us note the further provisions of the said section. We find this provision as to state offices:

> "but this provision shall not extend * * * to officers of the militia."

From this it would seem that the framers of the Constitution in using the term "office" had in mind not only offices in the civil service, but also officers in the military service. This also appears to be the construction placed upon this term by the courts.

I will quote from but one case, in which the court was construing a constitutional provision somewhat similar to our own, namely, Kerr v. Jones, 19 Ind. 351. In the syllabus the law is stated as follows:

> "The office of colonel of volunteers, as now existing, and the office of reporter of the decisions of the supreme court of Indiana, within the meaning of the ninth section of the second article of the Constitution of said state, are lucrative offices.
>
> "The office of colonel of volunteers in the military service of the United States, is not an office in the militia.
>
> "The acceptance, therefore, of the latter office, by the incumbent of another lucrative office, under the laws of Indiana, would vacate the former."

On page 353 the court in the opinion say:

> "Our constitution provides, that no person shall 'hold more than one lucrative office at the same time,' with some exceptions, not embracing the case at bar; and it specifies two classes of offices that shall not be regarded

as lucrative, namely, offices in the militia to which no salary is attached, and the office of deputy postmaster, where the compensation does not exceed ninety dollars per year. On general principles, the office of colonel of volunteers, as now existing, is lucrative, and so is that of reporter of the supreme court. Mr. Harrison can not hold them both, therefore, unless the office of colonel of volunteers is an office in the militia, within the meaning of the constitution, and if he can not hold them both, his acceptance of the colonelcy, being the later office, vacated that of reporter."

Hence, answering your question specifically, from all the above it is my opinion that if a member of the general assembly should accept a position either in the civil or in the military service of the federal government, which, under the principles above set out, would be denominated an office, he would forfeit his office as a member of the general assembly. If, on the other hand, he should accept a position either in the civil or military service of the United States, which, under the principles above set out, would be denominated a mere employment, he would not forfeit his office as a member of the general assembly.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

400.

ROAD IMPROVEMENT—WHEN COST TO BE DIVIDED BETWEEN COUNTY COMMISSIONERS AND TOWNSHIP TRUSTEES—BONDS COVERING TOWNSHIP'S SHARE OF COST SHOULD BE ISSUED BY COUNTY COMMISSIONERS.

Where a road is improved under agreement between county commissioners and township trustees, by the terms of which the cost and expense of the improvement is to be divided between the county and the township under authority of section 6921 *of the General Code, and it is necessary to issue bonds covering the township's share of the cost and expense of such improvement, such bonds should be issued by the county commissioners under authority of section* 6929 *of the General Code and in the manner therein provided.*

COLUMBUS, OHIO, June 21, 1917.

HON. GEO. C. VON BESELER, *Prosecuting Attorney, Painesville, Ohio.*

DEAR SIR:—This department is in receipt of your favor of June 6, 1917, in which you ask my opinion as follows:

"Will you please pardon an inquiry, but we failed to understand your opinion given to Hon. G. B. Findlay, prosecuting attorney, Lorain county, under date of February 23, 1917, relative to power of township trustees to issue bonds, in the event you intended it should be applicable to the construction of roads when being improved by the county commissioners, but not in conjunction with the state. What is your opinion when the state has no part in the improvement? May we call your attention repectfully to section 6921 of the General Code of Ohio?

" 'The county commissioners, or joint board thereof, upon an unanimous vote, may without a petition therefor, order that all the compensation and damages, costs and expenses of constructing any improvement be paid out of the proceeds of any levy or levies for road purposes on the grand duplicate of the county, or out of any road improvement fund available therefor, or the county commissioners or joint board thereof may enter into an agreement with the trustees of the township or townships in which said improvement is in whole or part situated, whereby said county or township, or one or more

of them may pay such proportion or amount of the damages, costs and expenses as may be agreed upon between them.'

"You are already familiar with section 3295. It seems to us that taking sections 6921 and 3295 together, that township trustees have power to issue bonds for the township's share of the cost and as well the cost of that portion to be assessed upon the abutting property when there is an agreement with the board of county commissioners to pay certain portions of such cost and expense."

The opinion referred to in your communication was limited to the matter of issuing bonds covering the township's share of the cost and expense of an inter-county highway improvement, and the conclusion there reached was that such bonds should be issued by the county commissioners under section 1223, General Code, and not otherwise.

Covering the precise question made by you, to wit: that of the matter of issuing bonds to meet the township's share of the cost and expense of a county road improvement, apportioned to the township by agreement between the trustees thereof and the county commissioners under section 6921, General Code, I herewith enclose copy of an opinion of this department addressed to the Industrial Commission of Ohio under date of April 24, 1917, (Opinion No. 213) and copy of an opinion of my predecessor, Honorable Edward C. Turner, addressed to Honorable Irving Carpenter, prosecuting attorney, Norwalk, Ohio, under date of March 6, 1916, (Opinion No. 1327).

The first of the opinions just referred to is one disapproving certain bonds issued by Middleburgh Township, Cuyahoga county, to pay the township's share of the improvement of a county road in said township on an agreement as to division of cost and expense made by and between the trustees of said township and the county commissioners of Cuyahoga county.

In the opinion of my predecessor referred to it was held that where a road is improved under an agreement between county commissioners and township trustees, by the terms of which the cost and expense of the improvement is to be divided between the county and the township, and it is necessary to issue bonds, the same should be issued by the county commissioners under authority of section 6929, General Code.

I see no reason to depart from the conclusions reached in the above mentioned opinions, and, answering your question specifically, I am of the opinion that bonds issued to meet the township's share of the cost and expense of a county road improvement, apportioned to the township by agreement between the trustees of said township and the county commissioners under section 6921 General Code should be issued by the county commissioners under section 6929 General Code, and not under section 3295 General Code as amended 106 O. L. 536.

With respect to your suggestion as to the authority of the township trustees under section 3295 General Code to issue bonds covering that portion of the cost and expense of a county road improvement to be assessed upon abutting property, I am clearly of the opinion that bonds in anticipation of assessments for the improvement of county roads under chapter 6 of the Cass road law should be issued by the county commissioners under section 6929 General Code and not otherwise. So far as I have been able to discover, the only bonds that township trustees are authorized to issue in anticipation of the collection of assessments for road improvements are those which, under the provisions of sections 3298-8 and 3298-9 General Code, they are authorized to issue on a vote of the electors for the purpose of improving roads in the township, and which bonds under the provisions of section 3298-14 General Code, may cover such part of the cost and expense of improving such roads as is assessed by the township trustees against lands lying within one mile from either side or terminus of the improvement or abutting thereon, as the trustees may determine.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

401.

A. V. DONAHEY—GOVERNOR'S DEED—BERTHA M. HOLMES.

Opinion relative to granting new deed by governor of Ohio to Bertha M. Holmes, in Athens county, Ohio.

COLUMBUS, OHIO, June 21, 1917.

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

DEAR SIR:—You have submitted to me the papers in connection with a mistake made in certificate of purchase No. 407, issued by the Ohio university on or about November 5, 1910, to William Skinner, upon which Hon. Judson Harmon, then governor of Ohio, by deed dated November 15, 1910, duly conveyed to said William Skinner an undivided one-half interest in and to the premises described as follows:

> "Situate in the city of Athens, county of Athens and state of Ohio, being the undivided one-half of the southwest subdivision of inlot No. 38, beginning at the southwest corner of said inlot No. 38; thence east 159 feet, more or less, to the west line of the lot owned and occupied by John P. Dana; thence north 58 feet; thence west 159 feet more or less to Congress street; thence south 58 feet to the place of beginning."

Section 8528 G. C. provides as follows:

> "When, by satisfactory evidence, it appears to the governor and attorney general, that an error has occurred in a deed executed and delivered in the name of the state, under the laws thereof, or in the certificate of any public officer, upon which, if correct, a conveyance would be properly required from the state, the governor shall correct such error by the execution of a correct and proper title deed, according to the intent and object of the original purchase or conveyance, to the party entitled to it, his heirs, or legal assigns, as the case may require, and take from such party a release in due form, to the state, of the property erroneously conveyed."

Under the above section, when it appears by satisfactory evidence to the governor and attorney-general that an error has occurred, the governor "shall correct such error by the execution of a correct and proper title deed."

From the papers submitted it appears that the property in question was Ohio university leasehold lands and that on March 11, 1891, E. R. Lash and wife conveyed the same to William Skinner and J. A. Holmes, and that the same were held jointly by said Skinner and Holmes until September 18, 1897, when Holmes conveyed his interest to Skinner. It further appears that William Skinner died in 1898, leaving a widow, since deceased, and one surviving heir at law, Bertha M. Holmes.

It further appears that on or about the 5th day of November, 1910, said Bertha M. Holmes paid or caused to be paid to Hon. H. H. Haning, treasurer of the president and trustees of the Ohio University, the sum of $8.50, being the amount required to pay off the lien of the Ohio University on the entire premises; that a certificate of purchase was duly issued, being certificate No. 407, but that said certificate erroneously stated that said sum was the amount required to pay off said lien *on the undivided one-half of said premises*, when in fact it was the sum required to pay off the lien on the whole of said premises, and that said certificate also stated that William Skinner was the then owner of the premises although said Skinner had died several years prior thereto and said Bertha M. Holmes was the owner of the whole of said premises.

It further appears that said certificate No. 407 was duly forwarded to the auditor of state and that thereafter Hon. Judson Harmon, then governor of Ohio, issued a deed based on said certificate, which deed was duly recorded in volume 114, pages 75 and 76, Athens County Deed Records.

The above facts are obtained from the papers which you have submitted to this department. In accordance with section 8528, said Bertha M. Holmes has tendered

a quit claim deed to the president and trustees of Ohio University for the premises conveyed by Hon. Judson Harmon to William Skinner, deceased, the description being the same as hereinbefore set out, the purpose of the deed being set out as follows:

"This deed is made for the purpose of clearing the record of the title of said premises and to comply with section 8528 of the General Code of Ohio, and to reinvest in the said grantee such title, if any, that passed to said William Skinner under said deed from said Judson Harmon, governor of the state of Ohio, the said William Skinner being deceased at the date of the execution of said deed, and said deed should have been executed to said Bertha M. Holmes for the entire interest in said premises."

Said Bertha M. Holmes and James A. Holmes, her husband, have likewise tendered a quit claim deed to the state of Ohio in trust for the benefit of the president and trustees of the Ohio University, its successors and assigns forever, for the above described piece of property.

The documents submitted are satisfactory evidence to me that an error has occurred in the deed executed and delivered in the name of the state and if my opinion is concurred in by the governor of Ohio a deed should be executed by the governor granting to Bertha M. Holmes all the right, title and interest in and to the premises described as follows:

"Situate in the city of Athens, county of Athens and state of Ohio, being the south-west subdivision of inlot No. 38, beginning at the south-west corner of said inlot; thence east 159 feet more or less to the west line of the lot owned and occupied by John P. Dana; thence north 58 feet thence west 159 feet more or less to Congress street; thence south 58 feet to the place of beginning."

We herewith return the papers which you submitted to us.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

402.

APPROVAL—TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE OF COUNCIL OF LAKEWOOD, OHIO.

COLUMBUS, OHIO June 22, 1917.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"IN RE:—Bonds of the city of Lakewood, Cuyahoga county, Ohio, in the sum of $7,530.00, in anticipation of the collection of assessments for draining and grading Hilliard avenue between West Madison avenue and Riverside road in said city, and for constructing sidewalks thereon."

I have carefully examined the transcript of the proceedings of the council and other officers of the city of Lakewood, Ohio, relating to the above bond issue, and find said proceedings to be in substantial conformity to the provisions of the General Code of Ohio and the provisions of charter of the city of Lakewood applicable thereto.

I am of the opinion that bonds of said city of Lakewood, Ohio, covering said bond issue will, when prepared in accordance with bond form submitted and signed by the proper officers, constitute valid and binding obligations of said city.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

403.

LOANS UPON NOTES, ETC.—PERSON ENGAGED IN SAID BUSINESS—WHO EXACTS GUARANTEE OF GENUINENESS OF NOTES, ETC.—CANNOT CHARGE MORE THAN EIGHT PER CENT INTEREST.

Under the act of May 7, 1915, including sections 6346-1 to 6346-10 General Code a person or firm engaged in the business of making loans upon notes or chattel mortgage, or both, as collateral security, and who exacts that a guarantee be obtained of the genuineness or validity of such note or mortgage cannot charge interest at such rate that the combined interest and premium shall exceed eight per centum per annum.

COLUMBUS, OHIO, June 22, 1917.

HON. PHILIP C. BERG, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—On June 4, 1917, you requested my opinion as follows:

"There are numerous firms over the state doing extensive business in advancing money on automobiles to the dealer, so as to enable him to retail machines on a partial payment plan. Will you be so kind as to give me your opinion as to the scope of sections 6346-1-10 the General Code, in so far as they apply to the following hypothetical case:

"A firm advances sixty per cent. of the retail value of an automobile to the dealer, taking from him the purchaser's note or notes. The charge on these notes is strictly six per cent. for the time they actually run. It is also possible to discount these notes should the purchaser care to (by making earlier payments and save interest charges). The firm, however, requires that the dealer shall give them a security bond, upon which the minimum premium is ten dollars, and also that the car, upon which the chattel mortgage is taken, shall be insured to the extent of their equity against fire, theft, collision, etc. The firm is the agent for the surety and bonding companies, and requires that the policies be taken out only in their companies.

"It is evident upon the face of this matter that the profit to the firm purchasing the notes comes through the insurance premiums, since they undoubtedly rediscount a large proportion of the paper thus secured. Is this in violation of the sections referred to above?"

The sections you mentioned, as amended, constitute the act of May 7, 1915, and it is only necessary to quote the first section as bearing upon your question, as the first is the declaratory part of the law and the others all supply the machinery and regulations for carrying it into effect. It is as follows:

"Sec. 6346-1. It shall be unlawful for any person, firm, partnership * * * to engage, or continue, in the business of making loans, on * * * notes, * * * or mortgage * * * of chattels, or of furnishing guarantee or security in connection with any loan or purchase, as aforesaid, at a charge or rate of interest in excess of eight per centum, per annum, including all charges, without first having obtained a license so to do from the superintendent of banks and otherwise complying with the provisions of this act."

The different things forbidden above are joined by the disjunctive "or" and are therefore in the disjunctive so far as the form of expression is concerned.

In your hypothetical case three charges are stated: "Interest," "guaranty insurance," and "insurance against fire, theft, collision, etc." The latter may be eliminated as it is in no sense any part of the charge for mere interest, but is a security which enures entirely to the interest of the owner of the machine. That is, if there is a loss he gets what is paid on the policy or gets the benefit of it by having it applied on his debt, the party making the loan receiving only the insurance instead of the mortgaged property where the latter is destroyed or injured. So that the question presented is whether the interest charge and the guaranty insurance together may exceed eight per centum, or, in other words, if they do exceed eight per centum, whether or not it requires the license provided for in the act.

The object of this law is primarily to prevent exactions of usury, and where it is permitted places it under the regulation of the banking department; and although the two things considered, namely, the interest on the loan and the premium for the guarantee of the debt are stated in the disjunctive form and separately it is to be considered whether, taking in view all the language of the section in connection with the purpose of its enactment, it does not mean that the total of both charges shall not exceed eight per centum.

Your inquiry does not state whether the transaction is a loan to the dealer or a purchase of the notes, the statement being simply that the firm in question advances sixty per cent. of the retail value of an automobile, taking the purchaser's note or notes. This, of course, might be a purchase outright of the notes, or it might be a loan upon them of that amount, taking the notes as collateral. We will suppose it to be the latter in order that the question of interest and usury may be clearly involved. Then let us repeat the section, leaving out all unnecessary parts, and we have:

> "It shall be unlawful for any person to engage in the business of making loans on notes or * * * mortgage of chattels or of furnishing guarantee or security in connection with any loan or purchase as aforesaid at a charge or rate of interest in excess of eight percentum including all charges."

This section is capable of the construction that eight per centum might be charged for each, that is, eight per cent. interest on the money and not to exceed eight per centum for the guarantee of the claim.

This guarantee in practice is not an insurance or suretyship of the claim, but a mere guarantee of the authenticity of the note and against the existence of any defense to it.

What then is the maximum of both these charges? Is it eight per centum, or is it sixteen per centum?

I am of the opinion that eight per centum is the total that can be charged for both, for the following reasons: "Or" may be read "and" when necessary to the sense. It is not, however, in this connection necessary to substitute "and" for "or" in order to obtain the above result. It follows from the use of the terms found in the section if the guarantee alone were being provided for by the legislature the word *"premium"* would have been used. What they did say, however, is "at a charge or rate of interest in excess of eight per centum, including all charges" so that the fact that the word "premium" is omitted, the word "interest" used and the statement that it is to include "all charges" makes clear the legislative intent that in such transactions the interest and all the other charges contemplated in the section are only to amount to eight per centum. This works no violence to the provisions of the law to charge interest alone at as high a rate as eight per centum. The prohibition of this statute is not simply for making the eight per centum include other charges which would thereby reduce the rate of interest, but it is

against engaging in the business of making loans at such rate including charges, and it does not even prevent this, but as a police regulation, which it is, requires such person engaging in such business to take a license and comply with the provisions of the act.

Where such interest charge and the other charges do not exceed eight per centum, of course, it is unnecessary to comply with the act; and if the transaction amounts to a sale of the notes in question, this would be equally true in an individual transaction or true generally unless the sale were merely colorable and the real arrangement constitutes or amounts to the making of loans. This could not be if the notes were endorsed "without recourse," but it would depend upon the facts of each case as it arose whether the course of business between the parties constituted sales of paper in good faith or was a mere scheme or device for furnishing credit at a higher rate than the statutes permit.

Answering your question directly, if the case you suppose is a loan upon collateral the parties engaged in making such loans, if the total charge for interest and premium exceeds eight per centum would be under the provisions of the law and must comply with it.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

404.

COLLATERAL INHERITANCE TAX—HOW ASSESSED AND COLLECTED AGAINST ESTATES DEVISED TO TAKE EFFECT AT FUTURE TIME.

Where a testator devised to his brother his interest in certain real property until all of said brother's children become of age, at which time testator's interest in said real property is to be divided equally between all of said children living at that time,

HELD:

(1) *That, without reference to the question whether the estate taken under said will by the children of testator's brother is vested or contingent, section* 5331 *General Code casts a lien upon the property for the security of the payment of the collateral inheritance tax on the share or shares passing to any child or children of testator's brother under the will; but that*

(2) *Inasmuch as the question as to which, if any, of the children of testator's brother will ultimately take under the will is one which cannot now be determined, the assessment and collection of the collateral inheritance tax on the share or shares of said estate going to any child or children of testator's brother will have to be postponed until the termination of the prior estate.*

COLUMBUS, OHIO, June 22, 1917.

HON. FRANK CARPENTER, *Prosecuting Attorney, Norwalk, Ohio.*

DEAR SIR:—I am in receipt of a letter from you asking opinion, in which you say:

> "The following is a copy of an item in the will of a testator who died in our county some time ago:
>
> "'I give and devise to my said brother, John Sweeting, the use of all of my interest in the farm now owned and occupied by us jointly, known

as the Warren Adams farm, containing 128 acres, until all of his children become of age, at which time I desire my said interest in said farm to be divided equally between all of his children living at that time.'

"The question which I desire to submit to you is in reference to the application of the statute providing for a collateral inheritance tax to this bequest.

"As I understand the law, all bequests made to persons other than those exempted by the statute, are subject to a collateral inheritance tax of five per cent. The statute, however, exempts $500.00 to each beneficiary. In this case John Sweeting is given an estate for a term of years, and without question this estate should pay the collateral inheritance tax, but the remainder or reversion is to go to his children when the youngest reaches the age of 21 years.

"At the present time there is one child in the family of John Sweeting, who is about three years of age.

"What would you say as to the correct procedure to be followed in ascertaining the collateral inheritance due on the estate left after John Sweeting has enjoyed the use bequeathed to him? As I view the matter there is no way of ascertaining how many exemptions there should be or how many legatees, if any, there will be under this item of the will."

Applicable to a consideration of the question presented by you, I note the following sections of the General Code:

"Sec. 5331. All property within the jurisdiction of this state, and any interests therein, whether belonging to inhabitants of this state or not, and whether tangible or intangible, which pass by will or by the intestate laws of this state, or by deed, grant, sale, or gift, made or intended to take effect in possession or enjoyment after the death of the grantor, to a person in trust, or otherwise, other than to or for the use of the father, mother, husband, wife, lineal descendent or adopted child, shall be liable to a tax of five per cent of its value above the sum of five hundred dollars. Fifty per cent. of such tax shall be for the use of the state; and fifty per cent. of such tax shall go to the city, village or township in which said tax originates. All administrators, executors and trustees, and any such grantee under a conveyance made during the grantor's life, shall be liable for all such taxes, with lawful interest as hereinafter provided, until they have been paid, as hereinafter directed. Such taxes shall become due and payable immediately upon the death of the decedent and shall at once become a lien upon the property, and be and remain a lien until paid.

"Sec. 5333. When a person bequeaths or devises property to or for the use of father, mother, husband, wife, lineal descendant, or adopted child, during life or for a term of years, and the remainder to a collateral heir, or to a stranger to the blood, the value of the prior estate shall be appraised, within sixty days after the death of the testator, in the manner hereinafter provided, and deducted, together with the sum of five hundred dollars, from the appraised value of such property.

"Sec. 5335. Taxes imposed by this subdivision of this chapter shall be paid into the treasury of the county in which the court having jurisdiction of the estate or accounts is situated, by the executors, administrators, trustees, or other persons charged with the payment thereof. If such taxes are not paid within one year after the death of the decedent, interest at the rate of eight per cent. shall be thereafter charged and collected thereon, and if not paid at the expiration of eighteen months after such death, the

prosecuting attorney of the county wherein such taxes remain unpaid, shall institute the necessary proceedings to collect the taxes in the court of common pleas of the county, after first being notified in writing by the probate judge of the county of the non-payment thereof. The probate judge shall give such notice in writing. If the taxes are paid before the expiration of one year after the death of the decedent, a discount of one per cent. per month for each full month that payment has been made prior to the expiration of one year, shall be allowed on the amount of such taxes."

"Sec. 5341. When any of the real estate of a decedent passes to another person so as to become subject to such tax, the executor, administrator or trustee of the decedent shall inform the probate judge thereof within six months after he has assumed the duties of his trust, or if the fact is not known to him within that time, then within one month from the time that it does become known to him.

"Sec. 5343. The value of such property, subject to said tax, shall be its actual market value as found by the probate court. If the state, through the prosecuting attorney of the proper county, or any person interested in the succession to the property, applies to the court, it shall appoint three disinterested persons, who, being first sworn, shall view and appraise such property at its actual market value for the purposes of this tax, and make return thereof to the court. The return may be accepted by the court in a like manner as the original inventory of the estate is accepted, and if so accepted, it shall be binding upon the person by whom this tax is to be paid, and upon the state. The fees of the appraisers shall be fixed by the probate judge and paid out of the county treasury upon the warrant of the county auditor. In case of an annuity or life estate, the value thereof shall be determined by the so-called actuaries' combined experience tables and five per cent. compound interest."

No question is presented in your communication with respect to the nature of the interest devised to John Sweeting, nor with respect to the manner in which the collateral inheritance tax thereon should be computed and collected. Your question is as to the correct procedure to be adopted with respect to the matter of computing and collecting the collateral inheritance tax due on the estate left after termination of John Sweeting's interest in this property.

The collateral inheritance tax is not a property tax, but is rather a tax on the right of inheritance, and the tax is on the separate shares passing to the recipients of the testator's bounty, each of whom is entitled to the five hundred dollars exemption provided for in section 5331 of the General Code.

In the Matter of Howe, 112 N. Y. 100.
In the Matter of Hoffman, 143 N. Y. 327.

Section 5331 General Code provides that such taxes shall become due and payable immediately upon the death of the decedent and shall at once become a lien on the property, and be and remain a lien until paid.

Without reference to the question whether the estate taken under this will by the children of John Sweeting when the youngest reaches the age of twenty-one years is vested or contingent, I am of the opinion that the provisions of section 5331 above quoted cast a lien upon the property for the securtiy of the payment of the collateral inheritance tax on the share or shares passing to any child or children of John Sweeting under the will.

In computing the value and the resultant tax of the estate subsequent to the

estate for years of John Sweeting, regard should be had to the provisions of section 5333 of the general Code, subject to the rule that each share passing under the will is entitled to the exemption of five hundred dollars. It will be noted from the provisions of section 5333 that they are not *in terms* applicable for the purpose of ascertaining the value of a subsequent estate when the prior estate is taxable. However, I note that in the case of Dow v. Abbott, 197 Mass., 283, a case construing a similar statute in the collateral inheritance tax law of the state of Massachusetts, on a situation of facts somewhat similar to that presented here by the interest devised to John Sweeting—there is authority to the point that in determining the value of the subsequent estate here in question section 5333 of the General Code should be applied.

Inasmuch, however, as the question as to which, if any, of the children of John Sweeting will ultimately take under the will is one which cannot now be determined, I quite agree with the view expressed in your communication, that the assessment and collection of the collateral inheritance tax on the share or shares of said estate going to the child or children of John Sweeting in remainder will have to be postponed until the termination of the prior estate.

It is a general rule, in the absence of statutory provisions to the contrary, that an inheritance or succession tax cannot be assessed or demanded as of the date of the testator's death when the actual value of the postponed estate cannot be ascertained, for the reason that the person or persons who will ultimately become entitled cannot be known or identified until the termination of the intermediate estate, as where the devolution of the remainder or other expectant estate depends on a question of survivorship or other simliar contingency.

In re Davis, 149 N. Y. 539;
People v. McCormick, 208 Ill. 437;
State v. Hennepin Co., 100 Minn. 192;
In re Hoffman, 143 N. Y. 327;
Shaw v. Bridges, 161 N. C. 246.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

405.

BIDS—HIGHWAY IMPROVEMENT—NOT NECESSARY TO ACCEPT LOWEST BID.

1. *Where county commissioners have received bids for the improvement of a highway, the specifications calling for separate bids upon a tar bound improvement and an asphalt bound improvement, in awarding the contract, they may take into consideration not only the bids, but the bids in connection with the kind of improvement upon which the bids are based.*

2. *Under section 6945 G. C. the question is not as to who is the lowest bidder, but who is the lowest and best bidder. The county commissioners have a right to consider the character of the bidder, the efficiency of the thing to be furnished, and the price in view of the other considerations. From this consideration the lowest bidder may not be the best bidder.*

COLUMBUS, OHIO, June 22, 1917.

HON. C. C. CRABBE, *Prosecuting Attorney, London, Ohio.*

DEAR SIR:—I have your communication of May 12, 1917, in which you ask for my opinion upon certain matters. Your communication reads as follows:

> "I am anxious to have your opinion on the following:
>
> "'Bids are to be received by the board of county commissioners for the construction of bituminous macadam road. The specifications drawn by the engineer for this work permit bidders to bid on either a bituminous material tar or a bituminous asphalt as a binder in the construction of the top course.
>
> "'So as to invite competition between the different kinds of binders the county engineer has provided in his proposal sheet or bidding blank a place for the bidder to bid on either a top course constructed with an asphalt binder or a top course constructed with a tar binder.
>
> "'In making up the approximate estimate he has estimated both top courses at the same unit price.
>
> "'Now the question arises, when the bids are opened by the board of county commissioners, should they make their decision as to the kind of top course, either asphalt bound or tar bound, which the contractor is to use before they decide on the lowest and best bidder?
>
> "'I am taking into consideration when I mention that the county commissioners decide as to the kind, General Code, section 6911 of the Cass highway law. This section gives the county commissioners the authority to decide the kind and extent of the improvement.
>
> "'In the event that the county commissioners decide to use a certain kind of top course for this construction and the bids on the other kind of top course are lower, would they have the authority to award the contract on the kind of top course which in their opinion is the best for the construction of this certain improvement?
>
> "'General Code, section 6945 of the Cass highway law, provides for the county commissioners to award the contract to the lowest and best bidder. Does the word "best" as used in this connection take into consideration the contractor's financial standing, the kind and character of equipment he has for doing the work, and his reputation for good workmanship, or does the word "best" refer exclusively to kind and type of work?'"

From your communication and in connection with it, I assume that the commissioners of your county, after deciding to proceed with the construction of a

certain highway, requested the county surveyor to make plans, profiles, specifications and estimates for the same; that he was ordered by the county commissioners to make his specifications and estimates so as to cover the improvement, provided a tar binder was used in the construction of the same, and also in the event that an asphalt binder should be used, or in any event the county surveyor did so make his specifications and estimates. The county commissioners then adopted the specifications and estimates so made by the county surveyor and advertised for bids for the construction of the highway, based upon said plans, profiles, specifications and estimates so made by the county surveyor; that bidders were notified in the advertisement that said plans, etc., were on file and could be examined by any one desiring to bid; that on account of said advertisement bids were submitted, some on the theory that the tar binder should be used and others on the theory that asphalt binder should be used, and that these bids were submitted on blanks furnished by the county surveyor, giving all bidders the opportunity to bid on each kind of construction, should he desire so to do. The bids so submitted have been opened by the county commissioners.

At this stage of the proceedings we reach the questions arising in the minds of your county commissioners. Your communication gives rise to three separate and distinct questions and I shall therefore separate it into three different parts:

> "1. Shall they make their decision as to the kind of top course, either asphalt bound or tar bound, which the contractor is to use, before they decide on the lowest and best bidder?"

In answering this question it will be well for us to note the provisions of section 6911 G. C., which reads as follows:

> "Sec. 6911. When the board of commissioners have determined that any road shall be constructed, improved or repaired, as herein provided for, such board shall determine by resolution by unanimous vote, if acting without a petition, and by a majority vote, if acting upon a petition, the route and termini of such road, the kind and extent of the improvement, and at the same time shall order the county surveyor to make such surveys, plats, profiles, cross-sections, estimates, and specifications as may be required for such improvement, but the profile and grade therefor shall be subject to the approval of the commissioners."

It will be noted by the provisions of said section that after the county commissioners have determined that any road shall be improved, they shall determine "the kind and extent of the improvement," and at the same time shall order the county surveyor to make such surveys, etc., as may be required for such improvement. From this section it will be seen that the natural and logical method to pursue is, first, to determine the kind and extent of the improvement, and then order the county surveyor to make the surveys, etc.

From a reading of this section it might be inferred that the county commissioners would be compelled to decide upon some one certain kind of improvement; but it will be noted that said section further provides that the county commissioners shall at the same time order the county surveyor to make *such* surveys, plats, profiles, cross-sections, estimates and specifications as *may be required* for such improvement. From this language it can well be inferred that the county commissioners would not necessarily be compelled to decide upon some certain kind of improvement.

Section 6912 G. C. provides that the county commissioners must give notice, by publication, to all persons interested, that the survey, plats, etc., are on file, for

the purpose that they may object to the improvement, if they have any objections. From this, persons interested in the improvement might ask the county commissioners to select some certain kind of improvement, in order that they might know whether to object or not. But however this may be, I am of the opinion that bidders would have no right to object to the action of the county commissioners in selecting two different kinds of improvement, and this especially after they have examined the specifications and estimates, have had full opportunity to bid upon the same, and have submitted their bids to the county commissioners, and when no advantage was taken of or fraud practiced upon them. They would be estopped from raising any question as to the method adopted by the county commissioners.

With this in mind, what is the answer to your first question? In arriving at a conclusion as to who is the lowest and best bidder, I believe that the county commissioners should consider the bids in connection with the kind of binder upon which bids were submitted; that the county commissioners may consider together the bids and the kind of improvement, and that they are not compelled first to select the kind of improvement and then decide, in view of this, as to who is the lowest and best bidder. By thus proceeding, they may be greatly helped in ascertaining as to who is the lowest and best bidder. It must be remembered that the question is not, who is the lowest bidder, but who is the lowest and best bidder, taking into consideration the work to be done and the persons who bid upon the work.

Your second question is as follows:

> "2. In the event the county commissioners decide to use a certain kind of top course for the construction of the highway, and the bids on the other kind of top course are lower, would they have the authority to award the contract on the kind of top course which in their opinion is the best for the construction of this certain improvement?"

In connection with this question, let us note the provisions of section 6945 G. C., which provides for the notice to be given by the county commissioners in advertising for bids, and reads in part as follows:

> "Sec. 6945. * * * Such notice shall state that plans and specifications for such improvement are on file in the office of the county commissioners, and the time within which bids will be received. The county commissioners may let the work as a whole or in convenient sections as may be determined. They shall award the contract to the lowest and best bidder."

As said in answer to your first question, the question is not, who is the lowest bidder, but who is the lowest and best bidder. The courts have always held that this confers upon the persons awarding the contract a wide discretion in the matter of awarding the same; that they may award the contract to one not the lowest bidder, provided they decide some other bidder is the best under all the circumstances.

In State ex rel. v. Village of St. Bernard, 10 C. C. 74, the court lays down the following proposition in the second branch of the syllabus:

> "2. Under the advertisement made for bids in this case, where no definite description is given as to the character of the pumping engines required, or that they should be of any designated pattern, or be of a certain system of operation, other than that mentioned in very general terms, then, if there be bids therefor by two or more persons, offering to furnish

engines of a substantially different character in one or more respects, and the trustees acting with due care and on proper inquiry and consideration, in good faith, are of the opinion that one of them is not in accordance with the terms of the advertisement for bids in any substantial respect, and that one is much preferable to the other, and that the interests of the village would be better subserved by choosing the one rather than the other, they might legally do so, though the bid for this was higher than the other."

The court in the opinion on p. 75 use the following reasoning:

"If there be bids therefor by two or more persons, offering engines of a substantially different character in one or more respects, and the trustees, acting with due care and on proper inquiry and consideration, in good faith, are of the opinion that one of them is not in accordance with the terms of the advertisement for bids in any substantial respect, and that one is much preferable to the other, and that the interests of the village would be better subserved by choosing the one rather than the other, that they might legally do so, though the bid for this was higher than for the other. In such case the one selected might well be the lowest bid for that particular kind of an engine, and in such case a court ought not to interfere with the discretion conferred upon them."

In State ex rel. v. Hermann, et al., 63 O. S. 440, the court lays down the law in the syllabus as follows:

"A statute which confers upon a board of public officers authority to make a contract 'with the lowest and best bidder,' confers upon the board a discretion with respect to awarding the contract which cannot be controlled by mandamus."

In State ex rel. v. Com'rs., 36 O. S. 326, the court reasons as follows, in the opinion, p. 330:

"If the commissioners were required, at all events, to award the contract to the one offering to perform the labor and to furnish the materials at the lowest price to determine which would be a mere matter of figures, it would not be difficult for bidders to so combine, as to secure the work at the full estimate of the architect. The statute was enacted for the benefit of the public, and not for individual bidders, and it should be executed with sole reference to the public interest.

"Mandamus will lie only where there is a plain dereliction of duty upon the part of public officers, and can never be invoked to control discretion which is being exercised in good faith, and with a sole view to the public welfare."

In view of all the above, I am of the opinion that your county commissioners, taking into consideration the kind of improvement, may award the contract to one who is not the lowest bidder, provided they decide that under all the circumstances his is the best bid.

Your third question is this:

"3. Does the word 'best,' as used in this connection, take into consideration the contractor's financial standing, the kind and character of the equipment he has for doing the work, and his reputation for good workmanship; or does the word 'best' refer exclusively to kind and type of work?"

In my opinion the word "best" does not refer exclusively to kind and type of work, but refers to everything that may enter into the carrying out of the contract entered into for the performance of the work.

In Yaryan v. City of Toledo, 8 C. C. (N. S.) 1, the court use the following language in the second branch of the syllabus:

> "2. The provision of section 143 of the Municipal Code that the board of public service shall make a contract with the lowest and best bidder, or may reject any and all bids, does not limit the board to a mathematical computation as to who is the lowest responsible bidder, but permits the board to go beyond the price bid and the character of the bidder, and to accept the best proposition offered, considering quality, feasibility and efficiency of the thing to be furnished, the qualifications and responsibility of the bidder, and the price proposed in view of all the other considerations."

In the opinion, p. 19, the court use the following language:

> "We think this permits the board to take into consideration more than the price and more than the character of the bidder; we think it allows the consideration of three elements at least, and that the competition provided for in this statute is in three lines, at least. The awarding tribunal may consider:
>
> "1st. The quality of the thing, the feasibility of the plan, the efficiency of the thing that is to be furnished, etc.
>
> "2nd. The quality of the bidder, his qualifications, responsibility, etc.
>
> "3rd. The price, in view of the other considerations."

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

406.

CREATION OF NEW SCHOOL DISTRICT—FILING REMONSTRANCE AND MAPS.

Sections 4692 and 4736 G. C. provide for two separate and distinct matters, one for the transfer of territory, the other for the arranging of school districts. The provisions of these sections are separate and distinct and the provisions of one of the sections are not in any way modified by or related to the provisions of the other.

COLUMBUS, OHIO, June 22, 1917.

HON. JOHN C. D'ALTON, *Prosecuting Attorney, Toledo, Ohio.* ---- ---------- --

DEAR SIR:—I have your communication of May 15, 1917, in which you ask for certain information. Your communication reads as follows:

> "The Lucas County Board of Education in accordance with the provisions of section 4736 of the General Code heretofore filed written notice with the boards of education of Maumee School Districts Nos. 1 and 2, which the county board desires to arrange in one school district.
>
> "Within the thirty days after the filing of said notice, more than a majority of the electors of Maumee School District No. 1 filed a petition in remonstrance against the proposed arrangement.

"Quaere 1. Is this petition in remonstrance sufficient, it not containing a majority of the qualified electors of Maumee School Districts Nos. 1 and 2?

"After the thirty days had expired the county board of education met to take such acts as it deemed necessary to complete the arrangements under section 4736 of the General Code. At that time the attorney representing the petition in remonstrance, called the attention of the board to the opinion of the attorney-general found in Vol. III of Opinions of the Attorney-General for the year 1915, p. 2450, and in accordance with that opinion told the board that the steps provided by section 4692 of the General Code were a necessary part of the proposed arrangement under section 4736. Acting upon the advice of the prosecuting attorney, the county board of education then took no further action, pending the opinion of the attorney-general upon this subject.

"Maumee School Districts Nos. 1 and 2 include the whole of the village of Maumee and some portions of adjoining townships. The dividing line between the two school districts is a street known as Key street.

"Quaere 2. What sort of a map has the county board to file with the auditor 'showing the boundaries of the territory transferred' if, in your judgment, section 4692 is a necessary part of the proceedings outlined in section 4736?

"Quaere 3. In the event that you should hold that the proceedings authorized by section 4692 are a necessary part of the proceedings of section 4736, the proceedings under section 4736 having been regular to this point, can the board proceed from there to perfect these proceedings under the provisions of section 4692?"

As the questions in your communication have to do with the provisions of sections 4692 and 4736 G. C., my conclusions must be deduced from a consideration and comparison of these two sections

1. In order to arrive at an understanding as to what was in the mind of the legislature in enacting these two sections, let us first compare the provisions of the two sections and the procedings therein set out.

It will be noticed in general at a glance that:

Section 4692 G. C. deals with the matter of the *transfer of territory,* and that section 4736 G. C. deals with the matter of *creating school districts;*

Section 4692 never creates a new school district, while section 4736 has to do entirely with the creation of school districts.

With this general scope of the two statutes in mind, let us compare the proceedings under the one with the proceedings under the other.

Section 4692 G. C. provides for the filing of a map, showing the boundaries of the *territory transferred,* and makes this filing a jurisdictional fact; while section 4736 G. C. provides for filing a notice of such *proposed arrangement,* and makes this filing a jurisdictional fact.

Section 4692 G. C. provides for filing a remonstrance against said *proposed transfer* by those living in the territory *annexed;* while section 4736 G. C. provides for filing a remonstrance against the *arrangement of school districts* proposed by those living in the *territory affected* by the order.

Section 4692 G. C. provides for giving notice of such *proposed transfer* to those living in the *annexed territory;* while section 4736 G. C. provides for giving notice of such *proposed arrangement* to boards of education in the *territory affected.*

Section 4692 G. C. makes no provision for the appointing of a board of education, while section 4736 G. C. makes provision for the appointing of a board of education.

Thus it will be noticed that the proceedings under these two sections of our statutes vary materially, the one from the other, and when we remember the scheme and purpose of said sections, we can readily see and understand why there is a difference in the method of procedure.

Take for example the matter of appointing a board of education. There is never any need of appointing a board of education under section 4692 G. C., for the simple reason that the provisions of this section never create a new district, but merely transfer territory from one district to another; while the provisions of section 4736 G. C. create new districts and hence provisions must be made for the appointing of boards of education.

Take for example the filing of a map. What use or purpose would the filing of a map serve under the provisions of section 4736 G. C., when it is dealing with whole districts? But under the provisions of section 4692 G. C. a map is absolutely essential, because of the fact that certain territory must be limited by metes and bounds and is transferred from one district to another, and hence a map is very essential to inform the auditor as to the territory transferred.

Take for example the giving of notice. When territory is transferred, notice must be given by publication and by the posting of notices to the people living in the territory transferred. However, when it comes to the provisions of section 4736 G. C., we are dealing with districts and boards of education, and hence notice is given merely to the boards of education of the districts concerned.

Thus we can readily see that these two sections provide entirely different schemes for entirely different purposes, and the terms and procedure of the one have absolutely nothing to do with the terms and the procedure of the other. As said before, one section has to do merely with the transfer of territory from one district to another; while the other has to do with the formation or arrangement of districts, without any thought of the transfer of territory.

2. It will aid us materially, in placing a construction upon these two statutes, to note the company in which they are found. This always assists in arriving at the scope, meaning and purpose of a statute or section thereof. We find that section 4692 immediately follows section 4690 (the intervening section having been repealed), and precedes section 4696 G. C. Section 4690 G. C. deals with the matter of annexing territory to a city or village, while section 4696 G. C. deals with the matter of transferring territory from a county school district to a city school district, or to another county school district. So that the general scope of all these sections has to do with the question of the transfer of territory. It is also well to remember that section 4692 G. C., before the enactment of the school code in 1914, was found in the General Code under the subject of transfer of territory.

Section 4736 G. C. immediately follows sections 4735, 4735-1 and 4735-2 G. C. Section 4735 G. C. has to do with present existing township and special school districts. Section 4735-1 G. C. has to do with the dissolution of a rural school district and joining the same to a contiguous rural or village district. Section 4735-2 G. C. has to do with the question of the title of the property of rural school districts when they are dissolved and joined to a rural or village district. The general scope of all these sections has to do with the question of school districts and not with the matter of territory at all.

3. It will aid us to note the history of these two sections. Section 4692, as said before, has for a long time been associated with those statutes and sections thereof which have to do with the transfer of territory. It is comparatively an old section of our statutes, and before the enactment of the school code related to the question of transfer of territory from one district to another. Section 4736 G. C. is comparatively a new section of the statutes, having been enacted for the first time in 1914, when the general school code was enacted.

It will be worth while to quote sections 4692 and 4736 G. C. as they were enacted in 1914 as a part of the general school code, and then as they now exist.

Section 4692 G. C., as found in 104 O. L. 135, read as follows:

"Part of any county school district may be transfered to an adjoining county school district or city or village school districts by the mutual consent of the boards of education having control of such districts. To secure such consent, it shall be necessary for each of the boards to pass a resolution indicating the action taken and definitely describing the territory to be transferred. The passage of such a resolution shall require a majority vote of the full membership of each board by yea and nay vote, and the vote of each member shall be entered on the records of such boards. Such transfer shall not take effect until a map, showing the boundaries of the territory transferred, is placed upon the records of such boards and copies of the resolution certified to the president and clerk of each board together with a copy of such map are filed with the auditors of the counties in which such transferred territory is situated."

Section 4692 G. C. as it now reads, is as follows:

"The county board of education may transfer a part or all of a school district of the county school district to an adjoining district or districts of the county school district. Such transfer shall not take effect until a map is filed with the auditor of the county in which the transferred territory is situated, showing the boundaries of the territory transferred, and a notice of such proposed transfer has been posted in three conspicuous places in the district or districts proposed to be transferred, or printed in a paper of general circulation in said county, for ten days; nor shall such transfer take effect if a majority of the qualified electors residing in the territory to be transferred, shall, within thirty days after the filing of such map, file with the county board of education a written remonstrance against such proposed transfer. If an entire district be transferred the board of education of such district is thereby abolished, or if a member of the board of education lives in a part of a school district transferred, the member becomes a non-resident of the school district from which he was transferred and ceases to be a member of such board of education. The legal title of the property of the board of education shall become vested in the board of education of the school district to which such territory is transferred. The county board of education is authorized to make an equitable division of the school funds of the transferred territory either in the treasury or in the course of collection. And also an equitable division of the indebtedness of the transferred territory."

Section 4736 G. C, as found in 104 O. L. 138, read as follows:

"The county board of education shall as soon as possible after organizing make a survey of its district. The board shall arrange the schools according to topography and population in order that they may be most easily accessible to pupils. To this end the county board shall have power by resolution at any regular or special meeting to change school district lines and transfer territory from one rural or village school district to another. A map designating such changes shall be entered on the records of the board, and a copy of the resolution and map shall be filed with the county auditor. In changing boundary lines the board may proceed with-

out regard to township lines, and shall provide that adjoining rural districts are as nearly equal as possible in property valuation. In no case shall any rural district be created containing less than fifteen square miles. In changing boundary lines and other work of a like nature, the county board shall ask the assistance of the county surveyor, and the latter is hereby required to give the services of his office at the formal request of the county board."

Section 4736, as it now reads, is as follows:

"The county board of education shall arrange the school districts according to topography and population in order that the schools may be most easily accessible to the pupils, and shall file with the board or boards of education in the territory affected, a written notice of such proposed arrangement; which said arrangement shall be carried into effect as proposed unless, within thirty days after the filing of such notice with the board or boards of education, a majority of the qualified electors of the territory affected by such order of the county board, file a written remonstrance with the county board against the arrangement of school districts so proposed. The county board of education is hereby authorized to create a school district from one or more school districts or parts thereof. The county board of education is authorized to appoint a board of education for such newly created school district and direct an equitable division of the funds or indebtedness belonging to the newly created district. Members of the boards of education of the newly created district shall thereafter be elected at the same time and in the same manner as the boards of education of the village and rural districts."

It will be noted that section 4736 G. C. was first enacted to take care of the organizing of the whole county into school districts by the county board of education, the first two sentences of the section reading as follows:

"The county board of education shall as soon as possible after organizing make a survey of its district. The board shall arrange the schools according to topography and population in order that they may be most easily accessible to pupils."

It will be seen that this section, as first enacted, dealt also with the transfer of territory, which provision is as follows:

"To this end the county board shall have power by resolution at any regular or special meeting to change school district lines and *transfer territory* from one rural or village school district to another."

This section when first enacted provided for a map, just as did section 4692 G. C. Let us notice when this map had to be filed as provided in section 4736 G. C. (104 O. L. 138). It reads:

"* * A map designating such changes shall be entered on the records of the board, and a copy of the resolution and map shall be filed with the county auditor. * *."

Thus it will be seen that even when the map was provided for in this section, it had nothing to do with the matter of the arranging of the districts, but simply

with the transfer of territory. This section 4736 G. C. was then amended and the matter of the transfer of territory was taken out of said section altogether. The question of the map was also taken out, because it had no further use in the section. From this it is absolutely clear that the legislature did not intend that the question of the map should still be considered when the procedure in section 4736 G. C. is followed.

So that from all the above we are safe in concluding, I think, that there are two separate, distinct and independent purposes embodied in these two sections, and two separate, distinct and independent methods of procedure set out in said sections, and that the procedure in one has absolutely nothing to do with the proceedings in the other, and the terms expressed in the one section are not to be modified by the terms as set forth in the other.

I am driven to this conclusion by another consideration. It will lead to endless confusion if the provisions of one of these sections are made to modify those of the other. Section 4692 G. C. provides that the remonstrance must be filed within thirty days after the filing of the map with the county auditor, while section 4736 G. C. provides that the remonstrance must be filed within thirty days after the filing of the notice with the board of education. Now, if both of these things are done in any proceeding, what date will control in fixing the thirty-day period? Further, section 4692 G. C. makes such provision that a whole district may be transferred to another district, and if this is done the board of education of the district transferred is abolished; while section 4736 provides that one district may be created out of two districts, and when this is done the county board shall appoint a board of education for the new district. If we confuse these two sections, how will we ascertain whether the boards of education of the two districts are abolished and a new one to be appointed by the county board of education; or whether but one board is abolished and the other one remains? The only safe and logical course to pursue is to consider these two sections as separate, distinct and independent sections, complete in and of themselves, without making the one refer in any respect to the other.

Whenever the object sought is a mere transfer of territory from one district to another, whether a part of a district or the whole thereof be transferred, the provisions of section 4692 G. C. should be followed. When the object sought is the arrangement or rearrangement of school districts or the formation of a new district, whether from one or more school districts or parts thereof, the provisions of section 4736 G. C. should be followed.

From all the above, your queries are easily answered; in fact they are already answered.

Query No. 1:

> "Is this petition in remonstrance sufficient, it not containing a majority of the qualified electors of Maumee School Districts Nos. 1 and 2?"

It is not. Section 4736 G. C. provides that:

> "* * a majority of the qualified electors of the territory *affected* by such order of the county board (may) file a written remonstrance * *."

Query No. 2: This has to do with the map. As suggested above, there is no map required under the provisions of section 4736 G. C.

Query No. 3: This relates to your further proceedings. The provisions of section 4692 G. C. have nothing to do with the provisions of section 4736 G. C. You will proceed under and by virtue of the provisions of section 4736 G. C. exclusively.

In answering your question, I am not unmindful of the opinion rendered by my predecessor, Hon. Edward C. Turner, on December 31, 1915, to which you refer, and which is found in Vol. III of the Opinions of the Attorney-General for the year 1915, at p. 2450. I do not concur in his opinion, wherein his conclusions vary from those herein reached.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

407.

SALARY—OF CLERK APPOINTED IN CLASSIFIED SERVICE—AFTER PASSAGE OF APPROPRIATION.

Where a clerk was appointed to a position in the classified service after the passage of the appropriation bill by the present general assembly to take the place of another who held the position at the time of the passage of said act, the new appointee is entitled to the same salary received by the former up to the end of the appropriation on the first of July, 1917, *unless such salary be reduced as provided in section* 4 *of the appropriation act of the* 81*st general assembly.*

The salary of such clerk having been appointed after the passage of the last appropriation act will be governed by the amount appropriated therefor by such act after the first day of July, 1917.

COLUMBUS, OHIO, June 23, 1917.

State Civil Service Commission, Columbus, Ohio.

GENTLEMEN:—You have submitted for my opinion the following inquiry:

> "Since the passage of the appropriation bill by the last session of the legislature, under section 8, of which provision is made for certain classifications and salary schedules of positions in the classified service, the following case has been presented, upon which we are unable to render proper decision without your interpretation of section 8 above referred to:
>
> "After the passage of the appropriation bill 'A' was appointed to a position in the classified service. The position to which he was appointed has been graded by the state civil service commission as of the clerical service, clerk group, grade III. 'A' succeeded 'B' who, on the day the act was passed, was receiving a salary in excess of the amount fixed by the general assembly for clerks of this grade. The following questions arise:
>
> "1. Is 'A's' salary, in so far as it is payable out of the 1915 appropriation bill, that is, for the period intervening between his appointment and the first of July, 1917, limited by section 8 of the 1917 appropriation bill?
>
> "2. Is 'A's' salary on and after July 1st, 1917, covered by the limitations of that section of the bill, even though it might result in a reduction of salary below that which he had theretofore been receiving, if the answer to the first question is in the negative?
>
> "We are called to pass upon many similar cases, and it is desirable that we have your opinion at the earliest possible moment."

Section 8 of H. B. 584, passed at the last session of the legislature, being the general appropriation bill, provides that so much of the appropriation made in

section 2 for personal service as pertains to the compensation of employes in certain groups and grades of the classified service, among which is the clerk group, may be expended at certain annual salaries attached to each of said groups, but contains a proviso as follows:

> "provided, however, that rates of compensation of *persons now* employed in the foregoing groups and grades of the classified civil service of the state, which on the date *of the passage of this act* may exceed the uniform rate fixed herein for the service, group and grade of their positions, as so classified, shall not be affected by the provisions of this section; but such rates of compensation as fixed on said date for such positions shall be the rates at which the appropriations herein made may be expended for the compensation of such persons while holding such positions."

This provision in the general appropriation bill, as you well know, is a distinct departure from former appropriation bills. Either an appropriation was made for a particular position or a lump sum appropriation was made for a number of such positions.

In section 9 of the appropriation act of the 81st general assembly (106 O. L., 828), when an appropriation was made for the payment of the salaries of a specified number of employes whose salaries were not fixed by law, it was made the duty of each department, board or commission, for whom the appropriation was made, to apportion such appropriation account and to assign to each position a specified amount or part thereof. The section further provides:

> "Such department, board or commission shall file such apportionment, in writing, with the president of the board provided for in section 4 of this act (consisting of the governor or any competent, disinterested person, appointed by him, the chairman of the finance committee of the house of representatives and senate, respectively, the attorney-general and the auditor of state), which board shall examine the same and see that the provisions of law and of this act are complied with in making such apportionment. Said board may change such apportionment in order to comply with such law or the provisions of this act, and when satisfied that the same is in all respects legal and in accordance with the provisions of this act, shall certify such apportionment, with any modification it may make, to the auditor of state, with the approval of a majority of its members endorsed thereon. Subject to the approval of said board, any department, board or commission may change the salary or compensation attached to any such position under its control. * * * *"

If an appropriation has been made for the payment of salaries of a specified number of employes as a lump sum appropriation, it is the duty of the board to apportion to each position a proportionate part of such lump sum approriation, and report the same to the board mentioned. This in practical effect was the same as if an appropriation had been made for each particular position, so that we can consider a particular appropriation made to a particular position, and the apportionment of a lump sum appropriation made to a number of such positions after apportionment is made amounts practically to the same thing.

The proviso in H. B. 584, quoted above, seeks only to protect those in the employ of the state at the date of the passage of the act, which was on March 21, 1917, from being reduced in compensation received by them at the time of the

passage of H. B. 584. It did not undertake to protect the successor of any such person in his compensation. However, H. B. 584 can have no effect upon the salary of any one paid prior to July 1, 1917, at which date it goes into effect.

Answering your two questions therefore,

1. "A's" salary, in so far as it is payable out of the 1915 appropriation bill, that is for the period intervening between his appointment and the first day of July, 1917, is not limited by section 8 of the 1917 appropriation bill.

2. "A's" salary on and after July 1, 1917, is covered by the limitations of that section of the bill, even though it might result in a reduction of salary below that which he had theretofore been receiving.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

408.

COUNTY AGRICULTURAL AGENT—NECESSARY STEPS FOR COUNTY TO SECURE STATE AID IN THE MATTER OF EMPLOYMENT—WHEN APPROPRIATION MAY BE MADE—SECTION 9921-4 FOR SUPPORT OF SUCH AGENT.

As steps preliminary to a county's securing the assistance of the state in the matter of the employment of an agricultural agent, it must raise its share for the support of the agent for the first year and transmit the same to the state treasurer, and at the same time give the trustees of the Ohio State University assurance that a like sum shall be raised for a second year.

Whether or not an appropriation may be made under section 9921-4 *G. C. for the support of a county agent at a given time, depends upon the form of the annual budget for the current year and the state of the appropriation accounts from the general revenue fund made at the beginning of the current fiscal half year.*

COLUMBUS, OHIO, June 25, 1917.

HON. TOM A. JENKINS, *Prosecuting Attorney, Ironton, Ohio.*

DEAR SIR:—I have your communication of May 16, 1917, in which you ask my opinion in reference to certain matters. Your communication reads in part as follows:

> "* * The chamber of commerce of this city at the instigation of some of our leading farmers organized a society which is prerequisite to the securing of an appropriation for the purpose of employing a farm agent, and after doing this they came before the board of commissioners and requested that the commissioners make them an allowance of $1,500 to cover the allowance made by the national and state governments. This request was granted, although our county is in poor circumstances financially. The commissioners feel that the purpose was a good one and was worthy of their support. In keeping with their judgment they adopted a resolution providing for the appropriation of $1,500.00 from the general fund of the county for the purpose of employing a county farm agent. The county auditor raised the question that this was an appropriation that could not be made except at stated times as provided by law. It seemed to be the policy of the commissioners to make this allowance and later recoup from funds which will be coming to our county fair and our local apple show.

The auditor claims that his $1,500.00 cannot be paid now, and he has taken this up with Mr. Parrot of the inspection department of the auditor of state's department, who is at work here in this county at present. Mr. Parrot believes that this money cannot be legally paid in this manner. The audior and I have talked the matter over, and we think that if we can get the state department to use their appropriation to meet the expense of this agent for the first half of this year, that we will include in our next levy a small levy for the farm agent proposition which will make available for us the necessary $1,500.00, which we can pay after the December taxes are collected. * *."

In considering the matter suggested in your communication, it will be necessary for us to quote a number of sections of statutes which have to do with the matter of agricultural agents.

Sections 9916, 9921-2 and 9921-4 G. C. read as follows:

"Sec. 9916. When twenty of more persons, residents of a county, organize themselves into a farmer's institute society, for the purpose of teaching better methods of farming, stock raising, fruit culture and business connected with agriculture, and adopt a constitution and by-laws conforming to rules and regulations furnished by the trustees of the Ohio State University, and when such society has elected proper officers and performed such other acts as are required by the rules of the trustees of the Ohio State University, it shall be a body corporate.

"Sec. 9921-2. From moneys appropriated by the state for the employment of agricultural agents, not to exceed three thousand dollars in any one year shall be expended for any county that shall raise at least one thousand dollars for the support of an agricultural agent for one year, and shall give satisfactory assurance to the trustees of the Ohio State University that a like sum shall be raised for a second year, or shall establish and maintain a county experiment farm as provided in the statutes. To secure this aid from the state, the board of county commissioners of any county shall agree to the employment of an agricultural agent approved by the dean of the college of agriculture of the Ohio State University.

"Sec. 9921-4. Each and every county of the state is authorized and empowered to appropriate annually not to exceed fifteen hundred dollars, for the maintenance, support and expenses of a county agricultural agent, and the county commissioners of said county or counties are authorized to set apart and appropriate said sum of money and transmit the same to the state treasurer who shall place it to the credit of the agricultural extension fund to be paid for the purposes aforesaid, on warrant issued by the auditor of state in favor of the Ohio State University. If for any reason it shall not be used as contemplated in this act (G. C. Secs. 9916 to 9921-5) before the expiration of two years, it shall revert to the county from which it came."

These sections contain the provisions which are necessary for us to take into consideration in answering the question suggested by you.

The matter suggested by you has to do with the question as to how the county commissioners may make provision for the necessary funds, in order to enable your county to take advantage of the provisions of these sections in the way of employing an agricultural agent for the county.

You state in your communication that your county is in poor circumstances financially, and has not the necessary funds at hand in order to take care of the

county's share of the cost and expense of an agricultural agent. You state further, however, that your county commissioners have made an appropriation of $1,500.00 to take care of the county's share of the cost and expense of the agricultural agent for the first year, and you inquire whether there is some way by which the state can pay the salary of the agent for the first half of the year, by the end of which time your county commissioners hope to be able to realize under the appropriation made.

In view of this question let us note the provisions of section 9921-2 G. C. Under this section the county is entitled to the assistance of the state in the matter of securing an agricultural agent under this condition:

> "any county that shall raise at least one thousand dollars for the support of an agricultural agent for one year, and shall give satisfactory assurance to the trustees of the Ohio State University that a like sum shall be raised for a second year."

From the provisions of this section it seems that the raising of not less than $1,000.00 and the assurance that a like amount will be raised for the second year must take place before the project is entered upon. It will be noticed that the assurance is not to be given that a certain sum will be raised to take care of the county's share of the cost and expense of the agricultural agent for the first year; but on the other hand, the amount must be raised for the first year and assurance given that the same amount will be raised the second year.

Section 9921-4 G. C. provides:

> "Each and every county of the state is authorized and empowered to appropriate annually not to exceed fifteen hundred dollars for the maintenance, support and expenses of a county agricultural agent * *;"

further, the amount so appropriated shall be transmitted

> "to the state treasurer, who shall place it to the credit of the agricultural extension fund to be paid for the purposes aforesaid * *."

Said section further provides:

> "If for any reason it shall not be used as contemplated in this act * * before the expiration of two years, it shall revert to the county from which it came."

From the language of these two sections it seems clear that the money to take care of the county's share of the cost and expense of the agricultural agent for the first year must be provided for and placed to the credit of the agricultural extension fund as a step preliminary to the entrance upon the project.

This seems also to have been the idea of your county commissioners, as your communication states they have appropriated $1,500.00 for the purpose. But you further state your county is not in condition financially to realize upon this appropriation. You seem to infer that the money is not on hand to meet it.

This condition does not harmonize with the provisions of section 5660 G. C., which reads in part as follows:

> "The commissioners of a county * * shall not enter into any contract, agreement or obligation involving the expenditure of money, or pass any resolution or order for the appropriation or expenditure of

> money, unless the auditor * * first certifies that the money required for the payment of such obligation or appropriation is in the treasury to the credit of the fund from which it is to be drawn, * *. Such certificate shall be filed and forthwith recorded, and the sum so certified shall not thereafter be considered unappropriated until the county, township or board of education, is fully discharged from the contract, agreement or obligation, or as long as the order or resolution is in force."

Hence, your county commissioners could not pass a resolution appropriating money, unless the same were in the fund, and if it were in the fund, this same money, so appropriated, could not be used for any purpose other than that for which it was appropriated.

Therefore, answering your question specifically, it is my opinion that a county, in order to take advantage of the provisions made in the sections above quoted, must first provide the necessary funds to take care of its share of the cost and expense of the agricultural agent for the first year and at the same time give assurance to the trustees of the Ohio State University that a like amount will be raised for a second year.

I note from your communication that your county auditor raises the question as to whether the $1,500.00 could be paid now. I am not quite clear as to what your county auditor may have had in mind, unless it is the provisions of section 5649-3d G. C., in which provision is made that:

> "At the beginning of each fiscal half year the various boards mentioned in section 5649-3a of this act shall make appropriations for each of the several objects for which money has to be provided, * * and all expenditures within the following six months shall be made from and within such appropriations and balances thereof, but no appropriation shall be made for any purpose not set forth in the annual budget nor for a greater amount for such purpose than the total amount fixed by the budget commissioners, exclusive of receipts and balances."

The annual budget of the county commissioners made up last year provided for the needs of the county for the fiscal year, which this department has held to begin and end on the first of March. If the last clause of the above quoted section, prohibiting the making of an appropriation for any purpose not set forth in the annual budget, be interpreted so as to require the county commissioners to specify, in making up their annual budget, not merely the general needs of the general county fund, but also in detail the various specific purposes for which such fund shall be expended, then it would follow that such specific purposes must be enumerated in the annual budget. Such enumeration will control the appropriation of the moneys in the general revenue fund for the next succeeding year. So that upon this theory it would follow that unless the support of a county agent were set forth in the annual budget made up last year, the county commissioners would be without authority to make an appropriation out of the general revenue fund of the county for such support at any time during the fiscal year beginning in March, 1917.

I do not think that any such hard and fast interpretation of the latter provisions of section 5649-3d G. C. is required. The section in this respect is to be read in connection with section 5649-3a G. C., which prescribes the form and contents of the annual budget. That section provides that there shall be set forth in the annual budget:

"an estimate stating the amount of money needed for their wants for the incoming year, and for each month thereof. Such annual budgets shall specifically set forth:

"(1.) The amount to be raised for each and every purpose allowed by law for which it is desired to raise money for the incoming year.

"(2.) The balance standing to the credit or debit of the several funds at the end of the last fiscal year.

"(3.) The monthly expenditures from each fund in the twelve months and the monthly expenditures from all funds in the twelve months of the last fiscal year.

"(4.) The annual expenditures from each fund for each year of the last five fiscal years.

"(5.) The monthly average of such expenditures from each of the several funds for the last fiscal year, and also the total monthly average of all of them for the last five fiscal years.

"(6.) The amount of money received from any other source and available for any purpose in each of the last five fiscal years, together with an estimate of the probable amount that may be received during the incoming year, from such source or sources.

"* *."

It will be observed that all the requirements of this section relate to "funds' as such. Therefore, it might be argued that no greater detail is required to be set forth in the annual budget than the amount needed for each fund in gross. It is difficult, however, to reconcile such a position with the prohibition of that part of section 5649-3d G. C. now under consideration.

Except in cases wherein a transfer of funds may be authorized, it would be impossible for any of the money in one of the funds of the county to be expended for any purpose otherwise than that for which such fund might lawfully be used. That being the case, there would be no need for the general assembly expressly to require that no appropriation should be made for any purpose other than that set forth in the annual budget, if the only purpose required to be set forth in the annual budget were the general purpose of a given fund.

Moreover, the further requirement that no appropriation shall be made for a greater amount for such purpose than the total amount fixed by the budget commissioners, exclusive of receipts and balances, tends to show that the budget commissioners are intended to have some control over the amount which may be appropriated for a given purpose, exclusive of receipts and balances.

Unless the word "appropriation," as used in section 5649-3d G. C., is synonymous with "fund," the necessary inference must be that the budget is required to go into as great detail as is the appropriation, and that such detail is greater than that required of the county commissioners in merely dividing their levy into funds.

A consideration of the legislative history of section 5649-3d G. C. shows clearly that the word "appropriation," as therein used, imports, indeed, a subdivision of a "fund." The form of this section was suggested by section 3797 G. C., which is a part of the municipal code and under which ,with the related sections, it has always been very clear that an appropriation account is a subdivision of a fund.

Indeed, section 5649-3e G. C., a part of the Smith law, of which section 5649-3d is likewise a section, provides as follows:

"Sec. 5649-3e. Unexpended appropriations or balances of appropriations remaining over at the end of the year, and the balances remaining

over at any time after a fixed charge shall have been terminated by reason of the object of the appropriation having been satisfied or abandoned, shall revert to the general fund, and shall then be subject to other authorized uses, as such board or officers may determine."

This requirement that an appropriation shall revert to a fund makes it clear that an "appropriation" and a "fund" are not the same thing.

On the whole, therefore, I am of the opinion that the strict meaning and intent of the sections which I have been considering are that the county commissioners, in making up their annual budget, must estimate the amount required to be raised by taxation, not merely for the general purposes of the general county fund, but also in detail for the different kinds of objects for which the general fund may lawfully be expended. So that it would follow as an abstract proposition that unless the appropriation for the support of a county agent were such an appropriation as had been set forth in the annual budget made up last year, it could not be made during the current year.

But I recognize the fact that in practice the strict view of the law which I have felt obliged to take has not been adhered to, and that the budget estimates and allowances for general county fund purposes have been made with little if any specification of detail. This is equivalent to saying that in general practice the counties have failed to realize the spirit of the Smith law; but it is, I believe, nevertheless the fact. And even where some detail has been observed, it is, and in my opinion may lawfully be, the practice to leave a general balance available for miscellaneous appropriation for any purpose for which the general fund may lawfuly be appropriated. Such an allowance, in the nature of a contingent allowance, is not out of keeping with the spirit and even the letter of the Smith law.

If, therefore, in your county, by reason of the manner in which the budget was made up and the allowances were made by the budget commissioners, there is no such detailed subdivision of the purposes of the general revenue fund, as to preclude the making of an appropriation for the purpose under consideration, on the ground that it is not within any of the purposes set forth in the annual budget, then the latter part of section 5649-3d G. C. does not so operate as to prevent the appropriation.

The effect of the requirement that appropriations shall be made at the "beginning of each fiscal half year" remains to be considered. As pointed out, an appropriation is the setting apart of a specified portion of a fund, i. e., the division of a fund into different accounts, attributable to different objects for which the fund may lawfully be expended. This is the sense in which the term is used in section 5649-3d G. C., and of course it is the sense in which it is used in section 9921-4 G. C.

There is this difference, however, between sections 9921-4 and 5649-3d G. C.: The former speaks of an annual appropriation, while the latter requires appropriations to be made semi-annually. This difference is reconciled, however, by observing that inasmuch as the whole amount appropriated under section 9921-4 G. C. is to be expended in one lump sum, so far as the county is concerned, this is a purpose which could pertain to only one fiscal half year, and therefore in truth and in fact an annual appropriation for this purpose is all that is required or authorized, though semi-annual appropriations for other purposes generally are required.

At the beginning of the fiscal half year, viz., March 1, 1917, your county commissioners made appropriations from the general county fund. If these appropriations exhausted the amount of money in the fund and were under headings or designations such as to exclude the possibility of referring the expenditure authorized under section 9921-4 G. C. to any of them, then the auditor's point would be

well taken and the appropriation for the purposes of the last named section could not now be made, for the money in the fund would all have been appropriated for other purposes, and there would be no more money in the fund subject to appropriation, no matter how much money might actually be in the fund.

But if at the March session the county commissioners did not appropriate all the money in the fund, leaving a balance equal to the amount intended for the support of the county agent, then in my opinion such appropriation may be made, despite the strict language of section 5649-3d G. C., which requires all appropriations to be made "at the *beginning* of each fiscal half year," for there is nothing requiring the county commissioners to make all appropriations by a single order; and if any object, for which the fund may lawfully be appropriated, is overlooked or omitted, I believe that action at earliest opportunity, with respect to such overlooked or omitted appropriation, must be held to be taken "at the beginning" of the fiscal half year, within the meaning of section 5649-3d G. C.

Again, if the appropriations which your commissioners made of the moneys in the general revenue fund at the beginning of the present fiscal half year were made under such general headings as to leave one of them available for expenditure for such a purpose as that defined in section 9921-4 G. C., then I am of the opinion that, although the law has not been strictly complied with, it would be lawful for the commissioners to authorize the expenditure of the amount of money determined upon for the support of the county agent, without further appropriations.

It will be observed that under section 9921-4 G. C. the appropriation and the expenditure are virtually simultaneous; and if an appropriation has been made under a heading which includes other objects than the support of a county agent, I am of the opinion that no further action by way of appropriation is necessary, and that authority immediately exists to order the expenditure.

It will be seen, therefore, that I cannot answer positively the question which the auditor raises, first, because you do not explain in your letter the exact point which the auditor has in mind, and second, because, assuming the point to arise under section 5649-3d G. C., I have no knowledge as to the manner in which the annual budget for the present year was made up, nor of the manner in which appropriations were made on March 1 of this year, from the general county fund.

I must, therefore, answer the question which the auditor has in mind by saying that if the budget was made in such detail as to exclude the making of any appropriation for the purpose of the support of the county agent, such appropriation cannot be made; if, regardless of the form of the annual budget, the appropriations made in March exhausted the general county fund and were themselves made in such detail and under such designations as to exclude the possibility of using any one of them for the purpose mentioned in section 9921-4 G. C., action under that section cannot now be taken; but if the annual budget for this year was not in such form as to preclude the making of an appropriation of the kind; and if either (1) the appropriations made in March, 1917, did not exhaust the entire fund, or (2) such appropriations were made under such general designations or headings as to render the expenditure authorized under section 9921-4 G. C. a proper charge on one of them, action may be taken under this section at the prsent time.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

409.

HOURS OF LABOR FOR WOMEN—EFFECT OF SECTION 12996 ON SECTION 1008.

Section 1008 *G. C., as amended March* 20, 1917, *and section* 12996 *G. C. are in pari materia and should be read together.*

Wherever the provisions of section 1008 *G. C., as amended, conflict with the provisions of section* 12996 *G. C., the former, as the later statute, control.*

Section 1008 *G. C., as amended, controls as to the hours per week and hours per day which a female between the ages of eighteen and twenty-one years of age may be employed in the occupations enumrated in said section.*

COLUMBUS, OHIO, June 25, 1917.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your letter of June 15, 1917, enclosing communication, bearing date April 2, 1917, from the chief deputy of the division of workshops, factories and public buildings, concerning which you ask an opinion. The enclosed communication reads as follows:

> "The legislature passed House Bill 327, amending section 1008 of the General Code, which relates to the hours of labor for women. I am enclosing you a copy of this bill with the request that an opinion be asked of the attorney-general as to what effect it will have on section 12996, which I am enclosing.
>
> "Section 12996 provides that no boy under the age of 18, or girl under the age of 21 shall be employed, permitted, or suffered to work in, about, or in connection with any establishment or occupation named in section 12993,
>
> "(1.) for more than six days in any one week;
>
> "(2.) nor more than 54 hours in any week;
>
> "(3.) nor more than 10 hours in any one day;
>
> "(4.) or before the hour of 6 in the morning or after the hour of 10 in the evening.
>
> "This was not repealed by House Bill 327, amending section 1008 of the General Code, which provides that females over 18 years of age shall not be employed, permitted or suffered to work in certain establishments, or occupations, more than nine hours in any one day, or more than fifty hours in any one week.
>
> "The question arises, which section of the law will control as to the hours per week, and hours per day which a girl between 18 and 21 years of age may be employed? I will respectfully request that an opinion be secured from the attorney-general as soon as possible."

An answer to your question involves provisions of the following sections of the General Code:

Section 1008 as amended by the last legislature in H. B. No. 327, 107 O. L. 149, reads:

> "Sec. 1008. * * Females over 18 years of age shall not be employed or permitted or suffered to work in or in connection with any factory, workshop, telephone or telegraph office, millinery, or dressmaking establistment, restaurant or in the distributing or transmission of messages or

in any mercantile establishment located in any city, more than nine hours in any one day, except Saturday, when the hours of labor in mercantile establishments may be ten hours, or more than six days, or more than fifty hours in any one week, but meal time shall not be included as a part of the work hours of the week or day, provided, however, that no restriction as to hours of labor shall apply to canneries or establishments engaged in preparing for use perishable goods, during the season they are engaged in canning their products."

Section 12993 G. C. reads as follows:

"No male child under 15 years or female child under 16 years of age shall be employed, permitted or suffered to work in, about or in connection with any (1) mill, (2) factory, (3) workshop, (4) mercantile or mechanical establishments, (5) tenement house, manufactory or workshop; (6) store, (7) office, (8) office building, (9) restaurant, (10) boarding house, (11) bakery, (12) barber shop, (13) hotel, (14) apartment house, (15) bootblack stand or establishment, (16) public stable, (17) garage, (18) laundry, (19) place of amusement, (20) club, (21) or as a driver, (22) or in any brick or lumber yard, (23) or in the construction or repair of buildings, (24) or in the distribution, transmission or sale of merchandise; (25) nor any boy under 15 or female under 21 years in the transmission of messages.

"* *."

Section 12996 G. C. reads as follows:

"* * No * * girl under the age of 21 years shall be employed, permitted or suffered to work in, about or in connection with any establishment or occupation named in section 12993 (1) for more than six days in any one week, (2) nor more than fifty-four hours in any one week, (3) nor more than ten hours in any one day, (4) or before the hour of 6 o'clock in the morning or after the hours of 10 o'clock in the evening. In estimating such periods, the time spent at different employments or under different employers shall be considered as a whole and not separately."

The conflict, if any, which arises under your question, occurs by reason of the fact that said sections 1008 and 12996 G. C., prior to the amendment by the last legislature, carried the same hours per day and hours per week for girls between the ages of 18 and 21 years. Now, by reason of the change in section 1008, different hours of labor are provided for the particular occupations found in both of the sections.

There is no difficulty in regarding the cases in which the occupations mentioned in the two sections, to wit, section 1008 and section 12993, to which section 12996 refers, are different. In those cases the provisions of the particular section which refers to the particular occupations in each section control respectively. But an examination of the enumeration of occupations in section 12993 and the enumeration found in section 1008, as recently amended, discloses that section 12993 fixes certain hours per week and hours per day for the occupations designated (2), (3), (4), (9) and part of (25), while in section 1008, in the enumeration of occupations are found the same occupations just referred to numerically, and a different schedule of hours per week and hours per day is provided.

It may not be amiss to compare the provisions of the two sections in so far as applicable herein.

Sec. 1008 G. C. applies to girls over 18 years of age. Section 12996 G. C. applies to girls under 21 years of age.

Sec. 1008 provides girls shall not be employed more than six days out of a week. The same provision is made in Sec. 12996.

Under Sec. 1008 girls shall not be employed more than fifty hours a week. Under Sec. 12996 they may not be employed more than fifty-four hours a week.

Under Sec. 1008 girls may not be employed more than nine hours a day. Under Sec. 12996 they may not be employed more than ten hours a day.

Under Sec. 1008 they may be employed ten hours on Saturday in mercantile establishments in cities. Under Sec. 12996 there is no specific provision as to length of time they may be employed on Saturday .

Under Sec. 12996 they cannot begin work before 6 o'clock in the morning, nor work after 10 o'clock in the evening. We find no provision as to this matter in section 1008.

Under Sec. 12996 the time spent in different employments or under different employers shall be considered as a whole, and not separately. Under Sec. 1008 there is no provision in reference to this matter.

Under section 1008 there is found an exception providing that no restrictions as to hours of labor shall apply to canneries or establishments engaged in preparing for use perishable goods during the season they are engaged in canning their products. Under Sec. 12996 there is no mention of canneries or other establishments, or exceptions thereof from the provisions of the section.

Bearing the above comparison in mind, it will be noted:

1. Both sections provide for six days a week. Hence, there is no difficulty in that regard.

2. Section 1008 G. C. provides for ten hours a day on Saturday. Said section 12996 contains no provisions in reference to Saturday. The provisions in section 1008 would control as to the occupations therein mentioned as to that day, as far as females over 18 years of age are concerned.

3. Section 1008 contains no provision in reference to the time at which girls may begin work and the times at which they must quit. Since this matter is provided for in section 12996, the provisions of the latter section will control as to occupations mentioned in section 12993, which contains the enumeration of occupations to which reference is made in section 12996.

4. Section 12996 provides that in estimating the periods of time therein mentioned, the time spent at different employments or under different employers shall be considered as a whole and not separately. No such provision is found in section 1008.

5. In section 12993, to which section 12996 refers, we find no provision as to canneries or other establishments preparing perishable goods. There is such an exception found in section 1008, and the latter section will control as to such establishments.

I have traveled a little outside of the question submitted, for the purpose of comparing the parts of the sections under consideration. Your direct question is: Which section of the statute will control as to the hours per week and hours per day which a girl between 18 and 21 years of age may be employed?

Bearing the comparisons above noted in mind, and in view of the fact that section 1008 is the last expression of the legislature in reference to the subject matter, it is my view that the provisions of section 1008 will control as to the hours per week and hours per day in all of such occupations as are found in section 1008, and that if the same establishments are mentioned in section 12993, said parts of said section are impliedly repealed wherever they are in conflict with the

provisions of section 1008. The two sections being *in pari materia,* must be read together, in so far as the same is possible. Wherever they conflict, the provisions of section 1008 G. C., being the latest statute on the subject, will control.

It will be noted that the provisions of both sections are in the negative and are prohibitive and not permissive.

From the foregoing it follows that a girl under 21 and over 18 years of age may not be employed for a longer period than fifty hours a week or nine hours a day in the occupations enumerated in section 1008, and as to such hours and such occupations the provisions of section 1008 control. In those occupations enumerated in section 12993 and to which reference is made in section 12996, and which occupations are not enumerated in classification found in section 1008 as amended, of course the provisions of section 12996 shall be given full effect. I think it is clear that both sections where not in conflict can be given the effect intended by the legislature and that wherever conflicting provisions are found in the sections the later provisions of section 1008 G. C. control.

In all the foregoing the references to section 1008 G. C. are to the section as amended March 20, 1917, and filed in the office of the secretary of state on March 29, 1917, which will go into effect ninety days after March 29, 1917.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

410.

WHEN APPROPRIATIONS MAY BE TRANSFERRED FROM ONE DEPARTMENT TO ANOTHER.

Sec. 7 of H. B. 584 (general appropriation act, 107 O. L.) provides for transfer of appropriations only when the functions of any department have been transferred to another department by a law becoming effective after July 1, 1917.

COLUMBUS, OHIO, June 25, 1917.

State Board of Pharmacy, Columbus, Ohio.

GENTLEMEN:—I am in receipt of a request for opinion from your board to the following effect:

> "The eighty-second general assembly in passing H. B. 158, transferred from the state board of agriculture to the state board of pharmacy the enforcement of the pharmacy laws. H. B. 158 did not carry with it an appropriation for the enforcement of said pharmacy laws, neither did H. B. 584 provide the state board of pharmacy with funds for the enforcement of said laws, except, that H. B. 584 did make appropriations to the dairy and food division of the state board of agriculture for the enforcement of the pharmacy laws so transferred by H. B. 158.
>
> "Section seven, of H. B. 584, provides for a transfer of appropriations when the functions of any department (in part) have been transferred to any other department by a law becoming effective after July 1st, 1917. Now, the fact that H. B. 158 becomes effective prior to the date on which H. B. 584 shall take effect, can the funds appropriated in H. B. 584 to the dairy and food division of the state board of agriculture for the enforcement of the pharmacy laws be transferred to the state board of pharmacy for the purpose for which they were intended?"

Section 7 of H. B. 584, being the general appropriation bill passed by the eighty-second general assembly, provides as follows:

"A transfer, in whole or in part, of the functions of any existing department, board or commission, for the uses and purposes of which appropriations are made in sections 2 and 3 of this act, to any other department, board of commission *by a law which takes effect after the date on which this act shall become effective,* shall not affect the availability of any such appropriations except as hereinafter provided. On and after the date on which any such law shall become effective such appropriations shall be available for the proper uses and purposes of the department, board or commission to which such functions are thereby transferred, and such department, board or commission shall on and after such date have the exclusive power and authority to incur liabilities against such appropriations and to draw orders and invoices on account thereof as provided in section 4 hereof, to the extent only, however, of the balances then remaining to the credit of such appropriations in excess of the amount of contingent liabilities theretofore incurred, which shall be considered the net balances thereof for the purposes of this section. In the event that any department, board or commission, for the uses and purposes of which an appropriation is made in sections 2 and 3 of this act, is abolished *by any such law,* and any function of such department, board or commission so abolished is not transferred to any other department, board or commission by the provisions of such law, the net balances of appropriations available for the uses and purposes of such abolished department, board or commission in the discharge of such function shall, on the date on which such law shall become effective, lapse into the fund from which they were appropriated.

"If any appropriation account, whether for personal service or otherwise, created by sections 2 and 3 of this act for the uses and purposes of a department, board or commission which is abolished, or any function, or functions, of which are transferred to any other department, board or commission *by the provisions of any law so taking effect as aforesaid* is primarily available in the discharge of all or several of the functions of such first department, board or commission, the controlling board, immediately upon the taking effect of such law, at a meeting open to the public, and after consultation with each of the departments, board or commissions to be affected by its action, shall ascertain and determine the proportion of the net balance of any such appropriation account which will be needed in the discharge of each of the functions or group of functions so transferred to a single department, board or commission, or the proportion thereof which will no longer be needed by reason of the abolition of any such functions. The board shall determine the amount of the net balance of such appropriation account attributable to each of the functions for which the original appropriation was made, and the auditor of state shall divide the appropriations accounts on the books of his office in accordance therewith, and in the event of the abolition of a function shall lapse the appropriation or the net balance of such appropriation account determined by the board to be attributable to such abolished function, into the fund from which the original appropriation was taken."

It is apparent from a consideration of section 7 that it only applies to the transfer, in whole or in part, of the functions of any existing department, board or commission to *any* other department, board or commission by a law which takes effect *after* the date on which the appropriation bill becomes effective, to wit, July

1, 1917, and therefore it does not in any manner apply when the act transferring the function of one board to another takes effect prior to the taking effect of the appropriation bill and that therefore the controlling board mentioned in the act would be without power to perform any duties under said section 7. The legislature does not seem to have made any provision relative to the situation which you present.

Even if we were to consider that while the act did not provide for such a situation, nevertheless it provided for a situation so similar that the spirit of the provision should be given effect rather than its strict letter, we are met with a further difficulty. Under the appropriation to the board of agriculture of Ohio, dairy and food division, there is an appropriation to the following effect: "4 drug inspectors $4,800.00" under personal service A-1. Under F-6 transportation, there is a sum of $20,000 appropriated which undoubtedly is to include transportation expenses of the four drug inspectors.

By an examination of the law pertaining to drug inspection I find that section 1177-12 authorizes the board of agriculture to enforce the laws against fraud, adulteration or impurities in "drugs" and unlawful labeling of the same within the state. That it is authorized to make uniform rules and regulations for the enforcement of the drug laws of the state.

Under section 1177-13 I find that the board of agriculture in the performance of its duty is authorized to enter any drug store "where it believes or has reason to believe drugs, * * * are made, prepared, dispensed, sold or offered for sale," and examine a package containing or supposed to contain a drug.

Under section 12757 a penalty is placed upon any person who refuses to allow the board of agriculture, its inspectors or agents to enter a drug store.

Section 5774 prohibits the manufacture for sale, offer for sale, the selling or delivering, or having in possession, of a drug which is adulterated.

Section 5775 defines the term "drug."

Section 12758 is a penal section against the selling, among other things, of a drug which is adulterated or misbranded.

Under section 12673 it is made the duty of the board of agriculture to enforce the provisions of section 12672 relating to the sale of cocaine, etc.

The bill to which you refer, being H. B. 158, amending section 1313, pertains solely to the enforcement of the laws pertaining to the practice of pharmacy and provides that the state board of pharmacy shall enforce such laws, the section providing:

> "It is the intention herein there the state board of pharmacy shall enforce or cause to be enforced the provisions of sections 12705, 12706, 12707, 12708, 12709 and 12710 of the General Code."

Section 12705 is a penal section for the managing and conducting of a retail drug store without having a legally registered pharmacist in charge thereof.

Section 12706 is a penal section relative to the dispensing or selling of a drug, etc., by one not being a legally registered pharmacist or assistant pharmacist.

Section 12707 states certain exceptions as does likewise section 12708.

Section 12709 refers to the filing of a false or forged affidavit with the state board of pharmacy, and section 12710 refers to the certificate of registration.

It is apparent, therefore, that the only laws to be enforced by the board of pharmacy are what may be strictly construed as "laws relating to the practice of pharmacy" and do not have any connection whatever with the question of the adulteration of drugs or to the sale of cocaine, etc.

It is apparent, therefore, from the above that there is necessity for the employment by the dairy and food division of the board of agriculture of drug in-

spectors and the number thereof has been determined by the legislature. I am informed that the mere fact that the board of agriculture will no longer enforce the provisions of sections 12705 to 12710 inclusive of the General Code will in no way lessen the work of the drug inspectors of the dairy and food division of the board of agriculture.

Answering your question specifically, I am of the opinion

(1) That section 7 of house bill 584 (general appropriation bill) does not apply to the situation which you have presented in your inquiry.

(2) That under the facts as I have them the situation presented by you would not be within the spirit of section 7 of H. B. 584 and would not authorize a transfer of a part of the appropriation made for drug inspectors to the board of pharmancy.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

411.

APPROVAL—FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN GUERNSEY, HANCOCK AND LAKE COUNTIES.

COLUMBUS, OHIO, June 29, 1917.

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

DEAR SIR:—I have your communication of June 26, 1917, in which you enclose the following final resolutions, upon which you ask my opinion:

"Guernsey County—Sec. 'I' National road, Pet. No. 2397, I. C. H. No. 1.

"Hancock County—Sec. 'F' Findlay-Kenton road, Pet. No. 2428, I. C. H. No. 221, Type 'A.'

"Hancock County—Sec. 'F' Findlay-Kenton road, Pet. No. 2428, I. C. H. No. 221, Type 'B.'

"Hancock County—Sec. 'F' Findlay-Kenton road, Pet. No. 2428, I. C. H. No. 221, Type 'C.'

"Hancock County—Sec. 'H-1' Findlay-Upper Sandusky road, Pet. No. 2430, I. C. H. No. 222.

"Lake County—Sec. 'G' Painesville-Warren road, Pet. No. 2559, I. C. H. No. 153."

I have examined said final resolutions carefully and find them correct in form and legal, and am therefore returning the same to you with my approval endorsed thereon.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

412.

OFFICES COMPATIBLE—DEPUTY CLERK IN PROBATE JUDGE'S OFFICE AND PROBATION OFFICER.

A deputy clerk in the probate judge's office may also be appointed probation officer in the court exercising juvenile jurisdiction, provided it is physically possible for one person to properly attend to the work of both offices.

As to question of civil service, see Opinion No. 93, March 8, 1917.

COLUMBUS, OHIO, June 29, 1917.

HON. FRED C. BECKER, *Probate Judge, Lima, Ohio.*

DEAR SIR:—I am in receipt of your letter wherein you submit the following:

"I respectfully request your opinion based upon the facts stated and the question propounded herein and assure you that I shall greatly appreciate the courtesy of an opinion.

"STATEMENT OF FACTS.

"On the 9th day of February, 1917, I gave bond and assumed the duties of probate judge of Allen county, Ohio. On the same date by the action of the judge of the common pleas court of Allen county, Ohio, and myself as probate judge of Allen county, Ohio, I was designated as judge of the juvenile court of Allen county, Ohio, and am now serving as probate and juvenile judge of Allen county, Ohio, as fully appears by the journal of both common pleas and probate courts. (Sec. 1639 G. C. as amended.)

"Provisions of the General Code of Ohio governing the appointment of deputies in probate judge's office and probation officers in juvenile court:

"'Sec. 1584 G. C. Each probate judge shall have the care and custody of the files, papers, books, and records belonging to the probate office. He is authorized to perform the duties of clerk of his own court. He may appoint a deputy clerk or clerks, each of whom shall take an oath of office before entering upon the duties of his appointment, and when so qualified, may perform the duties appertaining to the office of clerk of the court. Each deputy clerk may administer oaths in all cases when necessary, in the discharge of his duties. Each probate judge may take a bond with such surety from his deputy as he deems necessary to secure the faithful performance of the duties of his appointment.

"'Sec. 2981 G. C. Such officers may appoint and employ necessary deputies, assistants, clerks, bookkeepers or other employes for their respective offices, fix their compensation and discharge them, and shall file with the county auditor certificates of such action. Such compensation shall not exceed in the aggregate for each office the amount fixed by the commissioners for such office. When so fixed, the compensation of each duly appointed or employed deputy, assistant, bookkeeper, clerk and other em-employe shall be paid monthly from the county treasury, upon the warrant of the county auditor.

"'Sec. 1662 G. C. The judge designated to exercise jurisdiction may appoint one or more discreet persons of good moral character, one or more of whom may be women, to serve as probation officers, during the pleasure of the judge. One of such officers shall be known as chief probation of-

ficer and there may be first, second and third assistants. Such chief probation officer and the first, second and third assistants shall receive such compensation as the judge appointing them may designate at the time of the appointment, but the compensation of the chief probation officer shall not exceed twenty-five hundred dollars per annum, that of the first assistant shall not exceed twelve hundred dollars per annum, and of the second and third shall not exceed one thousand dollars per annum, each payable monthly. The judge may appoint other probation officers, with or without compensation, but the entire compensation of all probation officers in any county shall not exceed the sum of forty dollars for each full thousand inhabitants of the county at the last federal census, and in no case shall the entire compensation of all probation officers in any county exceed the sum of seven thousand five hundred dollars. The compensation of the probation officers shall be paid by the county treasurer from the county treasury upon the warrant of the county auditor, which shall be issued upon itemized vouchers sworn to by the probation officers and certified to by the judge of the juvenile court.'

"QUESTION.

"In view of the foregoing provisions may a probate judge appoint a person as deputy and fix his salary in the probate judge's office and also appoint him as a probation officer and fix his salary in conformity with the statute governing salaries of probation officer; so that he may act and perform services in both the probate judge's office and as probation officer in the juvenile court and receive from each a salary?"

Section 1662, referred to in your letter of inquiry, was amended in 103 O. L. 874 and again in 107 O. L. 19, said last amendment reading as follows:

"The judge designated to exercise jurisdiction may appoint one or more discreet persons of good moral character, one or more of whom may be a woman, to serve as probation officers, during the pleasure of the judge. One of such officers shall be known as chief probation officer and there may be one or more assistants. Such chief probation officer and assistants shall receive such compensation as the judge appointing them may designate at the time of the appointment, but the compensation of the chief probation officer shall not exceed three thousand dollars per annum and that of the assistants shall not exceed fifteen hundred dollars per annum. The judge may appoint other probation officers, with or without compensation, but the entire compensation of all probation officers in any county shall not exceed the sum of forty dollars for each full thousand inhabitants of the county at the last preceding federal census. The compensation of the probation officers shall be paid by the county treasurer from the county treasury upon the warrant of the county auditor, which shall be issued upon itemized vouchers sworn to by the probation officers and certified to by the judge of the juvenile court. The county auditor shall issue his warrant upon the treasury and the treasurer shall honor and pay the same, for all salaries, compensation and expenses provided for in this act, in the order in which proper vouchers therefor are presented to him."

This exact question was passed upon by my predecessor, Hon. Timothy S. Hogan, in an opinion to Hon. E. C. Peck, probate judge of Williams county, Ohio, on August 18, 1914, being Opinion No. 1103 and found in Vol. II of the Annual

Report of the Attorney General for 1914, at page 117. In the course of the opinion, after referring to sections 1584 and 1682 as set out in your letter, Mr. Hogan states:

> "The rule of incompatibility is stated by Judge Dillon, at page 727 of volume 1, of his work on municipal corporations, as follows:
>
> "'Incompatibility in offices exists when the nature and duties of the two offices are such as to render it improper from the considerations of public policy, for the incumbent to retain both.'
>
> "From a consideration of the duties of the deputy clerk of the probate court and probation officer, I can see nothing that would make the two offices incompatible under the above rule, and it is my opinion that they may be held by one and the same person, providing, of course, that it is physically possible for one person to properly attend to the work of both offices."

I concur in the conclusion reached by Mr. Hogan and therefore advise you that the probate judge may appoint a person as deputy and also appoint him as probation officer, when the probate judge exercises juvenile jurisdiction, provided, of course, that it is physically possible for one person to properly attend to the work of both offices.

The question relative to the probation officer being within civil service has been answered by Opinion No. 93, rendered to Hon. Ben. A. Bickley, prosecuting attorney of Butler county, on March 8, 1917, a copy of which opinion is herewith enclosed.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

413.

COMMITMENT TO HOSPITAL FOR INSANE—JURISDICTION OF PROBATE COURT—PAYMENT OF COSTS WHEN COMMITMENT ILLEGAL—HOW PERSON COMMITTED BY COURT WITHOUT JURISDICTION CAN BE RECOMMITTED.

Where a person lives in one county, and has a legal settlement in a township therein, the probate court of another county has no jurisdiction to commit said person to a hospital for the insane, the above facts appearing of record in the commitment proceedings.

There is no authority for the payment of costs in the transportation of such person and a re-commitment to the hospital for the insane is necessary. This can be done by having the probate judge of the county in which such person has a legal residence visit the state hospital and after having satisfied himself of her condition return to his county and proceed with the commitment.

COLUMBUS, OHIO, June 29, 1917.

HON. GEORGE W. TEHAN, *Probate Judge, Springfield, Ohio.*

DEAR SIR:—I have your letter of recent date, as follows:

> "We have had some correspondence with the state board of administration and the bureau of inspection arising upon the following state of facts:
>
> "In January of this year this court committed L. B., an insane patient, resident of Fayette county. On account of tied up traffic the probate

judge of Fayette county requested that she be committed from this county, she being at the time in the tuberculosis hospital here. She was extremely violent. The probate judge of Fayette county voluntarily offered to have that county pay the costs and after the commitment was made a bill was sent to Fayette county and the same was promptly paid. The bureau of inspection states that these fees should be returned to Fayette county. The bureau also took occasion to say that this court had no authority to make the committment but the state board of administration says there is no question but what the commitment was properly made.

"What we now would like to have a ruling on is, whether we shall remit the fees back to Fayette county. It did not seem fair that our county should stand the costs of the commitment when the patient did not have a residence here."

You also advise that the records of your county show this patient to have been a resident of Fayette county, with a legal settlement therein, at the time of her commitment to the insane hospital.

Sections 1953, 1954, 1961 and 1981 of the General Code provide:

"Sec. 1953. For the admission of patients to a hospital for the insane, the following proceedings shall be had. A resident citizen of the proper county must file with the probate judge of such county an affidavit, substantially as follows:

"The State of Ohio,_____County, ss:

"_____the undersigned, a citizen of _____county, Ohio, being sworn, says that he believes_____is insane (or, that in consequence of his insanity, his being at large is dangerous to the community.) He has a legal settlement in_____township, in this county.

"Dated this_____day of_____A. D. _____

"Sec. 1954. When such affidavit is filed, the probate judge shall forthwith issue his warrant to a suitable person, commanding him to bring the person alleged to be insane before him, on a day therein named, not more than five days after the affidavit was filed, and shall immediately issue subpoenas for such witnesses as he deems necessary, two of whom shall be reputable physicians, commanding the persons in such subpoenas named to appear before him on the return day of the warrant. If any person disputes the insanity of the party charged, the probate judge shall issue subpoenas for such person or persons as are demanded on behalf of the person alleged to be insane.

"Sec. 1961. The warrant, with the receipt of the superintendent thereon, shall be returned to the probate judge and filed by him with the other papers relating to the case. Until a certificate is furnished by a medical witness that the patient is free from all infectious diseases and from vermin, the probate judge shall refuse to make such application to the superintendent. The relatives of a person charged with insanity, or found to be insane, in all cases, may take charge of and keep such person if they desire to do so. In such case, the probate judge, before whom the inquest has been held, shall deliver such insane person to them.

"Sec. 1981. The probate judge shall make a complete record of all proceedings in lunacy. The costs and expenses, other than the fees of the probate judge and the sheriff, to be paid under the provisions of this chapter, shall be as follows: To each of the two physicians designated

by the court to make examination and certificate, five dollars, and witness fees as allowed in the court of common pleas; to witnesses the same fees as are allowed in the court of common pleas; to the person other than the sheriff or deputy sheriff making the arrest, the actual and necessary expense thereof and such fees as are allowed by law, to sheriffs for making arrests in criminal cases; to the person other than the sheriff, deputy sheriff or assistant, for taking any insane person to state hospital or removing one therefrom upon the warrant of the probate judge, mileage at the rate of five cents per mile, going and returning; and for the transportation of each patient to or from the hospital, mileage at the rate of two cents per mile; to one assistant to convey to the hospital when authorized by the probate judge, two dollars and, two cents per mile each way; all mileage allowed herein shall be for the distance actually and necessarily traveled."

It is clear from a reading of section 1953 G. C. that the patient referred to in your communication should have been committed to the hospital for the insane by the probate judge of Fayette county, since she was a resident of that county. Your court in Clark county, therefore, had no authority to commit such woman to the Columbus state hospital, and inasmuch as your court was without jurisdiction, it follows that no fees can be charged in connection with such commitment.

In order that the commitment of this woman to the Columbus state hospital for the insane may be lawful, it will be necessary for her to be re-committed by the probate court of Fayette county. This can be done in one of two ways. Such woman can be returned from the Columbus state hospital to the probate court of Fayette county and committed by the probate judge of that county in the regular manner, or, if it is deemed unsuitable or improper to return this woman to the probate court of Fayette county on account of the character of her affliction or insanity, such probate judge may visit such woman in the Columbus state hospital and certify that he is so ascertaining the condition of such woman by actual inspection, and then a proceeding may be had in the probate court of Fayette county regularly committing her to the Columbus state hospital. This by reason of section 1955 G. C., which reads:

"If, by reason of the character of the affliction or insanity, it is deemed unsuitable or improper to bring such person into such probate court, the probate judge shall personally visit such person and certify that he has so ascertained the condition of the person by actual inspection, and all proceedings as herein required may then be had in the absence of such person."

If the latter method is chosen, the probate judge of Fayette county may select two physicians from such county to pass upon the mental condition of such patient, or, since she is now located at the Columbus state hospital, he may select two physicians from Columbus for the same purpose and have them testify in the probate court of Fayette county.

I would also advise you that since there was no jurisdiction in your county in the commitment of this woman to the Columbus state hospital and no authority, therefore, for the payment of any fees to any officers in connection with such invalid commitment, there is no authority for the reimbursement of your county for such expense by the authorities of Fayette county.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

414.

STATE HIGHWAY COMMISSIONER—HAS NO AUTHORITY TO ASSIST IN IMPROVING HIGHWAY WITHIN A CITY—COUNTY COMMISSIONERS—MAY ASSIST IN SUCH IMPROVEMENT WITH CONSENT OF CITY COUNCIL—MAY ALSO LAY OUT COUNTY HIGHWAY WITHIN CITY LIMITS AND ERECT BRIDGE THEREON—VACATION OF HIGHWAYS.

1. *The state highway commissioner has no jurisdiction to improve or assist in improving any part of the highways lying within the limits of a city, his jurisdiction being limited to villages.*

2. *The county commissioners may, if the council of a municipality consents, construct a highway lying within the municipality, or may join in with the municipality in said construction.*

3. *The authorities of the municipality and of the county must take concurrent action in vacating that part of the public highway which lies within the corporate limits of the municipality, for the reason that it formerly was a part of the public roads of the county.*

4. *The county commissioners may vacate that part of the highway which is no longer used as a part of the main market roads of the state.*

5. *The authorities of the municipality have jurisdiction in the matter of relocating and establishing the streets lying within the corporate limits of the municipality.*

6. *The county commissioners have authority to lay out county highways within the corporate limits of a municipality and erect a bridge thereon.*

COLUMBUS, OHIO, June 29, 1917.

HON. E. E. LINDSAY, *Prosecuting Attorney, New Philadelphia, Ohio.*

DEAR SIR:—I have your communication of May 25, 1917, in which you ask my opinion in reference to several questions therein set out. Your communication reads as follows:

> "I submitted and left with you on the 18th inst. a map or plat to change and improve a part of main market road No. 9 in this county where it enters the city of Dover from the south, and went over the same with you somewhat in detail as to the reasons for such change, and for the improvement, and the law applicable thereto.
>
> "I now submit to you in writing the facts pertaining thereto and ask you to render me your opinion of the law in reference thereto as soon as you possibly can.
>
> "You will notice from the map you have that main market road No. 9 extends through the city of Dover. The corporation line of the city of Dover on the south is the center of a stream known as Sugarcreek. This road then enters the city of Dover from the south at a point about the center of a bridge across this creek. From this bridge it crosses a low tract of ground, unimproved, for the distance of about 1,000 feet until it strikes an improved street in the city of Dover. This low ground is called the 'bottom' of said creek, and during high water it becomes impassable for public travel, and crossing this roadway at grade between said bridge and said improved street in Dover is the main line of the

Baltimore & Ohio railroad running north and south, and a main line of the Pennsylvania running north and south, and fourteen switches and side-tracks.

"You will also notice on this map a county road extending northward along the south bank of this creek from this main market road from a point near the south end of said bridge.

'It is desired by the commissioners of this county, the council of the city of Dover and the railroad companies, to change this main market road beginning at the intersection of this road with said county road and run it northward along said county road on the south side of said creek a distance of about 800 feet and there cross said creek upon a new bridge to be constructed and cross said low ground and strike another improved street in the city of Dover as shown by said map. They desire to cross this low ground on a viaduct to be constructed by the city and the railroads and thus have an overhead crossing across said railroads, switches and side-tracks. By doing this it will eliminate danger and obstructions to public travel on said main market road by high water and it will eliminate the danger of crossing so many railroad tracks. In connection with this they desire to vacate said part of main market road No. 9 from its intersection with said county road on the south side of said creek to where it connects with said improved street in the city of Dover.

"Several questions of law arise in order to make this change and improvement, upon which I would like to have your opinion.

'1. Who has the authority to vacate a part of main market road outside of a municipality; the state highway commissioner or the county commissioners, or must they both act thereon?

"2. Who has the authority to vacate the unimproved part of a main market road that lies within a municipality; the state highway commissioner or the council of the city, or must both act thereon?

"3. Who has the authority to re-locate, change and establish an unimproved part of a main market road within the limits of a city, the state highway commissioner, the council of the city, or must both act together?

"4. If that part of said main market road within the city of Dover should be changed as indicated above and should be improved as so indicated, who should have jurisdiction within the corporate limits of the city to grant, supervise and construct such improvement; the state highway commissioner or the council, or both?

"5. If such change should be made and such improvement constructed by the state paying a part, the county paying a part, the city of Dover a part and the railroad companies a part, what in your opinion would be the necessary legislation to enact on the part of each body to accomplish the same? In other words point out the necessary steps to be taken by each body in order to make a valid agreement for that purpose."

Before answering your questions, I desire to say that I am answering them on the theory that Dover is a city and not a village, as it had a population of 6,621 at the census of 1910.

Further, I am answering your questions under the provisions of the law which will become effective on the 28th day of June, 1917, for the reason that you suggested, in an oral conversation had with a member of our department, that you would not be able to take any of the steps in reference to the improvement under consideration before that time.

With these two preliminary statements in mind, I will proceed to a consideration of the questions you submit.

From your communication and from the map to which you call attention in your communication, I am rendering this opinion upon the following facts:

One of the main market roads of the state of Ohio runs through the city of Dover. As it now runs, it crosses numerous railroad tracks at grade within the corporate limits of the city of Dover. For this reason it is the desire of the state, through the state highway commissioner, of the county of Tuscarawas, the city of Dover and the railroad companies over whose tracks the said market road now passes at grade, to deviate from the present course and enter the city of Dover over another street, and at the same time the said market road is improved to construct an overhead bridge over the railroad tracks which will be crossed by the new route of travel.

It will be noted that this will call into question the jurisdiction of the state highway commissioner, the county commissioners and the authorities of Dover, and this matter of jurisdiction to act in the premises is chiefly that to which you call attention in your communication.

In answering your question, I will not take them up in the order in which they are set out in your communication, but will in the end endeavor to have them all answered.

First, let us note just what authority the state has in the matter of consructing inter-county highways or main market roads that pass through a city, with a view to that part of the said road that lies within the limits of a city.

The jurisdiction of the state highway commissioner to act in reference to main market roads or intercounty highways passing through cities and villages is set out in sections 1193, 1193-1, 1193-2 and 1231-3 G. C. These sections are too lengthy to quote in full, but a consideration of the same will develop the fact that the state highway commissioner has no jurisdiction whatever to join in with the county or the city in the construction of a main market road or intercounty highway that lies within the city limits.

Section 1193 G. C. provides that the application for state aid, in the construction, improvement, maintenance or repair of intercounty or main market roads.—

> "may include any portion of a highway in the limits of any village when the same is a continuation of the proposed improvement."

Section 1193-1 G. C. provides that when—

> "the improvement of an intercounty highway or main market road is extended into or through a village, or an improvement constituting an extension of an improved intercounty highway or main market road is constructed within a village, it shall not be necessary for the village to assume any part of the cost and expense of the proposed improvement,"

when the county commissioners or township trustees perform the work under the supervision of the state highway department.

Section 1193-2 G. C. provides:

> "Whenever any portion of a road to be improved by the state highway commissioner in co-operation with the county commissioners or township trustees lies within the corporate limits of a village,"
> such and such a procedure may follow.

Section 1231-3 G. C. provides as follows:

"The state highway commissioner may extend a proposed road improvement into or through a village when the consent of the council of said village has been first obtained;"

and said section further provides that the state highway commissioner and the council of the village—

"shall be governed as to all matters in connection with said improvement within said village by the statutes relating to road improvements through *municipalities,* by boards of county commissioners."

From these sections—and there are no other sections dealing with this matter—it is quite evident that the state highway commissioner cannot assist in any way with the construction of the main market roads within the limits of the city of Dover, his jurisdiction being limited to the construction of roads within villages.

Let us for the present leave the question of the jurisdiction of the state highway commissioner in the matter, and turn to the matter of the jurisdiction of the county commissioners.

Section 6949 G. C. provides in part as follows:

"The board of county commissioners may construct a proposed road improvement into, within or through a municipality, when the consent of the council of said municipality has been first obtained * * *."

It will be noted in this section that the board of county commissioners has jurisdiction in the matter of constructing highways not only through a village, but through a city as well, for the reason that the general term "municipality" is used.

With the two above propositions in mind, I am of the opinion that it will be necessary, in the construction of the highway which is mentioned in your communication, for the officials to follow two different plans or schemes:

1. The county and the state can, under the provisions of sections 1191 et seq. G. C., unite in the construction of that part of the improvement which lies without the incorporated limits of the city of Dover. They can unite in the construction of this part of the highway upon such terms as they may agree, under the provisions of the statutes in relation thereto.

2. The county and the city of Dover may unite in the construction of that part of the proposed improvement which lies within the corporate limits of the city of Dover. This they may do under and by virtue of the provisions of sections 6949 et seq. G. C.

This still leaves for consideration the matter of the construction of the overhead bridge over the railroads which are crossed by the contemplated improvement. You state the city of Dover and the railroad companies are willing and ready that such an overhead bridge or bridges be constructed.

Section 8863 G. C. provides:

"If the council of a municipal corporation in which a railroad or railroads, and a street or other public highway cross each other at a grade or otherwise, * * and the directors of the railroad company or companies are of the opinion that the security and convenience of the public require alterations in such crossing, or the approaches thereto, or in the location of the railroad or railroads or the public way, or the grades thereof, so as to avoid a crossing at grade * * * they may be made as hereinafter provided * *."

Hence, in section 8863 et seq. G. C. you will find a comprehensive scheme which may be followed by the railroads interested and the city of Dover.

From all the above it will readily be seen that the improvement which your officials have under contemplation will necessarily divide itself into three separate and distinct parts:

(1.) The county commissioners and the state highway department may join in the construction of that part of the improvement which lies without the corporate limits of the city of Dover.

(2.) The county of Tuscarawas and the city of Dover may unite in the construction of that part of the improvement which lies within the corporate limits of the city of Dover, not taking into consideration the matter of the overhead bridge or bridges and the approaches leading thereto.

(3.) The city of Dover and the railroad companies, over whose tracks the contemplated improvement will pass, may unite in the construction of the overhead bridge or bridges and the approaches leading thereto.

This, as I understand it, will take care of the matter of the entire improvement. It will be observed from this reasoning that it will be necessary for all the parties interested in this improvement to agree as a whole upon some line of action, and after the whole improvement is mapped out by all the parties interested, it can then be divided into its different component parts, and the various parties then take up the work that each has to do, as above indicated.

However, before leaving the matter of the improvement, I desire to take up the question of the construction of the bridge which will cross the creek on the new route, the center line of which creek forms the boundary of the city of Dover. Part of this bridge will rest within the city limits of Dover and part will rest without the city limits. For this reason it is not an easy question to decide whether the city or the county will have authority to construct this bridge. The statutes of our state seem to make no provision for such a situation.

The general proposition is that the county commissioners must construct and keep in repair all necessary bridges over the streams on state and county roads, whether the bridges are within the city limits or not; but the city itself must build and keep in repair bridges that are located on the streets of the city and do not form a part of a state or county road.

But here is a bridge that neither lies wholly within nor wholly without a municipality. The only feasible plan, as I view it, to make provisions for the construction of this bridge, is as follows:

When the city of Dover locates the street hereinafter provided for in subdivision "3," let it establish the street to a point not nearer to the said creek than will permit the erection of the bridge, together with the necessary approaches thereto, on territory outside of and beyond the limits of the street as established by the city of Dover. Then let the county commissioners lay out and establish a county road from the point where the street ends to a point that will intersect with the highway upon which the new main market route is to be established. Then the state highway commissioner, when he changes the route of the main market road, can extend it to the center line of the stream, which is the boundary line of the city of Dover. This will enable the county commissioners to erect the bridge across the river, because it will be a bridge located upon a county road, although a part of it is within the corporate limits of the city of Dover.

That the county commissioners have authority to locate a county road, even though a part or all of it is within the corporate limits of a municipality, is clear from the decisions of our courts.

Wells v. McLaughlin et al., 17 Ohio 99.

Lewis et al. v. Laylin, 46 O. S. 663, 672.
Railway v. Cummins, 53 O. S. 683, without report.

Let us now proceed with the consideration of certain other questions which you ask, having to do with the contemplated improvement.

1. As to the matter of changing the route of the existing main market road.

This will be done under the supervision of the state highway commissioner, the provisions therefor being found in section 1189 G. C.

2. If any new right of way is needed in the new route, who will secure it?

All right of way that may be needed will be secured by the county commissioners, provisions for which are made in section 1201 G. C.; that is, as to part outside of the city limits.

3. As to the matter of relocating or establishing the new street required for the construction of the proposed improvement.

Neither the state highway nor the county commissioners have any jurisdiction of this matter, but it rests entirely with the municipal authorities, provision for which is made in section 3714 G. C.

4. In reference to the matter of vacating the part of the present main market road which will no longer be used after the change of route and which lies outside of the corporate limits of the city of Dover.

Section 6860 G. C. makes provisions for this and reads as follows:

> "The county commissioners shall have power to locate, establish, alter, widen, straighten, vacate or change the direction of roads as hereinafter provided. This power extends to all roads within the county, except the inter-county and main market roads."

It will be noted in this section that the provisions of the same do not apply to main market roads, but it must be remembered that when the state highway commissioner changes the route of the main market road, the parts abandoned will lose their identity as main market road and will become mere county road, and thus the county commissioners will have authority to vacate the same.

The facts in this case are different from those upon which I based an opinion rendered to Hon. James F. Flynn, Jr., prosecuting attorney, Sandusky, Ohio, on May 21, 1917, and hence the conclusion herein reached is different.

5. As to vating the part of the route of the main market road which lies within the corporate limits of the city of Dover.

In so far as this highway partakes of the nature of a street, the municipal authorities may vacate the same, provisions for which are made in section 3725 et seq. G. C.

However, it was held in Railway v. Cummins, 53 O. S. 683, without report, that a municipal corporation cannot abandon a county road which by annexation has been brought within its limits. Under this holding of the court it will be necessary also for the county commissioners to vacate this part of the highway under the provisions of section 6860 G. C., above set forth.

Having covered the whole matter suggested by you in your communication, let us now note the different steps which must be taken and the order in which they are to be taken:

(1.) The city of Dover must first open up or establish the new street, in order to provide a complete route for the main market road as it is to be established.

(2.) After the street is established, as hereinbefore set out, the county commissioners can establish the county road to connect with the street in the manner hereinbefore indicated. Section 6860 G. C.

(3.) After this is done, the state highway commissioner may change the route of the main market road, extending the same up to the middle line of said creek, which is the corporate limit of the city of Dover. Section 1189 G. C.

(4.) Proceedings can then begin in the way of the construction of said improvement:

(a) The county commissioners and the state highway department constructing the part of the highway lying outside of the city of Dover.

(b) The county of Tuscarawas and the city of Dover constructing the part of the highway that lies within the city of Dover.

(c) The county commissioners constructing the bridge which spans the creek and leads into the city of Dover.

(d) The city of Dover and the railroad companies interested constructing the overhead bridge.

So far as I can see, all these constructions might proceed together, it being unnecessary to follow any particular order.

(5.) Vacation of the parts of the highway no longer used. This vacation cannot be had until the improvement is fully constructed:

(a) The part outside of the city of Dover may be vacated by the county commissioners.

(b) The part inside of the city of Dover may be vacated by the concurrent action of the county commissioners and the council of the city of Dover.

In passing, however, I might call attention a little more specifically in reference to the matter of the construction of the bridge, by the county commissioners, across the said creek. Section 5638 G. C. provides that the county commissioners shall not levy a tax, appropriate money or issue bonds for the purpose of building a county bridge, the expense of which will exceed $18,000.00, except in case of casualty, and as thereinafter provided, without first submitting to the voters of the county the question as to the policy of making such expenditure. The words, "as hereinafter provided," refer to the provisions of section 5643 G. C., which reads as follows:

> "Sec. 5643. If an important bridge ,belonging to or maintained by any county, becomes dangerous to public travel, by decay or otherwise and is condemned for public travel by the commissioners of such county, and the repairs thereof, or the building of a new bridge in place thereof, is deemed, by them, necessary for the public accommodation, the commissioners, without first submitting the question to the voters of the county, may levy a tax for either of such purposes in an amount not to exceed in any one year two-tenths of one mill for every dollar of taxable property upon the tax duplicate of said county."

It is my opinion that you will be compelled to take into consideration the provisions of these two sections, in the erection of said bridge, and if it costs more than $18,000.00, the matter will have to be submitted to the voters of the county, unless it comes within the exceptions found in section 5643 G. C., even though the location of the bridge will be somewhat removed from the present location of the same.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

416.

WRIT OF EXECUTION—WHEN SAME RETURNED UNSERVED—AND CONSTABLE RESIGNS—SECOND WRIT MAY BE ISSUED TO ANOTHER CONSTABLE.

Where a constable returns a writ of execution unserved, and resigns his office, a second writ may issue to another constable or to the sheriff of the county in which the defendant resides.

COLUMBUS, OHIO, June 29, 1917.

HON. J. L. HEISE, *Prosecuting Attorney, Circleville, Ohio.*

DEAR SIR:—In your letter of June 14, 1917, you enclose for my opinion the following statement of facts:

> "An execution was issued by a justice of the peace in Pickaway county, Ohio, which was regular on its face and against the chattels of the defendant, and in the absence of chattels against the body of the defendant for fines and costs. Said execution was placed in the hands of a constable of Saltcreek township, in said county, who retained said writ, without executing same, for a period of 26 days, the writ being returnable in 30 days. After retaining the writ for said period the constable resigned his office and returned the writ unserved. Said execution is now dead.
>
> "Can the justice issue a new execution and what procedure should the justice follow under the above circumstances?"

General Code section 13718 provides as follows:

> "When a magistrate or court renders judgment for a fine, an execution may issue for such judgment and the costs of prosecution, to be levied on the property, or, in default thereof, upon the body of the defendant. The officer holding such writ may arrest such defendant in any county and commit him to the jail of the county in which such writ issued, until such fine and costs are paid, or secured to be paid, or he is otherwise legally discharged."

By the above section an execution may issue for the judgment on a fine and costs of prosecution, the same to be levied on the property of the defendant, or if there be no property of the defendant upon which such execution may levy, then the body of the defendant may be brought before the court or taken into custody.

The above rights were all possessed by the constable while he was in office and similar rights existed in the sheriff of your county or of any county in which the defendant resided.

General Code section 13719 provides:

> "An execution, as provided in the next preceding section, may issue to the sheriff of any county in which the defendant resides, is found or has property, and the sheriff shall execute the writ. If the defendant is taken, the sheriff shall commit him to the jail of the county in which the writ issued, and deliver a certified copy of the writ to the sheriff of such county, who shall detain the offender until he is discharged as provided in such section."

All would be perfectly clear, then, if said execution had issued in the first instance to the sheriff or if its terms had been carried out by the constable. Having been returned, however, unserved, the question is, can a new execution be issued in the place of or in addition to the one which was issued to the constable and returned unserved. As to this there seems to be no question, for it is held in Elliott v. Elmore, 16 Ohio, p. 27, that:

> "Two executions of the same kind may be carried on the same judgment."

The above rule was enunciated in a civil proceeding and our civil procedure is followed in criminal procedure except where the same is modified by the criminal statutes. It was held in Faris v. State, 3 O. S. 159, 163, that:

> "Though a constable or sheriff may render himself liable to the plaintiff in execution by failing to make a levy or return within the time limited by law, the principal defendant in execution cannot object to the levying of a second execution."

Anwering your question, then, I advise you that the justice of the peace shall issue a new execution to the constable or, if there be no constable, then to the sheriff of the county in which the defendant resides.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

417.

TRANSPORTATION OF PUPILS—POWER OF BOARD OF EDUCATION TO BORROW MONEY TO PAY FOR SUCH TRANSPORTATION.

A board of education may borrow money under section 5656 G. C. to pay for transportation of pupils and thus extinguish a valid legal obligation of such board which they have found exists.

COLUMBUS, OHIO, June 29, 1917.

HON. P. A. SAYLOR, *Prosecuting Attorney, Eaton, Ohio.*

DEAR SIR:—I have your communication in which is contained for my opinion the following statement of facts:

> "The West Elkton village school district is overdrawn in the contingent fund $1,799; they have a balance in the tuition fund of $1,212.37; they have sufficient funds to pay their teachers for the balance of the year but have no funds with which to pay the hack drivers and the other contingent expenses. The fund is overdrawn more than their August draw will be and the question now comes up as to what is best to be done with reference to the school. * * * As the matter stood in front of me I suggested to the school board the advisability of closing down the schools. What would you suggest in the premises?"

It is the policy of our law that no one of the four particular funds into which the school levy is devided by General Code section 7587 shall be overdrawn.

I know of no way in which a fund can be overdrawn legitimately. All expenses, except those upon contracts for the employment of teachers, officers and other school employes of boards of education are subject to the conditions of section 5660 G. C., which provides that before a board of education shall enter into any contract, agreement or obligation involving the expenditure of money, or pass required for the payment of such obligation is in the treasury to the credit of the fund from which it is to be drawn. So that any expenditure, except in the employment of teachers, officers and other school employes, would require such certificate. If your deficit, however, arose on account of transportation of pupils, then it has been held that no certificate would be required because the persons who performed such transportation thereof are considered "other school employes."

In Opinion No. 1226, Annual Report of the Attorney-General for 1914, page 1394, it is held:

> "Whether or not the money may be borrowed to pay for the transportation of pupils depends, therefore, upon the further question as to whether a contract for such transportation is a contract for the employment of a 'school employe' within the meaning of section 5661 General Code, as well as upon any other fact that might make such transportation a legal obligation of the district, notwithstanding the limitations of section 5660 General Code. * * * If transportation were provided for by the hiring of a team and driver, the contract would be only for the employment of a school employe within the meaning of section 5661 General Code."

So that not being subject to the required certificate, above mentioned, it is then permissible, when any such indebtedness arises, for the board of education to borrow money or issue bonds of the school district, as provided by section 5656 G. C., and pay said indebtedness.

Said section reads in part as follows:

> "* * * The board of education of a school district * * * for the purpose of extending the time of payment of any indebtedness which from its limits of taxation such * * * district * * * is unable to pay at maturity, may borrow money or issue the bonds thereof, so as to change, but not increase the indebtedness in the amounts, for the length of time and at the rate of interest that said * * * board * * * deem proper, not to exceed the rate of six per cent. per annum, payable annually or semi-annually."

The above section permits the school district to borrow money and it is held in Commissioners v. State, 78 O. S. 287-303, quoting from Merrill v. Town of Monticello, 138 U. S. 673, that:

> "It is admitted that the power to borrow money, or to incur indebtedness, carries with it the power to issue the usual evidences of indebtedness by the corporation to the lender or other creditor. Such evidences may be in the form of promissory notes, warrants, and, perhaps, most generally, in that of a bond."

And in opinion 1226, above cited, it is held:

> "The board of education may borrow money to pay a charge against the district on account of transportation * * * and that a contract

for furnishing transportation would be a contract of employment * * * and that a local board of education has power, under section 5656 G. C., to borrow money for this purpose to the extent that transportation may be required by law."

It is further held in opinion No. 418, Attorney-General's Reports, 1911-1912, page 551, that:

"Contracts for the employment of teachers, officers and other school employes of boards of education are excepted from the general rule requiring the presence of money in the fund at the time of entering into the contract, as a condition precedent to the validity of such contract. That being the case, it would be possible for such a contract to be a subsisting and valid obligation of the district, for which, in a given year, it would not have money, either in the treasury or levied and in process of collection. Being a valid obligation of the district the board of education might lawfully pass the resolution referred to in section 5658.

"Therefore, such obligations, which I suppose are within the purview of your question, being 'the usual running expenses of the school' may be met by borrowing money under section 5656."

From the last above quotation, however, it must not be understood that the usual running expenses of schools are outside of the provisions of section 5660 G. C., except in reference to contracts for employment of teachers, officers and other school employes of boards of education.

I therefore advise you that under the conditions above noted your board of education has the right to borrow money or issue bonds under section 5656 G. C. to make up said deficit.

You suggest that the board of education is going behind every year at least $2,000.00, and that the only remedy, in your judgment, was to have a vote on levying an additional three mills for five years. You must remember, however, that all limitations outside of the exceptions noted in sections 4450, 4451, 5629, 7419 and 7630-1 of the General Code must not exceed fifteen mills, for General Code section 5649-5b provides:

"If a majority of the electors voting thereon at such election vote in favor thereof, it shall be lawful to levy taxes within such taxing district at a rate not to exceed such increased rate for and during the period provided for in such resolution, but in no case shall the combined maximum rate for all taxes levied in any year in any county, city, village, school district, or other taxing district, under the provisions of this and the two preceding sections and sections 5649-1, 5649-2 and 5649-3 of the General Code as herein enacted, exceed fifteen mills."

You further ask what I suggest in the premises. It is, of course, impossible for me to suggest to you in this opinion all the courses which might be followed in the operation of the schools of said district, for under every given set of circumstances a different rule prevails and some of the things which would enter into my consideration would be the kind of district, tax valuation, population, adjoining districts, grade of schools and numerous other things, each, as above noted, depending upon the particular case and all probably unnecessary to consider if relief can be had by your district under section 5656 G. C.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

418.

BONDS—FOR ROAD IMPROVEMENT—ISSUED UNDER SECTION 1223 G. C.—MAY BE ISSUED BEFORE ASSESSMENT IS MADE AGAINST ABUTTING PROPERTY OWNER.

Bonds issued by county commissioners under and by virtue of the provisions of section 1223 G. C. may in point of time be issued before the assessment is made against the abutting property owners in the matter of any road improvement.

COLUMBUS, OHIO, June 30, 1917.

HON. FRANK CARPENTER, *Prosecuting Attorney, Norwalk, Ohio.*

DEAR SIR:—Your communication of June 12, 1917, in which you ask for my opinion upon a certain matter therein set out, was received. Your communication reads as follows:

> "Section 1223 of the General Code of Ohio provides that the county commissioners may, in anticipation of the collection of special assessments and taxes, sell the bonds of the county for the purpose of procuring funds with which to construct and repair roads in the manner set forth in sections 1178 to 1231-3 of the General Code of Ohio.
>
> "In sections prior to section 1223 provisions are made for assessing ten per cent. of the cost of the improvement and construction of a pike on an intercounty highway upon the abutting property owners according to the benefits.
>
> "I desire your opinion as to whether it is necessary to have these special assessments apportioned by the township trustees and such apportionment certified to the county auditor before the resolution providing for the issuance of bonds in the manner set forth in section 1223 is passed; or can this resolution be passed and the bonds issued and sold prior to the apportionment of the assessments?"

The direct question you have in mind is this: As to whether, when the county commissioners decide to issue bonds under and by virtue of the provisions of section 1223 G. C., these bonds may be issued before the assessment is made against the abutting property owners, or must the bonds be issued after the assessment is made against the abutting property owners?

The direct answer to your question is that the bonds may be issued before the assessment is made against the abutting property owners.

In order that we may get a correct understanding in reference to this matter, let us note a little history leading up to the point at which the assessment against the abutting property owners can logically and safely be made:

Section 1195 G. C. provides that if the state highway commissioner approves of the construction, improvement, maintenance or repair of an intercounty highway or main market road for which application has been made by the county commissioners, he shall certify his approval of the application, or any part thereof, to the county commissioners.

Sectoin 1196 G. C. provides that he shall then cause to be made plans, specifications, profiles and estimates for said improvement.

Section 1199 G. C. provides that these plans, etc., shall be transmitted to the county commissioners, with the certificate of approval of the state highway commissioner endorsed thereon.

Section 1200 G. C. provides that, if the county commissioners approve of such plans, profiles, etc., then they shall pass a resolution adopting the same and send a certified copy of such resolution to the state highway commissioner.

Under the provisions of section 1218 G. C. the state highway commissioner cannot enter into a contract for the improvement of a highway until the county commissioners shall have made a written agreement to assume in the first instance that part of the cost and expense of said improvement over and above the amount to be paid by the state. But under the provisions of section 5660 G. C. the county commissioners cannot enter into such an agreement until the county auditor shall have certified to the county commissioners that the money is in the treasury to the credit of the fund from which it must be taken for said improvement. However, if bonds have been issued and in process of delivery, these bonds, for the purpose of the certificate, may be considered to be in the treasury to the credit of the fund.

From all these provisions it is readily seen that, if the county commissioners decide to issue bonds to take care of that part of the cost and expense of an improvement to be borne by the county, township and abutting property owners, the bonds must be issued before the county commissioners can enter into the agreement to bear their share of the cost and expense, and this agreement must be made before the contract of the state highway commissioner is entered into. Hence, the bonds must be issued before the contract can be entered into by the state highway commissioner for the improvement of the highway.

Section 1211 G. C. provides that upon the completion of the improvement, the chief highway engineer shall immediately ascertain the cost and expense thereof and apportion the same to the state, county, township or townships and abutting property owners; and from the provisions of section 1214 G. C., unless otherwise provided, the county must pay twenty-five per cent of all cost and expense of the improvement, the township fifteen per cent., and the abutting property owners ten per cent. of the cost and expense of the improvement, and said section 1214 G. C. further provides that the township trustees shall make the assessment against the abutting property owners.

From the provisions of sections 1211 and 1214 G. C. it is readily seen that the assessment against the abutting property owners cannot logically be made until the improvement is fully completed, because it cannot be accurately ascertained what the abutting property owners will have to bear until the work is completed.

To be sure, I am not holding that it is absolutely essential in law that the assessment be put off until the work is completed, but if it is made before it would simply be an estimated amount that could be assessed against the abutting property owners.

I am aware that it is thought by some that the provision of section 11 of article XII of the state constitution compels a different conclusion from that above indicated. This provision of the state constitution, which is quite familiar, reads as follows:

> "No bonded indebtedness of the state, or any political subdivisions thereof, shall be incurred or renewed, unless, in the legislation under which such indebtedness is incurred or renewed, provision is made for levying and collecting annually by taxation an amount sufficient to pay the interest on said bonds, and to provide a sinking fund for their final redemption at maturity."

I think it is a sufficient answer to the contention that this constitutional provision requires the trustees of a township to apportion assessments against abutting property owners to meet their share of an intercounty highway improvement, or

to levy a tax on the taxable property in the township to pay the township's share of such improvement, before the county commissioners are authorized to issue bonds covering the same under section 1223 G. C., to note that the constitutional provision above quoted, as construed in the opinion of the court in the case of Link v. Karb, 89 O. S., 326, 338, has reference only to the *legislation,* to wit, ordinance or resolution, whereby the issue of the bonds is provided for, and is effective only as requiring that such ordinance, resolution or other legislation shall make provision for an annual levy of taxes sufficient in amount to pay the interest on said bonds and to provide a sinking fund for their final redemption at maturity, which provision, when so incorporated in the ordinance, resolution or other legislation providing for the issue of such bonds, is mandatory upon subsequent taxing authorities who must make such annual levy, regardless of what exigencies may arise in the future. Moreover, with respect to your precise question, which concerns only the matter of the apportionment and certification of assessments by the township trustees against the owners of abutting property to pay their share of the cost and expense of an intercounty highway improvement, it will be noted that the provision of the state constitution above quoted makes no reference to assessments, nor does it enjoin upon any authority the duty of making assessments in connection with the matter of issuing bonds.

Hence, answering your question specifically, I am of the opinion on the considerations above noted that bonds may be issued by the county commissioners under section 1223 General Code covering the cost and expense of an intercounty highway improvement before assessments are apportioned and certified by the township trustees against the owners of abutting property for the purpose of paying their share of the cost and expense of such improvement.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

419.

PROBATE COURT—MAHONING COUNTY—JURISDICTION AS JUVENILE COURT WILL END—UNDER ACT PROVIDING ADDITIONAL COMMON PLEAS JUDGE—DIVISION DOMESTIC RELATIONS.

Under the act providing for an additional common pleas judge in Mahoning county to be known as "Common Pleas Judge—Division of Domestic Relations," the jurisdiction of the probate court of said county as juvenile court and the power of said probate court to have such jurisdiction conferred upon it will end, and thereafter the said court or the judge thereof will have no further jurisdiction or capacity to have jurisdiction conferred upon it as such juvenile court.

The said law has no effect upon the exclusive jurisdiction of the probate court which will continue in said county as elsewhere to perform all duties under the statutes in reference to the adoption of infants.

COLUMBUS, OHIO, July 2, 1917.

HON. JOHN W. DAVIS, *Probate Judge, Mahoning County, Youngstown, Ohio.*

DEAR SIR:—Under date of June 21, 1917, you make an inquiry of this department as follows:

> "On May 20, 1917, the general assembly of the state of Ohio, enacted a law creating an additional judge of the court of common pleas of Mahoning county, said judge to be known as common pleas judge, division of

domestic relations. On April 4, 1917, this law was filed with the secretary of state, becoming effective under the constitution of the state of Ohio ninety days from said date or on the 3rd day of July, 1917.

"By agreement of myself as probate judge and the common pleas judges of Mahoning county I have been and am administering the juvenile code within and for said county. Under section 1639, of the General Code of Ohio, the probate judge is given concurrent jurisdiction with the common pleas judges as to the administration of the juvenile code.

"Under the new act, creating a court of domestic relations, no concurrent jurisdiction is given to the probate judge of this county as to the administration of the juvenile code. Therefore, I am of the opinion that when this law becomes effective, July 3, 1917, if no appointment has been made by the governor of a judge, as judge of the court of common pleas, division of domestic relations, it will be the duty of one of the other common pleas judges of this county to administer the juvenile code as provided under either or both section 1639 of the General Code and also the new law creating the court of domestic relations and that after said law creating said court of domestic relations becomes effective July 3, 1917, I will have absolutely no legal right to preside over the juvenile code in and for Mahoning county.

However, to make positive, as to the restrictions of said new law upon my present jurisdiction, I am presenting to you, for opinion, the question, whether or not, as probate judge, I will have any jurisdiction, legal right or authority to continue to administer the juvenile code within and for Mahoning county after said law, creating a court of domestic relations within and for Mahoning county, becomes effective July 3, 1917, in case no appointment has been made by the governor or whether said jurisdiction will exist only with the present common pleas judges until an appointment or election of a common pleas judge, division of domestic relations?

"I also wish to have your opinion on the following question, in connection with the law establishing said court of domestic relations, as to whether or not the phrase, 'In cases involving the care and custody of children in said county' or any other part of said act, will take away from me the right and jurisdiction, as probate judge, to pass upon and grant the adoption of minors?

"Inasmuch as the number of days are limited until such law becomes effective, I hope that you will make special effort to give me an immediate opinion on the two above questions."

Adverting to your last question as to the effect of said law upon your jurisdiction in reference to the adoption of children I refer you to an opinion rendered to Hon. Jared P. Huxley, prosecuting attorney of Mahoning county, on June 18, 1917, in reference to the jurisdiction of the court of common pleas, division of domestic relations, for Mahoning county.

It was pointed out in the opinion referred to that the law in question provides for an additional judge of the common pleas court, and then proceeds to make a statutory distribution of the business of said court whereby certain duties that had theretofore been apportioned among the judges and assigned to the different judges at different times by arrangement of the judges themselves was thereafter by virtue of said statute permanently assigned to said judge of the court of common pleas, division of domestic relations, and his successors in office.

Looking at the statute in reference to this subject it appears that the purpose of the act is as above stated, and that it is not an act intended to make radical differences in the jurisdiction of the court, and it may safely be stated that it makes

no jurisdiction of the court further than is involved in assigning to this particular court certain classes of cases that were before subject to the concurrent jurisdiction of the other court, that is—it gives no jurisdiction to the court of common pleas that the court did not formerly already possess, at least potentially, and that it is not intended to be a law not having uniform application throughout the state any further than by merely providing for such additional judge and assigning to him certain duties within the jurisdiction already possessed by the court. Therefore, the phrase, "in cases involving the care and custody of children in said county," refers to cases which might be in any court of common pleas. That is, the word "cases" is not used in a general sense as applied to all matters which might arise in any way involving the care and custody of children, but cases in the sense of *cases in court.* The adoption of a child in this sense is not a "case," but is a mere statutory duty imposed or authority conferred upon the probate court in relation to the adoption of such infant whereby a new relationship or status is created in some respects similar to the appointment of a guardian, but different in that it creates a new capacity to inherit.

The act in question is not intended to take away the jurisdiction of the probate court in such matters any more than it would as to the issuing of marriage licenses, which comes under the head of "Domestic Relations" so that, answering this question, your jurisdiction in reference to the adoption of children is not affected by this act.

Reverting now to your first question as to whether or not you, as probate judge, will have any jurisdiction to administer the juvenile court within and for Mahoning county after the law becomes effective, I have no hesitation in confirming your opinion that your functions as juvenile judge will cease upon the going into effect of this law, and may add that no vacancy in the office of the judge of the court of common pleas, division of domestic relations, will have the effect of imposing any duties as juvenile judge upon the probate judge of Mahoning county.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

420.

MUTUAL TELEPHONE COMPANY—NOT SUBJECT TO PUBLIC UTILITIES COMMISSION—BECAUSE OF RENTING TELEPHONES TO COUNTY.

If mutual telephone companies operating on assessment plan rent telephones to county at actual cost, such fact will not of itself subject them to public utilities commission.

COLUMBUS, OHIO, July 2, 1917.

HON. HARRY S. CORE, *Prosecuting Attorney, Ottawa, Ohio.*

DEAR SIR:—I am in receipt of your letter to the following effect:

> "At the request of a county commissioner, I am sending you his question for answer in a matter which fully explains itself, and kindly ask your opinion of the same."

The question which was submitted is as follows:

> "In this county, Putnam, are eighteen Farmers' Mutual Telephone companies with their exchanges located in the villages and at various places throughout the county, one of which is located at Ottawa, the county seat.

All are run on the assessment plan. If the company at Ottawa rents a few telephones to the county for use at the court house for the convenience of the general public of the county at actual cost, will it be subject to the public utilities commission and a rate fixed and they be compelled to change their plan of operation?"

Section 614-2 G. C. provides in part as follows:

"Any person or persons, firm or firms, co-partnership or voluntary association, joint stock association, company or corporation, wherever organized or incorporated * * * when engaged in the business of transmitting to, from, through, or in this state, telephonic messages, is a telephone company and as such is declared to be a common carrier. * * *"

Section 614-2a G. C. provides as follows:

"The term 'public utility' as used in this act, shall mean and include every corporation, company, co-partnership, person or association, their lessees, trustees or receivers, defined in the next preceding section, except such public utilities as operate their utilities not for profit and except such public utilities as are, or may hereafter be owned or operated by any municipality, and except such utilities as are defined as 'railroads' in section 501 and 502 of the General Code and these terms shall apply in defining 'public utilities' and 'railroads' wherever used in chapter one, division two, title three, part first of the General Code and the acts amendatory or supplementary thereto or in this act:"

Section 614-3 G. C. provides as follows:

"The public service commission of Ohio is hereby vested with the power and jurisdiction to supervise and regulate 'public utilities' and 'railroads' as herein defined and provided and to require all public utilities to furnish their products and render all services required by the commission, or by law."

There is no doubt that the mutual telephone companies, referred to in your communication, come within the definition of a telephone company as found in section 614-2, supra. Section 614-2a, supra, in defining the term "public utility" excepts such public utilities as operate their utilities not for profit. The mutual telephone companies as described in the question submitted do not fall within the definition of public utilities as defined in section 614-2a and therefore the public utilities commission of Ohio does not have power and jurisdicton to supervise and regulate the same so long as they continue to operate not for profit. The term "not for profit" does not mean that utilities that do not find themselves in possession of a surplus after all proper expenses and deductions are made, are not amenable to regulation by public authority. The sole question is whether or not they are operated with the intention and for the purpose of producing a profit on the investment, and this, in the case of the Putnam County Telephone companies, is negatived in the question submitted. If the company at Ottawa rents telephones to the county, their use being limited to public purposes, at a rental which covers the actual cost and no more, I am of the opinion that the same will not be subject to the public utilities commission, since such renting of telephones would not bring such company within the term "public utility" as defined in section 614-2a.

Very truly yours,
JOSEPH McGHEE,
Attorney-General.

421.

MAYOR—CANNOT RECEIVE PAYMENT FOR LEGAL SERVICES RENDERED ON BEHALF OF VILLAGE.

Section 3808 G. C. prohibits payment to the mayor of a village for legal services rendered by him on behalf of such village.

COLUMBUS, OHIO, July 2, 1917.

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

GENTLEMEN:—Hon. C. M. Babst, mayor of the village of Crestline, Ohio, has submitted to me for opinion a question which seems to me to be of general interest and I am, therefore, writing an opinion to you upon the subject and will send a copy thereof to Mr. Babst. He states as follows:

"I, as you probably know, am a practicing attorney and also mayor of Crestline. Council does not employ a legal adviser but depends on me and requests me to take care of all legal matters such as drawing of ordinances, resolutions, conducting bond issues and also empowered me to take care of litigation now pending in an appropriation proceeding, designating me in the ordinance to make the application for a jury and carry the case to a conclusion.

"Council also appropriated $200.00 at the beginning of the year for legal services and now wishes to pay me for what work I have done since the first of the year.

"I am not appointed legal adviser. One member of council wishes a ruling on the question before anything is done and at their request I am writing for the answer.

"I am familiar with the statute which prohibits the mayor's salary being rasied while in office, but I am inclined to believe that council has a legal right to pay for services rendered and which are outside of his duties as mayor.

"I conceive considerable difference between a legal adviser and a solicitor, for a solicitor must have qualifications pointed out by section 4304, he must be an attorney-at-law duly admitted to practice in the courts of the state, while a legal adviser need have no qualification, excepting perhaps that he must be learned in the law. He does not necessarily have to be an attorney admitted to practice. Thus while a village may employ a legal adviser of council or any department of the village, if this appointee was not an attorney it would have to employ one to bring or defend an action. I am prepared to state, too, that there are many men who are well qualified to give legal advice but who have never been admitted to practice; this is largely true in all probate offices.

"Council wishes to pay me for stenographer services in connection with my legal work. Kindly let me hear from you at your earliest convenience."

Section 4220 G. C. provides as follows:

"When it deems it necessary, the village council may provide legal counsel for the village, or any department or official thereof, for a period not to exceed two years, and provide compensation threefor."

In your letter, however, you state that the council of the village has not employed a legal adviser, but has designated you to look after the legal matters and had appropriated two hundred dollars at the beginning of the year for legal services.

Section 3808 G. C. provides:

> "No member of the council, board, officer or commissioner of the corporation, shall have any interest in the expenditure of money on the part of the corporation other than his fixed compensation. A violation of any provision of this or the preceding two sections shall disqualify the party violating it from holding any office of trust or profit in the corporation, and shall render him liable to the corporation for all sums of money or other thing he may receive contrary to the provisions of such sections, and if in office he shall be dismissed therefrom."

It appears, therefore, that the mayor of a village is prohibited by the provisions of the above section from having any interest in the expenditure of money on the part of the corporation other than his fixed compensation. Payment of the amount appropriated by council to you for compensation for legal services rendered would be an expenditure of money in which you would be interested, as would likewise the payment to you of money for stenographic services in connection with your legal work. I am, therefore, of the opinion that the payment would be unauthorized.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

422.

BOND FORM—TO BE USED IN ENTERING ALL CONTRACTS FOR PUBLIC WORKS OR IMPROVEMENT.

1. *In entering into all contracts for the construction, erection, alteration or repair of public buildings or other public works or improvements, substantially the form of bond as set out in an act entitled: "An act to protect persons performing labor and furnishing materials for the construction and repair of public works" must be used.*

2. *The difference between the Cass highway law and the White-Mulcahy law is not such as to require a different form of contract, other than that the material under the new act may not all be furnished by the contractor, as it was under the old law.*

COLUMBUS, OHIO, July 5, 1917.

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

DEAR SIR:—I have your communication of June 6, 1917, in which you ask my opinion in reference to the form of a contract and bond, a copy of each of which you attach thereto. Your communication reads as follows:

> "I am attaching hereto form of agreement and proposal and contract bond now in use by this department.
>
> "It is rather apparent from an examination of the White- Mulcahy law that some changes will be necessary both in the form of contract and bond, and I am transmitting these forms to you with the request that you kindly revise same so that they may be in accordance with the provisions of the new law."

1. The particular matter which you have in mind is as to whether the provisions of the White-Mulcahy law will necessitate a change in the form of the contract and bond used by you in the matter of highway improvements.

Let us first note the form of the bond. Section 1208 G. C. of the law as it now is provides among other things that the

> "bond shall be conditioned for the payment of all material and labor furnished for or used in the construction of the road for which such contract is made, and which is furnished to the original contractor or subcontractor, agent or superintendent of either engaged in said work."

Section 1208 as amended in the White-Mulcahy law leaves out all reference to the conditions above quoted, for the reason, I think, that provision is made in said section 1208 of the White-Mulcahy law that:

> "* * * The state highway commissioner shall not draw his requisition for any warrant in favor of any contractor or make any payment to any contractor for any estimates on account of any contract let under the provisions of the preceding sections, until the affidavit of such contractor, or its officer or agent in the case of a corporation, that all indebtedness of such contractor on account of material incorporated into the work or delivered on the site of the improvement, or labor performed thereon has been paid, is filed with the state highway commissioner * * *;"

or in lieu thereof it is provided that he may file a waiver from all persons furnishing material and labor.

From these provisions, the legislature evidently felt that the persons furnishing labor or material were fully protected under the law, and, therefore, there would be no necessity for protecting them under the bond.

We find in section 1209 G. C. of the White-Mulcahy law this provision:

> "* * * Before entering into a contract for the completion of an improvement, the commissioner shall require a bond with sufficient sureties, conditioned as provided in section 1208 of the General Code. * * *"

The form of bond now used by your department is conditioned as provided in section 1208 of the law as it now stands, and from the change in the provisions of section 1208 and the provision set forth, found in section 1209 of the new law, it might be reasonably inferred that you could safely omit said conditions from your bonds on and after June 28, 1917.

But I desire to call your attention to an act entitled (107 O. L. 642):

> "To protect persons performing labor and furnishing materials for the construction and repair of public works."

This act is too long to quote, but I will enclose a copy of same for your consideration. In said act it is provided:

> "That when public buildings or other public works or improvements are about to be constructed, erected, altered or repaired under contract, at the expense of the state,"

the bond required shall be conditioned as set out in the act. Section 4 of the act (Sec. 2365-4 G. C.) sets forth a form of bond and provides that this form shall be substantially followed.

There is no question that contracts such as you enter into are for the construction of public works or improvements and I believe that the only safe plan for you to adopt is to use a bond substantially the same as that set out in section 4 of the above named act.

I desire further to say that when you compare the form of bond which has been used by your department and the form of the bond set forth in section 4 of said act, there is no great difference in the terms or conditions set out. But on account of a decision of our supreme court in Roofing Co. v. Gaspard, 89 O. S. 185, I believe it will be well for you to change your form of bond and follow exactly the bond set out in section 4 of the said act, for the reason that your form of bond does not provide that it is for the benefit of the material men and laborers, while the form set out in section 4 does so provide.

2. You ask in reference to the form of contract used by you. I am of the opinion that your present form of agreement would need to be modified but very little. It provides that the second party agrees to furnish *all materials.* This might have to be modified under the new law, because of the fact that there is provision made for your purchasing the material from the state board of administration, providing they have suitable material on hands. For this reason it might be advisable for you to modify your form of contract to read something as follows:

> "That for and in consideration of payments hereinafter mentioned, to be made by the party of the first part, party of the second part agrees to furnish all materials excepting the following: (then leave a blank space in which you could write the materials that you might secure through the state board of administration) and all appliances, tools and labor and perform all the work," etc.

The above is suggested, although it might not be absolutely essential, for the reason that it is further provided in the agreement that the "plans and specifications" shall become an essential part of every contract; and the new law provides that all materials secured from the state board of administration must be set out in the plans and specifications. So that this matter would practically be taken care of under the plans and specifications, although I believe it would be well to make the above change.

Other than the suggestions above made, I am of the opinion that your present form of contract and bond will be adapted to the provisions of the new law, as well as they are to those of the old.

You will remember that I suggested in a former communication that there seems to be no specific provision for a proposal contract bond; that is, the law seems to contemplate that the bond will be given after the contract is awarded. But this is a matter more of procedure than of law, and, as you have been following the procedure requiring a proposal contract bond, I am not desirous of in any way interferring therewith.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

423.

APPROVAL—FINAL RESOLUTION FOR ROAD IMPROVEMENT IN JEFFERSON COUNTY.

COLUMBUS, OHIO, July 5, 1917.

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

DEAR SIR:—I have your communication of June 29, 1917, enclosing a final resolution for a certain road improvement, as follows:

"Jefferson County—Sec. 'K' of the Steubenville-Cambridge road, Pet. No. 2538."

I have examined this final resolution and find the same correct in form and legal, and am, therefore, returning it to you with my approval endorsed thereon.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

424.

APPROVAL—FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN JEFFERSON, LICKING AND SUMMIT COUNTIES.

COLUMBUS, OHIO, July 5, 1917.

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

DEAR SIR:—I have your communication of July 2, 1917, enclosing final resolutions for certain road improvements, as follows:

"Jefferson County—Sec. 'A' Skelly-Empire road, Pet. No. 2542, I. C. H. No. 378 (also duplicate).

"Summit County—Sec. 'P' Akron-Medina road, Pet. No. 2965, I. C. H. No. 95.

"Licking County—Sec. 'I' Columbus-Millersburg road, Pet. No. 865, I. C. H. No. 23."

I have examined these final resolutions and find the same correct in form and legal, and am, therefore, returning them to you with my approval endorsed thereon.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

425.

CHIEF OF FIRE DEPARTMENT—HAS AUTHORITY TO ENTER BUILDINGS FOR PURPOSE OF EXAMINATION—MUNICIPALITY MAY PASS ORDINANCE TO AUTHORIZE SUCH AN EXAMINATION—AND MAY PROVIDE PENALTY FOR REFUSAL TO ALLOW SUCH EXAMINATION.

1. *Where a city has regularly established a fire department the chief of said department, under Sec.* 834 *G. C. has the same authority to enter upon premises and into buildings for the purpose of examination as have the state fire marshal, his deputies and subordinates, etc.*

2. *"Or other officer," as found in Sec.* 12858 *G. C. includes such chief of fire department.*

3. *A municipality may by ordinance designate and authorize the chief of its fire department to enter for the purpose of examination any building in the city at reasonable times, which in his opinion is in danger of fire.*

4. *Such municipality may provide a penalty within the limits of Sec.* 3628 *G. C., for obstructing such chief of the fire department in the performance of his duties under such ordinance.*

COLUMBUS, OHIO, July 5, 1917.

HON. T. ALFRED FLEMING, *State Fire Marshal, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your communication of June 22, in which you state that the chief of the fire department of the city of Canton seeking to act under authority of section 834 General Code attempted in the course of his inspection work to make inspection of a certain dwelling house in said city, and that he was refused the privilege of so doing. You further state that the chief filed an affidavit in the matter, copy of which is attached to your letter. The affidavit, omitting the formal parts, charges that one G. H. White

> "did unlawfully refuse to permit the said R. O. Mesnar, the legally appointed, acting and qualified chief of the fire department of said city of Canton, to enter said building for the purpose of making an inspection thereof to ascertain what specially hazardous agencies and things existed therein liable to cause fire, and for the purpose of inspecting the manner of the construction of flues and chimneys of said building; said R. O. Mesnar as such chief of the fire department having on said day at about the hour of 3:00 o'clock in the P. M. made a request upon said G. H. White to make said inspection."

You ask that an opinion be given in the matter.
Section 834 of the General Code provides as follows:

> "The state fire marshal, his deputies and subordinates, the chief of the fire department of each city or village where a fire department is established, the mayor of a city or village where no fire department exists, or the clerk of a township in territory without the limits of a city or village, at all reasonable hours may enter into all buildings and upon all premises within their jurisdiction for the purpose of examination."

If the affidavit were founded on this section I think it would be defective in

that it does not aver that Canton is a city where a fire department had theretofore been established, but on its face it shows it was founded on an ordinance, and not on the statute.

Section 834 purports to give the chief of a fire department of a city or village where a fire department is established the right and authority at all reasonable hours to enter buildings and upon premises for the purpose of examination.

Section 835 includes the chief of the fire department in the list of officers who upon inspection, and finding the necessity therefor, are authorized to make certain orders providing for remeding dangerous conditions. The only penalty section in the fire marshal statutes seems to be section 837 General Code, which provides as follows:

> "Any person or persons, being the owner, occupant, lessee or agent of buildings and premises who willfully fails, neglects or refuses to comply with any order of any officer named in the last four preceding sections, shall be guilty of a misdemeanor and shall be fined not more than fifty dollars nor less than ten dollars for each day's neglect."

This section provides a punishment for a person who "willfully fails, neglects or refuses to comply with any order of any officer named in the last four preceding sections." I do not think that this section would furnish a penalty for the refusal of a person to permit the officer named to go upon the premises or to make the inspection. It seems rather to provide a penalty for failure to comply with an order after the inspection has been made.

It seems to me that the only violation under the facts stated in your inquiry would possibly be under section 12858 of the General Code, which reads as follows:

> "Whoever abuses a judge or justice of the peace in the execution of his office, or knowingly and willfully resists, obstructs or abuses a sheriff, constable or other officer in the execution of his office, shall be fined not more than five hundred dollars or imprisoned not more than thirty days, or both."

There might be some contention that the chief of the fire department was not such "other officer" as is contemplated in said section, but I believe the reasoning found in Woodworth v. State 26 O. S. 196, especially the language of McIlvaine, C. J., on pages 198 and 199, is sufficient to bring the chief of the fire department within the provisions of section 12858. At page 199 the court uses the following language:

> "The words of this statute, 'or other officers,' when viewed in the light of their ordinary meaning, and of all the rules or maxims for construction, and the mischief to be remedied, to wit, abuse of or resistance to public officers engaged in the execution of their offices, we think should be construed so as to embrace ministerial as well as judicial offices generally other than those named. Otherwise, the administration of most important public affairs may be thwarted by evil-disposed persons, without any adequate remedy on the part of the public—a state of the law which should not be made by construction merely, when the words of the statute are sufficiently comprehensive to prevent it."

In this case a road supervisor was held to be within the term "or other officers." In the case of State v. Steube, 10 Dec. Rep. 199, "other officers" was held to include a prosecuting attorney.

It would be my opinion that a person refusing the chief of the fire department of a city or village, where a fire department has been regularly established under the law, permission to enter into buildings or upon premises for the purpose of making an examination would be resisting an officer under section 12858 General Code.

Since the consideration of your communication of June 22nd, I am in receipt of your letter of June 27th, in which further facts are given. It appears that an affidavit by the chief of the fire department was made on April 26, 1917; that said affidavit was held to be subject to a motion to quash; and that a new affidavit was filed May 21, but it further appears that the affidavits were not filed under section 834, nor was the chief of the fire department acting in an official capacity under that section, but that he was acting under and by virtue of an ordinance of the city of Canton and that the affidavit charged a violation of not a state law but of an ordinance of the city of Canton, to wit, section 58, page 35, of the Revised Ordinances of the City of Canton. It seems that this ordinance provides, among other things, that it shall be the duty of the fire chief

> "from time to time to inspect all buildings and structures within the city, to ascertain what specially hazardous agencies and things exist therein liable to cause fire, * * * to inspect the manner of construction of all flues, fire places, furnaces, ovens, chimneys, heating pipes, electric lights, etc. * * *"

The penalty clause reads:

> "Any person refusing or neglecting to abate any dangerous thing when ordered to do so by the chief of the fire department, or refusing to permit said chief of the fire department to enter such building or premises for the purpose of such inspection and investigation, shall be fined in any sum not exceeding fifty dollars ($50.00) and costs of prosecution, or be imprisoned not more than ten days or both."

Attention is called to the fact that section 834 General Code provides for "entering buildings at all reasonable hours" and that the question is raised whether city ordinances giving fire chiefs the right to go on premises and in buildings from time to time and at any time is valid inasmuch as the state law only gives that privilege to the chief of the fire department in reasonable hours, and a further question is presented as to the penalty. It is said that the city ordinance appears to provide a greater penalty than the state law, if the state law provides any penalty at all. Not having the entire city ordinance before me I can only consider that portion which is quoted.

I am inclined to the view that the city would have a right by ordinance to provide for the inspection of buildings and structures within the city in the manner provided in the ordinance, and that the city might designate the chief of the fire department to perform this inspection, and likewise provide for the penalty as in the ordinance provided.

Section 3617 General Code authorizes municipalities to organize fire departments.

Section 3636 authorizes municipalities to provide for the regulation of the erection of buildings and

> "to provide for the inspection of buildings or other structures and for removal and repair of insecure buildings."

This is the section that authorizes the establishment of the building inspection department.

Section 3628 General Code authorizes municipalities to make the violation of ordinances a misdemeanor and provide for the punishment thereof by fine or imprisonment or both, but "such fine shall not exceed five hundred dollars and such imprisonment shall not exceed six months."

By virtue of this section, assuming the authority of the city to enact the ordinance in question irrespective of whether or not a penalty was provided under the state law, the city would be authorized to provide a penalty not exceeding the provisions found in section 3628 General Code.

Section 4395 Genral Code provides as follows:

> "The council may regulate the erection of houses and business structures and prohibit within such limits as it may deem proper, the erection of buildings, unless the outer walls be constructed of non-combustible material, and, on the petition of the owners of not less than two-thirds of the ground included in any square, or half-square, prohibit the erection on any such square or half-square, of any building, or addition to any building more than ten feet high, unless the outer walls be made of iron, stone, brick and mortar, or of some of them, and to provide for the removal of any building or additions erected contrary to such prohibition."

Section 4396 General Code provides as follows:

> "The council may invest any officer of the fire or police department, with the power, and impose on him the duty, to be present at all fires, investigate the cause thereof, examine witnesses, and compel their attendance and the production of books and papers, and to do and perform all such other acts as may be necessary to the effective discharge of such duties."

Section 4397 General Code provides as follows:

> "Such officer shall have power to administer oaths, make arrests and enter for the purpose of examination, any building which, in his opinion, is in danger from fire; and he shall report his proceedings to the council at such times as may be required."

Assuming again that the ordinance in question was passed under authority of section 4395 General Code above mentioned, then I am satisfied that the prosecution brought by the chief of the fire department, provided the affidavit was proper in all respects, could be successfully maintained and that the procedure therein would be only under the city ordinance, and the provisions of the state fire marshal law would not affect the situation in any way.

Section 4396 General Code authorizes council to invest the chief of the fire department with certain powers and duties, while section 4397, among other things, gives him the right to enter, for the purpose of examination, any building which in his opinion is in danger from fire. Of course the officer would be permitted only to enter buildings for the purpose of inspection at reasonable times, but what would constitute a "reasonable time" would appear from the particular facts in the individual case, and the courts would correct any abuse of discretion that might be lodged in the officer as to the time of his making an inspection.

In view of all the foregoing I am of the opinion that in a city or village where a fire department has been regularly established by law, the chief of the fire department has the same authority to enter upon premises and into buildings for

the purpose of inspection as have the state fire marshal, his deputies and assistants; that a person wilfully obstructing the chief of the fire department in the performance of his duties in this regard is guilty of resisting an officer under section 12858 General Code: that a city by ordinance can designate the chief of the fire department to make inspection of buildings, and in order to force compliance with the orders of the chief of the fire department may by ordinance make it an offense to obstruct him in the performance of his duties in that regard, and may provide a penalty not exceeding the provisions found in section 3628 General Code.

Trusting that this answers your several questions, I am,

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

426.

TITLE GUARANTEE AND TRUST COMPANY—NOT UNDER CONTROL AND SUPERVISION OF THE INSURANCE DEPARTMENT OF THE STATE—GUARANTEE OF TITLE BY SUCH COMPANY IS IN EFFECT THE SAME AS THE INSURANCE OF SUCH TITLE.

A title guarantee and trust company under the provisions of sections 9850 *et seq. General Code is not in the insurance business in the sense that it is under the control and supervision of the insurance department of the state.*

The guarantee of a title by such a company to its customer to whom it furnishes an abstract of title is in legal effect the same as the insurance of such title.

COLUMBUS, OHIO, July 5, 1917.

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

DEAR SIR:—Under date of June 1, 1917, you addressed the following request to this department:

> "A question has arisen respecting the proper construction to be given to section 9850 G. C., which provides as follows:
>
> "'A title guarantee and trust company may prepare and furnish abstracts and certificates of title to real estate, bonds, mortgages and other securities, and guarantee such titles, the validity and due execution of such securities, and the performance of contracts incident thereto, make loans for itself or as agent or trustee for others, and guarantee the collection of interest and principal of such loans; take charge of and sell, mortgage, rent or otherwise dispose of real estate for others, and perform all the duties of an agent relative to property deeded or otherwise entrusted to it.'
>
> "We have assumed that the provision of that section, that such companies may guarantee titles is in effect an insurance of the title. That construction has been challenged, and we will thank you for an early opinion upon that question. We have ourselves occasionally looked into the statutes of other states on this subject, notably that of New York, which uses the conjunctive phrase 'guarantee and insure.'"

A difference is recognized in the text books and authorities between "guaranty" and "insurance." Upon examination, however, the difference is found to

be subjective rather than objective. That is to say, the difference is found to exist between the two things themselves in their nature and essence and not in the objects accomplished by them, which, in substance, is the same.

You have kindly submitted with your request a copy of an opinion of Hon. Timothy S. Hogan, attorney-general, under date of December 2, 1913, found in the Annual Report of the Attorney-General for the year 1913, Vol. I, page 164. This opinion was rendered to you upon your inquiry which in substance was as to whether you still had the supervision and control over guarantee title and trust companies, or whether the same was taken away or affected by the statutes creating the superintendent of banks and providing for supervision by him of banks and trust companies, which answer was that your powers and duties with reference to such guarantee title and trust companies still remained unaffected by the statutes in question. With that opinion I am in full agreement.

The guaranty of a title is the same thing in legal effect as would be the insurance of it, so far as the benefit to accrue to the guarantee or policyholder is concerned, but as to the company itself a guaranty company is not an insurance company. This is well illustrated in an Iowa case. (*Cole v. Haven,* 7 N. W. 383.) The question on that case was with reference to a person or organization engaged in the business of putting up lightning rods who gave a guaranty with each sale against loss from lightning. The question was whether they were subject to the regulations of the insurance department of the state, and they were held not to be so because not engaged in the insurance business because of the difference between guaranty and insurance.

While it is not clearly stated in this case, or elsewhere in any authority I have examined, I find the difference to be essentially this: That in the case of guaranty it is not the principal or main object of the business, but a collateral or incidental matter to some other object in reference to which parties contract together, as in the case just cited the business of the parties giving the guaranty was not insuring buildings against lightning, but was furnishing and erecting lightning rods to protect buildings, and the issuance of the guaranty was merely collateral to the other business—an inducement to enter into it. No building was insured against lightning except where the party sold the lightning rods and put them up, which was the main or principal business, the guaranty was merely auxiliary and accessory to it.

The same situation is true in the case of a guarantee title and trust company. The business in which these companies engage is primarily that of making abstracts of title. As incidental to that business they insure the correctness of their work, or, more correctly speaking, guarantee such correctness. They do not guarantee titles generally or to persons or in instances otherwise than where they have furnished such abstracts, and are not therefore considered to be in insurance business or under the regulations of the insurance department of the state of Ohio. The business, however, is insurance so far as it affects the persons with whom such company deals. If the work turns out bad or the title is defective upon which they pronounced favorably their customer is reimbursed for what he loses, just as he would be if he called the business insurance, so that it would seem that in the statutes of New York referred to by you nothing was added by the words "and insure"; that *insure* is a simple repetition of the word "guarantee."

The word "guaranty" does not exactly indicate the nature of the obligation assumed, which is really a warranty. The former is used where the undertaking is collateral to some other original obligation, while the latter is applied to an original agreement. However, the contract is collateral in the sense that it is not the main thing agreed about, but only incidental thereto, that is, the business is furnishing abstracts and, as incidental or collateral to that, the title is guaranteed. It is called "guaranty" in the statutes, and the business is fully regulated in the accompanying sections 9850 to 9856 General Code under the heading "Title Guarantee and Trust Companies."

"Sec. 9850. A title guarantee and trust company may prepare and furnish abstracts and certificates of title to real estate, bonds, mortgages and other securities, and guarantee such titles, the validity and due execution of such securities, and the performance of contracts incident thereto, make loans for itself or as agent or trustee for others, and guarantee the collection of interest and principal of such loans; take charge of and sell, mortgage, rent or otherwise dispose of real estate for others, and perform all the duties of an agent relative to property deeded or otherwise entrusted to it.

"Sec. 9851. No such company shall do business until its capital stock amounts to at least one hundred thousand dollars fully paid up, and until it has deposited with the treasurer of state fifty thousand dollars in securities permitted by sections ninety-five hundred and eighteen and ninety-five hundred and nineteen. Except such deposit, the capital shall be invested as the board of directors of such company prescribes.

"Sec. 9852. The treasurer of state shall hold such fund or securities deposited with him as security for the faithful performance of all guarantees entered into by such company, but so long as it continues solvent he shall permit it to collect the interest or dividends on, its securities so deposited, and to withdraw them or any part thereof, on depositing with him cash or other securities of the kind heretofore named so as to maintain the value of such deposit at fifty thousand dollars.

"Sec. 9853. Any company so organized shall be limited in its operation to only one county in this state, which shall be designated in its application for a charter, except, that if it desires to issue its policies of title insurance in more than one county it may issue them in such other county or counties upon depositing with the treasurer of state an additional sum of fifty thousand dollars in securities as above provided, for each additional county in which it proposed to operate.

"Sec. 9854. If such a company has made deposits with the treasurer of state as herein required, it may request such treasurer to return to it securities in excess of the amount so required, and he shall surrender such excess to the company, taking proper receipts therefor.

"Sec. 9855. All companies doing the business of guaranteeing titles to real property shall comply with and be governed by the foregoing provisions relating thereto. But such companies heretofore organized and doing business thereunder, may continue business without prejudice to any rights thereby acquired or obligations incurred.

"Sec. 9856. Title guarantee and trust companies shall make such reports to the auditor of state as are required of safe deposit and trust companies and be subject to like examinations and penalties."

The last section requires reports to be made to the auditor of state in like manner as were required of safe deposit and trust companies. Other sections require a deposit of fifty thousand dollars, provide for its custody and repayment and impose various restrictions and limitations on the business.

I am therefore of the opinion that the assumption of your bureau of accounting for municipalities that the guarantee of such titles is in effect an insurance of titles is correct.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

427.

COSTS—OF CONVICTION AND TRANSPORTATION—STATE LIABLE FOR SAME—WHERE WOMEN ARE SENTENCED TO OHIO REFORMATORY FOR WOMEN FOR COMMISSION OF FELONIES.

1. *The state is liable for the cost of conviction and the costs of transportation in cases where women are sentenced and committed to the Ohio reformatory for women for the commission of felony, transportation fees to be the same as are allowed in penitentiary cases.*

2. *The state is not liable for costs of conviction and costs of transportation when women are sentenced to the Ohio reformatory for women for misdemeanors or delinquency.*

COLUMBUS, OHIO, July 5, 1917.

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

DEAR SIR:—I have your communication in which you submit the following:

"Kindly let me have your written opinion on the following propositions at your earliest convenience:

"1. Is the state liable for the costs of conviction when a female is sentenced to the reformatory for women for a felony?

"2. Is the state liable for the costs of conviction when a female is sentenced to the reformatory for women for a misdemeanor?

"3. Is the state liable for the costs of conviction when a female is sentenced to the reformatory for women for delinquency?

"4. If the state be liable for any of the costs above enumerated, is it also liable for transportation fees, and, if so, what fees shall be paid in each of the three specific instances; namely, in cases of felony, misdemeanor and delinquency?'

Sections 2148-1, 2148-5, 2148-6 and 2148-7 G. C. provide:

"Sec. 2148-1. The Ohio reformatory for women shall be used for the detention of all females over sixteen years of age, convicted of a felony, misdemeanor, or delinquency as hereinafter provided, and for the detention of such female prisoners as shall be transferred thereto from the Ohio penitentiary and the girls' industrial school as hereinafter provided.

"Sec. 2148-5. As soon as the governor shall be satisfied that suitable buildings have been erected and are ready for use and for the reception of women convicted of felony he shall issue a proclamation to that effect, attested by the secretary of state, and the secretary of state shall furnish printed copies of such proclamation to the county clerks of courts and from the date of said proclamation all portions of this act except those relating to the commitment of misdemeanants and delinquents shall be in full force and effect Whenever additional buildings have been completed so as to care for misdemeanants and delinquents a proclamation shall be issued and published in the same manner and copies furnished to county clerks of courts and to all judges and magistrates having authority to sentence misdemeanants and delinquents and from and after the date of this proclamation all portions of this act relating to the commitment of persons to said reformatory shall be in full force and effect.

"All female persons convicted of felony, except murder in the first degree without the benefit of recommendation of mercy, shall be sentenced to the Ohio reformatory for women in the same manner as male persons are now sentenced to the Ohio state reformatory. And in so far as applicable, the laws relating to the management of the Ohio state reformatory and the control and management thereof, shall apply to the Ohio reformatory for women.

"Sec. 2148-6. Female persons over sixteen years of age found guilty of a misdemeanor by any court of this state shall be sentenced to the Ohio reformatory for women and be subject to the control of the Ohio board of administration, but all such persons shall be eligible to parole under the provisions of this act.

"Sec. 2148-7. After the issuance of the first proclamation hereinbefore referred it, it shall be unlawful to sentence any female convicted of a felony to be confined in either the Ohio penitentiary or a jail, workhouse, house of correction or other correctional or penal institution, and after the issuance of the second proclamation it shall be unlawful to sentence any female convicted of a misdemeanor or delinquency to be confined in any such place, except in both cases the reformatory herein provided for, the girls' industrial school or other institution for juvenile delinquency, unless such person is over sixteen years of age, and has been sentenced for less than thirty days, or is remanded to jail in default of payment of either fine or costs or both, which will cause imprisonment for less than thirty days provided that this section shall not apply to imprisonment for contempt of court."

FELONY CASES

Sections 13722, 13724, 13725 and 13726 G. C. read:

"Sec. 13722. Upon sentence of a person for a felony, the officers, claiming costs made in the prosecution, shall deliver to the clerk itemized bills thereof, who shall make and certify, under his hand and the seal of the court, a complete bill of the costs made in such prosecution, including the sum paid by the county commissioners for the arrest and return of the convict on the requisition of the governor, or on the request of the governor to the president of the United States. Such bill of costs shall be presented by such clerk to the prosecuting attorney, who shall examine each item therein charged, and certify to it if correct and legal.

"Sec. 13724. If the convict is sentenced to imprisonment in the penitentiary or to death, and no property has been levied upon, the sheriff shall deliver such certified cost-bill, having accredited thereon the amount paid on costs, with the convict, to the warden of the penitentiary. When property has been levied upon and remains unsold, the clerk shall not certify to the sheriff the costs of such conviction, or part thereof, for payment from the state treasury, but the convict shall be delivered to such warden in pursuance of his sentence, upon payment of the costs of transportation.

"Sec. 13725. In transporting convicts to the penitentiary, the sheriff may employ one guard for every two convicts transported; but the court may authorize a larger number, in which case a transcript of the order of such court shall be certified by the clerk thereof, under the seal thereof, and the sheriff shall deliver it to the warden of the penitentiary with

such convict. The sheriff shall receive eight cents per mile for mileage, five cents per mile for transporting each convict and six cents per mile for the service of each guard, the number of miles to be computed by the usual route of travel.

"Sec. 13726. When the clerk certifies on the cost bill that execution was issued according to the provisions of this chapter, and returned by the sheriff 'No goods, chattels, lands or tenements, found whereon to levy,' the warden of the penitentiary shall allow so much of the cost-bill and charges for transportation as is correct, and certify such allowance, which shall be paid by the state."

From these sections it is evident that there was ample provision for the payment of costs and transportation charges in the case of women sent to the Ohio penitentiary before the law made it mandatory to send them to the Ohio reformatory for women. Section 3016 reads:

"In felonies, when the defendant is convicted the costs of the justice of the peace, police judge, or justice, mayor, marshal, chief of police, constable and witnesses, shall be paid from the county treasury and inserted in the judgment of conviction, so that such costs may be paid to the county from the state treasury. In all cases, when recognizances are taken, forfeited and collected and no conviction is had, such costs shall be paid from the county treasury."

Sections 13726 and 13727 General Code, providing for the payment of costs by the state, were originally parts of an act passed March 4, 1844, entitled "An act further to provide for the collection of costs in criminal cases." (42 O. L., p. 30.) This act provided for the payment of costs by the state "in all cases of conviction of any person of any crime, punishment whereof is imprisonment in the penitentiary." It will be noted here that the object of the statute was to pay the costs of convicting any person convicted of any crime the punishment whereof is imprisonment in the penitentiary, and as to the provision for the payment of costs, the legislature had uppermost in mind the crime of which the person was convicted rather than the institution to which such person was being sent. It was provided that the warden of the penitentiary should certify to cost bills, but at that time no other institution was taking care of prisoners convicted of felonies. If there had been such institutions at that time there is no doubt but that the superintendents of such institutions would have had similar duties imposed upon them. Some years after this act was passed, the Ohio State Reformatory was established and it has always been held that the above sections, providing for payment of costs, included cases where the defendant was sentenced to the Ohio State Reformatory as well as to the penitentiary. This holding, I think, was correct since the prisoners sentenced to the reformatories for felonies were convicted of a crime "the punishment whereof is imprisonment in the penitentiary" within the meaning of the act of March 4, 1844.

The reformatory act provided:

"Male persons between the ages of fifteen to twenty-one years, convicted of felonies shall be sentenced to the reformatory instead of the penitentiary."

This did not affect the status of the prisoners so far as this act was concerned since although they were sentenced to the reformatory, they were sen-

tenced for a crime which was punishable by imprisonment in the penitentiary.

Section 2134 of the act relative to the Ohio State Reformatory, provided:

> "In transporting a prisoner to the reformatory, the sheriff shall perform like duties, have like powers and receive like compensation as provided by law for transporting prisoners to the penitentiary."

This is the only expression of the legislature regarding transportation of prisoners to the reformatory. There is no legislative expression at all concerning payment of costs by the state. However, as stated above, it has always been held that the costs and transportation charges in the case where prisoners are sentenced to the Ohio State Reformatory for felonies should be paid the same as when such prisoners are sentenced to the penitentiary. For the reasons stated above I believe this holding to be correct. The act establishing the Ohio reformatory for women provided that women convicted of felonies should be sentenced to the Ohio reformatory for women instead of the Ohio penitentiary, but makes no express provision for payment of costs or transportation.

Section 2148-5 G. C. provides:

> "In so far as applicable, the laws relating to the management of the Ohio state reformatory and the control and management thereof, shall apply to the Ohio reformatory for women."

The reasoning outlined above, to the effect that the act of 1844, providing for the payment of costs and transportation in felony cases, applies to the Ohio state reformatory, is equally applicable to the present situation concerning the Ohio reformatory for women. These women, though sentenced to the Ohio reformatory for women, have been convicted of crimes the punishment whereof is imprisonment in the penitentiary, and in the light of the reasoning just outlined, and the provision of section 2148-5 just referred to, it is my opinion that when a woman is convicted of a felony and sentenced to the Ohio reformatory for women, the costs and transportation to such institution should be paid by the state the same as if such women were sentenced to the Ohio penitentiary.

MISDEMEANORS.

COSTS:

The only provision of law concerning the payment of costs in misdemeanor cases is section 3019 General Code, which provides as follows:

> "In felonies wherein the state fails, and in misdemeanors wherein the defendant proves insolvent, the county commissioners, at any regular session, may make an allowance to any such officers in place of fees, but in any year the aggregate allowances to such officer shall not exceed the fees legally taxed to him in such causes, nor in any year shall the aggregate amount allowed an officer exceed one hundred dollars."

Under this section county commissioners may allow costs in misdemeanor cases wherein the defendant proves insolvent to the extent of $100.00 per year, but there is nowhere in the statutes any provision of law by which the state is made to reimburse the county for the payment of such costs. The fact that the defendant, when convicted, is sentenced to a state institution does not carry with

it any such obligation independent of statute and therefore even though a woman, when convicted of a misdemeanor, is sentenced to the Ohio reformatory for women, the state is not liable for the costs in the case.

TRANSPORTATION CHARGES:

Section 13716 General Code reads:

> "When a person convicted of an offense is sentenced to imprisonment in jail, the court or magistrate shall order him into custody of the sheriff or constable, who shall deliver him, with the record of his conviction, to the jailer, in whose custody he shall remain in the jail of the county until the term of his imprisonment expires or he is otherwise legally discharged."

Women sentenced to the Ohio reformatory for women for misdemeanors are sentenced either by the common pleas court, probate court, the mayor, justice of the peace, or police judge.

When sentenced by the common pleas or probate court, the order of commitment should be addressed to the sheriff.

In such case the transportation charges may be taken care of under section 2997 of the General Code, which reads:

> "In addition to the compensation and salary herein provided, the county commissioners shall make allowances quarterly to each sheriff for keeping and feeding prisoners, as provided by law, for his actual and necessary expenses incurred and expended in pursuing or transporting persons accused or convicted of crimes and offenses, in conveying and transferring persons to and from any state hospital for the insane, the institution for feeble minded youth, Ohio hospital for epileptics, boys' industrial school, girls' industrial home, county homes for the friendless, houses of refuge, children's homes, sanitariums, convents, orphan asylums or homes, county infirmaries, and all institutions for the care, cure, correction, reformation and protection of unfortunates, and all expenses of maintaining horses and vehicles necessary to the proper administration of the duties of his office. * * *"

It will be noted from a reading of this section that the county commissioners may allow the sheriff in such cases his actual and necessary expenses incurred and expended in conveying such women to the Ohio reformatory for women. There is no provision in law whereby the state is obliged to reimburse the county for this expenditure.

Neither do I know of any provision of law imposing any obligation upon the state to pay the cost of transportation of prisoners to the Ohio reformatory for women when sentenced by the mayor, justice of the peace or police judge.

DELINQUENCY CASES:

In regard to delinquency cases, section 2148-1 provides:

> "The Ohio reformatory for women shall be used for the detention of all females over sixteen years of age, convicted of a felony, misdemeanor, or delinquency as hereinafter provided, and for the detention

of such female prisoners as shall be transferred thereto from the Ohio penitentiary and the girls' industrial school as hereinafter provided."

This department has held that girls between 16 and 18 years of age, found to be delinquent, may be committed to the Ohio reformatory for women.

Section 1682 General Code, a part of the juvenile court chapter, reads:

"Fees and costs in all such cases with such sums as are necessary for the incidental expenses of the court and its officers, and the costs of transportation of children to places to which they have been committed, shall be paid from the county treasury upon itemized vouchers, certified to by the judge of the court."

This section was originally a part of section 40 of an act passed April 23, 1908, entitled "An act to regulate the treatment and control of dependent, neglected and delinquent children, and to repeal certain acts therein named." Section 40, at page 202, reads:

"This act shall be liberally construed to the end that its purpose may be carried out, to-wit: That proper guardianship may be provided for in order that the child may be educated and cared for, as far as practicable in such manner as best subserves its moral and physical welfare, and as far as practicable in proper cases that the parent, parents or guardians of such child may be compelled to perform their moral and legal duty in the interest of the child. And all fees and costs in all cases coming within the provisions of this act, together with such sums as shall be necessary for the incidental expenses of such court and its officers, and together with the costs of transportation of children to places to which they may be committed, shall be paid out of the county treasury of the county upon itemized vouchers and certified to by the judge of the court."

No express provision is now made as to who shall convey girls to the girls' industrial school when committed for delinquency, but it has been held by this department that the probate judge may appoint, if he sees fit, a probation officer to accompany such girls and fix her compensation as he sees fit.

1914 Opinions of the Attorney-General, Vol. 2, page 1275.

Of course if the judge should order a regularly appointed probation officer to do this, such probation officer would only be paid his expenses. From the above it is seen that when a girl has been committed to the girls' industrial school for delinquency, she may be taken to such institution by a regularly appointed or especially appointed probation officer. The costs in that case, as well as the expense of transporting the girl to the girls' industrial school, must be paid by the county and no provision is made in law for the reimbursement of the county by the state.

The Ohio reformatory for women statute simply provides that delinquent girls over 16 years may be committed to the Ohio reformatory for women instead of the girls' industrial school. Neither the statute relating to the costs in the case nor the statute relating to the powers of the court to order the probation officer to convey the delinquent child are affected by the Ohio reformatory for women law, and therefore it is my opinion that when the juvenile court sends

the delinquent child to the Ohio reformatory for women instead of the girls' industrial school, the costs of transportation to such institution are paid in the same manner as when the court commits the juvenile delinquent to the girls' industrial school.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

428.

TOLLS—RIGHT TO FIX TOLLS TO BE CHARGED BY BRIDGE COMPANY OWNING BRIDGE SPANNING NAVIGABLE RIVER FORMING COTERMINOUS BOUNDARY BETWEEN TWO STATES.

1. *In the matter of fixing a schedule of tolls to be charged by a bridge company owning a bridge spanning a navigable river forming the coterminous boundary between two states, congress has the paramount right for the reason that the traffic across said bridge is interstate in nature.*

2. *But where congress has not spoken, the two states upon the soil of which the ends of the bridge rest may by concurrent action fix a schedule of rates. But neither state alone can do so, excepting as to rates of toll from that state to the other state.*

3. *If the bridge company is charging an unreasonable schedule of tolls for passage over the bridge, either the courts of West Virginia or those of Ohio would have jurisdiction to grant relief. The federal courts would not have such jurisdiction.*

COLUMBUS, OHIO, July 5, 1917.

HON. ROY R. CARPENTER, *Prosecuting Attorney, Steubenville, Ohio.*

DEAR SIR:—I have your communication of April 25, 1917, in which you ask for certain information. Your communication reads as follows:

> "At Steubenville, Ohio (Jefferson county), there is a bridge across the Ohio river, owned by a corporation. This bridge is used for public traffic, vehicles, traction line and pedestrians.
>
> "There is a schedule of tolls ranging from five cents for foot passengers to ten dollars for traction engine. At present there is considerable complaint against the rates charged under this schedule.
>
> "Kindly inform me what commission or court or authority has the power to regulate the toll over such bridge. I am aware of section 9312 G .C., but I find nothing in connection therewith prescribing what authority may be appealed to in the matter of tolls."

The matter about which you inquire in your communication raises an interesting and at the same time an important question. In order to arrive at a conclusion which will bear investigation, it will be necessary to note a number of propositions which are more or less closely related to the direct question propounded by you in your communication. The bridge mentioned therein extends from the Ohio side, across the Ohio river, to the West Virginia side of the river, the Ohio river being a navigable one. This statement of fact alone suggests the different elements to be taken into consideration in answering your question.

We have suggested in this statement three different jurisdictions which we must consider, namely, the jurisdiction of the state of Ohio over the bridge, the

jurisdiction of the state of West Virginia over the same, and the jurisdiction of the federal government over it. The jurisdiction of the state of Ohio is raised because one end of the bridge rests upon the soil of the state of Ohio. The jurisdiction of the state of West Virginia is raised because the other end of the bridge rests upon the soil of that state. And the fact that the bridge exends over and across a navigable river, raises the jurisdiction of the United States.

1. Let us note from what source an individual or corporation gets authority to build a bridge crossing a navigable river, with permission to charge tolls upon those persons who desire to use the same. The courts are unanimous upon this proposition, and that is, that this right can be secured only from the legislature of the state in which the bridge is to be built.

In Fall et al. v. County of Sutter, et al. 21 Calif. 237, the court say:

> "Franchises for erecting toll bridges, or ferries, being sovereign prerogatives, belong to the political power of the state and are primarily represented and granted by the legislature as the head of the political power."

The court in a case reported in 76 Ga. 644, styled Welchel et al. v. State of Georgia, holds that private individuals have no authority to erect a bridge across a navigable river and charge toll for the passing of persons over the river, unless they get their authority so to do from the proper authority of the state.

In Wright v. Nagle, 101 U. S. 798, we find the following language:

> "This court follows the supreme court of Georgia, that authority to grant the franchise of establishing and maintaining a toll bridge over a river where it crosses a public highway in that state is vested solely in the legislature, and may be exercised by it, or be committed to such agencies as it may select."

In the opinion, p. 794, the court say:

> "A grant of this franchise from the public in some form is therefore necessary to enable an individual to establish and maintain a toll bridge for public travel. The legislature of the state alone has authority to make such grant. It may exercise its authority by direct legislation, or through agencies duly established, having power for that purpose."

2. Inasmuch as the Ohio river lies between two states, let us next consider the proposition how an individual or corporation could get the right to erect a bridge across a river running on the boundary between two states.

The courts are harmonious upon the proposition that no one has the right to erect such a bridge except he be given authority to do the same by the legislatures of the two states between which the river forms the boundary.

In The President, Managers, etc., v. Trenton City Bridge Co., 13 N. J. Eq. 46, the first two branches of the syllabus read as follows:

> "Upon principles of public law, it is clear that the power of erecting a bridge, and taking tolls thereon, over a navigable river which forms the coterminous boundary between two states can only be conferred by the concurrent legislation of both states.
>
> "When the power to make and maintain such bridge, and take tolls thereon, has been given by the joint legislature of both states, the principle

could hardly be admitted, that either state, by its separate legislation, could declare that no other bridge should be built across such river within certain limits, and thus render the franchise exclusive."

On p. 50 of the opinion we find the following language:

"Independent of the provisions of this agreement, upon principles of public law, it would seem to be a principle too clear to admit of doubt, that the power of erecting a bridge within the territories of both states, and of taking tolls thereon, could only be conferred by the concurrent legislation of both states. Neither state can, of its own authority, authorize a corporation to place piers, to erect a bridge, and construct a highway over the navigable waters and within the territory of an adjacent state, much less can it confer upon such corporation the franchise of taking tolls within the territory of such state. That franchise is a branch of the sovereign prerogative. The conferring of it is an exercise of sovereign power, and the right can only be exercised within the territory of the sovereignty that confers. The principle, that New Jersey, alone, could neither confer the power of building the bridge or of taking tolls within the territory of Pennsylvania, is too clear to admit of dispute or to require an authority in its support. The principle was recognized and acted upon in the case of Middle Bridge Corporation v. Marks, 26 Maine R. 326."

3. The principle is well established that neither state granting the privilege to build a bridge across a navigable river forming the boundary between two states, has any rights or jurisdiction over the end of the bridge located upon the soil of the other state.

In Middle Bridge Corporation v. Marks, 26 Me. 326, the court say in the syllabus:

"1. The legislature of this state cannot create a corporation and so authorize it to build a bridge, extending out of the limits of this state as to empower such corporation to collect toll of one who passes only upon that part of the bridge without the limits of this state.

"2. And where no express promise is made, the law will not enable such corporation to recover toll or compensation, as on an implied one, against a person for merely passing over without their permission, and under any claim of right, such portion of the bridge as was erected by such corporation upon the territory of a foreign government."

At p. 328 the court say in the opinion:

"The legislature of this state had no power to authorize or create a corporation to build that end of the bridge, it being out of the limits of this state. As an incorporated body, therefore, the plaintiffs, by virtue of their act of incorporation, can have no claim to any use of a privilege, or exercise of authority there."

In the above case a bridge was built from the state of Maine into the Province of New Brunswick, and the corporation was chartered under the laws of Maine.

In Evansville & H. Traction Co. v. Henderson Bridge Co., 134 Fed. Rep. 973, there is a very interesting case upon this question. In the syllabus of said case the following langauge is used:

"A statute of Indiana cannot give a right to use a bridge across the Ohio river beyond low water mark, which constitutes the boundary line of the state."

On p. 975 of the opinion the court uses this language:

"Beyond this, however, is the question, much discussed at the hearing, as to whether the Indiana law can have any controlling effect upon the propositions involved in the case. Neither by virtue of its enactment by the Indiana legislature, nor by the lesser matter of its acceptance by the defendant, could Indiana law have any vigor south of the low water line on the Indiana side of the Ohio river, which line is the boundary limit of the state of Indiana and of its jurisdiction. Even assuming that defendant's bridge is a public highway in Indiana, the laws of that state and the consent of defendant to accept the benefits thereof cannot give any vigor to those laws in Kentucky. The mere acceptance of their benefits by a Kentucky corporation, with the consent and under the authorization of this state, does not bring those laws across the Ohio river even on a bridge. This seems clear enough, and, if the court be correct in that conclusion, the provisions of the Indiana law, both as respects the uses to which the Indiana end of the bridge may be put and as to the duties of the defendant in Indiana, may be let out of consideration, leaving us only to deal with the rights of the complainant and the duties of the defendant in this case, as they may be fixed by or as they may depend upon the laws of Kentucky alone."

4. The principle of law is well established that in so far as the building of the bridge involves the navigability of a stream, the federal government has sole jurisdiction under its power to regulate commerce between the states and with foreign nations.

In support of this proposition, we desire to call attention to the case of Newport & Cincinnati Bridge Co. v. The United States, 105 U. S. 470. In the syllabus the court say:

"1. The paramount power of regulating bridges that affect the navigation of the navigable waters of the United States, is in congress.

* * * * * * * * * * *

"3. The power of congress, in respect to legislation for the preservation of interstate commerce, is free from state interference. When, therefore, congress in a proper way declares a bridge across a navigable river of the United States to be an unlawful structure, no legislation of a state can make it lawful."

On p. 475 of the opinion, Chief Justice Waite uses the following language:

"The paramount power of regulating bridges that affect the navigation of the navigable waters of the United States is in congress. It comes from the power to regulate commerce with foreign nations and among the states. That the Ohio is one of the navigable rivers of the United States must be conceded. It forms a boundary of six states and the commerce upon its waters is very large."

5. With the above fundamental principles in mind, let us now turn to a history of the legislation that has to do with the bridge about which you speak in your communication.

Section 9310 G. C. provides as follows:

"A company organized to construct a bridge over the Ohio river may construct and maintain such bridge, with suitable avenues or approaches leading thereto, and with a single span or a draw, as it determines; but in either case, in order that the bridge may not obstruct the navigation of the river, it shall be built in accordance with an act of congress approved July 14, 1862, entitled, 'an act to establish certain post-roads,' or any act subsequently passed on the subject."

In reference to fixing and collecting tolls for the use of any bridge erected across the Ohio river, section 9312 G. C. provides as follows:

"Such company may fix and collect reasonable rates of toll for all persons, animals, vehicles and property passing or transported over the bridge, but which at no time shall exceed those collected at the Covington and Cincinnati bridge. The company shall set up and keep in a conspicuous place, at each end of the bridge, a board on which the rate is written, painted, or printed in a plain, legible manner."

So much for Ohio legislation.

Section 2014 of the West Virginia code provides as follows:

"Corporations may be formed under the provisions of the first twenty-four sections of chapter 54 of the code, for the purpose of bridging the Ohio river. Any such corporation or any railroad company is hereby authorized to construct or maintain a bridge across said river in the manner now or which may hereafter be provided by the congress of the United States, upon complying with the requirements, conditions and provisions so prescribed, and not otherwise; and such corporation is authorized to take tolls for the passage of persons, railroad cars, engines, vehicles and other things passing on and over such bridge. * * *"

I want to call attention right here to the fact that the laws of Ohio provide that *reasonable* rates of tolls may be fixed and collected by the company, while the West Virginia laws simply authorize the corporation to take tolls for the passage of persons, etc.

Let us now turn to the legislation enacted by congress in reference to the erection of the bridge at Steubenville. The act was passed July 14, 1862, chapter 167, 12 Statutes at Large, p. 569, and was, "An act to establish certain post-roads." The act provides that the bridge partly constructed across the Ohio river at Steubenville, in the state of Ohio, abutting on the Virginia short of said river, is hereby declared to be a lawful structure. It further provides that when completed, it shall have been so constructed as to leave the navigation of the river unobstructed; also for certain dimensions, etc.; that said bridge is hereby declared to be a public highway, and the act establishes a post-road for the purpose of transmission of mails of the United States, and provides that the parties interested therein, or either of them, are authorized to complete, maintain and operate said road and bridge when completed, as set forth in the preceding section (which section provides for dimensions, etc.), anything in any law or laws of the above named states to the contrary notwithstanding.

6. Now, with all the above kept clearly in mind, the next important question that arises is as to whether the traffic carried on across the bridge is interstate commerce or not. If it be interstate commerce, the federal authorities have com-

plete and final jurisdiction over all matters connected with the traffic over the bridge. This is one of the important questions raised in your communication and I shall therefore give it careful consideration.

In Boyle v. The Philadelphia & Reading Ry. Co., 54 Pa. St. 310, the court, in the fourth branch of the syllabus, makes the following distinction:

> "'Toll' is a tribute or custom paid for *passage,* not for *carriage;* something taken for a liberty or privilege, not for a service."

In Commonwealth v. Henderson Bridge Co., 99 Ky. 623, the court was called upon to pass upon such a question, and held:

> "This defendant company is not engaged in commerce or transportation at all. It has no authority or power or franchise to engage in commerce or transportation. It was simply authorized to build this bridge, and, when built, then the railroads that may be engaged in transportation, and so indirectly engaged in commerce, may transmit merchandise and passengers over its structure, in consideration of a reasonable rate of toll for so doing. This is all; nothing more."

In the above case the bridge company was attempting to escape a franchise tax imposed by the laws of Kentucky, on the ground that it was engaged in interstate commerce.

The above cases, and others which might be cited, seem to indicate that the traffic across a bridge of the kind under discussion is not interstate commerce in any sense of the term, and therefore would not under any circumstances be regulated by congress.

There is a case reported in 154 U. S. 204, styled Covington & Cincinnati Bridge Co., Plff. in Err., v. Commonwealth of Kentucky, which seems to decide this question the other way, although the language used in what might be termed the syllabus and the language used in the opinion proper, when compared with that used in the concurrence of the opinion, is, to say the least, very confusing; yet I feel that we can draw from this case certain principles which will control in the matter under consideration and which at least establishes the proposition that the traffic across a bridge of the kind under consideration is in the nature of interstate commerce. In the syllabus it is stated:

> "A state has no power to regulate tolls upon a bridge connecting such state with another state; congress alone has such power.
>
> "Whether two states can, in the absence of legislation by congress, fix, by reciprocal action, the rates of toll and fare over a bridge connecting such states, this court does not decide in this case.
>
> "A bridge across waters between two states and connecting such states, is an instrument of interstate commerce and traffic across it is interstate commerce."

In studying the opinion carefully, we find that the language used above is not warranted, from the real finding of the court, and, therefore, to ascertain what the court really decided, we must turn to the opinion itself.

On p. 209 the court states the question involved in the case as follows:

> "This case involves the power of a state to regulate tolls upon a bridge connecting it with another state, without the assent of congress, and without the concurrence of such other state in the proposed tariff."

In discussing this question, the court further on in the opinion lays down the fundamental principles which control in the matter of commerce, as follows:

"1. Those in which the power of the state is exclusive;

"2. Those in which the states may act in the absence of legislation by congress;

"3. Those in which the action of congress is exclusive and the states cannot interfere at all."

In discussing these three propositions, the court say that one illustration of the cases coming under the second division, namely, wherein the states and congress have concurrent jurisdiction, is, "the construction of dams and bridges across the navigable waters."

In its reasoning on p. 220 the court uses the following language:

"It is clear that the state of Kentucky, by the statute in question, attempts to reach out and secure for itself a right to prescribe a rate of toll applicable not only to persons crossing from Kentucky to Ohio, but from Ohio to Kentucky, a right which practically nullifies the corresponding right of Ohio to fix tolls from her own state. It is obvious that the bridge could not have been built without the consent of Ohio, since the north end of the bridge and its abutments rest upon Ohio soil; and without authority from that state to exercise the right of eminent domain, no land could have been acquired for that purpose. It follows that, if the state of Kentucky has the right to regulate the travel upon such bridge and fix the tolls, the state of Ohio has the same right, and so long as their action is harmonious there may be no room for friction between the states; but it would scarcely be consonant with good sense to say that separate regulations and separate tariffs may be adopted by each state (if the subject be one for state regulation), and made applicable to that portion of the bridge within its own territory. So far as the matter of construction is concerned, each state may proceed separately by authorizing the company to condemn land within its own territory, but in the operation of the bridge their action must be joint or great confusion is likely to result."

The court uses the following language on p. 222:

"We do not wish to be understood as saying that, in the absence of congressional legislation or mutual legislation of the two states, the company has the right to fix tolls at its own discretion. There is always an implied understanding with reference to these structures that charges shall be reasonable, and the question of reasonableness must be settled as other questions of a judicial nature are settled, by the evidence in the particular case."

At the conclusion of the opinion in this case we find language used which we feel can safely be relied upon in arriving at the conclusion as to what the court really found in the case before it. The language is as follows:

"Mr. Chief Justice Fuller, Mr. Justice Field, Mr. Justice Gray and Mr. Justice White concurred in the judgment of reversal, for the following reasons:

"The several states have the power to establish and regulate ferries and

bridges, and the rates of toll thereon, whether within one state, or between two adjoining states, subject to the paramount authority of congress over interstate commerce.

"By the concurrent acts of the legislature of Kentucky in 1846, and of the legislature of Ohio in 1849, this bridge company was made a corporation of each state, and authorized to fix rates of toll.

"Congress, by the act of February 17, 1865, chap. 39, declared this bridge 'to be, when completed, in accordance with the laws of the states of Ohio and Kentucky, a lawful structure;' but made no provision as to tolls; and thereby manifested the intention of congress that the rates of toll should be established by the two states. 13 Stat. at L. 431.

"The original acts of incorporation constituted a contract between the corporation and both states, which could not be altered by one state without the consent of the other."

From the above, I feel I am safe in arriving at the following conclusions:

1. One state alone cannot fix a schedule of charges or tolls for passage over a bridge across a navigable stream located on the boundary between two states. This principle seems established beyond a doubt.

2. Traffic over the bridge is in the nature of interstate commerce, or, in other words, it is commerce of such a nature that congress and the states concerned have concurrent jurisdiction over the matter of fixing tolls charged for such traffic.

3. The right of congress to act in the matter of fixing tolls and tariffs for the traffic across the bridge is paramount but not exclusive.

4. If congress does not speak through legislative action, its intention is manifested to the end that the states may concurrently act in the matter of fixing the tolls and tariff.

5. If neither congress nor the states act in the matter of fixing a rate of tariffs for passage across the bridge, the courts will grant relief in cases where the company owning the bridge charges an unreasonable tariff for passage across the same.

With these fundamental principles in mind, let us also remember, in view of what has been set out above, that the state of West Virginia and the state of Ohio have concurrently granted the franchises to the said bridge company, to locate its bridge across the Ohio river; that congress has fixed no schedule or tariff of rates in the matter of passage across the bridge, simply having declared the bridge to be a legal structure when completed according to plans and specifications set out in the act; and that neither the state of Ohio nor the state of West Virginia, nor both acting concurrently, have attempted to fix a schedule of rates that may be legally charged by the bridge company.

From all the above the answer to your question is fairly evident and is as follows:

(1) The people interested might appeal to congress to fix a schedule of rates for passage across the bridge, inasmuch as the right of congress to act in this matter is paramount.

(2) Inasmuch as congress has not seen fit to act in this matter, the people interested might appeal to the states of West Virginia and Ohio to act concurrently in the matter of fixing a schedule of rates to be charged by the company for passage across the bridge.

(3) If the people interested do not care to appeal to congress or to the legislatures of the states of West Virginia and Ohio for relief, they might, as suggested in Covington & Cincinnati Bridge Co. v. Commonwealth of Kentucky, supra, appeal to the courts.

But here the same question arises that we considered in reference to the law-making bodies. What court has jurisdiction over a matter such as this? Have the federal courts jurisdiction, or have the state courts jurisdiction? As said above, congress has the paramount right and power to enact legislation in reference to the tolls that may be charged for passage across the bridge, for the reason that the traffic is in the nature of interstate commerce; but congress has never acted in reference to this matter. Hence, I am of the opinion that the federal courts have nothing over which they may exercise jurisdiction.

In 8 Fed. 190, there is a case styled Canada South. Ry. Co. v. International Bridge Co., which involves facts very similar to those under consideration. The Canada Southern Ry. Co. applied to the federal courts, asking them to determine the rate of tolls to be charged for the use of a bridge erected by the defendant, The International Bridge Co. This bridge company was chartered under the laws of the state of New York and the Dominion of Canada. In these charters no limitation was placed upon the rate of tolls to be charged for the use of the bridge by railway trains, but the directors were empowered to charge such tolls as they might deem expedient. The bridge rested upon the soil of the state of New York and the Dominion of Canada and was across navigable waters.

Congress had enacted some legislation in reference to the bridge, but said nothing about the rate of tolls. The defendant raised the question that the act of congress did not confer power upon the court to prescribe the compensation which the bridge company might charge for the use of its property, and that therefore the court had no jurisdiction over the matter. The court held that the contention of the defendant was correct and dismissed the petition on the ground that it had no jurisdiction in the matter. In fact this case went so far as to almost hold that in no case could the courts assume jurisdiction to determine the matter of tolls unless express jurisdiction were given to it for this purpose.

So that in view of the holding of the court in this case and of the fact that congress has enacted no legislation whatever in the case under consideration, in reference to the matter of tolls, it is my opinion that the federal courts have no jurisdiction over the matter.

If the federal courts have no jurisdiction, have the courts of this state jurisdiction, when we remember that one end of the bridge is on the soil of West Virginia? Would an order of the court bind the bridge company as to its rights on the West Virginia side of the river?

In State of Maryland v. Northern Central Ry. Co., 18 Md. 193, the court laid down the following propositions of law in the syllabus:

> "Corporations owing their corporate existence, in part, to the state of Maryland, and exercising their franchises therein, may be restrained from expending their funds for any other than corporate purposes anywhere.
>
> "A plea, by a corporation, to the jurisdiction of a Maryland court, on the ground that the corporate property lies partly in another state, or that its corporate existence is derived, in part, from a charter of another state, is not tenable.
>
> "Such a corporation must, for the purposes of justice, be treated as a separate corporation by the courts of each state from which it derives its being; that is, is a domestic corporation to the extent of the state in which it acts, and as a foreign corporation as regards the other sources of its existence."

In Alexander v. Tolleston Club, 110 Ill. 65, the court say in the syllabus:

> "A court of equity in this state has jurisdiction of a bill, the object of

which is to obtain an injunction to prevent the defendant from interfering with a right of way claimed by the complainant over lands situate in another state, where the defendants are personally served. The jurisdiction in equity by way of injunction is strictly *in personam.*"

In the opinion on p. 77 the court say:

"The further objection made is, that the circuit court had no jurisdiction over the subject-matter of the action because the land was in another state. Appellant resided within the jurisdiction of the court and was personally served with process. The object of the bill was to obtain an injunction to prevent appellant from interfering with a right of way claimed by complainant over lands situated in the state of Indiana, under a lease, the controversy involving the construction of the lease. The jurisdiction of equity by way of injunction is strictly *in personam.* It is well settled that courts of equity may decree the specific performance of contracts respecting land situated beyond the jurisdiction of the state where suit is brought. The ground of this jurisdiction, as said by Story, is, that courts of equity have authority to act upon the person; and although they cannot bind the land itself by their decree, yet they can bind the conscience of the party in regard to the land, and compel him to perform his agreement according to conscience and good faith."

So that in view of the above decisions it is my opinion that the people interested might appeal to the courts of our state for relief.

In passing, however, I desire to call attention to a case found in 234 U. S. 317, styled Ft. Richmond, etc., v. Board of Chosen Freeholders, etc. The finding in this case is broad enough to permit the legislature of the state of Ohio to act alone in so far as tolls to be charged for passage from the state of Ohio to the state of West Virginia is concerned; but the legislature of the state of Ohio could not act in so far as passage from the state of West Virginia to Ohio is concerned. Hence, if you should simply desire to control the rates of passage from the state of Ohio to the state of West Virginia, the legislature of Ohio could act independently of that of West Virginia.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

429.

TOWNSHIP CLERK—SALARY NOT TO EXCEED $150.00 PER ANNUM.

The township clerk is entitled to receive, as his compensation for any one year, the sum of not to exceed $150.00.

Amounts received over and above the sum of $150.00 *by the township clerk should be returned to the township treasury.*

COLUMBUS, OHIO, July 6, 1917.

HON. EARL K. SOLETHER, *Prosecuting Attorney, Bowling Green, Ohio.*

DEAR SIR:—In your letter of June 14, 1917, previously acknowledged, you request my opinion as follows:

> "Referring to the examination of the township accounts of Henry township, Wood county, Ohio, from August 22, 1914, to November 3, 1916, by State Examiner C. C. Davis, you will find the following finding:
>
> "(7) Clerk, William B. Henning, received as follows:
>
> "For 1914, amount paid, $250.00; excess, $100.00.
>
> "For 1915, amount paid, $250.00; excess, $100.00.
>
> "For 1916, amount paid, $262.50; excess, $111.50.
>
> "Total finding of $311.50 being made against Mr. Henning.
>
> "You will further note that the examiner made findings against the trustees of this township for the reason that stone road improvements had not been made under the subdivision covered by section 6999 G. C.
>
> "These findings against the trustees were later cancelled by the bureau of inspection and supervision of public offices for the reason that a further examination of the stone road books of this township showed that this township was improving its roads under the provisions of sections 6976 to 7018 G. C. inclusive. I made an extensive examination of the stone road books of this township and found that they had been improving under these sections ever since the law was enacted, and upon this showing being made to the bureau of inspection they promptly cancelled the finding against the trustees.
>
> "It seems to me that the same reasoning would apply in the case of the clerk, as according to section 6999, he is entitled to services performed under sections 6976 to 7018 inclusive, an allowance not to exceed $100.00 in any one year. Section 3294 G. C. limits the amount to be paid to the trustees to $150.00 per year, and section 3308 limits the amount a clerk is entitled to receive to $150.00 per year. If the trustees are entitled to the additional $100.00 under section 6999, I can see no reason why the clerk should not receive pay for his services under this same section not to exceed $100.00 per year.
>
> "In view of the above facts, I wish you would render me an opinion as to whether the finding against the clerk is correct."

Your inquiry calls for a consideration of those sections of the General Code which provided for the compensation of a township clerk prior to the enactment of what is commonly called the Cass road law.

General Code section 3308 provides as follows:

> "The clerk shall be entitled to the following fees, to be paid by the parties requiring the service; twenty-five cents for recording each mark

or brand; ten cents for each hundred words of record required in the establishment of township roads, to be opened and repaired by the parties; ten cents for each hundred words of records or copies in matters relating to partition fences, but not less than twenty-five cents for any one copy, to be paid from the township treasury; ten cents for each hundred words of record required in the establishment of township roads, to be opened and kept in repair by the superintendents; for keeping record of the proceedings of the trustees, stating and making copies of accounts and settlements, attending suits for and against the township and for any other township business the trustees require him to perform, such reasonable compensation as they allow. In no one year shall he be entitled to receive from the township treasury more than one hundred and fifty dollars."

The above section is followed in ascertaining the compensation of the township clerk in all township matters, that is, in all matters in which the township as a whole is interested or matters which would be considered "township business."

Under the General Code sections which provide how township roads should be improved, and especially under the subdivision beginning with section 6976 and ending with section 7018, a certain plan was permitted for road improvement by township trustees. Said plan provided that when a petition of one hundred or more taxpayers of such township was presented to the trustees of the township, praying for the improvement of the public roads within such township, and which includes a road running into or through a village or city, that the township trustees should submit the question of such improvement to the qualified electors of the township at a general or special election held therein, and that if said proposition carried, then the roads of said township should be improved as provided by said subdivision.

It is a separate and distinct plan and is distinguished from the other plans set forth in the various subdivisions of said chapter in which the same is found by being a complete scheme of procedure and different from that which was followed when acting under other subdivisions of said chapter. Under said subdivision the township trustees, by virtue of section 6999, are entitled to a compensation other and different from their regular compensation as such trustees. That is, under said subdivision the township trustees are entitled to the sum of $2.00 per day for the time actually employed in addition to the fees allowed otherwise by law for other services. For other township services generally township trustees are only entitled to the sum of $1.50 per day.

It is also provided in said subdivision that the township treasurer shall receive compensation other and different from his regular fees as such township treasurer. That is to say, for handling the township money generally the township treasurer receives the sum of two per cent., but under the subdivision of said chapter, above referred to, and as provided by General Code section 7015, the township treasurer shall receive and disburse the monies arising from the provisions of the subdivision of this chapter, and shall receive as compensation therefor one-half of one per cent. of the first ten thousand, or less, distributed in any one year, and one-fourth of one per cent. of any amount in excess of ten thousand dollars, to be paid out of the township funds, and he shall receive no other compensation for services rendered under said subdivision of said chapter.

It is also provided in said subdivision of said chapter, and in section 6999:

> "The trustees shall allow the township clerk for his *services under such subdivision* a reasonable compensation not to exceed one hundred dollars in any one year."

The services of the township clerk, under such subdivision of said chapter, are no different than are the services of the township trustees different from their other services as township trustees, and are no different than are the services of the township treasurer different from his regular duties as such township treasurer. How a distinction could be made between these different officials is a thing I am not quite able to understand.

Under section 3294 G. C., the compensation of any trustee, to be paid from the treasury of the township, shall not exceed in any one year the sum of $150.00, but said sum is or may be made up in part of the $2.00 per day which is allowed such trustees under the subdivision of said chapter, and in part of the $1.50 per day which is allowed under section 3294 G. C.

Section 3308 G. C. provides:

> "In no one year shall he (the clerk) be entitled to receive from the township treasury more than $150.00."

Said $150.00 may be made up of such reasonable compensation as the township trustees may allow the township clerk for his services under the subdivision of the chapter, above referred to, or it may be made up from the fees for services performed in other township matters, but in either event whenever the amount of such fees, or whenever the amount of such reasonable compensation, reaches the amount of $150.00 in any one year, then under the provisions of section 3308 no greater amount can be paid.

I do not understand that the bureau of inspection and supervision held that your township trustees could draw more than $150.00 in any one year. As I understand it, what the bureau did hold was that the amount which the trustees could draw was ascertained for the services rendered under the subdivision of said chapter above referred to, at the rate of $2.00 per day, under section 6999, instead of at the rate of $1.50 per day, as provided by section 3294 G. C., and that the whole amount could not, in any one year, exceed the sum of $150.00. The same reasoning would apply to the township clerk if his services for matters outside of those rendered under the subdivision of the chapter above referred to amounted to the sum of $150.00. Then no matter what the trustees should allow him under section 6999, he would not be entitled to receive the same from the township treasury on account of the prohibition contained in section 3308.

In the same opinion of my predecessor, above referred to, the following language is used:

> "I am of the opinion that for services rendered by the township clerk in the performance of duties required by the statutes governing the aforesaid plan of township road improvement, said clerk is entitled to a reasonable compensation not to exceed $100.00 in any one year, to be allowed by the township trustees under authority of section 6999 of the General Code, and that said compensation is in lieu of any allowance for such service under authority of section 3308 G. C., *and is subject to the limitation of one hundred and fifty dollars per year provided by said section.*"

I concur in the above and, answering your question, advise you that the finding of the examiner is correct and that the township clerk should return the amount of such finding to the township treasurer.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

429½.

STATE HIGHWAY DEPARTMENT—MONEY SPENT BY SAID DEPARTMENT—SHOULD BE TAKEN INTO CONSIDERATION—IN DETERMINATION OF AMOUNT OF PREMIUM DUE FROM STATE TO INDUSTRIAL COMMISSION.

The amount of money paid out by the state highway department for labor, either directly or through an agent, under the provisions of section 1209 *G. C., should be included in the amount of money spent by the state during the preceding fiscal year and the premium thereon should be taken care of as provided in section* 1465-64 *G. C.*

COLUMBUS, OHIO, July 6, 1917.

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

DEAR SIR:—I have your communication of June 5, 1917, which reads as follows:

> "Attached hereto please find statement of the Industrial Commission of Ohio addressed to Edmund Burke claiming a premium of $112.00 covering the employment of twenty employes by Mr. Burke as an employer.
>
> "I am submitting herewith copy of a contract which this department has with Mr. Burke for the improvement of section 'I' of the Columbus-Millersburg road, I. C. H. No. 23, in Knox county, and respectfully request that you advise me whether Mr. Burke or this department is liable for the payment of the premium requested by the Industrial Commission."

Your question arises under the following statement of facts and provisions of law.

Your department originally let a contract for the improvement of section "I" of the Columbus-Millersburg road, I. C. H. No. 23, in Knox county. The original contractor failed to proceed with the work as provided in the contract and your department, under the provisions of section 1209 G. C., took the work over and is completing it under what is termed force account.

Said section 1209 G. C. reads in part as follows:

> "If, in the opinion of the state highway commissioner, the contractor has not commenced his work within a reasonable time, or does not carry the same forward with reasonable progress, or is improperly performing his work, or has abandoned, or fails or refuses to complete a contract entered into under the provisions of this chapter (G. C. Secs. 1178 to 1231-3), the state highway commissioner shall have full power and authority to enter upon and construct said improvement either by contract, force account or in such manner as he may deem for the best interest of the public, paying the full costs and expense thereof from the balance of the contract price unpaid to said contractor, and in case there is not sufficient balance to pay for said work, the state highway commissioner shall require the contractor or the surety on his bond to pay the cost of completing said work. * * *"

In completing this improvement under force account, you employed Edmund Burke as your agent and entered into a contract with him for the completion of the same. The contract which you attached to your communication is too lengthy

to set out in full, but I will quote the parts of same which are necessary to enable me to render an opinion upon the matter submitted in your communication.

The "SECOND" provision of said contract reads as follows:

"SECOND: The party of the second part agrees to act as the agent of the party of the first part in employing all necessary labor, teams and all employes necessary in the completion of the work. The number of said teams, laborers and other employes and the price to be paid for their services, shall be subject to the approval of the party of the first part, except that party of the second part agrees to furnish competent foremen to be approved by the party of the first part for the sum of $4.00 per day. The compensation of said laborers, teams and other employes shall be paid by the party of the first part."

The "FOURTH" provision of said contract reads as follows:

"FOURTH: The party of the second part agrees to supervise the work of completing said improvement according to the plans and specifications heretofore prepared therefor on file in the office of the state highway commissioner and to the satisfaction and acceptance of the party of the first part. The party of the second part agrees to so supervise and superintend the completion of the said work that no damage will result to third persons and be responsible for any damage that may result by reason of any unlawful act on its part or the part of the laborers, foremen and other employes acting under its supervision and control."

From these two provisions it will be readily seen that Edmund Burke is merely the agent of the state of Ohio in the matter of the completion of this highway, and is not responsible for the payment of the premium for injury to the men, unless it be due to his own unlawful act or the unlawful act of his foremen and employes.

If Edmund Burke is not liable for the payment of this premium of $112.00, the question then arises, is the state of Ohio liable for the payment of same? In order to ascertain this it will be necessary for us to note the provisions of a number of sections which have to do with what is termed the workmen's compensation law of the state.

Section 1465-60 G. C. reads in part as follows:

"The following shall constitute employers subject to the provisions of this act (* * *):

"1. The *state* and each county, city, township, incorporated village and school district therein.

"* * *"

Section 1465-61 G. C. reads in part as follows:

"The terms 'employe,' 'workman' and 'operative' as used in this act, shall be construed to mean:

"1. Every person in the service of the state, or of any county, city, township, incorporated village or school district therein, including regular members of lawfully constituted police and fire departments of cities and villages, under any appointment or contract of hire, express or implied, oral or written, except any official of the state, or of any county, city,

township, incorporated village or school district therein. Provided that nothing in this act shall apply to policemen or firemen in cities where policemen's and firemen's pension funds are now or hereafter may be established and maintained by municipal authority under existing laws.

"* * *."

From the provisions of these two sections I think it is quite evident that the state, in the matter suggested by you, is liable for the payment of a premium, for the reason that it has in its employ persons as set out in section 1465-61 G. C. If it is liable for a premium, for what premium is it liable?

Section 1465-62 G. C. reads as follows:

"Every employer mentioned in subdivision one of section thirteen hereof (G. C. Sec. 1465-60), shall contribute to the state insurance fund in proportion to the annual expenditure of money by such employer for the service of persons described in subdivision one of section fourteen hereof (G. C. Sec. 1465-61), the amount of such payments and the method of making the same to be determined as hereinafter provided.".

Section 1465-63 G. C. reads as follows:

"The amount of money to be contributed by the state itself, and by each county, city, incorporated village, school district or other taxing district of the state shall be, unless otherwise provided by law, a sum equal to one per centum of the amount of money expended by the state and for each county, city, incorporated village, school district or other taxing district respectively during the next preceding fiscal year for the service of persons described in subdivision one of section fourteen hereof (G. C. Sec. 1465-61)."

From the provisions of these two sections it is evident that the state must contribute, to the state insurance fund, one per cent. of the amount expended by it in any one year.

Section 1465-64 G. C. reads as follows:

"In the month of January in the year 1914 the auditor of state shall draw his warrant on the treasurer of state in favor of said treasurer as custodian of the state insurance fund, and for deposit to the credit of said fund, for a sum equal to one per centum of the amount of money expended by the state during the last preceding fiscal year, for the service of persons described in subdivision one of section fourteen hereof (G. C. Sec. 1465-61), which said sums are hereby appropriated and made available for such payments; and thereafter in the month of January of each year, such sums of money shall in like manner be paid into the state insurance fund as may be provided by law; and it shall be the duty of the Industrial Commission of Ohio to communicate to the general assembly on the first day of each regular session thereof, an estimate of the aggregate amount of money necessary to be contributed by the state during the two years next ensuing as its proper portion of the state insurance fund."

What answer to your question do we obtain from the provisions of the sections herein quoted? It is evident that the state is not liable for the payment of the premium of $112.00. However, the amount of money that your depart-

ment pays out during any one year, directly or through an agent, for the completion of contracts, under and by virtue of the provisions of section 1209 G. C., should be taken into consideration in arriving at the conclusion as to the amounts to be paid into the state insurance fund under the provisions of section 1465-64 G. C.

Hence, answering your question specifically, neither Mr. Burke nor your department is liable for the payment of the premium of $112.00. But the matter of the premium paid would be regulated by the provisions of section 1465-64 G. C.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

430.

KAUSTINE CHEMICAL CLOSETS—LIMITATION UPON THE USE OF SAME.

The state board of health has authority to permit the use of Kaustine chemical closets subject to the following limitations:

Such closets may not be installed in a school house or other building. See Secs. 12600-65 *and* 12600-218 *G. C.*

They may not be installed within two (2) *feet of any lot or alley line, or twenty* (20) *feet of any street line or any building of human habitation or occupancy, or within fifty* (50) *feet of any cistern, well, spring, or other source of water supply used for drinking or culinary purposes, whether they are located on the same or an adjoining lot or premises.*

See Sec. 12600-267 *G. C.*

Sec. 12600-267 *G. C., relating to the construction of privy vaults, has no application to Kaustine chemical closets.*

COLUMBUS, OHIO, July 6, 1917.

The State Board of Health, Columbus, Ohio.

GENTLEMEN:—I have your letter of recent rate, as follows:

> "Section 12600-65 G. C. in specifying school building sanitation, states '* * * Where water supply and sewerage systems are not available no sanitary equipment shall be installed within the building, but pumps in lieu of drinking fountains, closets and urinals in the above proportions shall be placed upon the school building grounds, and no closets or urinals shall be placed nearer any occupied building than fifty (50) feet.'
>
> "Section 12600-267 G. C. prescribes the location of privy vaults and prohibits their construction within fifty (50) feet of any school building. Section 12600-268 prescribes the construction of vaults specifying materials and methods.
>
> "In an opinion date July 25, 1916, the attorney-general states 'Whatever may be claimed for the Kaustine system chemical closets, it must certainly be regarded as a sanitary equipment for the uses and purposes for which it has been originated, and it is my opinion that the sweeping provisions of section 12600-65 G. C., supra, clearly prohibits the installation of this or any similar device inside of a school building in this state.'
>
> "We desire to bring the above to your attention in connection with a request for consideration of what power the state board of health may have to adopt regulations pertaining to the installation, use and mainte-

nance of chemical closets. We believe that cognizance of the advantages of chemical closets over privy vaults, as this term is generally accepted, may properly be taken, at the same time recognizing the limitations of chemical closets, their inferiority to plumbing and the construction and maintenance which should be required. Obviously, in our opinion, the above sections of the General Code do not recognize any device which might be considered intermediate between plumbing fixtures and privy vaults, and as chemical closets must be considered sanitary equipment and not plumbing fixtures, the privy vault requirements seem to apply to them. We have in mind that it may be just and proper to put into effect regulations which will satisfactorily control the location, construction, installation, use and maintenance of chemical closets, recognizing their advantages and limitations.

"It is respectfully requested that you furnish this department an opinion in answer to the following:

"1. In enforcing the state building code (sections 12600-1 to 12600-282 G. C.), has the state board of health authority to permit the installation and use of chemical closets?

"2. If so, (a) must such equipment be located and installed as prescribed by sections 12600-267 and 12600-268 G. C., pertaining to privy vaults? or (b) has the state board of health authority to adopt and enforce regulations to control the location, construction, installation, use and maintenance of chemical closets and urinals?"

I am also in receipt of a copy of a report of a committee appointed by your board concerning the Kaustine chemical closet, with the recommendations of such committee as to the use of such closet.

Section 1237 G. C. reads:

"The state board of health shall have supervision of all matters relating to the preservation of the life and health of the people and have supreme authority in matters of quarantine, which it may declare and enforce, when none exists, and modify, relax or abolish, when it has been established. It may make special or standing orders or regulations for preventing the spread of contagious or infectious diseases, for governing the receipt and conveyance of remains of deceased persons, and for such other sanitary matters as it deems best to control by a general rule. It may make and enforce orders in local matters when emergency exists, or when the local board of health has neglected or refused to act with sufficient promptness or efficiency, or when such board has not been established as provided by law. In such cases the necessary expense incurred shall be paid by the city, village or township for which the services are rendered."

Section 1261-2 G. C. reads:

"It shall be the duty of the state board of health, within ninety days after the passage and approval of this act, to appoint an elector of this state to fill the office of state inspector of plumbing, and to hold office until such a time as his successor may be appointed and qualified. The person so appointed must be a plumber with at least ten years' experience. The state board of health shall have the power to make and enforce rules and regulations governing plumbing to carry out the provisions of this act."

Section 12600-65 G. C. reads:

"*Sanitation.* Where a water supply and sewerage system are available a sanitary equipment shall be installed as follows:

"In the superstructure of the building one sink and one drinking fountain shall be installed on each floor to each six thousand (6,000) square feet of floor area or less.

"In the basement one sink and one drinking fountain shall be installed on the males' side, and the same on the females' side to each three hundred and fifty (350) pupils, or less.

"Sinks shall be the ordinary slop sinks, or in lieu of same, lavatories may be used providing the waste plug or stopper has been removed.

"Sanitary schoolhouse drinking fountains with jet giving a continuous flow of water shall be installed, and no tin cups or tumblers shall be allowed in or about any school building.

"In libraries, museums and art galleries there shall be provided the following fixtures, viz.:

"One water closet to each one hundred (100) females, or less.

"One water closet to each two hundred (200) males, or less.

"One urinal to each two hundred (200) males, or less.

"The above to be based upon the actual number of persons to be accommodated, the capacity, being established as prescribed under section 12, means of egress.

"In all other school buildings there shall be provided the following fixtures, viz.:

"One water closet for each fifteen (15) females, or less.

"One water closet for each twenty-five (25) males or less.

"One urinal for each fifteen (15) males or less.

"Toilet accommodations for males and females shall be placed in separate rooms, with a traveling distance between the same of not less than twenty (20) feet.

"Juvenile or short closets shall be used for primary and grammar grade schools. This does not apply when latrine closets are used.

"In buildings accommodating males and females it shall be presumed that the occupants will be equally divided between males and females.

"Where water supply and sewerage systems are not available no sanitary equipment shall be installed within the building, but pumps in lieu of drinking fountains, closets and urinals in the above proportions shall be placed upon the school building grounds, and no closets or urinals shall be placed nearer any occupied building than fifty (50) feet.

"Where pumps or hydrants are used the outlet shall be inverted.

"Buildings more than three stories in height shall be provided with toilet rooms in each story and basement, and in these shall be installed water closets and urinals in the above required ratios in proportion to the number of persons to be accommodated in the various stories.

"Toilet rooms for males shall be clearly marked 'Boys' toilet' or 'Men's toilet' and for females 'Girls' toilet' or 'Women's tilet'."

Section 12600-267 General Code reads:

"*Location of Vault.* No vault, manure pit, open top cesspool, septic tank or other reservoir which is used as a privy or receptacle for human or animal excreta shall be located within two (2) feet of any lot or alley line or twenty (20) feet of any street line or any building of human

habitation or occupancy or within fifty (50) feet of any cistern, well, spring or other source of water supply used for drinking or culinary purposes, whether they are located on the same or an adjoining lot, or premises.

"Exception. No privy vault shall be located within fifty (50) feet of any school building."

Section 12600-218 G. C. reads:

"*Water Closets Prohibited.* Pan, valve, plunger, offset washout and other water closets except latrines having invisible seals or an unventilated space, or the walls of which are not thoroughly washed at each discharge are prohibited.

"Long hopper water closets, and similar appliances shall not hereafter be installed in any building.

"The provisions of this section shall also apply to the dry closet system or other system of closets in which the venting, back venting or local venting is to be made otherwise than in this code prescribed."

On July 25, 1916, Opinions of the Attorney-General, 1916, Vol. II, page 1276, my predecessor, Hon. E. C. Turner, rendered an opinion in which he held that "Indoor chemical closets may not be installed in school houses in view of the provisions of section 12600-65 G. C."

In that opinion Mr. Turner said:

"It is contended by counsel that the Kaustine system is a private sewage disposal system, and as such is not comprehended within the prohibitions contained in the section just quoted, and the further argument is offered that the system should not be brought within the terms of the statute for the reason that it was not originated until several years after the building code had been in force.

"Whatever may be claimed for the Kaustine system it must certainly be regarded as a sanitary equipment for the uses and purposes for which it has been originated, and it is my opinion that the sweeping provisions of section 12600-65 G. C., supra, clearly prohibit the installation of this or any similar device inside a school building in this state."

Mr. Turner in that opinion took the view that the Kaustine chemical closet was "Sanitary Equipment" within the meaning of Sec. 12600-65- G. C.

I agree with this view, and after carefully reading the report of the special committee above referred to, I am of the opinion that in determining when and where the chemical closet may be used within the provisions of the building code, we should view this closet as a "dry closet" which is, of course, also sanitary equipment. That it should not be classed as a "privy vault," I am satisfied after reading the various provisions that apply to such vaults.

The state building code, while not expressly authorizing the use of "dry closets," recognizes their use in several of its provisions, and in view of this and the provisions of Sec. 1237 to the effect that the board of health may make regulations "for such other sanitary matters as it deems best to control by a general rule." I am of the opinion that the board has authority to permit the use of these closets subject, however, to the following limitations:

Such closets may not be installed in a school house or other building. See Ssc. 12600-65 and 12600-218 G. C.

They may not be installed within two (2) feet of any lot or alley line, or

twenty (20) feet of any street line or any building of human habitation or occupancy, or within fifty (50) feet of any cistern, well, spring, or other source of water supply used for drinking or culinary purposes, whether they are located on the same or an adjoining lot or premises.

See Sec. 12600-267 G. C.

Sec. 12600-268 G. C., relating to the construction of privy vaults does not, I think, have any application.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

431.

INDUSTRIAL COMMISSION—HAS RIGHT TO COMMUTE AWARDS MADE IN CASE OF PERMANENT TOTAL DISABILITY.

1. *Section* 1465-87 *G. C. as amended by* 107 *O. L.* 162, *authorizes the industrial commission to commute awards made in cases of permanent total disability, in addition to awards made in cases of death.*

2. *Commutation may be made of awards which have been made prior to the date when said amendment became effective.*

COLUMBUS, OHIO, July 6, 1917.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—On June 29, 1917, you made the following request for my opinion:

> "On the 24th day of January, 1916, Hon. E. C. Turner rendered an opinion with respect to the allowance of lump sum awards in cases of permanent total disability. The opinion of Mr. Turner, as set forth in this communication, was to the effect that the commission was without authority to make lump sum awards in cases of this character.
>
> "We desire, in this connection, to call your attention to the following language contained in section 1465-90 of the General Code, as same is embodied in house bill 506, passed by the last general assembly:
>
> "'The commission under special circumstances, and when the same is deemed advisable, may commute *payments of compensation* or benefits to one or more lump sum payments.'
>
> "The commission requests that you express an opinion as to whether or not the above amended section will apply to application for lump sum awards in claims involving permanent total disabilities which were sustained prior to the date on which the amendment became effective.
>
> "The case is rather urgent, and we respectfully request your opinion at the earliest possible date."

The section which you quote is Sec. 1465-87 G. C., instead of 1465-90. This section as it stood prior to the amendment of 107 O. L. 162, reads:

> "The board, under special circumstances, and when the same is deemed advisable, may commute periodical benefits to one or more lump sum payments."

As amended (107 O. L. 162), it reads:

> "Sec. 1465-67. The commission, under special circumstances, and when

the same is deemed advisable, may commute payments of compensation or benefits to one or more lump sum payments."

The opinion of Attorney-General Turner, to which you refer, was based on the theory that old section 1465-87 only authorized commutation of *benefits* payable to the dependents of killed employes, while there was no authority to commute *compensations* payable to injured employes.

This distinction has been eliminated by the legislature in amending this section by the addition of the words, "Payments of compensation or," and the omission of the word, "periodical;" and as Sec. 1465-90 G. C., and other sections of the act, give the board full power and authority to determine all questions within its jurisdiction, said section 1465-87 as amended, puts the commutation of compensation and benefits squarely within the jurisdiction of the board.

The amendment of Sec. 1465-87, conceding that the same was necessary in order to allow the board to commute periodical payments of compensation in case of permanent total disability, does not interfere in any way with any right which existed before the amendment. As the law stood prior to the amendment, the fund was presumably liable for the total amount of compensation awarded, but the same could only be paid in periodical payments, no matter how urgent might be the reason for commuting the award. Under the amendment the employe is not compelled to accept commutation in place of periodical payments. As a matter of fact, the amendment is for his advantage, and it is safe to say commutation will never be made except upon the application of the claimant. The amendment cannot have the effect of increasing or decreasing awards, and has no effect on awards that have been made, except to authorize commutation of the same and immediate payment of a lump sum, instead of a long series of periodical payments.

Therefore there is no reason why this amendment should not apply to a case in which an award has been made prior to the date upon which it became effective, if application is made for commutation of the balance due under such award, and the board deems it advisable to commute the same. Express power to so commute existing awards is given by Sec. 1465-86, taken in connection with Sec. 1465-87 as amended. Said section 1465-86 provides:

"The powers and jurisdiction of the board over each case shall be continuing, and it may from time to time make such modification or change with respect to former findings or orders with respect thereto, as, in its opinion may be justified."

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

432.

PRINCIPALS—IN PUBLIC SCHOOLS IN CITY DISTRICTS—MAY BE APPOINTED BY THE SUPERINTENDENT.

"Principals" in the public schools are teachers, and under section 7703 General Code, in city districts, may be appointed by the superintendent.

COLUMBUS, OHIO, July 7, 1917.

HON. FRANK B. PEARSON, *Superintendent of Public Instruction, Columbus, Ohio.*

DEAR SIR:—An inquiry has been received by this department from Hon. Max E. Brunswick, city solicitor, Youngstown, Ohio, in reference to a matter concerning your department, which inquiry is as follows:

"A question has arisen in our city in regard to the authority of the

superintendent of schools to employ a principal of high school. This department was requested by the board of education to render an opinion in regard to this matter. We decided that the superintendent of schools had no such authority. An opinion purporting to come from the state superintendent of schools was published in our local papers last Saturday in a communication from our superintendent of schools, which was not in accord with the opinion we rendered the board of education.

"We beg to inquire whether you would, under these circumstances, decide this matter, provided we submit the questions of the board, our communication to the board and our reasons for reaching this conclusion.

"We desire this favor from you, only in order that we may have a decision from your office on this important matter."

The questions asked by the board of education, attached to the inquiry, which apply to the question asked here, are as follows:

"3. Does a superintendent of high schools in a city possess the authority to appoint the principal of a high school in said city?

"4. Does said superintendent possess the authority to appoint the principal of a grade school in said city?

"5. If said superintendent does not possess the authority, who then appoints the principals of high and grade schools in a city?"

The answer to the 5th question, of course, depends upon the answers to the third and fourth, and these may both be considered together. The statute vesting the control of schools in the school board is section 7690 General Code, and is as follows:

"Each board of education shall have the management and control of all of the public schools of whatever name or character in the district. It may appoint a superintendent of the public schools, truant officers, and janitors and fix their salaries. * * *"

This section is applicable to all boards in all districts. As to city districts it is somewhat modified by another section, section 7702 General Code, which reads:

"The board of education in each city school district at a regular meeting, between May 1st and August 31st, shall appoint a suitable person to act as superintendent of the public schools of the district, for a term not longer than five school years, beginning within four months of such appointment and ending on the 31st day of August. * * *"

It will be noticed that while it is *permitted* to all boards under section 7690 General Code to appoint a superintendent it is *required* in a city district, that is, it is mandatory in such city district.

Section 7703 gives the authority of such superintendent, and is as follows:

"Upon his acceptance of the appointment, such superintendent, subject to the approval and confirmation of the board, may appoint all the teachers, and for cause suspend any person thus appointed until the board or a committee thereof considers such suspension, but no one shall be dismissed by the board except as provided in section seventy-seven hundred and one. But any city board of education, upon a three-fourths vote of its full membership, may re-employ any teacher whom the superintendent refuses to

appoint. Such superintendent shall visit the schools under his charge, direct and assist teachers in the performance of their duties, classify and control the promotion of pupils, and perform such other duties as the board determines. He must report to the board annually, and oftener if required, as to all matters under his supervision, and may be required by it to attend any and all of its meetings. He may take part in its deliberations but shall not vote."

It is here enacted that the superintendent may appoint all teachers, and the question as to whether he may appoint a principal therefor depends upon whether such principal is a teacher. Several sections are quoted by the city solicitor in the brief attached by him to the inquiries as bearing upon the subject. These are the sections in which principals are named and are as follows:

"Section 7695. Except teachers, assistant teachers, supervisors, principals, superintendent of inspection, clerk of the board of education, etc.

"Section 7718. A superintendent, supervisor, principal or teacher employed by the board of education, etc.

"Section 7772. Principals and teachers of all schools, public, private and parochial, shall report to the clerk of the board of education of the city, etc."

From these sections he draws the following conclusion:

"The foregoing sections indicate that the position of principal and teacher are two separate and distinct positions of our public schools."

This conclusion is drawn upon a rule of construction of more or less value in its application to different cases that may arise, to the effect that unnecessary language is not used in the wording of statutes. Or, expressed in another form, that the legislature means some different and distinct thing by each different word used in an enumeration or list of subjects.

This rule is by no means of universal application and its uniform use would in many cases defeat the legislative intent, as words are frequently used in the way of apposition. In the present instance, however, there is a distinction which nevertheless does not take the principal out of the designation of "teachers." Every principal is a teacher, but every teacher is not a principal. The common, and almost universal, practice is that the principals of these ward schools hear classes and are teachers in every respect; the designation of "principal" only signifying that they have some authority over the other teachers in the building or division of the district; so that, to be a teacher is a necessary qualification of a principal, and after the teacher is promoted to be a principal he is none the less a teacher.

If the language of the statute be considered ambiguous in this respect so as to raise any doubt on that account and we look to the reason or spirit of it, the reflection is compelled that the same appointing power that selects the teachers should create the distinction among them as to which one shall be principal.

The reasons for the appointment of teachers by the superintendent are apparent. The superintendent more than any one else is supposed to know the school, know its necessities, the manner in which its work is carried on, the persons who are doing it, the different capacities and adaptabilities to the different branches of the work, whch includes the supervision given by the principals just as much as any other part of the work, and this, indeed, would seem to be more properly within the knowledge and capacity, and therefore within the authority of the superintendent than would the teachers, except that they are expressly named.

This is the interpretation given the law by the teaching profession and the people of the state, as the information is received from your department to the effect that it has been the universal understanding and practice for many years for superintendents to select the principals. I have, therefore, no hesitation in saying that the principal is a teacher, and that the superintendent may appoint him under the statutes. A question has been raised, however, as to whether this is not changed by the re-enactment of section 7705 General Code, which is as follows:

> "The board of education of each village, and rural school district shall employ the teachers of the public schools of the district, for a term not longer than three school years, to begin within four months of the date of appointment. The local board shall employ no teacher for any school unless such teacher is nominated therefor by the district superintendent of the supervision district in which such school is located except by a majority vote. In all high schools and consolidated schools one of the teachers shall be designated by the board as principal and shall be the administrative head of such school."

In the concluding sentence of the above section it is enacted that the principal shall be selected by the board of education. It is seen, however, that this section is expressly restricted to villages and rural school districts, and it is the plain intent that the clause in question is restricted just as much as the residue of the section. It could hardly be concluded that if the legislature in the pursuance of one demand for a change in the method of the selection of principals of schools in a city would have made the change in this obscure manner by inserting a clause in general words in a section having particular application.

You are advised, therefore, that the practice of your department, of the teaching profession, and of the people of the state in this respect is according to law, and that the superintendent of a city district has authority to appoint principals of the various schools in the district.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

433.

COUNTY SURVEYORS—WILL DRAW SALARY UNDER CASS LAW UNTIL EXPIRATION OF THEIR EXISTING TERMS.

County surveyors will continue to draw their salaries and compensation under and by virtue of the provisions of the Cass highway law up until the end of their present existing terms on the first Monday of September next.

COLUMBUS, OHIO, July 7, 1917.

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

GENTLEMEN:—I have your communication of May 18, 1917, in which you ask my opinion in reference to the following:

> "Does the change of salary of the county surveyor, as fixed by the provisions of section 7181 G. C., as amended in amended house bill No.

300, enacted by the recent session of the general assembly, become operative with the going into effect of the bill, or is this change of salary to be deferred until the commencement of a new term of the county surveyor?"

Your question has to do with this:

"Will the county surveyors, whose terms of office expire on the first Monday of September next, draw their compensation under and by virtue of the law as it stood prior to June 28, 1917, up until the time their terms expire, or will they draw compensation under and by virtue of the new highway law becoming effective on the 28th day of June, 1917?"

The section under the old law, providing for compensation, has been repealed by the new law and as soon as the new law goes into effect the provisions of the old will no longer have any force or effect. Hence, county surveyors cannot draw their compensation under the provisions of the old law on and after June 28, 1917, but must draw it under the provisions of the new law. This would be the general provision of the law in reference to the matter set out in your communication.

However, the provisions of section 20 of article II of the constitution of Ohio is to be considered. This section reads as follows:

"The general assembly, in cases not provided for in this constitution, shall fix the term of office and the compensation of all officers; but no change therein shall affect the salary of any officer during his existing term, unless the office be abolished."

Hence, if the provisions of the new law modify the salaries of county surveyors, that is, either reduce the salaries heretofore received or increase the salaries, then the county surveyors would draw their compensation or salaries under and by virtue of the old law up until the times their present existing terms are at an end; and this because of the provisions of said section 20 of the constitution to the effect that no change therein shall affect the salary of any officer during his existing term. So that it is necessary that we consider the proposition as to whether the provisions of the new law change the salaries of county surveyors on the light of the provisions of section 20 of article II of the constitution. In order to ascertain this question, it would be necessary for us to note the provisions of the old law as to the salaries of county surveyors as well as the provisions of the new law.

Section 7181 of the General Code (the old law) reads, in part, as follows:

"The county surveyor shall be the county highway superintendent. The county surveyor shall give his entire time and attention to the duties of his office and shall receive an annual salary to be computed as follows: One dollar per mile, for each full mile of the first one thousand miles of the public roads of the county, and in addition thereto forty dollars for each full one thousand of the first fifteen thousand of the population of the county as shown by the federal census next preceding his election; thirty dollars per thousand for each full one thousand of the second fifteen thousand of the population of the county; twenty-five dollars per thousand for each full one thousand of the third fifteen thousand of the population of the county; fifteen dollars per thousand for each full one thousand of the fourth fifteen thousand of the population of the county and five dollars per thousand for each full thousand of the population of the county in excess of sixty thousand. Such salaries shall be paid out of the county

treasury in the same manner as the salaries of other county officials are paid; provided, however, that no county highway superintendent shall receive in the aggregate a salary of more than four thousand dollars per annum. * * * Such compensation shall be paid out of the county treasury in the same manner as the salaries of county officials are paid. * * *"

From the provisions of this section it is quite evident that the county surveyors under the old law received a salary fixed and certain, payable in the same manner as the salary of the other county officials is paid, and in no event to exceed the sum of four thousand dollars per annum; the amount received not depending at all upon the services rendered but upon the time of service.

I am aware that the provisions of this section are somewhat uncertain in that it seems to confuse the salary of the county surveyor with the salary of the county highway superintendent.

In this connection I desire to call attention to an opinion rendered by my predecessor, Hon. Edward C. Turner, found in Vol. II of the Report of the Attorney-General for 1915, at page 1785. On page 1787 in the opinion, Mr. Turner in discussing the above matter uses the following language:

"It is observed, first, that the salary provided is the salary of the county surveyor, not as highway superintendent but as county surveyor. That by virtue of his office as county surveyor, the county surveyor is highway superintendent. That 'the salary above provided for,' that is the salary of the *county surveyor,* shall cover also all services rendered by him as the county highway superintendent to the state, county and townships. In other words, instead of this language showing an intent to pay the salary 'above provided for' to the county surveyor for his services as county highway superintendent, I think it clearly means that the county highway superintendent shall draw no salary or fees as such but that the salary above provided for the county surveyor shall cover his services, not only as county surveyor but as highway superintendent. Not only is there no salary provided for the county highway superintendent, but there is an express provision that the salary of county surveyor shall cover all services in his ex-officio office of county highway superintendent and no public authority will have the power to grant him additional compensation for his duties as county highway superintendent."

It will be seen from this argument that the county surveyor receives a salary which covers all services rendered in his ex-officio office of county highway superintendent. In this I believe Mr. Turner was correct. With this in mind let us now turn to the provisions of the new law in reference to the salary of the county surveyor. They are found in section 7181 General Code, and are as follows:

"Sec. 7181. The county surveyor shall give his entire time and attention to the duties of his office and shall receive an annual salary to be computed as follows: One dollar per mile for each full mile of the first one thousand miles of the public roads of the county; and in addition thereto forty dollars per thousand for each full one thousand of the first fifteen thousand of the population of the county as shown by the federal census next preceding his election, thirty dollars per thousand for each full one thousand of the second fifteen thousand of the population of the county, twenty-five dollars per thousand for each full one thousand of the third fifteen thousand of the population of the county, fifteen dollars per thousand

for each full one thousand of the fourth fifteen thousand of the population of the county and five dollars per thousand for each full one thousand of the population of the county in excess of sixty thousand; and also in each county in which on the twentieth day of December, 1915, the aggregate of the tax duplicate for real estate and personal property was twenty-five million dollars or more the sum of fifty dollars for each full one million dollars, not more than fifteen, by which such tax duplicate exceeded twenty-five million dollars, ten dollars for each full one million dollars, not more than sixty, by which such tax duplicate exceeded forty million dollars and five dollars for each full one million dollars by which such tax duplicate exceeded one hundred million dollars; provided, however, that in no case shall the annual salary paid the county surveyor exceed six thousand dollars. Such salary shall be paid monthly out of the general county fund upon the warrant of the county auditor and shall be instead of all fees, costs, per diem or other allowances, and all other perquisites of whatever kind or description which any county surveyor may collect or receive. * * *"

From the provisions of this section it is readily seen that the county surveyor receives under the new law an annual salary fixed and definite, based not upon services rendered but upon the time which he serves. This salary is to be paid monthly out of the general county funds upon the warrant of the county auditor, and in no case shall exceed the amount of $6,000.00 per year.

From a comparison of the provisions of section 7181 General Code as amended with the provisions of section 7181 General Code before it was amended, it is readily seen that the salary of a county surveyor is changed, as it is based upon a different calculation in the new as compared with the old law. For this reason the provisions of section 20 of article II of the constitution would apply, which are to the effect that "no change therein (that is in the salary) shall affect the salary of any officer during his existing term"—that is, the county surveyors now in office will continue to draw their salaries or compensation under the provisions of the old law until their present terms expire.

In rendering this opinion I am not unmindful of the fact that the county surveyors under the old law drew in addition to their salaries certain compensation in the way of fees in connection with ditches and drainage work, and also in connection with services rendered under sections 2807 to 2814, inclusive, of the General Code, but I am of the opinion that this can have no effect upon the matter in hand, for the reason that the stated salary of the county surveyor is changed, and therefore the provisions of section 20 of article II of the constitution must apply.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

434.

COUNTY CORONER—ENTITLED TO COMPENSATION FOR HOLDING POST MORTEM EXAMINATION AT INSTANCE OF PROSECUTING ATTORNEY.

County coroner, if he performs a post mortem examination at the instance of the prosecuting attorney, is entitled to such compensation as the county commissioners deem proper.

COLUMBUS, OHIO, July 7, 1917.

HON. P. A. SAYLOR, *Prosecuting Attorney, Eaton, Ohio.*

DEAR SIR:—I have your letter of April 26, 1917, as follows:

"On the tenth day of October, 1916, John Goodwin shot Samuel Decket at a point about two miles north of Camden, Ohio. Information was brought to me, and I immediately notified the coroner, and we repaired to the scene of the accident, and the coroner held an inquest. It was late in the evening, and a great many people were at the scene of the tragedy, and the coroner and myself viewed the body, and found that the deceased met his death by a shot fired from a revolver in the hands of John Goodwin. The bullet entered the breast and pierced the heart. The eye witness said that there was two shots fired, but that the first shot missed. We saw no evidence of a second shot or wound that night.

"I went to Camden the next day and was working on the case when the undertaker called my attention to the fact that there was a wound in the right shoulder. It then became a matter of extreme importance to the state to know how many bullets had entered the body. I at once saw two physicians at Camden, and requested them, with the assistance of the coroner, to make a post mortem of the body. The coroner came from his home about twenty miles north of where the deceased lived. He came there, and in conjunction with the two physicians already mentioned, held a post mortem examination, requiring considerable time and skill.

"The two physicians have been paid by the county commissioners. The question now turns upon the fees of the coroner. Can he be paid by the county commissioners? I can find no authority in 2866 for the payment of this fee, but believe that he should receive the same fee that the other physicians received. Is there any authority in law, known to your office, for the payment of this fee?"

General Code Section 2866 G. C. reads:

"Coroners shall be allowed the following fees: For view of dead body, three dollars; for drawing all necessary writings, and return thereof, for every one hundred words, ten cents; for traveling each mile, to the place of view, ten cents; when performing the duties of sheriff, the same fees as are allowed to sheriffs for similar services."

Section 2495 G. C. reads:

"The county commissioners may allow a physician or surgeon making a post mortem examination at the instance of the coroner or other officer such compensation as they deem proper."

Former Attorney-General Denman, under date of March 22, 1910, and found on page 688 of the Annual Report of the Attorney-General for 1910-11, rendered the following opinion:

"Hon. A. J. Crawford, Member of House of Representatives, Columbus, O.

"Dear Sir:—You have made of me oral inquiry as follows:

"Has a coroner, when duly elected and qualified in a county of this state, the legal authority to hold a post-mortem examination without the aid of persons or another physician, and to make a special charge against the county which elects him for such services?

"In reply thereto I beg to say that section 2856 of the General Code provides that,

"'When informed that the body of a person whose death is supposed to have been caused by violence has been found within the county, the coroner shall appear forthwith at the place where the body is, issue subpoenas for such witnesses as he deems necessary, administer to them the usual oath, and proceed to inquire how the deceased came to his death, whether by violence from any other person or persons, by whom, whether as principals or accessories before or after the fact, and all circumstances relating thereto. * * *'

"In the exercise of his official discretion, the coroner may make such examination as is necessary to determine the cause of the death into which he is inquiring; but his fees for such services must not exceed those allowed by section 2866 General Code. Our courts have construed this section as giving to the coroner the right to employ a physician or surgeon to conduct a post-mortem examination in cases in which, in the sound discretion of the coroner, such examination is necessary in order to determine the cause of the death.

"Section 2495 provides that:

"'The county commissioners may allow a physician or surgeon making post-mortem examinations, at the instance of the coroner or other officers, such compensation as they deem proper.'

"While it is the clear duty of the coroner to hold an inquest, not only to ascertain the cause of the death, but whether a crime has been committed, who the perpetrator is, and to secure and preserve the evidence to the end that justice may not be defeated, it is equally clear that the coroner is not authorized by these statutes to hold unnecessary inquests or post-mortem examinations, thereby incurring needless expense to the public.

"'The coroner must act in good faith—not capriciously or arbitrarily. He may not act where there is no ground to suspect that violence was the cause of the death.'

"State ex rel. v. Bellows, 8 Ohio Circuit Decisions, 376; 62 O. S. 307.

"Very truly yours,

"U. G. Denman,

"Attorney-General."

In that case the coroner evidently held the post-mortem on his own initiative and without direction or authority from the prosecuting attorney or other officer. In the case you present the coroner was acting at the instance of the prosecuting attorney. When the coroner performs a post-mortem at the prosecuting attorney's request, the coroner acts as a private physician and may be paid for his services

the same as any other physician, it clearly not being his official duty to perform a post-mortem. This was the view taken by the common pleas court of Scioto county in the unreported case of Board of Commissioners v. Edwards. In that case the petition alleged that the defendant, while coroner, held a post-mortem examination at the request of the sheriff of Scioto county, and claimed that the coroner had no right to receive compensation from the county for such service. Petition prayed judgment for compensation collected by the coroner and the defendant demurred to the petition on the ground that it did not allege facts sufficient to constitute a cause of action. The court sustained the demurrer.

I am therefore of the opinion, in answer to your question, that the county commissioners may allow the coroner such compensation as they deem proper for his services in performing the post-mortem examination referred to.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

435.

COUNTY SURVEYOR—WITHOUT AUTHORITY TO CHARGE FOR RECORDING SURVEYS OF OTHER SURVEYORS.

When county surveyor records surveys of other surveyors upon order of county commissioners under section 2803 G. C. he is without authority to charge the county for such recording.

COLUMBUS, OHIO, July 7, 1917.

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

GENTLEMEN:—I have your letter of May 31, 1917, as follows:

> "If a county surveyor records the surveys of other surveyors, upon order of the county commissioners, under the provisions of section 2803 G. C., may he charge the county the recording fees mentioned under section 2822 G. C., or does the amendment of section 7181 G. C., amended house bill No. 300, prevent him from so doing?
>
> "If he can charge the fees mentioned in section 2822 G. C. for such services, may he retain same for his own use?"

Sections 2803 and 2822 G. C. read:

> "(2803.) The county surveyor shall make and keep in a book provided for that purpose an accurate record of all surveys made by himself or his deputies for the purpose of locating any land or road lines, or fixing any corner or monument by which it may be determined, whether official or otherwise. Such surveys shall include corners, distances, asimuths, angles, calculations, plats and a description of the monuments set up with such references thereto as will aid in finding the names of the parties for whom made, and the date of making such surveys. Such book shall be kept as a public record by the county surveyor at his office, and shall be at all proper times open to inspection and examination by all persons interested therein. Any other surveys made in the county by competent surveyors, duly certified by such surveyor to be correct and deemed worthy of preservation, may, by order of the commissioners be recorded by the county surveyor.
>
> "(2822.) When employed by the day, the surveyor shall receive five

dollars for each day and his necessary actual expenses. When not so employed, he shall be entitled to charge and receive the following fees: For each rod run, not exceeding one mile, three-fourths of one cent, and for each rod over one mile, one-half of one cent; for making out or recording a plat not exceeding six lines, seventy-five cents, and for each line in addition, five cents; for each one hundred words or figures therein, six cents; for calculating the contents of a tract not exceeding four sides, six cents, and for each additional line, ten cents; for mileage, going and returning, five cents per mile; and for all other services, the same fees as those of other officers for like services. Chain carriers and markers are entitled, each, to two dollars."

Section 7181 General Code, as amended in 107 O. L., page 110, reads:

"The county surveyor shall give his entire time and attention to the duties of his office and shall receive an annual salary to be computed as follows: One dollar per mile for each full mile of the first one thousand miles of the public roads of the county; and in addition thereto forty dollars per thousand for each full one thousand of the first fifteen thousand of the population of the county as shown by the federal census next preceding his election, thirty dollars per thousand for each full one thousand of the second fifteen thousand of the population of the county, twenty-five dollars per thousand for each full one thousand of the third fifteen thousand of the population of the county, fifteen dollars per thousand for each full one thousand of the fourth fifteen thousand of the population of the county and five dollars per thousand for each full one thousand of the population of the county in excess of sixty thousand; and also in each county in which on the twentieth day of December, 1915, the aggregate of the tax duplicate for real estate and personal property was twenty-five million dollars or more the sum of fifty dollars for each full one million dollars, not more than fifteen, by which such tax duplicate exceeded twenty-five million dollars, ten dollars for each full one million dollars, not more than sixty, by which such tax duplicate exceeded forty million dollars and five dollars for each full one million dollars by which such tax duplicate exceeded one hundred million dollars; provided, however, that in no case shall the annual salary paid the county surveyor exceed six thousand dollars. Such salary shall be paid monthly out of the general county fund upon the warrant of the county auditor and shall be instead of all fees, costs, per diem or other allowances, and all other perquisites of whatever kind or description which any county surveyor may collect or receive. The county surveyor shall be the county tax map draftsman, but shall receive no additional compensation for performing the duties of such position. When the county surveyor performs service in connection with ditches or drainage works under the provisions of sections 6442 to 6822 inclusive of the General Code of Ohio, he shall charge and collect the per diem allowances or other fees therein provided for, and shall pay all such allowances and fees monthly into the county treasury to the credit of the general county fund. The county surveyor shall do likewise when he performs services under the provisions of sections 2807 to 2814 inclusive of the General Code of Ohio."

It will be noted that the fees provided for in section 2822 General Code are not authorized to be charged the county by the surveyor at all times, but simply when such surveyor was not employed by the day.

In an opinion of former Attorney-General Hogan, rendered under date of March 26, 1913, and found in Reports of the Attorney-General for 1913, Vol. I, page 232, it was held:

> "Under section 2803, General Code, when a county surveyor is not given a per diem compensation, he is to be allowed the fees therein specified for recording plats made by him in the course of his official duties. He is to be allowed the same fees for recording plats made by other surveyors or by himself for private parties, when they are recorded by him upon the order of the county commissioners."

In that opinion Mr. Hogan said:

> "By virtue of section 2803 of the General Code, the county surveyor is legally bound to make and keep, in a book provided for that purpose, an accurate record of all surveys, whether official or otherwise, and such survey shall include corners, distances, etc. Under section 2822 of the General Code the county surveyor may be employed by the day, or if not so employed by the day, then he is to receive certain prescribed fees. The fee prescribed for making out and recording a plat not exceeding six lines, seventy-five cents; and for each line in addition, five cents. If the surveyor is employed by the day, as provided in said section, then he is not legally entitled to fees for the making and recording of such plats. If, on the other hand, the surveyor is not so employed by the day, but is paid for his services by fees in accordance with said section, then he is entitled to the fees prescribed therein for making and recording plats of his own official surveys."

In case the county surveyor was employed by the day, he could not charge the county with any fees under section 2822 G. C.

Section 2822 has been made by reference to apply to fees charged by the county surveyor to private persons in political subdivisions other than the county, as well as to fees charged the county itself. After the enactment of section 7181 General Code in its present form, there was no longer any reason for the existence of section 2822 G. C., so far as the county is concerned, but in order to preserve its schedule of fees for charges to be made by the county surveyor to private persons, or to political subdivisions other than the county, the legislature provided in section 7181 G. C. that:

> "When the county surveyor performs service in connection with ditches or drainage works under the provisions of sections 6442 to 6822 inclusive of the General Code of Ohio, he shall charge and collect the per diem allowances or other fees therein provided for and shall pay all such allowances and fees monthly into the county treasury to the credit of the general county fund. The county surveyor shall do likewise when he performs services under the provisions of sections 2807 to 2814 inclusive of the General Code of Ohio."

The first group of sections referred to under section 7181 relate to ditch improvements and the second group of sections relate to the establishment of corners of tracts of land when lines become lost or uncertain. The surveyor's fees in the first instance are paid as a part of the costs of the ditch proceeding and in the second instance by the person or persons applying for the survey.

In thus preserving the right of the surveyor to charge fees in such cases, the

legislature evidenced an intention of abolishing such charges altogether, when the same will have to be paid by the county, and under the provisions of section 7181 G. C. the county surveyor is prevented from charging or receiving fees for services rendered the county.

It is therefore my opinion, in answer to your question, that when the county surveyor records the surveys of other surveyors upon order of the county commissioners, under the provisions of section 2803 G. C., he is without authority to charge the county, for recording, the fees mentioned in section 2822 G. C.

Very truly yours,
JOSEPH McGHEE,
Attorney-General.

436.

"ROAD IMPROVEMENT"—(SEC. 1231-9 G. C.) TO WHAT IMPROVEMENTS SAID WORDS APPLY.

The word "road improvement" as used in section 1231-9 General Code apply not only to the construction, improvement, maintenance and repair of inter-county highways and main market roads in reference to which certain proceedings are had leading up to the same, but they apply also to the regular and continuous repair and maintenance of such highways.

COLUMBUS, OHIO, July 9, 1917.

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

DEAR SIR:—I have your communication of June 9, 1917, in which you ask my opinion in reference to a certain matter therein set out. Your communication reads as follows:

> "I respectfully direct your attention to section 1231-9 as contained in amended house bill No. 300:
>
> "'No act of the state highway commissioner * * * purchasing any material, machinery, tools, or equipment for road improvement * * * shall be valid or have any force and effect until such act has been approved by the highway advisory board by resolution duly passed by majority vote and entered upon its journal.'
>
> "Large quantities of different materials, tools and equipment are almost constantly being purchased through our bureau of maintenance. We are often confronted with a condition where the work of a maintenance gang must be suspended unless some particular item of equipment or material is purchased at once to permit the work to proceed. They are, in short, conditions of emergency that cannot be foreseen and must be acted upon at once in order to facilitate the work with despatch and economy to the state.
>
> "I, therefore, respectfully request your advice as to the scope of the word 'improvement' as contained in the above section, and as to how this section will apply to our maintenance and repair work, if at all."

The section upon which you ask me to place a construction forms a part of a group of sections which embodies an entirely new idea and departure in the matter of the construction, improvement, maintenance and repair of main market roads

and intercounty highways under the jurisdiction of the state highway commissioner. This new idea is embodied in sections 1231-5 to 1231-11 General Code, inclusive.

The main idea of these sections is to have a board of four electors of the state of Ohio of recognized character and ability to act as an advisory board to the state highway commissioner. The state highway commissioner has many and various duties to perform. He handles and expends vast sums of money, he exercises an absolute discretion in matters of far-reaching effect and importance, and up to the time of the taking effect of the new law he had no one with whom to advise or consult in reference to matters which come under his jurisdiction. It seems to have been the thought and object of the legislature that the state highway commissioner should have a board with whom he might consult and advise and who might act in a sort of supervisory capacity in reference to the various important and far-reaching duties which he has to perform.

Keeping this apparent object of the legislature in mind, it will possibly not be difficult to place an interpretation upon the two words, "road improvement," as found in section 1231-9 General Code. The particular phrase in which these words are found is as follows:

> "purchasing any material, machinery, tools or equipment for road improvement."

In order to get the meaning of this section we would have to read in connection with it other parts of the same section, as follows:

> "No act of the state highway commissioner * * * purchasing any material, machinery, tools or equipment for road improvement * * * shall be valid or have any force and effect until such act has been approved by the highway advisory board, by resolution duly passed by a majority vote and entered upon its journal."

The question which you have particularly in mind in reference to this is as to whether the provisions of this section should apply only to those road improvements embodying a certain procedure leading up to the improvement, or whether the words should be made to apply also to all maintenance and repair of highways, whether the same be done under a certain procedure or whether the same be done from day to day and from time to time in the maintenance and repair of state highways of Ohio in general.

In answering this question it will be well to keep in mind that the powers of the state highway commissioner in the matter of maintaining and repairing the intercounty highways and the main market roads have been greatly increased and extended under the new law. This is evidenced by a consideration of section 1224 General Code and subdivision 3 of section 1221 General Code. These sections are too long to quote, but a careful consideration of the same will evidence the fact that the powers of the state highway commissioner in the matter of the maintenance and repair of state highways in general have been greatly extended and increased, and therefore if we should place such a construction upon the words "road improvement" as to limit the application to such construction, improvement, repair and maintenance of highways in which a certain definite proceeding is contemplated, and eliminate from the meaning the ordinary and continuous repair and maintenance of state highways by the state highway commissioner we must entirely circumvent the idea which the legislature had in mind.

It must be remembered that the state highway commissioner purchases but little material or equipment in the matter of the construction, improvement and maintenance of highways in which a certain proceeding is had leading up to the

same, and this for the reason that such matters are done under contract through competitive bidding and not by the state highway commissioner himself; while in the matter of the ordinary and continuous repair and maintenance of intercounty highways and main market roads of the state the state highway commissioner will be compelled to buy a vast amount of material and equipment.

Hence it is my opinion that the legislature intended these words "road improvement" to include not only the construction, improvement, maintenance and repair of highways in which certain jurisdictional steps are necessary to be taken leading up to the same, but also intended to make them apply to the regular and necessary repairs in general of the highways of the state.

You infer in your letter that this will possibly place a burden on the state highway department that will be difficult to bear. But let me call your attention to this fact: Under section 1231-9 General Code it is the act of the state highway commissioner which must be approved by the highway advisory board; hence it is not necessary in all cases in the purchase of material and equipment that the approval of the highway advisory board comes first, but the act may be performed first and afterwards the approval of the act given by the highway advisory board.

Under the plain reading of the statute I think it will not be very difficult for the highway advisory board and the state highway commissioner to map out a course of proceeding as will not place an undue burden upon the state highway department and yet will carry out the evident object and intent which the legislature had in mind in the enactment of the said statute.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

437.

BOARD OF AGRICULTURE—NO AUTHORITY TO ISSUE ORDER OF QUARANTINE FORBIDDING SHIPPING OF CERTAIN SPECIES OF PINE INTO STATE.

Neither the board of agriculture nor the secretary of agriculture has authority to issue an order of quarantine forbidding the shipping of all of certain species of pine into the state, irrespective of the fact as to whether it is infected or has been exposed to infection or not. This would be an order regulating interstate commerce and not a mere order of quarantine.

COLUMBUS, OHIO, July 9, 1917.

The Board of Agriculture, Columbus, Ohio.

GENTLEMEN:—I have your communication in which you ask my opinion, as follows:

> "The question has arisen as to whether our quarantine against the shipment of white pine into Ohio on account of the white pine blister rust can be enforced.
>
> "What, if any, is our course of procedure? Can our quarantine be enforced?"

The order of quarantine about which you make inquiry, and a copy of which is attached to your communication, is in the words and figures as follows:

"OFFICIAL NOTICE OF QUARANTINE.

"It has been established by federal authorities that a dangerous im-

ported disease of white pine trees, known as white pine blister rust (cronartium ribicola) exists in a number of states, principally those east of Ohio.

"As white pine trees have been found to be especially adapted to the poor soils of this state and are being used largely in reforestation work, and believing that the shipment of such trees into Ohio would be a menace to white pine plantings, and that the establishment of this disease in the state would check reforestation work, the board of agriculture of Ohio, by virtue of the authority conferred upon it by section 1122 General Code, hereby prohibits, until further notice, the shipment into the state of any of the following species of pines or their horticultural varieties, viz.: white pine (pinus strobus L), western white pine (P Monticola Dougl.), sugar pine (P lambertina Dougl.), stone pine or cembrian pine (P cembra L), rhotan or himalayan pine (P excelsa) and limber pine (P flexilis).

"This order shall not apply to pine trees necessary to be secured outside of Ohio by the state forester of the experiment station to be used for scientific purposes.

"Effective February 21, 1917.

"The Board of Agriculture of Ohio.
"N. E. SHAW, Chief, Bureau of Horticulture
"G. A. STAUFFER, Secretary."

From this order it is to be noted that the shipment of certain species of pine into the state of Ohio is absolutely forbidden, this order to be in force and effect until further notice. Your question is as to whether this order of quarantine is constitutional and valid and whether the same can be enforced.

Your department issued this order of quarantine under and by virtue of the provisions of section 1122 G. C., which reads as follows:

"The secretary (formerly the board) of agriculture may make such regulations as he deems necessary for the prevention and control of insect pests or plant diseases. The term 'nursery stock' as used in the section relating to nursery and orchard inspection, includes trees, shrubs, plants, vines, buds, scions and cuttings commonly grown in nurseries and orchards except greenhouse plants and cuttings thereof, bulbs, flowers, and vegetable plants. The terms 'insect pests' and 'plant diseases' as used in such section include San Jose scale, peach yellows, black knot and other dangerously injurious insect pests and plant diseases."

While the secretary (formerly the board) of agriculture has the power and authority, under and by virtue of the provisions of said section, to make rules and regulations, yet there is no specific provision made for the matter of quarantine. Sections 1131, 1132 and 1133 G. C. make certain provisions which shall control in the matter of shipping nursery stock into the state, but these provisions are more in the nature of inspection than of quarantine. Even though the statutes do not give any specific authority for quarantine, yet under the police powers of the state the secretary (formerly the board) of agriculture would have authority to issue a proper order of quarantine. The question is as to whether the order made is proper and whether it is valid and constitutional.

The particular question arises under and by virtue of the provision of the United States Constitution which is as follows:

"The congress shall have power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."
(Art. I, Sec. 8, Const. of U. S.)

In order to arrive at the answer to the question as to whether your order is constitutional, I desire to call attention to several decisions of the United States supreme court.

In the case of Hannibal & St. Joseph Rd. Co. v. John F. Husen, 95 U. S. 465, the court had before it a question very similar in principle to the one under consideration. Mr. Justice Strong delivered the opinion of the court and during the course of his opinion used the following language:

> "The statute, approved January 23, 1872, by its first section enacted as follows:
>
> "'No Texas, Mexican or Indian cattle shall be driven or otherwise conveyed into or remain in any county in this state between the first day of March and the first day of November in each year, by any person or persons whatsoever. * * *'
>
> "It is noticeable that the statute interposes a direct prohibition against the introduction into the state of all Texas, Mexican or Indian cattle during eight months of each year, without any distinction between such as may be diseased and such as are not * * *. It seems hardly necessary to argue at length that, unless the statute can be justified as a legitimate exercise of the police power of the state, it is a usurpation of the power vested exclusively in congress. It is a plain regulation of interstate commerce; a regulation extending to prohibition. Whatever may be the power of a state over commerce that is completely internal, it can no more prohibit or regulate that which is interstate than it can that which is with foreign nations. Power over one is given by the constitution of the United States to congress, in the same words in which it is given over the other, and in both cases it is necessarily exclusive. That the transportation of property from one state to another is a branch of interstate commerce is undeniable, and no attempt has been made in this case to deny it."

Further on in the opinion Mr. Justice Strong states the following proposition:

> "While we unhesitatingly admit that a state may pass sanitary laws and laws for the protection of life, liberty, health or property within its borders; while it may prevent persons and animals suffering under contagious or infectious diseases or convicts, etc., from entering the state; while for the purpose of self-protection it may establish quarantine, and reasonable inspection laws, it may not interfere with transportation into or through the state beyond what is absolutely necessary for its self-protection. It may not, under the cover of exerting its police powers, substantially prohibit or burden either foreign or interstate commerce."

In Kimmish v. Ball, 129 U. S. 217, the court had under consideration this same question. The case involved the validity of a statute of Iowa making a person having in his possession within it any Texas cattle which have not been wintered north of the southern boundary of Missouri and Kansas liable for any damages that may accrue from allowing them to run at large, and thereby spreading the disease known as Texas fever. In this case the question was raised that such a statute was in contravention of the commerce clause of the federal constitution. In support of this contention the attorneys relied upon Railroad Co. v. Husen, supra; but Justice Field, who rendered the decision in this case, reasoned as follows:

> "The case of Railroad Co. v. Husen, upon which the defendant relies

with apparent confidence, has no bearing upon the questions presented. The decision in that case rested upon the ground that no discrimination was made by the law of Missouri, in the transportation forbidden, between sound cattle and diseased cattle; and this circumstance is prominently put forth in the opinion. 'It is noticeable,' said the court, 'that the statute interposes a direct prohibition against the introduction into the state of all Texas, Mexican or Indian cattle during eight months of each year, without any distinction between such as may be diseased and such as are not.' It interpreted the law of Missouri as saying to all transportation companies: 'You shall not bring into the state any Texas cattle or any Mexican cattle or Indian cattle between March 1 and December 1 in any year, no matter whether they are free from disease or not, no matter whether they may do an injury to the inhabitants of the state or not; and if you do bring them in, even for the purpose of carrying them through the state without unloading them, you shall be subject to extraordinary liabilities.'"

Then Mr. Justice Field continues:

"Such a statute, the court held, was not a quarantine law nor an inspection law, but a law which interfered with interstate commerce, and therefore invalid. At the same time the court admitted, unhesitatingly, that a state may pass laws to prevent animals suffering from contagious or infectious diseases from entering within it. No attempt was made to show that all Texas, Mexican or Indian cattle coming from the malarial districts during the months mentioned were infected with the disease, or that such cattle were so generally infected that it would have been impossible to separate the healthy from the diseased."

After thus discussing Railroad Co. v. Husen, supra, Mr. Justice Field concluded:

"The case is therefore reduced to this, whether the state may not provide that whoever permits diseased cattle in his possession to run at large within its limits, shall be liable for any damages caused by the spread of the disease occasioned thereby; and upon that we do not entertain the slightest doubt."

In Rasmussen v. State of Idaho, 181 U. S. 198, the court was considering a statute enacted by the Idaho legislature, authorizing the governor, when he had reason to believe that there is an epidemic of infectious disease of sheep in localities outside the state, to investigate the matter and if he finds that the disease exists, to make a proclamation declaring such localities infected and prohibiting the introduction therefrom of sheep into the state, except under such restrictions as, after consultation with the state sheep inspector, he may deem proper. The court in this case held that such a statute is within the police power of the state and is not in violation of the federal constitution as a regulation of interstate commerce.

Mr. Justice Brewer, in rendering the opinion in this case, discussed Railroad Co. v. Husen, supra, and used the following language:

"It will be perceived that the act was an absolute prohibition, operative during eight months of each year. It was an act continuous in its force; provided for no inspection; and was predicated on the assump-

tion that the state had the right to exclude for two-thirds of each year the introduction of all those kinds of cattle, sick or well, and whether likely to distribute disease or not.

"In the case before us the statute makes no absolute prohibition of the introduction of sheep, but authorizes the governor to investigate the condition of sheep in any locality, and, if found to be subject to the scab or any epidemic disease liable to be communicated to other sheep, to make such restriction on their introduction into the state as shall seem to him, after conference with the state sheep inspector, to be necessary."

In Reid v. State of Colorado, 187 U. S. 137, the court had under consideration a statute of Colorado which prohibited the importing of cattle from south of the thirty-sixth parallel of north latitude between April 1 and November 1, unless first kept for ninety days at some place north of that parallel, or unless a certificate of freedom from contagious or infectious disease has been obtained from the state veterinary sanitary board. The court held that the provisions of this law placed no unconstitutional burden on interstate commerce.

In the opinion Mr. Justice Harlan says:

"The Colorado statute, in effect, declares that live stock coming between the dates and from the territory specified are ordinarily in such condition that their presence in the state may be dangerous to its domestic animals; and hence the requirement that before being brought or sent into the state they shall either be kept at some place north of the thirty-sixth parallel of north latitude for at least ninety days prior to their imporation into the state, or the owner must procure from the state veterinary sanitary board a certificate or bill of health that the cattle are free from all infectious or contagious diseases and have not been exposed to any of said diseases at any time within ninety days prior thereto. * * * As, therefore, the statute does not forbid the introduction into the state of *all* live stock coming from the defined territory—that diseased as well as that not diseased—but only prescribes certain methods to protect the domestic animals of Colorado from contact with live stock coming from that territory between certain dates, and as those methods have been devised by the state under the power to protect the property of its people from injury, and do not appear upon their face to be unreasonable, we must, in the absence of evidence showing the contrary, assume that they are appropriate to the object which the state is entitled to accomplish."

In Smith v. St. Louis & S. W. Rd. Co. of Tex., 181 U. S. 248, the court extended this principle of quarantine possibly further than is found in any other decision of the United States supreme court. In this case Brown, Harlan and White, J. J., refused to concur and rendered dissenting opinions. But even in this case Justice McKenna lays down the following proposition in the opinion:

"It (the principle) depends upon whether the police power of the state has been exerted beyond its province—exerted to regulate interstate commerce—exerted to exclude, without discrimination, the good and the bad, the healthy and the diseased, and to an extent *beyond what is necessary for any proper quarantine.* The words in italics express an important qualification. The prevention of disease is the essence of a quarantine law. Such law is directed, not only to the actually diseased, but to what has become exposed to disease."

From all the above cited cases it seems to me that one principle can be safely drawn, and that is that a state has not the power, under an order of quarantine, to prohibit the coming into a state of all of any class of objects, without any discrimination as to whether the same be good or bad, healthy or diseased.

The further principle may be deduced that the state has power to pass laws requiring a proper inspection and a proper quarantine, to prevent the coming into this state of diseased animals or those which have been exposed to a dangerously infectious or contagious disease.

I might cite many cases decided by the different states to the same effect, but I do not deem it wise so to do. I will quote from but one

In commonwealth v. Moore, 214 Mass. 19, in the opinion on p. 25 the court uses the following suggestive language:

> "A state law, although apparently for the protection of the public health, will be scrutinized as to its results in actual practice, to ascertain its essential characteristics, and will not be upheld merely because of its declared purpose. A statute which really operates as an undiscriminating exclusion of the products of other states will not be sustained because under the guise of a health statute. If it is in fact a regulation of interstate commerce in its primary application, then it is invalid, regardless of its dress or designation."

It is true all the above cases were decided in reference to statutes which apply to the animal kingdom, but it seems to me the same principles would apply much stronger to statutes having to do with the vegetable kingdom, especially such as we have under consideration.

With the above principles in mind, let us again turn to the question which we particularly have under consideration.

(1) The only authority given to the state board of agriculture for the promulgation of the order herein considered arises from the fact that it has authority to make rules and regulations. Section 1122 G. C.

(2) The statutes of our state do not grant power or authority to the secretary (formerly the board) of agriculture to promulgate an order of quarantine such as you set out in your communication, but he would have power and authority under the police powers of the state to issue a proper order in reference to the matters set out in the order of quarantine.

(3) The board of agriculture in its order has absolutely prohibited the shipping into this state of certain species of pine, not from one locality, not from one state, but from everywhere. It has not limited its order to infected pine nor to that which has been exposed to the infection in question.

It seems clear to me, from the law in the case as applied to the facts, that an order such as your board has issued would be invalid and unconstitutional and therefore could not be enforced. As set forth in the adjudicated cases above cited, your orders cannot be general and absolute, but must be limited to the object which you seek, and that is to prevent the spread of the infection in question. The order must be based upon a finding as to conditions existing in certain localities outside the state or in certain states, and it must be made in reference to those conditions. The order of quarantine cannot absolutely prohibit the shipment of certain species of pine into the state, without considering the fact as to the localities or the states whence it comes, or whether it is infected or not.

There is another principle to which I might call attention and that is this: In matters of which both the United States and the states have a sort of concurrent jurisdiction, if congress acts upon such matters, then the states cannot act upon the same.

In section 8 of an act to regulate the importation of nursery stock and other plants and plant products, etc., found in Vol. 37 of United States Statutes at Large, p. 315, we have the following:

> "Sec. 8. That the secretary of agriculture is authorized and directed to quarantine any state, territory, or district of the United States, or any portion thereof, when he shall determine the fact that a dangerous plant disease or insect infestation, new to or not theretofore widely prevalent or distributed within and throughout the United States, exists in such state or territory or district; and the secretary of agriculture is directed to give notice of the establishment of such quarantine to common carriers doing business in or through such quarantined area, and shall publish in such newspapers in the quarantined area as he shall select notice of the establishment of quarantine. That no person shall ship or offer for shipment to any common carrier, nor shall any common carrier receive for transportation or transport, nor shall any person carry or transport from any quarantined state or territory or district of the United States, or from any quarantined portion thereof, into or through any other state or territory or district, any class of nursery stock or any other class of plants, fruits, vegetables, roots, bulbs, seeds, or other plant products specified in the notice of quarantine except as hereinafter provided. * * *"

But under the above authority the secretary of agriculture has not seen fit to issue an order preventing the shipping of the species of pine set out in the order issued by your board, into the state of Ohio from other states. However, congress has given him authority so to do.

Hence, the secretary of agriculture not having acted in this matter, the state of Ohio, through its board of agriculture, might act in a proper order and not come in conflict with the above enunciated principle.

This is a question of considerable importance and I have therefore given to it the attention which I felt it deserved.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

438.

TAX MAP DRAFTSMAN—NECESSARY STEPS TO BE TAKEN BEFORE COUNTY COMMISSIONERS MAY EMPLOY SUCH PERSON.

A contract by the county commissioners with a person to act as tax map draftsman comes within the provisions of sections 5660 *and* 5661 *G. C. and, therefore, cannot be entered into until the county auditor certifies that the money necessary to take care of said obligation is in the treasury to the credit of the proper fund.*

COLUMBUS, OHIO, July 9, 1917.

HON. PERRY SMITH, *Prosecuting Attorney, Zanesville, Ohio.*

DEAR SIR:—I have your communication of May 22, 1917, in which you ask my opinion in reference to certain matters. Your communication reads as follows:

> "The following question has been submitted to me by Ralph H. Strait, who is our county surveyor. Under house bill 300, which amended the Cass law being section 7181, I would like to have an answer to the following question:

"This amendment takes effect and becomes operative on or about the 28th day of June, 1917. Mr. Strait as county surveyor's term expires the first Monday in September of this year. Will he as county surveyor receive the salary as contemplated under section 7181 from June 28, 1917, to the first Monday in September, 1917, or what salary will he receive?

"March 1st, the county commissioners of this county entered into a contract with one John Dennis to make the tax maps of the county at a salary of $85.00 per month to be binding upon said county from one year March 1st. Under this amendment of section 7181 can he hold his position or contract for $85.00 a month when it is incumbent upon the county surveyor to make the tax maps under section 7181."

There are two separate and distinct questions embodied in your communication. The first one is as to whether the county surveyor, after June 28, 1917, the day upon which the new highway act takes effect, will draw compensation under the law as it now stands or under the new law.

Your first question is answered by an opinion rendered to the bureau of inspection and supervision of public offices on July 7, 1917, being Opinion No. 433, a copy of which is herewith enclosed.

Your second question has to do with the matter of the employment of a tax map draftsman for your county. In your communication of May 22, 1917, you state that your board of county commissioners entered into a contract with John Dennis to make the necessary tax maps for one year beginning with March 1, 1917, at a salary of $85.00 per month. Upon my request for further information you write under date of June 8, 1917, as follows:

"In reply to your letter of June 7th, I am sending you a copy of the record as found on Journal 18, page 233 of the county commissioners of Muskingum county, Ohio. Contract of agreement. Same was entered into on the first day of March, 1917. There is no record in the commissioner's office that the auditor of the county certified for or on behalf of this contract."

In your latter communication you state that there is no record in the county commissioner's office that the county auditor certified for or on behalf of this contract. I desire to notice this fact first.

Section 5660 General Code provides that:

"The commissioners of a county, * * * shall not enter into any contract, agreement or obligation involving the expenditure of money, or pass any resolution or order for the appropriation or expenditure of money, unless the auditor * * * first certifies that the money required for the payment of such obligation or appropriation is in the treasury to the credit of the fund from which it is to be drawn, or has been levied and placed on the duplicate, and in process of collection and not appropriated for any other purpose. * * * Such certificate shall be filed and forthwith recorded, and the sums so certified shall not thereafter be considered unappropriated until the county * * * is fully discharged from the contract, agreement or obligation, or as long as the order or resolution is in force."

Section 5661 General Code provides as follows:

"All contracts, agreements or obligations, and orders or resolutions entered into or passed contrary to the provisions of the next preceding

section, shall be void, but such section shall not apply to the contracts authorized to be made by other provisions of law for the employment of teachers, officers, and other school employes of boards of education."

Hence, applying the law as found in these two sections to the facts as set out in your latter communication, I am compelled to arrive at the conclusion that the contract entered into by the county commissioners with Mr. Dennis is void.

The courts of our state are uniform in applying the provisions of these two sections strictly to all contracts, agreements or obligations entered into by the county commissioners and other boards therein mentioned. The only exception to the above uniform holding of our courts is in a case where there has been a special fund created by means other than taxation for a specific purpose, and which cannot be used for any other purpose. With this one exception the courts are uniform in a strict application of the provisions of these two sections.

If the contract is void there is no need of our proceeding further to inquire as to whether Mr. Dennis has such vested rights in this contract that it will bind the county commissioners for a period of one year from the date upon which it was entered into, notwithstanding the fact that the law taking effect on June 28, 1917, changes the matter as to who may be tax map draftsman.

Hence, answering your second question specifically, I am of the opinion that before the county commissioners could enter into a contract with a person employing him to act as tax map draftsman, the county auditor must certify that the funds necessary to take care of the obligation are in the treasury to the credit of the proper fund.

In passing I might call attention to an opinion rendered by my predecessor, Hon. Edward C. Turner, on May 29, 1916, and found in Vol. I of the Opinions of the Attorney General for 1916, p. 943, in which he held (in the syllabus) as follows:

"County commissioners are not authorized to employ any person other than the county surveyor for the purpose of correcting and keeping up to date an existing set of tax maps of the county."

It is readily seen that if this opinion should hold, the county commissioners would under no circumstances have been authorized to employ Mr. Dennis to correct and keep up to date the tax maps of your county.

However, the court of appeals of Muskingum county, in the November term, 1916, rendered an opinion in a case styled Earl A. Montgomery, Auditor, et al. v. The State of Ohio, ex rel. John S. Dennis, No. 91, in which it held different from the opinion rendered by Mr. Turner. The relief sought in said case before the court of appeals was a peremptory writ of mandamus requiring the commissioners to carry out a contract entered into by them with the relator for keeping up the tax maps and plats of said county at the agreed price of seventy-five dollars per month. In this case it was argued that the county commissioners were not authorized under the statutes to employ any person other than the county surveyor to correct and keep up to date the tax maps of the county, but the court held that the county commissioners had authority to enter into such a contract with a person other than the county surveyor, by virtue of section 5589 G. C. So that from this decision of the court of appeals of Muskingum county, the county commissioners had authority to enter into a contract with Mr. Dennis, provided the provisions of section 5660 G. C. had been complied with.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

439.

APPROVAL—ABSTRACT OF TITLE—EXECUTIVE MANSION.

COLUMBUS, OHIO, July 9, 1917.

The Executive Mansion Board, Columbus, Ohio,

Attention Hon. James E. Campbell.

GENTLEMEN:—Your board has submitted to this department abstracts of title covering four different pieces of real estate located in the city of Columbus, as follows:

1. The following described premises, situate in the county of Franklin, in the state of Ohio, and in the city of Columbus,

> "Being part of lot number one (1) of Gates and Ann O'Harra's subdivision of part of half-section No. 14, township 5, range 22 Refugee Lands, described as follows: Beginning at an iron pipe at the northwest corner of Broad street and Champion avenues in said city of Columbus; thence southwesterly along the north line of Broad street and the south line of said lot No One, 189.40 feet to an iron pipe in the east line of John C. Bullitt's Ohio avenue addition; thence northerly along the east line of said Bullitt's Ohio avenue addition, 174.81 feet to the south line of the first alley north of Broad street in said Bullitt's Ohio avenue addition, produced eastwardly to Champion avenue; thence eastwardly along said alley produced eastwardly to Champion avenue, 188.06 feet to the west line of Champion avenue; thence southerly along the west line of Champion avenue 174.53 feet to the place of beginning."

2. The following described premises situate in the county of Franklin, in the state of Ohio, and in the city of Columbus:

> "Being lot number three (3) of John C. Bullitt's Ohio avenue addition to the city of Columbus, Ohio, as the same is numbered and delineated upon the recorded plat thereof, of record in Plat Book 5, page 137, recorder's office, Franklin county, Ohio."

3. The following described premises situate in the county of Franklin, in the state of Ohio, and in the city of Columbus:

> "Being lot number four (4) of John C. Bullitt's Ohio avenue addition to the city of Columbus, Ohio, as the same is numbered and delineated upon the recorded plat thereof, of record in Plat Book 3, page 137, recorder's office, Franklin county, Ohio."

4. The following described premises situate in the county of Franklin, in the state of Ohio, and in the city of Columbus:

> "Being lot number five (5) of John C. Bullitt's Ohio avenue addition to the city of Columbus, Ohio, as the same is numbered and delineated upon the recorded plat thereof, of record in Plat Book 5, page 137, recorder's office, Franklin county, Ohio."

Part of lot number one (1) *Gates' and O'Harra's subdivision.*

I find upon examination of the above abstract, date May 26, 1917, that the title to the premises described is in the name of Mary Elizabeth Deshler and that a general warranty deed from said Mary Elizabeth Deshler, with release of dower if necessary, will vest in the state of Ohio a clear title except for the taxes for the last half of 1916, amounting to $180.32, which remain unpaid and are a lien, and also the taxes for the year 1917, which are as yet undetermined.

Lot number three (3) *of John C. Bullitt's Ohio avenue addition.*

I find upon examination of the above abstract, dated June 20, 1917, that the title to said premises is in the name of Clarence E. Woolman and that a general warranty deed from said Clarence E. Woolman, with release of dower if necessary, will vest in the state of Ohio a clear title except for the taxes for the last half of the year 1916, amounting to $74.29, which remain unpaid and are a lien, and the taxes for 1917, the amount of which is as yet undetermined, and also a special assessment for improving Ohio avenue, said assessment consisting originally of ten annual installments of $30.24 each, one of which has been paid—the next installment due with the taxes payable December 20, 1917—unpaid balance of said assessment $272.17 principal, $6.12 accrued interest for six months.

Lot number four (4) *of John C. Bullitt's Ohio avenue addition.*

I find upon examination of the above abstract, dated June 20, 1917, that the title to the premises described is in the name of Clarence E. Woolman and that a general warranty deed from said Clarence E. Woolman, with release of dower if necessary, will vest in the state of Ohio a clear title except for the taxes for the last half of the year 1916, amounting to $70.11, which remain unpaid and are a lien, and the taxes for 1917, the amount of which has not yet been determined.

Lot number five (5) *of John C. Bullitt's Ohio avenue addition.*

I find upon examination of the above abstract, dated June 20, 1917, that the title to the premises described is in the name of Clarence E. Woolman and that a general warranty deed from said Clarence E. Woolman, with release of dower if necessary, will vest in the state of Ohio a clear title except for the taxes for the last half of the year 1916, amounting to $70.44, which remain unpaid and are a lien, and the taxes for 1917, the amount of which has not yet been determined.

I am herewith handing you the four abstracts hereinbefore referred to.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

440.

TOWNSHIP TRUSTEES—HOW BONDS MUST BE ISSUED BY SAID OFFICIALS FOR ROAD IMPROVEMENT.

Sections 3298-15e and 3298-45 G. C. contain the only provisions authorizing the township trustees to issue bonds in the matter of the improvement of township roads, and in issuing bonds thereunder the provisions of said sections must be followed.

COLUMBUS, OHIO, July 9, 1917.

HON. D. H. PEOPLES, *Prosecuting Attorney, Pomeroy, Ohio.*

DEAR SIR:—I have your communication of June 20, 1917, in which you ask my opinion in reference to a number of matters, as follows:

"1. Can township trustees issue bonds to build roads without submitting same to the electors of the township?

"2. If bonds can be issued, for what length of time can the bonds be issued?

"3. Can township trustees issue said bonds to pay their portion for building state roads?

"4. Must the sale of bonds be advertised, or can they be sold without advertisement?

"5. When the levy for road purposes amount to about $2,500 per year, can the trustees of a township borrow $15,000.00 and pay a portion of the same each year out of the levy for road purposes, and continue to pay each year until said amount is paid in full?

"6. If the township trustees can issue bonds, what proceeding is necessary (if the same is not submitted to a vote) to make the issuing of said bonds legal?"

Owing to the fact that the new highway act became effective on the 28th day of June, 1917, I will base my opinion upon the provisions of this act. I do this especially for the reason that the provisions of law now in force, having to do with the matter of constructing, reconstructing, resurfacing and improving township roads and all matters connected therewith, have been radically modified by the new law.

Under the law which became effective on June 28, 1917, there are two separate and complete plans for the improvement of township highways. The one scheme or plan is set forth in sections 3298-1 to 3298-15n inc. G. C.; the other in sections 3298-25 to 3298-53 inc. G. C. The first plan takes into consideration the property and territory of the entire township, including the property and territory in the municipal corporations situated therein. The second plan exempts the property and territory located within the corporate limits of the municipalities situated therein, the property and territory outside of said municipalities forming a road district.

The two plans are complete and comprehensive within themselves, and in deciding in reference to questions pertaining to the powers of township trustees in the matter of road improvements we must look to the provisions made in the two above plans or schemes. With this in mind, let us note what provisions are made in the first plan for the issuing of bonds by township trustees.

Section 3298-15d G. C. gives authority to the township trustees to levy annually a tax not exceeding three mills upon each dollar of the taxable property of the township, to provide a fund for the payment of the township's proportion of the cost and expense of the improvement.

Section 3298-15e G. C. provides that:

> "The township trustees, in anticipation of the collection of such taxes and assessments, or any part thereof, may, whenever in their judgment it is deemed necessary, sell the bonds of said township in any amount not greater than the aggregate sum necessary to pay the estimated compensation, damages, costs and expenses of such improvement. * * *"

This section contains the only provisions of law for the issuing of bonds by the township trustees in the matter of improving roads under this plan.

Under the second plan we find provisions made in section 3298-44 G. C., enabling the township trustees to levy a tax of not exceeding three mills upon each dollar of the taxable property of *"said district;"* that is, the property outside the corporate limits of any municipalities located within the township.

In section 3298-45 G. C. provisions are made for the issuing of bonds as follows:

> "The township trustees, in anticipation of the collection of such taxes and assessments, or any part thereof, may whenever in their judgment it is deemed necessary, sell the bonds of said road district, in any amount not greater than the aggregate sum necessary to pay the estimated compensation, damages, costs and expenses of such improvement. * * *"

This is the only provision made in the second plan or scheme giving authority to the township trustees to issue bonds.

Section 3298-18 G. C. provides that the township trustees may levy a tax to create a fund for dragging, maintenance and repair of roads, upon all the taxable property of the township outside of any incorporated village or city, or part thereof therein situated, not exceeding in the aggregate two mills in any one year; but there is no provision made for the issuing of bonds in anticipation of the collection of such taxes.

At this point let us note the answers to a number of your questions. First, can township trustees issue bonds to build roads, without submitting same to the electors of the township? Under the provisions of sections 3298-15e and 3298-45 G. C., it is evident that the township trustees have authority, in anticipation of the collection of taxes, to issue bonds without submitting same to the electors of the township, but these bonds must be issued in the matter of such particular road improvement and the funds derived from the sale of the bonds must be used for that particular improvement.

You also ask for what length of time can the bonds be issued. Under the provisions of said two sections, the bonds may be issued for a period not to exceed ten years.

You also ask whether the sale of the bonds must be advertised, or whether they can be sold without advertisement. The said two sections above noted provide that:

> "The sale of such bonds shall be advertised once not later than two weeks prior to the date fixed for such sale in a newspaper published in the county," etc.

You inquire whether the township trustees could borrow fifteen thousand

dollars and pay a portion of the same each year out of the levy for road purposes, and continue to pay each year until said amount is paid in full. It is my opinion that this cannot be done. As said before, there is a specific and definite plan mapped out in the above provisions for the improvement of the township roads, and it is my opinion that these sections contain the only provisions in reference to the issuing of bonds and borrowing of money. It is true that section 3295 G. C. provides for the issuing of bonds by the township trustees, but the provisions of said section would not apply to the matter about which you inquire.

You also inquire what proceeding is necessary to make the issuing of bonds legal. Under sections 3298-15e and 3298-45 G. C., the method of proceeding is set out.

In addition to what I have already suggested, it might be well to call attention to the following provision found in each section:

> "Prior to the issuance of such bonds the township trustees shall, in case all or any part of said bonds are to be redeemed by special assessments, provide for the levying of a tax upon all the taxable property of the township to cover any deficiencies in the payment or collection of any such special assessments."

This provision of the statute can be met by the adoption of a resolution in which the township trustees pledge themselves and their successors that they will, if necessary, to take care of any deficiencies that may arise, due to the non-payment of any special assessments, levy a tax sufficient to take care of any deficiencies so arising; but the levy need not be made until deficiencies occur. The other provisions of these two sections are easily followed.

You make inquiry also as to the authority of township trustees to issue bonds to pay the township's portion of the cost and expense of building inter-county highways and main market roads. In order to answer this question it will be necessary for me to turn to the chapter having to do with the improvement of intercounty highways and main market roads, and especially to sections 1222 and 1223 G. C.

Section 1222 G. C. provides in part as follows:

> "* * * For the purpose of providing a fund for the payment of the proportion of the cost and expense to be paid by the interested township or townships for the construction, improvement, maintenance or repair of highways under the provisions of this chapter, the county commissioners or the township trustees are authorized to levy a tax not exceeding two mills upon all taxable property of the township in which such road improvement or some part thereof is situated. * * * Where the improvement is made upon the application of the county commissioners said county commission shall levy the tax and where the improvement is made upon the application of the township trustees said township trustees shall levy the tax. * * *"

Section 1223 G. C. provides that the county commissioners, in anticipation of the collection of such taxes and assessments or any part thereof, when the improvement is being done upon their application, may issue bonds to cover the shares of the cost and expense of the improvement payable by the county township or townships and the owners of the lands assessed for such improvement. But this section further provides that:

> "Where such construction, improvement or repair is made upon the

application of the township trustees, such township trustees are hereby authorized to sell the bonds of the interested township in any amount not greater than the estimated compensation, damages, cost and expense of such construction, improvement or repair and under like conditions herein prescribed for county commissioners."

It will readily be seen from the provisions of this section that the township trustees have nothing to do with the levying of a tax or the issuing of bonds in the matter of the improvement of intercounty highways or main market roads, excepting in those cases in which the township trustees made application to the state highway commissioner for state aid.

When the county commissioners make application to the state highway commissioner for state aid, the taxes levied are levied by the county commissioners, and the bonds issued, if any, are issued by the county commissioners in a sufficient amount to cover not only the proportion of the cost and expense of the improvement due from the county, but also the proportion of the cost and expense of the improvement due from the township and from the assessed property owners. This matter will be more readily understood by a reference to the provisions of section 1192 G. C., which provides that if the county commissioners do not file any application for state aid before March 1 of any year, then the board of township trustees of any township may file such application.

Section 1223 G. C. contains the only provisions authorizing the township trustees to issue bonds in the matter of the improvement of intercounty highways and main market roads.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

441.

MUNICIPAL CIVIL SERVICE COMMISSIONER—SALARY CANNOT *BE* INCREASED OR DIMINISHED DURING TERM.

A municipal civil service commissioner is an officer with a fixed term of office and a salary which cannot be increased or diminished during such term.

COLUMBUS, OHIO, July 9, 1917.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—In your communication of recent date you requested an opinion from this department as follows:

"Mr. Van Dousen, city solicitor of Lorain, Ohio, was in the office yesterday informing the writer that he had submitted a matter for your opinion, which you had agreed to answer through the bureau. We are much pleased that this has been done with your consent as a written opinion upon this matter will also be of much value to this office.

"We beg to inform you, however, that this question was submitted to

the writer some time since by State Examiner Will E. Heck, and at the time he was working upon the examination of the city of Lorain, and we replied to him as follows:

"'We have your favor of the 8th inst., and will take up your question as follows:

"'"1. The council of this city passed an ordinance increasing the salary of the members of the civil service commission. Are members of the civil service commission under the law which forbids an official having his salary raised during his term of office? If so, should I make a finding for the increased amount paid the members of the commission in this city?"

"'In reply thereto we respectfully refer you to section 486-19 G. C., covering municipal civil service as follows: "The mayor or other chief appointing authority of each city in the state shall appoint three persons, one for a term of two years, one for four years and one for six years, who shall constitute the municipal civil service commission. * * *" We also refer you to section 4213 G. C., providing that the salary of any officer, clerk or employe shall not be increased or diminished during the term for which he was elected or appointed and we are, therefore, of the opinion that findings for recovery should be made for any violations of this section. You must ascertain, of course, the date of appointment of each man and be sure that the salary was increased during his term.'

"If we should happen to be incorrect in our judgment, we shall be pleased to hear from you."

Your answer given above seems to be undoubtedly correct as it is in consonance with two opinions of a former attorney-general, and recently the court of appeals of Muskingum county have decided to the same effect. The municipal civil service commissioners are municipal officers although they have sometimes jurisdiction over territory outside of the corporation, that is in case of school districts. They are appointed by the mayor. (Section 486-19 General Code.) Their salary is fixed by council. They are called "officers" wherever mentioned in the civil service law. It has not occurred to the attorney-general in either of the opinions mentioned, or to the court in the decision above alluded to, to question that they are such municipal officers. They are, therefore, governed by the provisions of section 4213 of the General Code, which is as follows:

"The salary of any officer, clerk, or employe shall not be increased or diminished during the term for which he was elected or appointed, and except as otherwise provided in this title, all fees pertaining to any office shall be paid into the city treasury."

The first of the opinions above referred to—found in Vol. I, Reports of the Attorney-General, 1914, page 524, by Mr. Hogan—is to the effect that when the act then in effect was passed taking the place of the former statutes upon the subject, the existing terms of the commissioners being saved, that it could not be changed during the terms for which they were originally appointed.

The second opinion rendered in the same year, page 1439, Vol. II, was in a case where the salary having been changed the civil service commissioner resigned and then was reappointed in order that he might receive the new salary, which it was held he could not do.

The case in the court of appeals of Muskingum county was decided at the May term, 1917, and was the exact case as to which you ask an opinion. The court there considered not only section 4213, but also the constitutional provision as all-controlling, which is article II, section 20, which is as follows:

"The general assembly, in cases not provided for in this constitution, shall fix the term of office and the compensation of all officers; but no change therein shall affect the salary of any officer during his existing term, unless the office be abolished."

The above constitutional provision certainly does lay down a principle of universal application. It is unnecessary to decide whether section 4213 is enacted in pursuance of article II section 20 or not. It is the law and whether it be required by that section of the constitution or not it is not in conflict with any other section, but is in harmony with the principle declared in that section. The particular question the court of appeals passed upon was upon the meaning of the word "term," or what it is that constitutes the term, and they held that it did not apply to one appointed to fill a vacancy after the change in salary had taken place. That is, the term of office, instead of being the statutory term for which the officer is chosen, is the term for which the office is held by the particular incumbent under an appointment or election.

There seems therefore to be no question left, but upon authority as well as reason you are advised that the salary of the civil service commissioners cannot be increased or diminished during the terms for which they are appointed. This, in the case in question, will result in different members of the board receiving different compensation for exactly the same services. This consequence, however, is a necessary one and any commissioner not satisfied with his salary may resign and make way for another to be appointed who will receive the same salary as his fellow commissioners; and this is nothing more than frequently happens, and as did happen in the case of the common pleas judges when those serving out terms of different numbers of years received the old salaries while the new ones chosen after the change received a new and different one.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

442.

APPROVAL—FINAL RESOLUTIONS FOR ROAD IMPROVEMENTS IN CLERMONT AND PICKAWAY COUNTIES.

COLUMBUS, OHIO, July 11, 1917.

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

DEAR SIR:—I have your communication of July 7, 1917, requesting my approval of certain final resolutions therein enclosed, as follows:

"Clermont County—Sec. 'I,' Ohio River road, I. C. H. No. 7.
"Pickaway County—Sec. 'A,' Cincinnati-Zanesville road, I. C. H. No. 10."

I have carefully examined these final resolutions and find them correct in form and legal. I am therefore returning the same to you with my approval endorsed thereon.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

443.

APPROVAL—LEASES OF CANAL LANDS TO THE EAST OHIO GAS COMPANY, CLEVELAND, OHIO—A. J. HEIMAN, BARBERTON, OHIO—EDWARD CLARK, LAKEVIEW, OHIO.

COLUMBUS, OHIO, July 11, 1917.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your communication of June 19, 1917, in which you enclose three leases of state canal lands, in triplicate, said leases being as follows:

> "The East Ohio Gas Co. of Cleveland, Ohio, right of way along the outer slope of the Ohio canal between Newburgh Height, Cuyahoga Co. and the village of Peninsula in Summit Co. a distance of 15 miles. This right of way is to be used for laying and maintaining a 10-inch gas main, $7,500.00.
>
> "A. J. Heiman, Barberton, Ohio, permission to occupy and use about 5 miles of the bed of the Ohio canal south of Barberton for the propagation of fish for commercial purposes. This is rather in the line of an experiment, $1,200.00.
>
> "Edward Clark, Lakeview, Ohio, a cottage site on the west bank of Indian Lake, $300.00."

I have examined these leases carefully and find them correct in form and legal, and am forwarding the same, with my approval endorsed thereon, to Hon. James M. Cox, governor of Ohio, for his consideration.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

444.

APPROVAL—LEASE OF CANAL LANDS TO THE DEFIANCE MACHINE WORKS, DEFIANCE, OHIO—E. F. WOLLASTON, DAYTON, OHIO—JOHN GAMMETER, AKRON, OHIO.

COLUMBUS, OHIO, July 11, 1917.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your communication of May 28, 1917, with which you enclose leases in triplicate for canal lands, as follows:

	Valuation.
"To The Defiance Machine Works, Defiance, Ohio	$2,000.00
"Karl G. White, Hebron, Ohio, canal property at Hebron Ohio	500.00
"E. F. Wollaston, Dayton, Ohio, M. & E. canal	200.00
"John R. Gammeter,, Akron, Ohio, Ohio canal north of Akron	700.00"

I have examined these leases carefully and find the same correct in form and legal, and am therefore endorsing my approval thereon and have forwarded the same to the governor for his approval.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

445.

APPROVAL—FINAL RESOLUTION FOR ROAD IMPROVEMENT IN MERCER COUNTY, OHIO.

COLUMBUS, OHIO, July 13, 1917.

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

DEAR SIR:—I have your communication of July 11, 1917, asking for my approval on a certain final resolution as follows:

> "Mercer County—Sec. 'A-2' Celina-Greenville road, Pet. No. 2681, I. C. H. No. 211."

I have carefully read final resolution and find the same correct in form and legal and am therefore returning the same to you with my approval endorsed thereon.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

446.

WORKMEN'S COMPENSATION ACT—PROVISIONS THEREOF UNENFORCIBLE AS TO ALL EMPLOYERS ENGAGED IN EMPLOYMENTS MARITIME IN NATURE.

Under the decision of the supreme court of the United States, rendered May 21, 1917, section 1465-98 Ohio General Code, and all other provisions of the Ohio compensation act, are unenforcible as to all employers engaged in employments maritime in nature, under maritime contracts with an employer engaged in maritime pursuits upon any of the navigable waters of the United States, whether the employment be interstate or intrastate.

COLUMBUS, OHIO, July 14, 1917.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—On June 30th I received from you the following request for my opinion:

> "The commission has received a letter involving a point of law which we find necessary to refer to your department for an opinion. The letter reads as follows:
>
> "'Re—Question of application of the Ohio workmen's compensation act to stevedoring operations.

"'My attention has just been called to a decision rendered May 21, 1917, by the supreme court of the United States in the case of the Southern Pacific Company, plaintiff in error, v. Jensen and a number of other similar cases concurrently decided.

"'I assume that you are familiar with the decision in question. I write this letter to ask if you will be good enough to favor me with your views as to whether or not stevedores in Ohio, having particular reference to the large coal and ore docks along the lakes, who are engaged in the receiving and trans-shipment of iron ore and coal—are affected by this decision, taken in connection with section 51. (1465-98 O. G. C.)'

"As there are quite a few employers of labor whose status under the workmen's compensation law depend upon this opinion, we will kindly ask you to favor us with same at the very earliest possible date."

Stevedores are persons employed in loading and unloading vessels in port.

Section 1465-98 G. C. referred to in the above request is as follows:

"The provisions of this act (G. C. sections 1465-41a to 1465-43, 1465-45, 1465-46, 1465-53 to 1465-106) shall apply to employers and their employes engaged in intrastate and also in interstate and foreign commerce, for whom a rule of liability or method of compensation has been or may be established by the congress of the United States, only to the extent that their mutual connection with intrastate work may and shall be clearly separable and distinguishable from interstate or foreign commerce, and then only when such employer and any of his workmen working only in this state, with the approval of the state liability board of awards, and so far as not forbidden by any act of congress, voluntarily accept the provisions of this act by filing written acceptances, which, when filed with and approved by the board, shall subject the acceptors irrevocably to the provisions of this act to all intents and purposes as if they had been originally included in its terms, during the period or periods for which the premiums herein provided have been paid. Payment of premium shall be on the basis of the payroll of the workmen who accept as aforesaid."

This statute is almost identical with Sec. 114 of the New York workmen's compensation act, which is as follows:

"The provisions of this chapter shall apply to employers and employes engaged in intrastate, and also in interstate or foreign commerce, for whom a rule of liability or method of compensation has been or may be established by the congress of the United States, only to the extent that their mutual connection with intrastate work may and shall be clearly separable and distinguishable from interstate or foreign commerce, except that such employer and his employes working in this state may, subject to the approval and in a manner provided by the commission and so far as not forbidden by any act of congress, accept and become bound by the provisions of this chapter in like manner and with the same effect in all respects as provided herein for other employers and their employes."

This section of the New York act was considered by the supreme court of the United States in the case of Southern Pacific Company v. Jensen, referred to in your request, the decision of the court was rendered May 21, 1917.

The findings of fact, made by the New York commission, and upon which findings the case was determined, are as follows:

"1. Christen Jensen, the deceased workman, was, on August 15, 1914, an employe of the Southern Pacific Company, a corporation of the state of Kentucky, where it has its principal office. It also has an office at pier 49, North river, New York city. The Southern Pacific Company at said time was, and still is, a common carrier by railroad. It also owned and operated a steamship, El Oriente, plying between the ports of New York and Galveston, Texas.

"2. On August 15, 1914, said steamship was berthed for discharging and loading at pier 49, North river, lying in navigable waters of the United States.

"3. On said date Christen Jensen was operating a small electric freight truck. His work consisted in driving the truck into the steamship El Oriente where it was loaded with a cargo, then driving the truck out of the vessel upon a gangway connecting the vessel with pier 49, North river, and thence upon the pier, where the lumber was unloaded from the truck. The ship was about ten feet distant from the pier. At about 10:15 a. m., after Jensen had been doing such work for about three hours that morning, he started out of the ship with his truck loaded with lumber, a part of the cargo of the steamship El Oriente, which was being transported from Galveston, Texas, to New York city. Jensen stood on the rear of the truck, the lumber coming about to his shoulder. In driving out of the port in the side of the vessel and upon the gangway, the truck became jammed against the guide pieces on the gangway. Jensen then reversed the direction of the truck and proceeded at third or full speed backward into the hatchway. He failed to lower his head and his head struck the ship at the top line, throwing his head forward and causing his chin to hit the lumber in front of him. His neck was broken, in this manner he met his death.

"4. The business of the Southern Pacific Company in this state consisted at the time of the accident and now consists solely in carrying passengers and merchandise between New York and other states. Jensen's work consisted solely in moving cargo destined to and from other states.

"5. Jensen left surviving him Marie Jensen, his widow, 29 years of age, and Howard Jensen, his son, seven years of age, and Evelyn Jensen, his daughter, three years of age.

"6. Jensen's average weekly wage was $19.60 per week.

"7. The injury was an accidental injury and arose out of and in the course of Jensen's employment by the Southern Pacific Company and his death was due to such injury. The injury did not result solely from the intoxication of the injured employe while on duty, and was not occasioned by the wilful intention of the injured employe to bring about the injury or death of himself or another.

"8. This claim comes within the meaning of chapter 67 of the consolidated laws as re-enacted and amended by chapter 41 of the laws of 1914, and as amended by chapter 316 of the laws of 1914.

"9. Award of compensation is hereby made to Marie Jensen, widow of the deceased, at the rate of $5.87 weekly during her widowhood with two years' compensation in one sum in case of her marriage; to Harold Jensen, son of the deceased, at the rate of $1.96 per week and to Evelyn Jensen, daughter of the deceased, at the rate of $1.96 per week until said Harold Jensen and Evelyn Jensen respectively shall arrive at the age of eighteen years, and there is further allowed the sum of one hundred ($100.00) dollars for funeral expenses.'

The award was attacked on several different grounds, but was sustained by the New York court. In the federal supreme court only two contentions were considered.

First, that the Southern Pacific Company being an interstate common carrier by railroad is responsible for injuries to employes only under the federal employers' liability act, and no state statute can impose any other or different liability. The court quickly disposes of this contention, holding that the federal employers liability act applied only to employes having a direct and substantial connection with railroad operations, and the fact that the ship upon which the accident occurred happened to be owned by a railroad company did not bring employes engaged in loading or unloading the ship under the federal employers' liability act.

The second contention was that the application of the compensation act as made by the New York commission in this case conflicts with the general maritime law, which constitutes an integral part of the federal law under art. III, section 2 of the United States Constitution, and to that extent is invalid. The majoriy of the court held this contention to be sound; the holding, and reasons therefor, will appear by the following quotations from the opinion of Mr. Justice McReynolds:

> "Article III, section 2, of the Constitution, extends the judicial power of the United States 'To all cases of admiralty and maritime jurisdiction;' and Art. 1, Sec. 8, confers upon the congress power 'To make all laws which may be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this constitution in the government of the United States or in any department or officer thereof.' Considering our former opinions, it must now be accepted as settled doctrine that in consequence of these provisions congress has paramount power to fix and determine the maritime law which shall prevail throughout the country. Butler v. Steamship Co., 130 U. S. 527. In re Garnett, 141 U. S. 1, 14. And further, that in the absence of some controlling statute the general maritime law as accepted by the federal courts constitutes part of our national law applicable to matters within the admiralty and maritime jurisdiction. The Lottawanna, 21 Wall. 558; Butler v. Boston S. S. Co., 130 U. S. 527, 557; Workman v. New York, 179 U. S. 552. * * *
>
> "By section 9, judiciary act of 1789 (1 Stat. 76, 77), the district courts of the United States were given 'exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction; * * * saving to suitors in all cases the right of a common law remedy where the common law is competent to give it.'. And this grant has been continued. Judicial Code, Secs. 24 and 256. * * *
>
> "The work of a stevedore in which the deceased was engaging is maritime in its nature; his employment was a maritime contract; the injuries which he received were likewise maritime; and the rights and liabilities of the parties in connection therewith were matters clearly within the admiralty jurisdiction. Atlantic Transport Co. v. Imbrovek, 234 U. S. 52, 59, 60.
>
> "If New York can subject foreign ships coming into her ports to such obligations as those imposed by her compensation statute, other states may do likewise. The necessary consequence would be destruction of the very uniformity in respect to maritime matters which the constitution was designed to establish; and freedom of navigation between the states and with foreign countries would be seriously hampered and impeded. A far more serious injury would result to commerce than could have been inflicted by the Washington statute authorizing a materialman's lien condemned in the Roanoke. The legislature exceeded its authority in at-

tempting to extend the statute under consideration to conditions like those here disclosed. So applied, it conflicts with the constitution and to that extent is invalid.

"Exclusive jurisdiction of all civil case of admiralty and maritime jurisdiction is vested in the federal district courts, 'saving to suitors in all cases the right of a common law remedy where the common law is competent to give it.' The remedy which the compensation statute attempts to give is of a character wholly unknown to the common law, incapable of enforcement by the ordinary processes of any court and is not saved to suitors from the grant of exclusive jurisdiction. The Hine, 4 Wall. 571, 572; The Belfast, 7 Wall. 624, 644; Steamboat Co. v. Chase, 16 Wall. 522, 531, 533; The Glide, 167 U. S. 606, 623. And finally this remedy is not consistent with the policy of congress to encourage investments in ships manifested in the acts of 1851 and 1884 (R. S. 4283-4285; Sec. 18, act of June 26, 1884, 23 State. 57, Ch. 121) which declare a limitation upon the liability of their owners. Richardson v. Harmon, 222 U. S. 104.

"The judgment of the court below must be reversed and the case remanded for further proceedings not inconsistent with this opinion."

Upon this important question the court was divided, five to four, Justices Holmes, Pitney, Brandeis and Clark dissented from the opinion of the majority as expressed by Mr. Justice McReynolds. Justices Holmes and Pitney delivered very strong dissenting opinions, but, as the law is what is announced by the five judges and not by the four, it "profiteth nothing" to discuss the dissenting opinions.

While it has nothing to do with this opinion, the open declaration by Mr. Justice Holmes that judges legislate should be noted. He says, in his dissenting opinion, "I recognize without hesitation that judges do and must legislate, but they can do so only interstially; * * *" I think the statement correct, but it should be taken so meaning that some courts when exercising this legislative power, will and do, when they deem it necessary that the power be exercised, create interstices, if none exist.

The opinion of the majority of the court is conclusive and speaks for itself; under it no state compensation law can apply to any employes engaged in employment maritime in its nature, or under what may be called a maritime contract, with an employer engaged in maritime pursuits, upon any of the navigable waters of the United States; it makes no difference whether the employment be interstate or intrastate. The test is, is the employment maritme so that the admiralty jurisdiction attaches?

The opinion in this case really has no application to G. C. 1465-98. An examination of that section shows that it was intended to apply only to "employers engaged in intrastate and also in interstate and foreign commerce, *for whom a rule of liability or method of compensation has been or may be established by the congress of the United States.* Only one such act is in existence and that is the federal employers liability act, which, the court expressly found, did not apply to the Jensen case. It will be noted too that section 1465-98 is purely optional and requires the written acceptance of the terms of the Ohio act by both employer and employe. It is needless to further consider this particular section, because, as stated above, it applies only to employers coming under the federal employers' liability act, and does not apply to maritime employes, such as stevedores. For maritime employes, no rule of liability or method of compensation has been established by congress—and, except to the extent indicated in the opinion of the court in the Jensen case, congress has not legislated in this field. The question really is, as maritime employes do not come under the federal employers' liability act, are they entitled to the protection of the Ohio compensation act? Our act

is compulsory and in no sense elective and the answer given by the opinion in the Jensen case is that the Ohio act does not and cannot apply to maritime employments.

If the Ohio act were elective, then I think, as congress has not prohibited employer and employe from *contracting* as to liability, that if both actually and not by presumption agreed to comply with the act and be bound by its administration, then they would be held to their contract. But our act is compulsory and there is absolutely no provision for persons not bound by it electing to be so bound—except in the case of certain employes coming under the field of the federal employers' liability act, I am forced to hold that the ruling of the majority of the court in the Jensen case, must be construed as deciding that the Ohio act does not apply to maritime employments.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

447.

SALARY OF CIVIL SERVICE EMPLOYE—MUST BE PAID IN ACCORDANCE WITH APPROPRIATION BILL.

Section 8 of the general appropriation budget bill of 1917 (107 O. L. 353) in prescribing uniform salaries for certain civil service positions, adopts the classifications and ratings of the civil service commisson and by such adoption controls designations of particular positions in section 2 of the same bill inconsistent with such classifications.

An appointing department, board or commission must pay out personal service appropriations for positions to which said section 8 relates only at the rates therein specified, which are not maximum rates merely but are absolute and uniform rates.

If the sums appropriated for personal service are not sufficient in amount to pay the rates so specified, the appointing authority, or the controlling board, is not required to secure additional funds in order to enable such payments to be made; but if such additional sums are not secured, no compensation at all may be paid on account of the positions affected by such failure; so that such positions are in effect abolished by such failure to secure additional funds.

COLUMBUS, OHIO, July 14, 1917.

The Ohio Board of Administration, Columbus, Ohio.

GENTLEMEN:—I have your letter of June 20th, in which you request my opinion as follows:

> "The civil service commission has furnished this department with certain classifications of positions, and the salaries attached to same are in excess of the amounts this board desire to pay; for instance, an employe, whose service is clerical, is rated as clerk, grade 2, rate C, under which classification the salary is fixed at a minimum of $1,140 per year. The present salary of this employe is $900 per year, and this board does not desire to pay more. The same condition obtains with reference to a number of employes.
>
> "Your opinion is requested as to whether or not it is mandatory upon this board to pay to its employes the compensation fixed by the civil service rating."

Your inquiry involves consideration of section 8 of the general appropriation budget bill of 1917. The section is found in 107 O. L. 353, and provides in part as follows:

> "So much of the appropriation herein made for personal service as pertains to the compensation of employes in the following groups and grades of the classified civil service of the state, save and except employes in such groups and grades in * * * institutions under the control of the Ohio board of administration, * * * may be expended only in accordance with the classification and rules of the state civil service commission and at the following rates of annual salaries for the respective groups and grades, to wit:
>
> (Here follows a schedule of grades and rates with specific sums fixed to each rate.)
>
> provided, however, that rates of compensation of persons now employed in the foregoing groups and grades of the classified civil service of the state, which on the date of the passage of this act may exceed the uniform rate fixed herein for the service, group and grade of their positions, as so classified, shall not be affected by the provisions of this section; but such rates of compensation as fixed on said date for such positions shall be the rates at which the appropriations herein made may be expended for the compensation of such persons while holding such positions.
>
> "In case any personal service appropriation * * * is insufficient in amount to enable the * * * board or commission, for which the same is made to comply with the provisions of this section in the payment of the compensation of its employes, the controlling board may from the appropriation made to such controlling board, allot to such * * * board or commission a sum sufficient to enable such * * * board or commission to comply with this section. Such allotment shall be made on application and all the provisions of section 4 of this act, so far as consistent herewith shall apply. * * *"

Section 4 of the act referred to provides the machinery for application to the controlling board. It will not be necessary to quote that section in this connection. The appropriation to the controlling board referred to in section 8 is general under the heading "Contingencies" and does not shed any light upon the question referred to. See 107 O. L. 232-307.

I should state in connection with your inquiry as I have phrased it that your letter elsewhere shows that it is necessary to apply to the controlling board to get funds to pay the salary which you have in mind. Inasmuch as the general personal service items of the appropriation law, in section 2, for the Ohio board of administration, are all specific in column one, I assume, though you do not say so, that the clerkship which you have in mind is the one which is designated in said appropriation as "Grade IV clerk" as this is the only position for which a salary of $900 is appropriated. It will be observed that $900.00 is in excess of any rate fixed for grade IV clerks by section 8 of the law. It is apparent therefore that while the legislature has designated this position as grade IV in section 2, the effect of section 8 upon it must be one of two things:

1. If the position is properly rated as a grade IV clerkship, then the salary must be reduced so as to conform to the proper rating of grade IV.

2. If the position is properly classified as a higher grade than as stated, application to the controlling board is necessary to secure the funds with which to pay the compensation referred to in section 8.

Your statement seems to indicate that the second situation is the one which obtains with respect to the position under consideration.

It appears, therefore, that although in section 2 an appropriation is made for the salary of one grade IV clerk at $900.00, this particular clerkship has been regarded by the civil service commission as belonging in grade II and has taken rate C.

The first question to be considered, therefore, is as to whether or not there is a conflict between the gradings which have been mentioned and as to whether the position really is a grade IV position or a grade II clerkship.

The pertinent provision of section 8 in this connection is that which is expressed in the language "only in accordance with the classification and rules of the state civil service commission." In my opinion this is the controlling provision and even though in the body of the appropriation bill, that is section 2 thereof, a given position may be referred to as, for example, "grade IV clerk" yet for the purpose of section 8 this description is not controlling, but the grade of a particular position is to be determined by the classification and rules of the state civil service commission.

The reference here is to the action of the civil service commission under sections 486-7 and 486-9 of the General Code, as enacted 106 O. L. 400. I quote such portions of the sections named as are necessary to show the source of the authority of the civil service commission.

> "Sec. 486-7. The commission shall, First, Prescribe, amend and enforce administrative rules for the purpose of carrying out and making effectual the provisions of this act.
>
> "Sec. 486-9. As soon as practicable after the taking effect of this act, the commission shall put into effect rules for the classification of offices, positions and employments, in the civil service of the state. * * * Due notice of the contents of such rules and of all changes therein shall be given to appointing officers affected thereby, and such rules shall also be printed for public distribution. * * *"

There are also certain limitations in sections 486-15, 486-16 and 486-17 providing for promotions, transfers, reinstatements and reductions, which together with the term "classified service," which runs throughout the civil service act, show that the classification of positions and their gradation with respect to similarity of duties, etc., is one of the essential ideas of the civil service law as a whole, without which many of its provisions can have no effect.

There is no question in my mind as to the authority of the general assembly to delegate to the civil service commission as an administrative board the power to determine by comparison of duties, etc., the natural classes and grades into which the positions in the civil service of the state fall. This is not legislative power but merely a duty to apply the legislative policy embodied in the civil service act to particular facts.

I conclude, therefore, that section 8 of the appropriation law effectually controls section 2 thereof and that whatever designation may be given to a particular position in section 2, such designation must yield to that which is given to the same position by the classification and rules of the civil service commission where an inconsistency exists.

Therefore, even though the appropriation may have been made in the instance which you have in mind for a grade IV clerk, such appropriation, if expended for the payment of the salary pertaining to a position which according to the classification and rules of the civil service commission is a grade II position, must be governed by section 8.

Section 8 certainly legislates with respect to the salary to be paid to the incumbents of the different grades and rates of positions therein enumerated. It does not, of course, govern with respect to the salaries payable in the institutions under the control of the board of administration and I assume that your question does not relate to such positions.

The question arises, however, as to the extent to which section 8 controls. Plainly stated that question is whether section 8 absolutely fixes the salaries pertaining to the positions enumerated therein or whether it merely fixes the maximum compensation for each of them.

Examining section 8 closely we discover that its first and most significant declaration is that the appropriations for personal service, so far as they pertain to certain positions, "may be expended only * * * at the following rates of annual salaries for the respective groups and grades." This language is not ambiguous. It does not fix a maximum nor a minimum, but absolutely determines the rate applicable to a given grade and rate.

Other language of the section must, however, be considered. In the first place there is the proviso that the rates of compensation of persons "now employed in the foregoing groups and grades" shall not be affected by the provisions of the section. In effect it saves from reduction the salaries of employes whose compensation on a given date may exceed the uniform rate. The very phrase "uniform rate" as used in this proviso shows what the legislature intended, namely, that the compensation paid should be uniform throughout a given grade and class of the civil service. Moreover, the same proviso enacts as to the rates of compensation of such persons whose salaries are not to be affected by the schedule, that "such rates of compensation as fixed on said date (the date of the passage of the act) for such positions, shall be the rates at which the appropriations herein made may be expended for the compensation of such persons while holding such positions."

Here again is a limitation which precludes both the raising and lowering of salaries. It is not that the rates as fixed on the date of the passage of the act shall be the maximum salary which may be paid from the appropriations made in the body of the act nor that it shall be the minimum salary which shall be so paid, but that it shall be the rate at which the appropriation may be expended.

Of course at this point it is appropriate merely to call attention to the fact that when an appropriation is made for a given department, board or commission in the state government, coupled with the statement that it may be expended only in a certain way, or even that it may be expended in a certain way without the use of the word "only," a power is conferred which must be strictly construed. In this instance "construction" is scarcely necessary for the legislature thus far in section 8 has clearly evinced the intention to fix a uniform scale of salaries. Such a uniform scale of salaries cannot be obtained by merely fixing a uniform maximum rate or a uniform minimum rate. The uniformity at which the legislature has aimed is absolute.

The real doubt which arises grows out of the provisions for securing the additional funds necessary to enable a given department, board or commission to comply with the section. The language is permissive, not mandatory. Neither the department, board or commission nor the controlling board to which the section refers is in words required to do anything—all is optional.

What effect upon the preceding provisions of the section does this fact have?

In my opinion the clearly expressed intention of the first paragraph of section 8 of the law absolutely controls the expenditure of the funds. It does not, however, require that the funds be expended at these rates, but merely that if the funds appropriated are expended at all thy shall be so expended. There is nothing in section 8 which precludes the abolition of positions.

If, therefore, a given department, board or commission, or the controlling

board, should determine that it was inexpedient to ask for or make the additional allowance necessary to comply with the salary rating set forth in the section with respect to a given position, such determination is not precluded by anything which is in the statute; but the effect of it will be virtually to abolish the given position.

The answer to your question, then, may be shortly stated as follows: It is not mandatory upon the board of administration to apply to the controlling board for an additional allowance in order to pay the particular employe mentioned in your question the salary to which, if retained in your employment, he is entitled to have as the incumbent of a clerkship in grade II, rate C, but if your board desires to continue the existence of the position you must, in order to do so, secure such additional allowance; for you are without authority to retain the position without paying the salary stipulated therefor in section 8 of the law.

Your question is, of course, answered by the foregoing. I may say, however, that if in your judgment the position is improperly graded and rated, the matter should be taken up with the civil service commission, which has continuing authority to classify positions in the civil service of the state. The authority is reposed in that commission and the appointing authority, such as your board is, while at liberty to disagree with the commission, has no power to change its determination and must be governed by it.

If, however, the view of the board is based upon the conviction that while the position may bear such relation to other positions of a similar character as that it may be said to be properly graded yet the salary therefor is too high, then the board's disagreement is with the legislature and not the civil service commission; for the amounts found in section 8 were fixed by the legislature. The civil service commission has no such authority and has assumed none.

If, however, the opinion of your board is that whether or not the position is properly graded and rated the particular incumbent of it is not worth more than $900.00 per year, then if the conclusions of the civil service commission respectnig the proper gradation and rating of this position are correct, it must necessarily be true that the particular incumbent is incompent to discharge the duties of the position. In other words, what the board has is a $900.00 man in a $1,140.00 job. The remedy for this situation is, of course, the removal of the particularly employe, subject to an appeal to the civil service commission under sections 486-7 and 486-17a of the civil service law.

In no event, however, may the board of administration retain this employe upon the pay roll and pay him less than the salary stipulated in section 8 of the act, so long as the position which he occupies is graded as it now is. While I do not believe it would be within the power of the state civil service commission, under section 486-21 G. C., to refuse to approve the pay roll of your department on this account, I am clearly of the opinion that it would be the duty of the auditor of state to decline to issue a warrant for the salary pertaining to the particular position except in accordance with said section 8 of the appropriation law.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

448.

SECTION 7246 G. C.—RELATING TO TRAFFIC RULES—NOT UNCONSTITUTIONAL.

The provisions of section 7246 G. C., as it was amended, are not unconstitutional, whatever might have been held in reference to its provisions before amendment of said section.

COLUMBUS, OHIO, July 16, 1917.

HON. CLARE CALDWELL, *Prosecuting Attorney, Warren, Ohio.*

DEAR SIR:—I have your communication of June 28, 1917, in which you ask my opinion as follows:

> "Under favor of the above section (Sec. 7246 G. C.), certain traffic rules and regulations were adopted by the state highway commissioner to become effective December 5, 1915. Predicated upon section 7246 we have sections 13421-17 and 13421-22 of the General Code, which were passed for the enforcement of the traffic rules and regulations.
>
> "The question which I wish to raise is this:
>
> "Is not section 7246 unconstitutional, in so far as it permits a delegation of the legislative power in contravention of article two, section one, of the constitution? No provision is made for the delegation of this power to such a person as the state highway commissioner."

While the proposition is well settled that a board or officer may be given power by the legislature to make necessary rules and regulations to carry out the duties and obligations imposed upon them by the legislature, and by so doing the provisions of the constitution in reference to the delegation of legislative power will not be contravened, yet the establishing of rules and regulations may be carried to such an extent as to contravene the provisions of the constitution in the respect suggested by you. However, I will not pass upon this question, for the reason that section 7246 G. C. was radically amended by the law which took effect on June 28, 1917. Said section before it was amended read as follows:

> "The state highway commissioner within sixty days after the taking effect of this act, shall prepare and publish a set of traffic rules and regulations governing the use of, and traffic on, all state roads. All rules and regulations that are to apply generally throughout the state, including those applicable to roads constructed of the various kinds of road material, shall become effective thirty days after publication. Special rules and regulations or orders, applying only to specified sections of state roads, shall become effective as soon as posted at each end, and at all road crossings on such specified section. For the purpose of carrying into effect the provisions of this section, it shall be the duty of the state highway commissioner, the county commissioners, the county highway superintendent, the township highway superintendent, township trustees, and all patrolmen or deputies employed on any highways within the state, to prosecute any violation of this section. It shall be unlawful for any person or persons, firm or corporation to enter upon, or travel over said state roads, except in accordance with the traffic rules and regulations promulgated by the state highway commissioner."

As section 7246 G. C. now stands, it reads:

> "No traction engine, trailor, wagon, truck, steam roller, automobile

truck or other power vehicle, whether propelled by muscular or motor power, weighing in excess of twelve tons, including weight of vehicle, object or contrivance and load, shall be operated over and upon the improved public streets, highways, bridges or culverts within the state, except as hereinafter provided. This provision shall not apply to vehicles run upon rails or tracks or to fire engines, fire trucks, or other vehicles or apparatus belonging to any municipal or volunteer fire department or used by such department in the discharge of its functions. No object shall be moved over or upon such streets, highways, bridges or culverts upon wheels, rollers or otherwise, except as hereinafter provided, in excess of a total weight of twelve tons including weight of vehicle, object or contrivance and load."

From a comparison of the two sections, it will readily be seen that your communication is no longer pertinent, for the reason that the provisions, about which you raise the question, have been entirely eliminated from said section.

Section 13421-17 G. C., to which you refer, has also been amended and now reads as follows:

"Any person violating any of the provisions of sections 7246 to 7249 inclusive of the General Code, shall be deemed guilty of a misdemeanor and upon conviction thereof, shall be fined not less than twenty-five dollars nor more than one hundred dollars."

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

449.

WHITE-MULCAHY HIGHWAY LAW—SECTION 1208—DOES NOT AFFECT CONTRACTS—SECTION 1209 DOES NOT APPLY TO COMPLETING CONTRACT UNDER FORCE ACCOUNT—SECTION 1212 DOES NOT APPLY TO PAYMENT OF MATERIALS IN CERTAIN INSTANCES—WHEN CONTRACTS ENTERED INTO PRIOR TO JUNE 28, 1917—LAW GOVERNING PROCEEDINGS FOR ROAD IMPROVEMENT.

1. *The provisions of section* 1208 *G. C., as amended, do not affect contracts entered into prior to June* 28, 1917, *in so far as the new matter in said section is concerned.*

2. *The provisions of section* 1209 *G. C., in reference to completing contracts under force account, do not apply to those contracts entered into prior to June* 28, 1917, *in so far as the new matter therein set out is concerned.*

3. *The provisions of section* 1212 *G. C., in reference to the payment of materials delivered on the ground but not embodied in the work, do not apply to contracts entered into prior to June* 28, 1917.

4. *The different steps connected with an improvement of a highway constitute a proceeding and under section* 26 *G. C. the provisions of the law as it existed prior to June* 28, 1917, *must be followed when the first step in reference to a particular road improvement, was taken prior to said date. The first step in the matter of a road improvement is the approval by the state highway commissioner of the application of the county commissioners, or the approval of any part of the highways for which application is made, and his ordering the county surveyor to make plans, etc., of the part of the highway so approved.*

COLUMBUS, OHIO, July 16, 1917.

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

DEAR SIR:—I have your communication of June 27, 1917, in which you ask my opinion in reference to five separate and distinct propositions, as follows:

> "With further reference to my letters of June 7 and 26, in regard to the application of house bill 300, known as the White-Mulcahy bill, I beg to suggest the following as being questions of particular importance to us at this time:
>
> "(1) See section 1208. Are the provisions of this section with reference to the payment of estimates to contractors applicable on contracts entered into prior to the taking effect of the above bill?
>
> "(2) See section 1208. Are the provisions of this section with reference to assignments, and liens of subcontractors, material men, laborers and mechanics applicable on contracts entered into prior to the taking effect of the above bill?
>
> "(3) See section 1209. Are the provisions of this section applicable on contracts entered into prior to the taking effect of the above bill?
>
> "(4) See section 1212. Upon what contracts are the provisions of this section with reference to the payment for materials delivered applicable?
>
> "(5) See section 1213-1. Under what conditions is this section applicable? To be more specific—is or is not this section applicable where the proceedings for an improvement have not progressed as far as the final resolution?"

Before taking up your questions in the order in which they are set out in your communication, I will make a few observations which I feel will apply alike to all your questions.

In entering into a contract, the contracting parties take into consideration the provisions of law as they were at the time the contract was entered into. The law as it was at that time controls the case, as to the rights of the parties under the contract. The law really becomes a part of the contract itself and we usually say is read into the same. Therefore, a modification of the law cannot modify the rights of the parties under the contract, even though the modification may have no great or materrial effect upon the rights of the parties, or may not place any substantially greater burden upon the parties. In ascertaining the obligations which the parties assume in entering into a contract, they have the right to assume that the law which will be applied to the contract is the law in force and effect at the time the contract is entered into. With this in mind, let us note the questions in the order you have them.

1. Are the provisions of section 1208 G. C., with reference to the payment of estimates to contractors, applicable to contracts entered into prior to the taking effect of the bill mentioned?

The part of section 1208 G. C. which applies to this question read as follows:

> "The state highway commissioner shall not draw his requisition for any warrant in favor of any contractor or make any payment to any contractor for any estimates on account of any contract let under the provisions of the preceding sections, until the affidavit of such contractor, or its officer or agent in the case of a corporation, that all indebtedness of such contractor on account of material incorporated into the work or delivered on the site of the improvement, or labor performed thereon has been paid, is filed with the state highway commissioner. In lieu of such affidavit the contractor may file the writen consent of all persons who have furnished material, either incorporated into the work or delivered on the site of the improvement, or performed labor thereon, that any estimate or estimates then due may be paid. Such consent shall be accompanied by the affidavit of the contractor, or its officer or agent, in the case of a corporation, that the consent bears the signature of all persons who have furnished material, either incorporated in the work or delivered on the site of the improvement, or performed labor thereon, and who have not been paid in full for such labor or material."

The portion of the section just quoted is matter found in the law which took effect on June 28, 1917, but was not contained in the law as it existed prior to that time. This new matter undoubtedly places burdens and obligations on the contractor, not contemplated under the old law and it involves matters which a contractor would undoubtedly take into consideration when bidding upon a certain contemplated work. Therefore, under the principles above enunciated, I am of the opinion that the provisions above quoted would not apply to those contracts which were entered into under the old law—that is, prior to June 28, 1917. There is language used in this section which seems to indicate that such was the intention of the legislature. It reads:

> "The state highway commissioner shall not draw his requisition for any warrant in favor of any contractor or make any payment to any contractor for any estimates on account of any contract let *under the provisions of the preceding sections.*"

From this language it would seem to me that the legislature intended these provisions to apply to contracts entered into under and by virtue of the provisions of law after the same had been amended.

2. Your second question is as follows: Are the provisions of section 1208 G. C., with reference to assignments and liens of subcontractors, material men, laborers and mechanics applicable to contracts entered into prior to the taking effect of the above bill?

The part of section 1208 G. C. which is applicable to your second question is as follows:

> "Nothing herein contained shall be held to prevent the payment, out of any estimate or estimates that may be due, upon the assignment by the contractor to any person who has furnished material for the work, or performed labor thereon of the amount due for such material or labor. The provisions of section 8324 of the General Code and the succeeding sections in favor of sub-contractors, material men, laborers and mechanics shall apply to contracts let under the provisions of the preceding sections as fully and to the same extent as in the case of counties."

This is also new matter, the same not being found in the law as it stood prior to June 28, 1917.

In answering this question, exactly the same reasoning applies as was used in answering your first question.

Hence, it is my opinion that the provisions of section 1208 G. C., which are applicable to your second question, would not apply to contracts entered into prior to June 28, 1917.

3. Your third question makes reference to section 1209 G. C. and is as follows: Are the provisions of this section applicable to contracts entered into prior to the taking effect of the above bill?

The part of section 1209 G. C. which is applicable to this question reads as follows:

> "When the state highway commissioner elects to complete said improvement by contract, such contract may be let either with or without competitive bidding, as the state highway commissioner may deem for the best interest of the public. When the state highway commissioner elects to invite competitive bids, he shall proceed in the manner provided by section 1206 of the General Code. Contracts for the completion of improvements may be let either for a lump sum or on a unit price basis. Before entering into a contract for the completion of an improvement, the commissioner shall require a bond with sufficient sureties, conditioned as provided in section 1208 of the General Code. When the contract is for a lump sum, the bond shall be in an amount equal to the contract price, and when the contract is let on a unit price basis the state highway commissioner shall fix the amount of the bond. When the state highway commissioner elects to complete an improvement by force account, and in so completing said improvement enters into an agreement with an individual, firm or corporation, to furnish material or machinery, employ labor or purchase material on behalf of the state, or supervise the work of construction, or do any or all of said things, the state highway commissioner may, if he deems it necessary, require said individual, firm or corporation to enter into bond with sufficient sureties in an amount fixed by the state highway commissioner, conditioned for the faithful performance of said agreement."

The provisions above quoted vary materially from the provisions of the old law. However, it is readily seen that none of these provisions have anything to do with the contract as it was originally entered into, but they have to do with matters which arise after the entering into of the contract, and a first thought it might seem that these provisions might be made applicable to a contract entered into prior to June 28, 1917, as well as those entered into after said date. It must be remembered that the sureties of the contractor also have the right to rely upon the provisions of the law as they were at the time the contract of suretyship was entered into. The matter above quoted has to do very materially with the rights of the surety under his contract, for the reason that he is compelled to pay the difference between the original contract price and the price at which the state highway commissioner is enabled to complete the work under force account.

Hence, it is my opinion that these provisions should not be followed in the matter of completing contracts under force account, in reference to those contracts which were entered into prior to June 28, 1917.

4. Your fourth question has to do with the provisions of section 1212 G. C. and is as follows: Upon what contracts are the provisions of this section, with reference to the payment for materials delivered, applicable?

The particular part of the section in reference to which your inquiry arises reads as follows:

> "In addition to the above payments on account of work performed, the state highway commissioner may also, if he deems it proper allow and pay to a contractor a sum not exceeding eighty-five per cent. of the value of material delivered on the site of the work, but not yet incorporated therein, provided such material has been inspected and found to meet the specifications. When an estimate is allowed on account of material delivered on the site of the work but not yet incorporated therein, such material shall thereupon become the property of the state; but in case such material is stolen or destroyed or damaged by casualty before being used, or for any reason becomes unfit for use, the contractor will be required to replace the same at his own expense."

This is entirely new matter. These provisions are for the benefit of the contractor himself and therefore he would not be heard to complain in reference to his rights under the contract. The state, of course, could waive its rights under the contract if it so saw fit to do. But here again it must be remembered that there are other parties interested in the contract as originally entered into. First, the county, the township and the abutting property owners have an interest in the way in which the money is paid out to the contractor, the times at which it is paid out and whether it is paid out according to law or not. Secondly, the surety of the contractor has rights in the contract and these are more vital than the rights of the county, the township and the abutting property owners.

If the contractor is paid for material delivered upon the ground but not incorporated in the work, under certain circumstances the surety might be vitally affected. For this reason I am of the opinion that you cannot follow the provisions as above quoted, in reference to any contract that has been entered into before the 28th day of June, 1917; but you are limited in the making of estimates, in reference to work done, to the provisions of law as they existed before said date.

The answers to these four questions have been based upon the proposition that the rights of parties in contracts can not be interfered with by subsequent legislation and that the parties entering into the contract have a right to assume that matters done under and by virtue of the contract will be done in accordance with the law as it stood at the time the contract was entered into.

I might, in reference to the answer to these four questions, call attention to section 3 of the act which became effective on June 28. 1917, which is as follows:

> "This act shall not affect or impair any contract entered into, any act done, any right acquired or any obligation incurred prior to the time when this act takes effect, under or by virtue of any statute hereby amended or repealed, but the same may be completed, asserted or enforced as fully and to the same extent as if such statute had not been amended or repealed. * * *"

While this principle would be applied without the embodying of such a provision in the act, yet the saving clause above quoted makes the principle specific and certain.

5. We come now to a consideration of your fifth question, which has to do with section 1213-1 G. C., your query being as to when the conditions of this section may be applied. This section is an entirely new one, containing altogether new matter. It is very lengthy and hence I will not quote the same in full, but it permits the state highway commissioner and the county commissioners to enter into an agreement varying the proportion of the cost and expense of the proposed improvement, which is to be borne by the state, the county, the township and the assessed property owners, from that which is otherwise provided by law. This variation is to be based upon the tax duplicate and the road mileage in the county; that is, if the road mileage in the county is large and the tax duplicate is small, the state may assume more than half of the cost and expense of the improvement.

While the answers to the first four questions you submitted are based upon the contractual rights of parties, the answer to this question cannot be so based, as the rights of parties in and to a contract do not enter into the discussion of this question.

I desire to call attention to section 26 G. C. which provides as follows:

> "Whenever a statute is repealed or amended, such repeal or amendment shall in no manner affect pending actions, prosecutions, or proceedings, * * *."

The question immediately arises as to whether the matters leading up to a road improvement and the improvement itself would be considered as a proceeding. From the decisions of our courts, I am of the opinion that there is no question but that said steps would be considered a proceeding under the provisions of section 26 G. C.

In Raymond v. Cleveland, 42 O. S. 522, the court held:

> "That the various steps in council and before the boards, with respect to such street improvement, constituted a proceeding."

In State ex rel. v. Cass et al., 13 C. C. (N. S.) 449, at p. 457 of the opinion, the court, in discussing the question as to whether the erection of a court house by a court house commission could be considered a proceeding under the provisions of section 26 G. C., used the following language:

> "Thus the statute had one purpose—one object. The commission's service was continuous, beginning with its appointment and ending when the court house was completed. It seems clear, thus viewed, that the work of the commission in carrying out the objects and purposes for which it was appointed, and the building of the court house down to its completion,

constituted within the meaning of section 26 of the General Code 'a proceeding,' and that any amendment of the statute made after that *proceeding* was instituted and carried forward almost to completion, can in no manner affect the powers given that commission in the original act."

(Affirmed in State ex rel. v. Bldg. Com., 84 O. S. 443.)

In Hayes et al. v. City of Cincinnati, 62 O. S. 116, the court held that the making of an assessment upon the lots, in the matter of a proposed street improvement, constituted a proceeding under and by virtue of the provisions of section 26 G. C.

From all these cases it seems to me that there can be no question but that the matter of a road improvement constitutes a proceeding under the terms of section 26 G. C.

The question now is as to when the first step in the matter of a road improvement is taken, because the law which is in force and effect at the time of the taking of said first step will control in the further steps involved in the proceeding. It is my opinion that the first step is taken when the state highway commissioner approves the application of the county commissioners for the improvement of the intercounty highways or main market roads of the county, or when he approves any part of said highways for which application has been made, and orders the county surveyor to prepare plans, profiles, specifications, etc., for said improvement.

Hence, if this approval of the state highway commissioner was made and his ordering the county surveyor to make plans, specifications, etc., for an improvement occurred before June 28, 1917, then your department would proceed under the provisions of the old law. But if these steps have been taken since the 28th day of June, 1917, the provisions of the new law would control in the matter of your further proceedings.

I might in this connection call attention to section 2 of the act which became effective on June 28, 1917, which reads as follows:

"This act shall not affect pending actions or proceedings, civil or criminal, pertaining to the construction, reconstruction, improvement, maintenance, repair, supervision or control of highways, bridges or culverts, brought in any court at any time prior to the taking effect of this act, under or involving the provisions of any statute hereby amended or repealed; but the same may be prosecuted or defended to final determination in like manner as if such statute had not been amended or repealed."

However, the provisions of this section limit and restrict the meaning of the word "proceeding" as used in section 26 G. C. and interpreted by our courts.

But if the proceeding about which we are talking is not saved under and by virtue of section 2 of the act itself, it would be saved by the provisions of section 26 G. C. and the construction placed thereon by our courts.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

450.

APPROVAL—TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE OF THE COMMISSIONERS OF ERIE COUNTY.

COLUMBUS, OHIO, July 16, 1917.

Industrial Commission of Ohio, Columbus, Ohio.
GENTLEMEN:—

"IN RE: Bonds of Erie county, Ohio, in the sum of $7,000.00, for the purpose of paying said county's share of the cost and expense of improving section 'P' of intercounty highway No. 294."

I have carefully examined the transcript of the proceedings of the county commissioners of Erie county, Ohio, relative to the above bond issue, and find said proceedings to be in substantial conformity to the provisions of the General Code relating to improvements of this kind.

I am, therefore, of the opinion that bonds properly prepared according to the bond form submitted will, when signed by the proper officers of Erie county, constitute valid and binding legal obligations of said county.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

451.

APPROVAL—TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE OF THE COMMISSIONERS OF ERIE COUNTY.

COLUMBUS, OHIO, July 16, 1917.

Industrial Commission of Ohio, Columbus, Ohio.
GENTLEMEN:—

"IN RE: Bonds of Erie county, Ohio, in the sum of $18,500.00, for the purpose of paying the shares of said county, Margaretta township and abutting property owners in the cost and expense of improving section 'O' of intercounty highway No. 276."

I have carefully examined the transcript of the proceedings of the county commissioners of Erie county, Ohio, relative to the above bond issue, and find said proceedings to be in substantial conformity to the provisions of the General Code relating to improvements of this kind.

I am, therefore, of the opinion that bonds properly prepared according to the bond form submitted will, when signed by the proper officers of Erie county, constitute valid and binding legal obligations of said county.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

452.

SALARY—APPROPRIATED FOR LIQUOR LICENSE INSPECTORS—MAY BE EXPENDED FOR SALARY FOR EXAMINERS ONLY UPON AUTHORITY OF THE CONTROLLING BOARD.

An appropriation for the salaries of "thirty inspectors" may be expended for those of ten inspectors and twenty "examiners," the amounts being the same, only under authority granted by the "controlling board" under section 4 of the general budget appropriation act of 1917.

COLUMBUS, OHIO, July 16, 1917.

State Civil Service Commission, Columbus, Ohio.

GENTLEMEN:—I have your letter of July 9th enclosing copy of a resolution adopted by the state liquor licensing board, which resolution is sufficiently explained by the statement thereof made in your letter, which is as follows:

> "The liquor licensing board desires, by this resolution, to reduce the number of inspectors for which the legislature made an appropriation from thirty, the present number, to ten. The board also desires to appoint twenty examiners, at the same salary, each, as has been appropriated for the thirty inspectors.
>
> "In the first paragraph of section V of the liquor license law, is found this language:
>
> "'Said board shall employ the necessary clerks, examiners, inspectors, stenographers and other assistants as it may deem necessary, and fix their compensation, subject to the approval of the governor.'
>
> "The liquor licensing board has never, up to this time, appointed any examiners, as they were authorized to do by the act from which the quotation is made.
>
> "The question the civil service commission desires an opinion upon is: Has the liquor licensing board, under this act, the right to appoint, and pay the salaries of, the twenty examiners, provided for by the resolution, out of the appropriation made by the general assembly for inspectors?"

The question as to the power of the liquor licensing board to re-classify the field force of the department does not seem to be raised, and in fact the provision of the statute quoted by you seems to be sufficient to confer this authority. Your question would seem to relate solely to the power of the liquor licensing board to expend the appropriation in question for the given purpose.

In my opinion, the appropriation, in the first instance, may not be expended save in accordance with the stipulations thereof.

Section 2 of the general appropriation budget bill of 1917 appropriates to the state liquor licensing board the sum of $210,010.00 for personal service, itemized in column 1 thereof, *inter alia,* as follows:

" 6 special inspectors	$ 9,000.00
"30 inspectors	39,000.00"

The liquor licensing board, on its own motion, is without authority to expend the moneys appropriated except in accordance with this itemization. This is established by the first sentence of section 4 of the bill, which provides as follows:

"The sums set forth in the column designated 'Items' in sections 2 and 3 of this act, opposite the several classifications of detailed purposes, shall not be expended for any other purposes except as herein provided."

Therefore, the state liquor licensing board, on its own motion, is without authority to expend any part of its personal service appropriation for the salary of an "Examiner," nor any part of said appropriation set apart, in the first instance, for the salaries of "Inspectors" for any purpose other than the salary of an "Inspector."

However, section 4 itself provides how authority to deviate from the specifications of the column designated "Items" may be made. Without quoting it, it provides for application to a "controlling board, which may grant authority to expend the moneys appropriated * * * otherwise than in accordance with such classifications of detailed purposes, but within the purpose for which the appropriation is made." And said authority is expressly extended to cases in which the proposed purpose, which must be "within the purpose for which the appropriation is made," is not "included in the detailed purposes for which such appropriation is distributed by items." This is the case with respect to the situation about which you inquire. The state liquor licensing board desires to expend a part of its personal service appropriation otherwise than in strict accordance with the distribution thereof by items, but, nevertheless, for a purpose strictly within the general purpose for which the appropriation is made, viz., personal service.

It is my opinion that the state controlling board, by action taken under section 4, on the application of the liquor licensing board, has full power to authorize the expenditure of the personal service appropriation to the liquor licensing board in accordance with the re-classification of the liquor licensing service by that board.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

453.

BOARD OF HEALTH—POWER TO COMPEL COUNCIL TO APPROPRIATE SUFFICIENT FUNDS TO PAY EMPLOYES OF SAID BOARD—ANNUAL BUDGET—HOW REDUCED—MUNICIPAL BUDGET COMMISSIONERS.

1. *The council of a municipality may be compelled by a board of health to appropriate funds sufficient to pay the compensation fixed by the board of health for its employes and the proper remedy is mandamus, provided such sum, if placed in the annual budget, is not reduced by the budget commissioner.*

2. *The estimates of a city council, in the annual budget, and the various items thereof, including the item which contains estimates to pay such expenses, and to carry into effect the provisions of the board of health chapter, may be reduced by the county budget commission.*

3. *Strictly speaking, there is no municipal budget commission, but the board of tax commissioners of a municipality have only authority to examine the budget and return the same to the council with such suggestions and recommendations as the board of tax commissioners may deem proper.*

COLUMBUS, OHIO, July 16, 1917.

The State Board of Health, Columbus, Ohio.

GENTLEMEN:—Your request for my opinion contains the following:

"1. What, if any, authority has a municipal or county budget commission to reduce the estimates submitted by a board of health—including compensation for employes and other administrative expenses?

"2. Is there any procedure whereby council can be compelled to appropriate a sum sufficient to pay the compensation fixed by a board of health for its employes without compelling the individual employe to maintain an action in mandamus?"

General Code section 4404 provides that the council of each municipality shall establish a board of health composed of five members to be appointed by the mayor and confirmed by council, and shall serve without compensation. It also provides that the mayor, by virtue of his office, shall be president of said board. Said section further provides that in villages, if the council deems advisable, it may appoint a health officer, whose appointment shall be approved by the state board of health and who shall act instead of a board of health. In such village the council shall fix the salary and term of office of the health officer and in cities the board of health shall fix the salary of such health officer. Such appointee in villages shall have the powers and perform the duties granted to or imposed upon boards of health in cities, except that the rules, regulations or orders of a general character and required to be published, made by such health officer, shall be approved by the state board of health.

General Code section 4405 provides that if a municipality fails or refuses to establish a board of health, or appoint a health officer, the state board of health may appoint a health officer and fix his salary and term of office. Said section further provides that such health officer shall have the same powers and duties as health officers appointed in villages in place of a board of health, and the salary

as fixed by the state board of health, and all necessary expenses incurred by him in performing the duties of a board of health shall be paid by and be a valid claim against such municipality.

General Code section 4451 provides:

> "When expenses are incurred by the board of health under the provisions of this chapter, upon application and certificate from such board, the council shall pass the necessary appropriation ordinance to pay the expenses so incurred and certified. The council may levy and set apart the necessary sum to pay such expenses and to carry into effect the provisions of this chapter."

That it is necessary for a city council to act under the provisions of said section 4451 G. C., above quoted, was decided in the case of State ex rel. Miller v. Council of Massillon, 2 O. C. C. (n. s.) 167, in which case the court held that it is mandatory upon the council to make the necessary appropriation to meet the expense of a health officer and a board of health, and that mandamus will lie to compel an appropriation for such salary and expenses.

General Code section 3791 provides that on the first day of April in each year the mayor of each municipality shall submit to the council the annual budget of the current expenses of the municipality, and that any item of such budget may be reduced or omitted by the council, but that the council shall not increase the total amount of said budget; that in the making of such annual budget the mayor may revise and change any and all of the items in the annual estimates which have been furnished to him by the director of public service or director of public safety, or other officers of the municipality, but that he shall not increase the total of any such estimate when including it in his annual budget to council.

General Code section 3793 provides that council shall examine and revise such annual budget so submitted by the mayor, and after it has determined by ordinance the percentage to be levied for the several purposes, as provided by law upon the real and personal property in the corporation returned on the grand duplicate, the levies shall be submitted by the council to the board of tax commissioners, which board of tax commissioners shall examine and return the same, as provided by law, with such suggestions and recommendations as such board of tax commissioners may deem proper.

General Code section 4523 provides that in each city the trustees of the sinking fund shall be the board of tax commissioners. The levies of all taxes, however, shall be kept within certain limitations, as provided by General Code section 5649-2, which reads in part as follows:

> "Except as otherwise provided in section 5649-4 and section 5649-5 of the General Code, the aggregate amount of taxes that may be levied on the taxable property in any county, township, city, village, school district or other taxing district, shall not in any one year exceed ten mills on each dollar of the tax valuation of the taxable property of such county, township, city, village, school district or other taxing district for that year, * * *"

Section 5649-4 G. C. provides for certain emergencies for which emergencies the taxing authorities of any district may levy a tax to provide therefor, irrespective of any of the limitations of the Smith one per cent. law, and section 5649-5 G. C. provides that the council of a municipal corporation may, by a majority vote of all the members elected or appointed thereto, declare by resolution that the amount of taxes that may be raised by the levy of taxes at the maximum rate authorized by sections 5649-2 and 5649-3 of the General Code will be insufficient

and that it is expedient to levy taxes at a rate in excess of such rate and that a vote upon a specified rate of increase may be had, extending over a term of years not to exceed five, and if such vote carries such increased rate may be levied on such municipality.

General Code section 5649-3a provides that on or before the first Monday in June of each year the council of each municipal corporation shall submit or cause to be submitted to the county auditor an annual budget, setting forth in itemized form an estimate, stating the amount of money needed for its wants for the incoming year, and section 5649-3b provides that the county auditor, treasurer and prosecuting attorney of the county shall constitute such budget commission, and also sets forth the duties of such budget commission as to adjusting of the rates of taxation and fixing the amount of taxes to be levied in each taxing district.

General Code section 5649-3c provides that the auditor shall lay before the budget commissioners the annual budget submitted to him by the various boards and officers named in section 5649-3b, together with the estimates for state purposes. The budget commissioners shall examine the budgets and estimates and ascertain the total amount proposed to be raised. If the budget commissioners find that the total amount of taxes to be raised therein does not exceed the amount authorized to be raised in the various taxing districts, that fact shall be certified to the county auditor. If the total amount is found to exceed such authorized amount in any township, city, village, school district or other taxing district in the county, the budget commissioners shall adjust the various amounts to be raised so that the total amount thereof shall not exceed in any taxing district the sum authorized to be levied therein, and "in making such adjustment the budget commissioners may revise and change the annual estimates contained in such budgets *and may reduce any or all items in any such budget,* but shall not increase the total of any such budget *or any item therein.* The budget commissioners shall reduce the estimates contained in any or all of such budgets by such amount or amounts as will bring the total for each township, city, village, school district or other taxing district within the limits provided by law." The budget commissioners shall certify their action to the county auditor, who shall ascertain the rates necessary to be levied upon the taxable property therein of the county and of each township, city, village, school district or other taxing district, returned on the grand duplicate, and place it on the tax list of the county. That the budget commissioners may adjust the various amounts of taxes to be raised in each taxing district, and that they may reduce certain estimates contained in the various budgets was held in State ex rel. Patterson, 93 O. S. 25, and in the absence of fraud, bad faith or abuse of discretion, it is not within the power of the court to interfere or control the discretion or judgment of such budget commissioners.

On page 33 of said report the court says:

> "It is the positive duty of the budget commissioners, in adjusting the various amounts to be raised, to see that the total amount shall not exceed in any taxing district the sum authorized to be levied therein, to-wit, ten mills on each dollar of the tax valuation of the taxable property therein. In the discharge of this duty they are to reduce the estimates contained in any or all budgets by such amount or amounts as will bring the total of the taxing district within the limits provided by law. It is to be observed that they are authorized to 'revise and change the annual estimates contained in such budgets.' They 'may reduce any or all the items in any such budget.' According to the contention of counsel for relator they must reduce the estimates contained in all the budgets. We do not think the statute will bear that interpretation. By its plain provisions the budget commissioners are called upon to use their official judgment and

discretion in the adjustment of the various amounts and in the reduction which they make. In the absence of fraud, bad faith or an abuse of discretion, their action as certified to the county auditor cannot be interfered with."

I find nothing in our laws which permits a board of health to make or certify levies for taxes, but a board of health has the right to create the necessary expense in carrying out the orders provided for in the sections above noted, and when such expense is certified to the council of a municipality, then under the decision in the case of State v. Council, above cited, the council of the municipality must appropriate funds for such expenses and make the necessary levies therefor. If, however, the expenses so incurred would be such as to cause the tax rate to be increased beyond the maximum levy, then under the decision in State v. Patterson, the budget commissioners would have a right to reduce such budget so that the items thereof would come within the limits allowed by law.

From the language above quoted from General Code section 5649-3c, I am satisfied that the budget commissioners may not only reduce the various budgets as a whole, but "may reduce any or all items in such budget." That is to say, if in the judgment of the budget commissioners the amount certified by the board of health should be reduced along with the other items, or instead of certain other items, said section gives the budget commissioners the authority to so reduce said items.

Answering your questions specifically, then, I advise you:

(1.) That the county budget commission may reduce the estimates submitted by the board of health only when the total amount of the various budgets exceed the maximum levy provided by law; and that while, technically speaking, there is no municipal budget commission, I am taking it that you refer to the board of tax commissioners of the municipality, who have authority only to examine the budget and return the same to council with such suggestions and recommendations as the board of tax commissioners may deem proper.

(2) The council of a municipality may be compelled to appropriate a sum sufficient to pay the compensation fixed by the board of health for its employes, provided there are funds from which such appropriation can be made and an action in mandamus is the proper remedy and if the sum so certified by the board of health to the council is placed in the annual budget by the council and the budget commission in the exercise of its proper discretion reduces said item in order to bring the budget within the limitations allowed by law, then the council can only be compelled to appropriate that part of the sum so certified which is so allowed by said budget commission and which is collected and is the subject of appropriation.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

454.

COUNTY BOARD OF REVISION—NOT ENTITLED TO EXPENSES INCURRED IN ATTENDING MEETINGS OF SAID BOARD.

Members of the county board of revision, when residing away from the county seat, are not authorized under section 5585 G. C. to receive their expenses incurred in traveling from their home to the county seat and return on matters connected with the board of revision's work, or are they entitled to be reimbursed for the amount expended for board while engaged in such work at the county seat.

COLUMBUS, OHIO, July 16, 1917.

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

GENTLEMEN:—I have your letter of June 18, 1917, as follows:

"In a county where the president of the board of county commissioners does not reside in the county seat, and acts as a member of the board of revision, as provided by section 5585 G. C., as amended in senate bill No. 177, does the language of this section referring to contingent expenses permit of the payment of this member's board bill while at the county seat, and his traveling expenses from his home to the county seat and return on such days as he serves in this capacity?

"If you answer this question in the affirmative, would this also apply to the county auditor, or county treasurer, acting as members of this board in case either of them lived away from the county seat?

"In this connection we desire to call your attention to an opinion of Attorney-General Edward C. Turner, to be found in the Opinions of the Attorney-General for 1916, Vol. 1, page 623."

Section 5585 G. C., as amended in senate bill 177, reads:

"The compensation of the experts, clerks and other employes of the county boards of revision shall be paid monthly upon the certificate of the county auditor or county board of revision, as the case may be. The contingent expenses of the county auditor and county board of revision, including postage, and express charges, their actual and necessary traveling expenses and those of their deputies, experts, clerks or employes on official business outside of the county, when required by orders issued by the tax commission of Ohio, shall be allowed and paid as other claims against the county."

In an opinion dated April 24, 1915, my predecessor, Hon. Timothy S. Hogan, was asked to construe section 35 of the so-called Warnes law (103 O. L. 786-795), therein designated as section 5614 G. C., which statute was very similar to the one here before us.

In that opinion (found in Vol. 1, Annual Reports of the Attorney-General for 1914, p. 514) Mr. Hogan said:

"The nature of the expenses for which the officers mentioned may be reimbursed under favor of the statute, is generally indicated by the use of the word 'contingent.' The term 'contingent expenses' has a well understood technical meaning, viz.: Those expenses, miscellaneous in character,

which the legislative body presumes will be incurred in the natural course of official business, but the exact character of which cannot be so definitely ascertained in advance as to permit specific enumeration of them.

People v. Yonkers, 39 Barb. 236, 272.
Dunwoody v. U. S., 22 Ct. Cl. 269, 280.

"Ordinarily, therefore, the phrase would not include such classes of expenses as might reasonably be foreseen and provided for by express mention. On the other hand, it would include all miscellaneous expenses which would naturally and necessarily be incurred by the public officer in the ordinary discharge of his duties.

"That the general assembly supposed that the phrase 'contingent expenses, would not necessarily include all expenditures is reasonably apparent from consideration of that part of the above quoted sentence which begins with the word 'including.' By specifically enacting that postage and express charges and certain traveling expenses shall be included within the purview of 'contingent expenses' of which the sentence speaks, the general assembly has made it plain, I think, that such charges and expenses would not, without the provision, have been contemplated within the meaning of the phrase, being expenses the incurring of which is a certainty and which are, therefore, not of the miscellaneous and unascertainable character ordinarily contemplated by the term 'contingent expenses.'"

Former Attorney-General Turner, in an opinion rendered April 6, 1916, found in volume 1, Opinions of the Attorney-General for 1916, page 623, quoted this opinion at length concerning its construction of the words "contingent expenses" and concurred in the same.

In the case of People v. Yonkers, 39 Barb. 266, referred to above, the court said at page 272:

"What is meant by contingencies? As the charge is found in an estimate of the expenses of improving Warburton avenue, I infer that thereby is intended contingent expenses—expenses which the commissioners could not ascertain—expenses which were unknown, which were uncertain, and which might or might not be incurred thereafter. A contingency is a fortuitous event which comes without design, forsight or expectation. In law a contingent remainder is a remainder depending upon an uncertainty. And so a contingent expense must be deemed to be an expense depending upon some future uncertain event."

In the case of Dunwoody v. U. S., 22 Ct. Cl. 269, 280, the court said at page 280:

"The adjectives contingent, incidental, and miscellaneous, as used in appropriation bills to qualify the word expenses, have a technical and well-understood meaning; it is usual for congress to name the principal classes of expenditure which they authorize, such as clerk hire, fuel, light, postage, telegrams, etc., and then to make a small appropriation for the minor and unimportant disbursements incidental to any great business, which cannot well be foreseen and which it would be useless to specify more accurately."

In the case of Wander v. Coleman, 95 N. Y. Sup. 696, the court said at page 700:

"Contingent expenses are such as are possible or liable but not certain to occur."

With these definitions of "contingent expenses" before us I must conclude that this expression cannot be held to include the traveling expenses of the president of the county commissioners, the county treasurer or county auditor, from their homes in the county to the county seat and return, nor their board bill while at the county seat in connection with their duties as members of the county board of revision. To authorize the payment of such expenses there should be clear statutory authority for the same. In this case there is no such authority but, on the contrary, the provision of section 5585, allowing these members of the board of revision contingent expenses, including their actual and necessary traveling expenses when on official business outside of the county, strongly indicates a contrary legislative intention.

It is a well known fact that all county officials do not actually reside at the county seat and an equally well known fact that in going to the county seat and returning therefrom to their homes they will necessarily incur certain expenses. There is nothing uncertain about this and inasmuch as the legislature has not expressly authorized the payment of such expense, I am confident it intended to withhold any authority for allowing the same.

I am, therefore, of opinion, in answer to your question, that the members of the county board of revision, viz.: the president of the board of county commissioners, the county auditor and county treasurer, are not authorized to receive, in case they do not reside at the county seat, their expenses in traveling from their home to the county seat and return on matters connected with the board of revision's work, nor their board bill while engaged in such work at the county seat.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

455.

APPROVAL—ARTICLES OF INCORPORATION OF THE MUTUAL AUTOMOBILE INSURANCE COMPANY.

COLUMBUS, OHIO, July 17, 1917.

HON. WILLIAM D. FULTON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I am herewith returning to you, with my certificate of approval endorsed thereon, articles of incorporation of the Mutual Automobile Insurance Company, which you submitted for my approval under date of July 17, 1917.

As pointed out in my opinion No. 20, rendered to you under date of February 3, 1917, disapproving articles of incorporation of the Mutual Fire and Automobile Insurance Company, theretofore submitted to this department for approval, there was at that time nothing in the way of statutory provision authorizing a mutual insurance company (other than life) to transact business other than fire insurance business and such other business as by statute was made incident to the transaction of fire insurance business.

On March 21, 1917, the legislature passed an act, the same being house bill No. 563, amending certain sections of the General Code authorizing the organization of mutual fire insurance companies so as to authorize the organization of mutual insurance companies for the purpose of transacting certain classes of insurance business other than fire insurance. Section 9607-2 G. C., as amended in said act above referred to, now provides that a domestic mutual company may be organized by a number of persons not less than twenty to carry on the business of mutual insurance and to reinsure and accept reinsurance, as authorized by law and its articles of incorporation. Said section further provides that such persons shall ex-

ecute articles of incorporation which, if not inconsistent with the constitution and laws of this state and of the United States, shall be approved by the attorney-general and the secretary of state, and such articles and certificate of approval by the attorney-general shall be recorded by the secretary of state, who shall deposit a copy thereof with the superintendent of insurance.

The different kinds of insurance which mutual insurance companies are authorized to transact are classified in the section, as amended, beginning with fire insurance, and the section provides that a mutual (or stock) insurance company may transact only the first kind of insurance, or may transact such other as it may elect of the other kinds of insurance classified in the section.

Sub-section 4 of said section 9607-2 G. C. reads as follows:

> "4. Automobile insurance. Against loss, expense and liability resulting from the ownership, maintenance or use of any automobile or other vehicle, provided no policies shall be issued under this subdivision against the hazard of fire alone."

The purpose clause of the articles of incorporation here in question is drawn in exact accord with the provisions of subsection 4, above quoted. The articles are signed by twenty persons, the majority of whom it appears are citizens of the state of Ohio, the articles have been properly acknowledged by the incorporators and same certified in the manner required by the statute in such case made and provided.

It appearing, therefore, that these articles of incorporation have been drawn, signed, acknowledged and certified in the manner required by said act and the general provisions of the state corporation law, and it not appearing that said articles are in any respect inconsistent with the constitution and laws of this state or with the constitution or laws of the United Staes, said articles of incorporation are hereby approved by me, as authorized and required by the provisions of said section 9607-2 General Code.

I am returning herewith check for $25.00 submitted with your inquiry of July 16th.

Very truly yours,
JOSEPH McGHEE,
Attorney-General.

456.

COLONY FOR VAGRANTS—NO APPROPRIATION AVAILABLE TO PURCHASE LANDS THEREFOR.

There is no appropriation available for the purchase by or under the advice of the Ohio branch council for national defense of lands for the purpose of establishing a colony or colonies for the segregation of vagrants.

COLUMBUS, OHIO, July 18, 1917.

HON. H. H. SHIRER, *Secretary, Ohio Board of State Charities, Columbus, Ohio.*

DEAR SIR:—Your letter of July 6th in which you inquire whether the Ohio branch council for national defense may secure state funds for the purchase or leasing of lands whereon might be established a state colony or colonies for the segregation of vagrants, has received my careful consideration. I have examined in connection with it the appropriation to the governor for expenditure in the mobilization of the national guard in case of war and for co-operation with the federal government, which I am advised is the appropriation which has heretofore

been expended for the purposes suggested by the Ohio branch council for national defense, and also the provisions of the act amending the law providing for the investigation of the housing requirements of the officers, departments and commissions of the state, and to provide for the adequate housing thereof, which contains some general authority for the acquisition of lands for state purposes.

Without going into particulars I may say that I am of the opinion that neither of these appropriations is available for expenditure in the manner suggested.

I know of no other appropriation or provision of law under which the proposed action might be taken. The inherent difficulty in the case is that the Ohio branch council for national defense has no legal standing as a department of the state government. Theoretically it is merely the "governor;" that is to say, it really amounts to an advisory council for the governor. The governor is not authorized to purchase lands for such purposes.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

457.

APPROVAL—FINAL RESOLUTION FOR ROAD IMPROVEMENT IN ERIE COUNTY.

COLUMBUS, OHIO, July 19, 1917.

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

DEAR SIR:—I have your communication of July 13, 1917, with a final resolution in duplicate enclosed, which resolution is in reference to the following named highway:

"Erie County—Section 'P' of the Sandusky-Norwalk road, I. C. H. No. 294."

I have examined this final resolution carefully, and find the same correct in form and legal, and am, therefore, returning the same to you with my approval endorsed thereon.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

458.

APPROVAL—ABSTRACT OF TITLE COVERING CERTAIN LANDS IN FRANKLIN COUNTY—OHIO STATE UNIVERSITY.

COLUMBUS, OHIO, July 20, 1917.

HON. CARL E. STEEB, *Secretary, Board of Trustees, Ohio State University, Columbus, Ohio.*

DEAR SIR:—A few days ago you submitted to this department an abstract of title covering the following premises, situate in the county of Franklin, in the state of Ohio, and in the township of Clinton, and bounded and described as follows:

"(Description from surveys of same made in 1859 and 1891). Situated in section three, township one, range eighteen, United States military lands and being part of lots four (4) and five (5) as shown and designated on

the plat in the partition suit of the Hess estate, of record in complete record No. 32, pages 479 to 491, court of common pleas, Franklin county, Ohio, and being more particularly described as follows, viz.:

"Beginning at the southwest corner of lot five (5), named above, thence N. 0° 45′ E. along the center of a road on the west line of said lot five (5) ninety and one-half (90.5) poles to the northwest corner of said lot five (5) to a stone, thence S. 88° 15′ E. on the north line of said lot five (5) one hundred three and seventy-four one hundredths (103.74) poles to a stone, an original corner in the center of the Delaware and Sandusky road; thence S. 7° 50′ W. with the center of said road three (3) poles to a limestone set for a corner, with a broken sewer pipe around it, from which a maple tree four inches in diameter bears N. 54° W. twenty-three feet and eight inches, another maple eighteen inches in diameter, bears N. 75° 45′ E. thirty-seven feet six inches to a blaze on tree 2 feet 6 inches above the root, and a maple 15 inches in diameter bears S. 80° E. thirty-four feet six inches to a blaze and thirty-three feet and six inches to a chop in root, thence S. 81° 15′ E. nineteen and eighty-eight one hundredths (19.88) poles to a niggerhead stone, three feet long, planted for a corner, October, 1891, thence N. 8° 00′ E. passing a limestone which is a corner to lot four (4) at twenty-five feet two inches and continuing same course four poles farther to a limestone corner between said lot four (4) and said lot five (5) of the Hess partition, thence S. 88° 15′ E. along the line between said lots 4 and 5 forty-eight and twenty-five one hundredths (48.25) poles to a stone from which a sycamore 20″ in diameter bears S. 36° W. 17 links distant, thence down the Olentangy river and with the meanders thereof S. 65° 15′ W. forty-eight (48) poles, thence S. 33° 15′ W. thirty-two (32) poles, thence S. 8° 20′ W. forty.three (43) poles to a stone and buckeye N. E. corner to said E. M. Lisle land, thence N. 88° 15′ W. on the south line of said lot five (5) and along the center of Lane avenue Free turnpike one hundred eight and twenty-five one hundredths (108.25) poles to the place of beginning, containing sixty-nine acres more or less of land and water."

With the abstract you also sent a deed covering the same piece of property, wherein Maria Louisa Hess Brown and William Preston Brown, her husband, deed said property to the state of Ohio.

I have carefully examined said abstract, dated June 22, 1917, and find that the title to the premises described is in the name of Maria Louisa Hess Brown and that the deed submitted will convey a clear title to the state of Ohio, save and except for the taxes for 1917 which are now a lien on said premises, but as yet undetermined.

The deed submitted, if accepted, will fully convey the title to the state of Ohio, but in the form submitted, the said Maria Louisa Hess Brown covenanting that she is lawfully seized of the premises and that said premises are free and clear from all encumbrances whatsoever, the amount of the taxes for the year 1917 should be deducted from the purchase price, since the deed is dated June 22, 1917.

I also note in the abstract that the premises are now under lease to the Ohio state university for the term beginning April 1, 1915, to be fully completed and ended on March 31, 1918, and that in said lease there is a privilege of purchase for $61,000.00, payable in cash. Upon the acceptance of the deed this lease should be cancelled.

I am herewith returning you the abstract and deed submitted.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

459.

APPROVAL—TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE OF THE BOARD OF EDUCATION OF CHESHIRE RURAL SCHOOL DISTRICT.

COLUMBUS, OHIO, July 23, 1917.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"IN RE: Bonds of Cheshire rural school district, Gallia county, Ohio, in the sum of $20,000.00, for the purpose of constructing and equipping new school building in said school district."

I have carefully examined the transcript of the proceedings of the board of education and other officers of Cheshire rural school district relating to the above bond issue, and find said proceedings to be in conformity to the provisions of the General Code relating to bond issues of this kind.

I am of the opinion that properly prepared bonds, duly signed by properly authorized officers of said school district will, when so signed, be valid and subsisting obligations of said school district.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

460.

WEAK SCHOOL DISTRICT—BOND ISSUE TO FUND OR REFUND TUITION INDEBTEDNESS—WHEN SAME MAY BE INCLUDED IN DEFICIENCY FOR WHICH STATE AID IS ALLOWED.

A weak school district may include in its deficiency for which state aid is allowed, the principal and interest of bonds issued to fund or refund tuition indebtedness in a past year, if the bonds fall due in the year in which state aid is granted. (Sec. 7596-1 G. C., 107 O. L. 621.)

COLUMBUS, OHIO, July 23, 1917.

HON. D. H. PEOPLES, *Prosecuting Attorney, Pomeroy, Ohio.*

DEAR SIR:—I have your letter of recent date requesting my opinion upon the following questions:

"The board of education of Olive township, this county (Meigs) have an indebtedness of about $450.00, due teachers for the year 1916-17. Can the board issue bonds to pay this amount? If bonds are issued can the board still draw state aid?

"If bonds are issued must the same be submitted to the electors of said township? If the bonds are issued must the same be advertised?"

Your first question has been repeatedly answered in the opinions of this department under various administrations, all of which held that under section 5656 of the General Code indebtedness due teachers for teaching service actually rendered and not paid for may be funded by the issuance of bonds as a "valid

existing obligation" of the district; such indebtedness being a valid obligation because by virtue of section 5661 of the General Code contracts with teachers are not required to be made under the sanction of the certificate that the funds are in the treasury, etc., as required for contracts generally by section 5660 G. C.

Your third question is of course answered by the mere reference to section 5656 of the General Code. Bonds therein authorized to be issued do not require the approval of the electors.

Your fourth question is answered by the general provisions of section 2294 G. C., as amended 106 O. L. 492, which reads as follows:

> "All bonds issued by boards of county commissioners, boards of education, township trustees, or commissioners of free turnpikes, shall be sold to the highest bidder after being advertised once a week for three consecutive weeks and on the same day of the week, in a newspaper having general circulation in the county where the bonds are issued, and, if the amount of bonds to be sold exceeds twenty thousand dollars, like publications shall be made in an additional newspaper having general circulation in the state. The advertisement shall state the total amount and denomination of bonds to be sold, how long they are to run, the rate of interest to be paid thereon, whether annually or semiannually, the law or section of law authorizing the issue, the day, hour and place in the county where they are to be sold."

It is to be observed that under other sections, such bonds should not be advertised for sale until they have been offered at par and par and accrued interest respectively to the commissioners of the district sinking fund (if any) and to the industrial commission of Ohio, and have been refused by them. (See G. C. Secs. 7619, 1465-58.)

Your second question as to whether, if bonds are issued, the board of education can still draw state aid, requires consideration of certain new legislation. I refer to the act found in 107 O. L. 621, and which amends the state aid law. This act was filed in the office of the secretary of state April 2, 1917, and is now a law, and will of course determine the right of a school district to receive state aid for the year 1917-18, about which I assume you are inquiring. One of the provisions of that law is that embodied in section 7596-1 which is new matter therein and which provides as follows:

> "Whenever a school district receives state aid, as is provided for in section 7595-1 of the General Code the board of education of such school district may refund any tuition indebtedness by issuing bonds, as is provided by section 5656 of the General Code. When such bonds are due, the amount and interest of the bonds shall be a part of the deficit for the current year, and shall be paid as state aid by the auditor fo state as is provided by section 7596 of the General Code."

Without this section I do not think there would be any question but that a board of education could have issued bonds under section 5656 without impairing its right to receive state aid, if otherwise qualified; but the principal and interest of the bonds, or any part thereof, would not have constituted a part of the deficiency as estimated for the year in which they fall due in accordance with the general provisions of the state aid law. Section 7596-1, as I have quoted it, however enlarges state aid by making the accumulated tuition fund deficiency of a previous year a part of the deficiency for which state aid may be granted for a succeeding year, if bonds have been issued, and are due in such year.

Your second question is therefore answered by the statement that not only may the board "still draw state aid" if bonds are issued, but that the amount and interest of the bonds may become a part of the deficiency of the district for the succeeding year in which they fall due and state aid may be drawn.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

461.

OHIO BOARD OF ADMINISTRATION—HAS NO AUTHORITY TO RELEASE STATE HIGHWAY DEPARTMENT FROM THE PURCHASE OF ROAD BUILDING MATERIALS—FOR GIVEN LENGTH OF TIME.

1. *Under section* 1224-1 *G. C. there is no provision authorizing the Ohio board of administration to grant a release to the state highway department for the purchase of road building material for districts consisting of certain counties in the state and for a given length of time, such as a year.*

2. *The provisions of this section were meant to apply to each individual contract and force account, as improvements are taken up from time to time by the state highway department.*

COLUMBUS, OHIO, July 23, 1917.

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

DEAR SIR:—I have your communication of June 30, 1917, in which you ask my opinion as follows:

> "This department is just in receipt of the following letter from the Ohio board of administration in regard to the purchase of prison made road material from that board.
>
> "'You are hereby granted a release from the purchase of road building material, such as stone and brick, from the Ohio board of administration for the year 1917, for your division No. 4 consisting of the following counties: Ottawa, Sandusky, Seneca, Erie, Huron, Lorain, Medina, Cuyahoga, Lake, Geauga, Ashtabula.'
>
> "I respectfully request an opinion from you as to whether or not the above letter is a sufficient compliance with house bill No. 300 or whether a written request shall be made by this department upon the Ohio board of administration prior to the letting of each contract or the starting of each force account for the construction, improvement, maintenance or repair of a main market road or intercounty highway or any part thereof."

The question about which you make inquiry arises under and by virtue of the provisions of section 1224-1 G. C., and in order to have a correct understanding of the matter it will be necessary for me to quote the section in full. Said section reads as follows: (107 O. L. 134.)

> "Sec. 1224-1. Before a contract is let or a force account is started for the construction, improvement, maintenance or repair of a main market or intercounty highway or any part thereof, wherein standard paving brick or crushed stone are to be used, the state highway commissioner shall make a written request upon the Ohio board of administration to furnish prison-made brick or crushed stone for said proposed improvement, and said board shall furnish prison-made, standard brick or crushed stone, or

so much thereof as it may be able, for such improvement. If the Ohio board of administration is able to furnish prison-made materials or a part thereof, of the kind and quantity required by the state highway commissioner, it shall notify the state highway commissioner of that fact and also of the price to be charged by the board for such materials. If the Ohio board of administration is able to furnish materials or a part thereof, of the kind and quantity required by the state highway commissioner, and if the price quoted by the board of such materials plus the freight charges to the railroad shipping point nearest the road on which it is proposed to use such materials, does not exceed the cost at which such materials may be elsewhere purchased, plus the freight charges to the railroad shipping point nearest the road on which such materials are to be used, it shall be the duty of the state highway commissioner to purchase such materials of the Ohio board of administration and make payment therefor out of any available funds of the department. And the amount of material so furnished by the said Ohio board of administration shall be set forth in the specification and estimate for such improvement. And in case the cost of the stone or paving brick furnished by the Ohio board of administration for any improvement amounts to more than the apportionment assumed by the state, then the county commissioners shall pay to said board of administration, in the manner provided by law, the difference between the part of the cost and the expense of said improvement apportioned to the state and the total cost of the stone and paving brick furnished by said board for the improvement."

I will now note the different steps logically set forth in the section above quoted:

1. Before a contract is let or a force account started for the construction, improvement, maintenance or repair of a main market or intercounty highway, or any part thereof, the state highway commissioner must make a written request upon the Ohio board of administration to furnish prison-made brick or crushed stone for said proposed improvement.

2. If the Ohio board of administration has the kind and quantity of materials, or any part thereof, required by the state highway commissioner, it shall notify the state highway commissioner of that fact and the price at which the said board can furnish the material.

3. If the price quoted, plus the freight charges to the railroad shipping point nearest the road on which it is proposed to use such materials, does not exceed the cost at which such materials may be elsewhere purchased plus the freight charges to the railroad shipping point nearest the road on which such materials are to be used, it shall be the duty of the state highway commissioner to purchase such materials of the Ohio board of administration.

It will be noted that the provisions of this section apply to every contract entered into where standard paving brick or crushed stone are to be used. The only question is as to whether the board of administration has on hands brick or stone of the kind to be used and whether it can furnish the material as cheaply as it can be purchased elsewhere. If these two questions are answered in the affirmative, then it becomes the duty of said board to furnish the material and the duty of the state highway commissioner to purchase it.

In computing the cost of the material, the freight rate to the point nearest the particular improvement under contemplation must be taken into consideration, and before a contract is let or force account entered into, a request must be made upon the board of administration. From this it is evident that the provisions of

section 1224-1 G. C. are meant to apply to each individual contract and each individual force account, and not to whole counties or whole districts for a given length of time, such as a year.

In the plan suggested by you in your communication, the board of administration would have no means of knowing whether it would have material on hands when certain roads in certain counties were to be built, or whether or not they could furnish it as cheaply as it could be purchased on the market.

Hence, answering your question specifically, it is my opinion there is no provision in law warranting such a course as that mapped out in your communication, and that the provisions of section 1224-1 G. C. were meant to apply to each individual contract and force account, as improvements may be taken up from time to time by your department.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

462.

MILK—FROM TUBERCULAR CATTLE—PERSON MAY BE PROSECUTED WHO SELLS, ETC.—EVEN THOUGH SAME HAS BEEN PASTEURIZED.

A person who sells, exchanges or delivers, or has in his custody or possession with intent to sell or exchange, or sells or offers for sale or exchange, milk which is the product of cows afflicted with tuberculosis, may be prosecuted under section 12717 of the General Code, and the fact that the milk has been subjected to the process of pasteurization, or has been condensed, will in no wise prevent prosecutions under said section.

COLUMBUS, OHIO, July 23, 1917.

HON. T. L. CALVERT, *Chief of Dairy and Food Division, The Board of Agriculture, Columbus, Ohio.*

DEAR SIR:—I have your letter of June 15, 1917, as follows:

> "There are several instances in the state where city authorities have refused to receive milk from certain dairies on account of their cattle having tuberculosis.
>
> "When this action is taken by these city authorities they sell to some other place such as creamery, condensery or milk plant.
>
> "I would be glad to have an opinion stating whether this would be permissible if pasteurization is used. The only sections I have found that bear on this subject are 5778-5, 12717, 12727 and 12725. I will appreciate very much an early opinion."

Section 5774 G. C. reads:

> "No person, within this state, shall manufacture for sale, offer for sale, sell or deliver, or have in his possession with intent to sell or deliver, a drug or article of food which is adulterated within the meaning of this chapter, or offer for sale, sell or deliver, or have in his possession with intent to sell or deliver, a drug or article of food which is misbranded within the meaning of this chapter."

Section 5778 G. C. provides in part:

> "Food, drink, confectionery or condiments are adulterated within the

meaning of this chapter * * * (5) if it consists wholly, or in part, of a diseased, decomposed, putrid, infected, tainted or rotten animal or vegetable substance or article, whether manufactured or not or, IN THE CASE OF MILK, IF IT IS THE PRODUCT OF A DISEASED ANIMAL; * * *"

Section 12758 G. C. provides:

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

These sections were originally sections 1, 3 and 5 of an act passed March 20, 1884, 81 O. L. 67, entitled "An act to provide against the adulteration of food and drugs." These sections read in part:

"Sec. 1. Be it enacted by the general assembly of the state of Ohio that no person shall, within this state, manufacture for sale, offer for sale or sell any drug or article of food which is adulterated within the meaning of this act.

"Sec. 3. An article shall be deemed to be adulterated within the meaning of this act * * * (b) in the case of food; * * * (5) if it consists wholly or in part of a diseased, decomposed, putrid, infected, tainted or rotten animal or vegetable substance or article, whether manufactured or not, or, in the case of milk, if it is the product of a diseased animal * * *

"Sec. 5. Whoever refuses to comply upon demand with the requirements of section 4, and whoever violates any of the provisions of this act, shall be guilty of a misdemeanor and upon conviction shall be fined not exceeding one hundred dollars nor less than twenty-five dollars, or imprisoned not exceeding one hundred nor less than thirty days, or both. * * *"

At this time there was no separate and distinct legislation upon the subject of impure or adulterated milk, but milk was included as an article of food and prosecutions accordingly maintained.

It will be noted that under this act milk was deemed to be adulterated if, among other things, it was found to be a product of a diseased animal. This provision of the act is retained in section 5778 G. C. and it would therefore seem that a sale of milk which is the product of a diseased animal would now be punishable under section 12758—which was originally section 5 of the act referred to. On April 10, 1889, five years after the passage of the act referred to, the legislature passed an act entitled "An act to regulate the sale of milk," 86 O. L. 229. Sections 1 and 4 of this act provided:

"Sec. 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF OHIO, That whoever, by himself, or by his servant,

or agent, or as the servant or agent of any other person, sells, exchanges or delivers, or has in his custody or possession with intent to sell or exchange, or exposes or offers for sale or exchange, adulterated milk, or milk to which water or any foreign substance has been added, or milk from diseased or sick cows, shall, for a first offense, be punished by a fine of not less than fifty nor more than two hundred dollars; for a second offense by fine of not less than one hundred dollars nor more than three hundred dollars, or by imprisonment in the work-house for not less than thirty nor more than sixty days; and for a subsequent offense, by fine of fifty dollars, and by imprisonment in the workhouse of not less than sixty nor more than ninety days.

"Sec. 4. In all prosecutions under this chapter if the milk is shown upon analysis to contain more than eighty-seven per cent. of watery fluid, or to contain not less than twelve and one-half per cent. solids, not less than one-fourth of which must be fat, it shall be deemed, for the purpose of this chapter, to be adulterated, and not of good standard quality, except during the months of May and June, when milk containing less than twelve per cent. of milk solids shall be deemed to be not of good standard quality."

This act has since been several times amended and supplemented and the two sections mentioned are now found as sections 12716 and 12717 G. C., which read:

"Section 12716. In all prosecutions under this chapter, if milk is shown upon analysis to contain more than eighty-eight per cent of watery fluid, or to contain less than twelve per cent of solids or three per cent of fats, it shall be deemed to be adulterated.

"Section 12717. Whoever sells, exchanges, or delivers, or has in his custody or possession with intent to sell or exchange, or exposes or offers for sale or exchange, adulterated milk, or milk to which water or any foreign substance has been added, or milk from cows fed on wet distillery waste or starch waste, or from cows kept in a dairy or place which has been declared to be in an unclean or unsanitary condition by certificate of any duly constituted board of health or duly qualified health officer within the county in which said dairy is located, or from diseased or sick cows, shall be fined not less than fifty dollars nor more than two hundred dollars; and, for a second offense, shall be fined not less than one hundred dollars nor more than three hundred dollars, or imprisoned in the jail or workhouse not less than thirty days nor more than sixty days."

It might be contended that since the passage of the act of April 10, 1889, the act of March 20, 1884, has not applied to milk prosecutions, since the later act, being a special and more comprehensive act upon the subject of the regulation of milk sales, repealed by implication the former act in so far as that act regulated the sale of milk, and that therefore section 5778 G. C. no longer applies to milk prosecutions.

I do not think, however, that this question necessitates a discussion of this proposition since the remedy you seek can be had as well under the later act as the former. In other words, section 12717 affords you the same remedy as section 12758 would afford, if it applied.

It will be noted that section 12717 provides that "whoever sells, exchanges or delivers, or has in his custody or possession, with intent to sell or exchange, or exposes or offers for sale or exchange, * * * milk * * * from diseased or sick cows, shall be fined not less than $50.00 nor more than $200.00; and for a

second offense shall be fined not less than $100.00 nor more than $300.00, or imprisoned in the jail or workhouse not less than thirty days nor more than sixty days."

The milk you refer to in your communication comes from cows afflicted with tuberculosis and is, therefore, milk from diseased or sick cows within the meaning of this section. The fact that it has been subjected to a process of pasteurization does not alter this fact.

Section 12727, to which you refer, reads:

> "Whoever sells, exchanges, or offers for sale, or exchange, unclean, impure, unhealthy or unwholesome milk shall be fined not less than fifty dollars nor more than two hundred dollars, and for each subsequent offense shall be fined not less than one hundred dollars nor more than five hundred dollars and imprisoned not less than ten days nor more than ninety days."

This section deals with the condition of the milk rather than with the condition of the animal and its provisions would hardly include milk purified by pasteurization even though such milk was originally the product of a diseased cow.

You also call my attention to section 12725 G. C., which reads:

> "Whoever manufactures, sells, exchanges, exposes or offers for sale or exchange, condensed milk unless it has been made from pure, clean, fresh, healthy, unadulterated and wholesome milk, from which the cream has not been removed and in which the proportion of milk solids shall be the equivalent of twelve per cent. of milk solids in crude milk, twenty-five per cent. of such solids being fat, and unless the package, can or vessel containing it is distinctly labeled, stamped or marked with its true name, brand, and by whom and under what name made, shall be fined not less than fifty dollars nor more than two hundred dollars, and, for each subsequent offense, shall be fined, not less than one hundred dollars nor more than five hundred dollars and imprisoned not less than ten days nor more than ninety days."

This section was originally section 13 of an act passed May 17, 1886, 83 O. L. 178, entitled "An act to prevent adulteration of and deception in the sale of dairy products and supplementary to chapter 11, title 1, part 4 of the Revised Statutes." At this time the only definition of "adulterated milk" to be found in the statutes was that of section 3 of the act of March 20, 1884, to which reference has heretofore been made. As stated before, that definition applied only to that act so that at the time section 12725 G. C. was passed as section 13 of the act of May 17, 1886, the legislature had not determined what "adulterated" milk was for the purposes of that statute. Subsequently on April 10, 1889, an act was passed, as heretofore noted, entitled "An act to regulate the sale of milk." Section 4 of that act provided that:

> "In all prosecutions under this chapter, if the milk is shown upon analysis to contain more than eighty-seven per cent. of watery fluid, or to contain not less than twelve and one-half per cent. solids, not less than one-fourth of which must be fat, it shall be deemed, for the purpose of this chapter, to be adulterated, and not of good standard, quality, except during the months of May and June, when milk containing less than twelve per cent. of milk solids shall be deemed to be not of good standard quality."

The words "this chapter," as used in that act, undoubtedly would have been

held to mean "this act" up until the formation of the General Code, and would therefore not have referred to section 12725 G. C., which was originally section 13 of the act of 1886. However, in the formation of the General Code the legislature saw fit to place section 4 of the act of 1889, defining adulterated milk, in the same chapter as section 13 of the act of 1889, prohibiting the manufacture of condensed milk from "adulterated milk," the former section becoming section 12716 G. C. and the latter becoming section 12715 G. C.

The question then arises, was this act upon the part of the legislature, in so placing these sections, sufficient to make the definition of adulterated milk in section 12716 apply to the word "adulterated" as used in section 12725? If it was, then the fact that milk is from cows afflicted with tuberculosis in itself is not sufficient to make the milk "adulterated" under section 12725, since it is clear that the milk could contain less than 87 per cent of watery fluid or more than 12 per cent. of solids, or 3 per cent. of fats, even though such milk was the product of a diseased cow. If the act of the codifying commission, in so placing the sections referred to, is not sufficient to indicate a legislative intention to apply the definition of section 12716 to section 12725, then there would be no definition in the statutes of "adulterated milk" for the purposes of section 12725 G. C. and the ordinary legal meaning of the word would have to be given it in this section. This word has been defined as follows:

> "The act of corrupting or debasing; the act of mixing something impure or spurious with something pure or genuine, or an inferior article with a superior one of the same kind. See 16 M. & W. 644; State v. Norton, 24 N. C. 40."

Giving this meaning to the word "adulterated" as used in section 12725, the fact that the milk was the product of a diseased cow is not in itself sufficient to make it adulterated, since this definition, as well as the definition outlined in section 12716, deals with the condition of the milk rather than with the condition of the animal producing it. However, I am inclined to the view that even though no prosecution, based solely upon the fact that the milk is a product of a cow afflicted with tuberculosis, could be maintained under section 12725, yet such prosecutions could be had under section 12717. This prosecution would not be for the sale or the having in possession of condensed milk, but for the sale or the having in possession of milk "from diseased or sick cows," since even though the milk has been condensed, it is still milk from "diseased or sick cows" and, as stated before, the fact that it has been subject to the process of pasteurization does not affect this fact.

Anwering, then, your communication, I am of the opinion that a person who sells, exchanges or delivers, or has in his custody or possession with intent to sell or exchange, or sells or offers for sale or exchange, milk which is the product of cows afflicted with tuberculosis, may be prosecuted under section 12717 of the General Code, and the fact that the milk has been subjected to the process of pasteurization, or has been condensed, will in no wise prevent prosecutions under said section. In other words, it is a crime in this state to sell, or have in possession, milk which is the product of a tubercular cow, even though such milk has been pasteurized or condensed.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

463.

REGISTRATION—STATE BOARD OF EMBALMING EXAMINERS—MAY ACCEPT SAME EVEN THOUGH APPLICANT HAD COMMENCED TWENTY-SIX WEEKS' COURSE BEFORE LAW WENT INTO EFFECT.

The state board of embalming examiners is authorized to accept registration after section 1342, as amended in 107 O. L. 656, became effective, even though the applicant was then pursuing the twenty-six weeks' course prescribed in said section.

COLUMBUS, OHIO, July 23, 1917.

HON. B. G. JONES, *President Ohio State Board of Embalming Examiners, Columbus, Ohio.*

DEAR SIR:—Recently you sent me a letter received by you from Hon. Charles O. Dhonau, president of the Cincinnati college of embalming, with the request for me to advise you as to whether or not your board had the right or authority to take the action desired by the college. The letter of Mr. Dhonau is in effect as follows:

> "Mr. Jones advised me several days ago that the new law would go into effect July 1st. (Referring to H. B. 224.)
>
> "There will probably be one or two students to matriculate for the 26 weeks' course in the middle of May.
>
> "If I notify you within five days after they matriculate, in accordance with the recommendations I made to the board, would the board co-operate and register these men for the November examination?
>
> "If the board will not do this for us we will probably lose the entire summer for Ohio 26 weeks' men.
>
> "I realize, of course, that the board would have no legal authority to register a man on the 15th of May, but in order to help things to keep on running in the proper manner, they might recognize this condition unofficially and make the proper arrangements.
>
> "Since the November and May examinations were approved by the schools of the state, the other schools would approve this suggestion because it would affect them in the same way."

The provisions of law relative to this matter are found in H. B. 224, which was filed in the office of the secretary of state on April 3, 1917. The bill was presented to the governor but did not receive his signature. However, without objection or approval, it was filed in the office of the secretary of state, as above stated.

Section 16 of article II of the constitution provides in part:

> "* * * If a bill shall not be returned by the governor within ten days, Sundays excepted, after being presented to him, it shall become a law in like manner as if he had signed it, unless the general assembly by adjournment prevents its return; in which case, it shall become a law unless, within ten days after such adjournment, it shall be filed by him, with his objections in writing, in the office of the secretary of state. * * *"

The bill, therefore, became a law on April 3, 1917, and became effective on the

ninety-first day thereafter, to wit, July 3, 1917. Therefore, the law was not in effect on the 15th day of May, being the time specified in the letter of Mr. Dhonau. Said law amended section 1342 G. C. (107 O. L. 656) to read in part as follows:

> "Every person desiring to engage in the practice of embalming or the preparation of the dead for burial, cremation or transportation, in the state of Ohio, shall make a written application to the state board of embalming examiners *for registration*, giving such information as the said board may, by regulation, require for such registration. * * * If the said board shall find the facts set forth in the application to be true, the said board shall issue to said applicant a certificate of registration. Before a registered applicant can apply for and take an examination in the practice of embalming or preparing for burial, cremation or transportation, the body of any dead person in the state of Ohio, said applicant shall have completed to the satisfaction and approval of the said board, a course consisting of at least twenty-six weeks of studies in the science of embalming, disinfection and sanitation in a regular school of embalming, recognized by said board or shall have had at least two years of practical experience * * * All applications for a license to practice embalming and the preparation of the dead for burial, cremation or transportation in this state, must be made to the state board of embalming examiners in writing and contain. * * * Each application must be accompanied by a fee of ten dollars and the certificate of registration. If after the state board of embalming examiners are satisfied that the applicant has qualified as set forth in this section, the said board shall cause the said applicant to appear before them and be examined. * * *"

While it is true that before section 1342 became effective there was no provision of law for the certificate of registration and consequently the board would be without authority to issue any certificate until the law became effective, nevertheless, a careful examination of section 1342 will disclose that there is no specific time mentioned within which registration must be applied for and, furthermore, there is no provision in the law that the registered applicant shall complete the twenty-six weeks of study only after registration, the law simply providing that before a registered applicant can take an examination "said applicant shall have completed to the satisfaction and approval of the said board" the twenty-six weeks. While it may have been the intention of the legislature to require that a person desiring to become an embalmer in this state shall first register, then take the course prescribed and then make application to take the examination, the law itself is not sufficiently explicit to show such to be the fact.

In view of that fact, I can see no objection in your board permitting registration after section 1342 as amended became effective, even though the applicant for registration shall have already taken part of the twenty-six weeks' course prescribed, especially so as no injustice would ensue to the state.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

464.

BOARD OF EDUCATION—VALIDITY OF BONDS ISSUED TO PURCHASE MOTOR TRUCKS FOR TRANSPORTATION OF PUPILS.

A board of education is not authorized under sections 7625, 7626 and 7627 G. C., to issue bonds for the purpose of purchasing automobile trucks with which to transport pupils of the school district, and when such purpose is included within the purposes of a bond issue by the board of education under said sections of the General Code, such issue of bonds is invalid.

COLUMBUS, OHIO, July 23, 1917.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

> "In Re: Bonds of Belle Center village school district, Logan county, Ohio, in the sum of $15,000.00, for the purpose of installing heating and ventilating, plumbing and drainage system in school building, making necessary repairs thereto, and for the purpose of procuring automobile trucks for the purpose of transporting pupils.

I am herewith returning to you, without approval, transcript of the proceedings of the board of education and other officers of Belle Center village school district relative to the above bond issue.

The board of education of this school district has provided for the issue of these bonds in said sum of fifteen thousand dollars ($15,000.00), pursuant to an affirmative vote of the electors of the school district on a submission of the question to said electors by the board of education, under the provisions of section 7625 G. C.

The resolution of the board of education under section 7625 G. C. designates the purposes of said bond issue as follows:

> "That it is necessary for the proper accommodation of the schools of such district that the school building of Belle Center, Ohio, be repaired and furnished, and that automobile trucks for the transportation of pupils of said district be purchased."

This being so, and the bond issue being a single proposition covering the purpose of procuring automobile trucks, as well as the purpose of equipping and repairing the school building, the bond issue fails for want of legal authority in the school district to submit the proposition in this form to the electors of the school district.

I have diligently endeavored to find something in the way of legal authority which might justify my approval of this bond issue in an amount sufficient to provide for equipping and furnishing the school building projects which the board of education might legally have provided for under the authority of said section 7625 G. C. This I have taken extra pains to do for the reason that I recognized that the condition confronting the board of education at Belle Center is one which in every sense is an emergency. The equipment and repairs which the board of education by means of this bond issue sought to furnish and make have been ordered by you through the department of workshops and factories, and some means must be found to make the necessary repairs and furnish the necessary equipment to carry out the order which you have made. However, I have not been able to find anything in the way of authority which would sanction my approval of any

part of the bond issue, as no means are available for ascertaining what portion of said bond issue was issued for purposes within the purview and authority of section 7625 G. C., and what part thereof was issued for automobile trucks.

In support of the conclusions above reached by me I note the recent decision of the court of common pleas of Crawford county, Ohio, in the case of Shell v. Bevier, et al., where under substantially similar circumstances as to the purposes for which bonds were issued by a board of education, the court enjoined the issue of such bonds for the reason that among the purposes of the bond issue as submitted to the electors and mentioned in the resolution of the board of education, was the purpose of providing money for the transportation of pupils.

On the considerations above noted I feel that I have no discretion to advise you otherwise than to disapprove the bond issue, and to advise you not to purchase same.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

465.

COMMISSION FOR THE BLIND—AUTHORITY TO EMPLOY PERSON TO SELL PRODUCTS OF ITS WARDS.

The commission for the blind has authority under General Code section 3666 to employ persons to sell the products of the industry of their said wards and to pay for making such sales either by salary or commission or by a combination of both methods.

COLUMBUS, OHIO, July 24, 1917.

The Ohio Commission for the Blind, Columbus, Ohio.

GENTLEMEN:—This department is in receipt of the following request for an opinion:

> "The Ohio commission for the blind respectfully requests your opinion relative to the paying of commissions upon sales to employes of this board.
>
> "Under section 1363, it will be observed that the object of the commission is 'to assist the blind in finding employment, and to teach them industries which may be followed in their homes.' Further, according to section 1366, the commission is authorized 'to devise means for the sale and distribution of the products made by the blind in workshops.'
>
> "In the spring of 1912, the commission established a trade school for the blind, a portion of which might be considered a workshop or factory—in other words, a broom-making industry is carried on. Apprentices are admitted and given instruction in the broom trade and when they are competent to make a salable article they are paid wages or encouraged to return to their homes and establish a small broom-making plant of their own, the commission helping them to dispose of their product. Other blind men, who are living at home, are being encouraged to sell brooms, the proceeds from which is as definite a form of help to them as the wages paid to those working in the commission's shop.
>
> "Another form of industrial aid, which the commission is giving is chiefly to blind women who live in their own homes. Over 650 of these are being provided with raw material which they work up into products which then have to be disposed of. One of the most difficult problems

which has confronted every organization for the blind in the world, which aims to give employment to the sightless, is that of finding a market for the things the blind make.

"The Ohio commission for the blind has tried three methods of selling the work of the blind:

"1. Through the co-operation of women's clubs, churches, etc., sales have been held in many towns throughout the state. The expense of such sales is not very large but on the other hand, the proceeds unfortunately are small and have not warranted much effort on our part.

"2. Prominent merchants in Akron, Cincinnati, Cleveland, Dayton, Springfield and Youngstown have contributed counter space in their stores and have allowed the commission to sell the blind people's products, the commission paying the salary of the clerks, and the stores holding themselves responsible for 'charge' accounts and delivery of goods. This method of selling has been fairly satisfactory although the commission feels that it is not the ideal as it has cost 33 1-3 per cent. of the total sales to defray the salary of the clerks, and furthermore it has not provided us with a market for all of the output of these blind women.

"3. The most recent method of disposing of the work has been to sell certain grades of articles at wholesale to merchants. In this plan, we find that the cost of disposing of the products will probably be less than any other method, and furthermore, the commission is able to give more work to the blind because the articles thus sold require less technical ability to make than those sold over the counters operated by the commission.

"The commission has sent its merchandise to these various stores by means of an agent who has been paid a salary of $75.00 a month and traveling expenses. As this phase of our work increased the commission found itself confronted with the fact that it had to compete with selling agents who were receiving a salary and a small compensation on repeat orders.

"The commission was confronted with the problem of paying more salary to its traveling sales agent or adopting the accepted plan of the mercantile world of granting a small commission on repeat orders in addition to the present salary. Recognizing the desirability of handling this part of our work on a basis similar to that pursued by other merchants, we took up the matter with the budget commissioner and finance committee and were instructed to pay this commission from our rotary fund and to make the effort to charge enough on our sale price of goods to cover the commission. In all the discussions relative to this matter, no one suggested that this might be legally impossible.

"We are presenting this matter to you in the hope that the law creating the commission may be such that it will be possible to operate under the policy of 'salary and commission' which is in vogue in other business concerns."

The statutes creating your commission and extending its authority and providing for the conduct of its duties are entitled, "Ohio Commission for the Blind," and consist of sections 1360 to 1369, inclusive. The particular section governing the matter concerning which you inquire is section 1366, which is as follows:

"The commission for the blind may establish, equip and maintain schools for industrial training and workshops for the employment of suitable blind persons, pay the employes suitable wages and devise means for the sale and distribution of the products thereof. * * *"

The section recognizes the well known condition to manufacturing, and that is that to make it successful it must be supplemented by sale and distribution of the product for prices sufficient to cover all expense and cost of production. It, therefore, does not simply authorize the sale of products, such authority would be implied, it is not at all necessary to express it, but the authority given, instead of simply to sell, is to "devise means for the sale and distribution of the products thereof."

A simple authority to sell would involve the means of making sales. This section goes further than that and permits you to devise means for the sale and distribution, and would indicate the legislative intent that you might resort to other or different methods of effecting such sale than the ordinary commercial methods. However, the means indicated in your inquiry are not unusual, but are the ordinary considerations and inducements for salesmen in the commercial world. There would, therefore, seem to be no doubt of your authority to make sale of the products manufactured in the schools for industrial training and workshops for the employment of suitable blind persons, as provided in section 1366, in the manner suggested, which has the approval of the budget commissioner and the finance committee, and you are instructed that you are fully authorized by law to do so.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

466.

COUNTY SURVEYOR—HOW DEPUTIES PAID WHEN ACTING AS TAX MAP DRAFTSMAN—OTHER DEPUTIES—HOW PAID—DUTY TO RUN LOT LINES IN MUNICIPALITY.

1. *When the county surveyor acts as tax map draftsman, his deputies are provided and paid under the provisions of sections* 5551 *and* 5552 *G. C.*

2. *When the county surveyor performs duties under sections* 6442 *to* 6822, *inclusive, or under sections* 2807 *to* 2814, *inclusive, G. C., his deputies are provided under the provisions of section* 2788 *G. C. and their expenses are paid under the provisions of section* 2786 *G. C.*

3. *Under the conditions of section* 2807 *et seq. G. C., the county surveyor may be required to run lot lines at the request of an owner or person therein interested, whether the municipality has a civil engineer or not, and the fees therefor must, under the provisions of section* 7181 *G. C., be paid into the county treasury. There is no provision of statute as to subdividing tracts of land in municipalities.*

COLUMBUS, OHIO, July 24, 1917.

HON. ROGER D. HAY, *Prosecuting Attorney, Defiance, Ohio.*

DEAR SIR:—I have your communication of June 29, 1917, in which you ask my opinion as follows:

> "The county surveyor has requested me to get an opinion from your office as soon as possible as to his duty under the White-Mulcahy Am. H. B. No. 300. This law went into effect June 26, 1917 and he has been called upon to perform some duties in reference to the following query:
>
> "When the county surveyor is required to perform duties under section

7181 as amended, in what manner are the deputies, their expenses and means of conveyance to be paid? Who will be held responsible for the collection of the above mentioned expense?

"Does the law give a lot owner within a municipality the right to require the county surveyor to locate the lines of any lot or subdivide any tract of land within such municipality under the provision of section 7181 as amended?

"In a city where no city engineer is employed, does the preceding paragraph apply?"

Your first question has to do with the matter of deputies for the county sursurveyor, in reference to his duties under and by virtue of section 7181 G. C. as found in the law which took effect on June 28, 1917. In order to answer this question intelligently, it will be necessary for me to differentiate the duties to be performed thereunder.

I will first note the duties the county surveyor has to perform under and by virtue of his position as tax map draftsman. Said section, in so far as it applies to these duties, reads as follows (107 O. L. 110):

"* * * The county surveyor shall be the county tax map draftsman, but shall receive no additional compensation for performing the duties of such position. * * *"

The duties he performs as tax map draftsman are not performed as county surveyor, but as county tax map draftsman; that is, virtually, two positions are held by the same person, namely, county surveyor and county tax map draftsman.

In so far as his deputies are concerned for this position, the provisions of sections 5551 and 5552 G. C. will control. If he needs a deputy in the performance of these duties, the county commissioners may fix the number and pay of the same, which is paid out of the county treasury, as other county officers are paid.

I went into this matter very fully in an opinion rendered to the bureau of inspection and supervision of public offices under date of June 7, 1917 (No. 353), a copy of which I am enclosing for your information.

The other duties to be performed by the county surveyor under the provisions of section 7181 G. C. he performs as county surveyor and he has the right and authority to appoint the deputies he may need for said duties, under the provisions and limitations of section 2788 G. C., which reads in part as follows:

"Sec. 2788. The county surveyor shall appoint such assistants, deputies, draughtsmen, inspectors, clerks or employes as he deems necessary for the proper performance of the duties of his office, and fix their compensation, but compensation shall not exceed in the aggregate the amount fixed therefor by the county commissioners or allowed by a judge of the court of common pleas of the county. After being so fixed such compensation shall be paid to such persons in monthly installments from the general fund of the county upon the warrant of the county auditor. * * *"

You make inquiry also as to the expenses of the deputies of the county surveyor under said section as amended. The expenses of the deputies of county surveyor are provided for in section 2786 G. C., the latter part of which reads as follows:

"The county surveyor and each assistant and deputy shall be allowed his reasonable and necessary expenses incurred in the performance of his official duties."

This provision would apply to the additional help which the county surveyor might need under and by virtue of his duties set out in section 7181 G. C.

Your section question goes to the point as to whether the county surveyor, under the provisions of section 7181 G. C. as amended, is required to locate lot lines or subdivide lands when the same are located within a municipality. There is no change made in the amended section, so far as the duties of the county surveyor along this line are concerned. The only change is that under the provisions of the law as amended, the county surveyor must pay all fees and allowances for the work he performs under and by virtue of sections 2807 to 2814 inc. G. C., into the county treasury; while under the law as it originally stood he was entitled to retain such fees and allowances as an additional compensation over and above the regular salary allowed to him by law. The part of section 7181 G. C. which is applicable to this question reads as follows:

> "Sec. 7181. * * * When the county surveyor performs service in connection with ditches or drainage works under the provisions of sections 6442 to 6822 inclusive of the General Code of Ohio, he shall charge and collect the per diem allowances or other fees therein provided for, and shall pay all such allowances and fees monthly into the county treasury to the credit of the general county fund. The county surveyor shall do likewise when he performs services under the provisions of sections 2807 to 1814 inclusive of the General Code of Ohio."

Hence, to answer your question, we must turn to the provisions of sections 2807 to 2814 inc. G. C. and especially to the provisions of said section 2807 which reads in part as follows:

> "Sec. 2807. Any person owning or being interested in a tract of land within the state, any corner, or line of which has become lost or uncertain, or is in danger of becoming lost or uncertain, by the removal, destruction, defacement or perishing condition of any corner, witness or line tree, or monument, or other cause, may call on the surveyor of the county where the land lies to make a survey thereof, and cause to be planted at any corner or corners, or at proper places in any line or lines thereof, a stone or post, noting particularly the situation and condition of the original corner trees, or monuments called for in the original survey, if found, and of all other trees or monuments, which it may be important or advisable to note, and of all the places of notoriety, over or by which the lines of such survey pass. * * *"

The provisions of this section are evidently broad enough to include lots or lines located in a municipality and it is my opinion that the county surveyor would be compelled to perform the duties mentioned in section 2807 G. C., whether or not the lands or lots are located in a municipality. You inquire, however, whether he would be compelled to subdivide tracts of land. I find no provision in said sections requiring the county surveyor to subdivide tracts of land.

Your third question has to do with the matter as to whether the county surveyor would be compelled to perform the duties under sections 2807 to 2814 inc. G. C., provided the land is located in a municipality and that the municipality has a civil engineer. In order to answer this question it will be necessary to note the provisions of section 4327 G. C., which reads as follows:

> "Sec. 4327. The director of public service may establish such subde-

partment as may be necessary and determine the number of superintendents, Deputies, inspectors, engineers, harbor masters, clerks, laborers and other persons, necessary for the execution of the work and the performance of the duties of this department."

and the provisions of section 4366 G. C. which reads as follows:

"Sec. 4366. In each municipal corporation having a fire engineer, civil engineer or superintendent of markets such officers shall each perform the duties prescribed by this title and such other duties not incompatible with the nature of his office as the council by ordinance requires, and shall receive for his services such compensation by fees, salary or both as is provided by ordinance."

Under the provisions of these sections, if the city has a civil engineer, his duties are such as are prescribed in chapter 8, subdivision 2, division 5 of title XII, part I, of which said sections are a part, and such duties as may be given him by ordinance. There are no provisions in chapter 8 which give the city civil engineer the exclusive authority to locate lines and corners of lots located in a municipality, and of course the provisions of an ordinance giving him authority to run lot lines and subdivide tracts of land could not set aside the plain provisions of a statute making it the duty of a county surveyor to do the same.

Hence, answering your questions specifically:

1. When the county surveyor acts as tax map draftsman, his deputies are provided and paid under the provisions of sections 5551 and 5552 G. C.

2. When the county surveyor performs duties under sections 6442 to 6822 inc. or under sections 2807 to 2814 inc. G. C., his deputies are provided under the provisions of section 2788 G. C. and their expenses are paid under the provisions of section 2786 G. C.

3. Under the conditions of sections 2807 et seq. G. C., the county surveyor may be required to run lot lines at the request of an owner or person therein interested, whether the municipality has a civil engineer or not, and the fees therefor must, under the provisions of section 7181 G. C., be paid into the county treasury.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

467.

BONDS—INDUCEMENT OFFERED BY CONTRACTOR TO BOND BUYER TO PURCHASE BONDS OF TAXING DISTRICT—LEGALITY OF SUCH TRANSACTION.

In the absence of any other facts, if a person of his own free will and accord enters into an understanding, verbal or otherwise, with a bond buyer to the effect that he will pay the bond buyer a certain premium out of his own pocket if such bond buyer purchases the bonds of a taxing district which were legally offered for sale, and if later on said person who paid said premium is awarded the contract at public letting for the improvement to be paid for out of the funds derived from said bond issue, neither the act of said person in offering said inducement for said bond sale nor the act of the bond buyer in accepting it is illegal; nor is said bond sale or the letting of said contract contrary to law, although the surrounding facts and circumstances should be carefully examined to ascertain if there was any fraud in the letting of said work.

COLUMBUS, OHIO, July 24, 1917.

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

GENTLEMEN:—I have your communication under date of June 29, 1917, in which you ask my opinion on the following request:

> "In view of the present conditions and the difficulty encountered by certain taxing districts in selling bonds, also the fact that the rate of interest on certain county bonds is limited by statute to five per cent., also in view of the fact that where bids are received for an improvement contract in the regular course of events as set forth by law, it would be impossible for any contractor to know that he was to receive the contract until certification of funds being in the treasury could be made:
>
> QUERY: If a contractor of his own free will and accord entered into an understanding, verbal or written, with a bond buyer that if such bond buyer purchases the bonds of a taxing district which were offered for sale in compliance with the laws of the state, to the effect that he, the contractor, will pay the bond buyer one point, being one per cent. of the face value of the bonds, is such act of the contractor, or bond buyer, or both, if consumated, illegal?"

I presume from the statement of facts contained in your request that the word "contractor" therein refers to a prospective contractor, and not to one who sustains that present relationship to the subdivision in question as to the particular work to be done with the funds derived from the sale of said bonds. However, in so far as the answer to your question is concerned, I do not think that it makes any difference whether the person concerning whom you write is an actual contractor who has entered into a binding agreement, or whether his status is prospective in character.

I have examined the provisions of the General Code with respect to the rights and duties of contractors, and do not find any prohibition against such an arrangement as you describe. It might be that the person in question is willing to take the chance that he will be the low bidder when the contract is let after the bonds are sold, and for that reason is desirous of seeing a speedy sale of the bonds made. So far as the understanding between the bond buyer and the prospective

contractor is concerned, it is a private matter pure and simple, since none of the public funds are involved in any way, nor can the public subdivision issuing the bonds be bound or obligated to any extent by this extraneous agreement between third parties, and the public has ample protection through the public sale of the bonds and public letting of the contract.

However, such an arrangement should cause you to scrutinize very closely the facts surrounding all transactions between the public officials of the particular subdivision and the person who paid the premium to the bond buyer, in the event that he should be the successful bidder, since it is possible that the conduct of the contractor with respect to the bond sale might be a factor in showing that there was a secret understanding between the officials and the contractor in the letting of the work. Still it must be understood that the facts you state by themselves would not prove anything in the way of criminal liability on the part of either the bond buyer or the prospective contractor; but if after the contract was let it was discovered that there were indications of an improper and illegal relationship between the representatives of the public and the successful bidder, this arrangement might tend to show the existence of such a condition.

I therefore advise you that in the absence of any other facts, if a person of his own free will and accord enters into an understanding, verbal or written, with a bond buyer to the effect that he will pay the bond buyer a certain premium out of his own pocket if such bond buyer purchases the bonds of a taxing district which are legally offered for sale, and if later on said person who paid said premium is awarded the contract at public letting for the improvement to be paid for out of the funds derived from said bond issue, neither the act of said person in offering said inducement for said bond sale nor the act of the bond buyer in accepting it is illegal, nor is said bond sale or letting of said contract contrary to law, although the surrounding facts and circumstances should be carefully examined to ascertain if there was any fraud in the letting of said work.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

468.

PHYSICIAN—FALSE STATEMENT TO INDUSTRIAL COMMISSION—TO RECEIVE ALLOWANCE FOR MEDICAL SERVICES—ALLOWANCE GRANTED—GUILTY OF OBTAINING MONEY UNDER FALSE PRETENSES.

If a physician makes a false statement of facts to the industrial commission as to the cause of the disability of an employe under the provisions of the workmen's compensation act, with the intent thereby to receive an allowance for medical services to which he knows he is not entitled under the law, and such false and fraudulent representations are relied upon by said industrial commission and by reason thereof the said physician obtains an allowance for medical services and receives a warrant therefor, said physician is guilty of the crime set forth in section 13104 *G. C.*

COLUMBUS, OHIO, July 24, 1917.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I have your communication of recent date in which you make request for my opinion on the following statement of facts:

> "Your opinion is desired as to whether the following facts are such as to constitute a case for criminal prosecution:

"Under date of October 10, 1916, there was filed with the commission report of an alleged injury on one of the blank forms furnished by the commission for this purpose. The report was signed by the employe, claiming to have been injured, and set forth the following facts as to the nature and extent of the injury:

"'First finger on left hand swollen and pains, and has sore on first joint of same.'

"Blank forms of report were forwarded to the attending physician named on the employe's report, and the medical report filed by the attending physician contains the following description as to the nature of the alleged injury:

"'Forefinger of right hand burned—infected.'

"An investigation was made by the department, which developed the fact that claimant had a felon on the first finger of his left hand, and that this was the sole cause of his disability. There is no evidence whatever of any burn, nor does the employer have any record of the employe receiving any injury in the course of his employment.

"There seems to be no question but that the report of the attending physician was prepared for the purpose of fraudulently deceiving the commission as to the nature of the condition causing disability, so that the physician could collect fee for the treatment of a condition which ordinarily would not come within the scope of the compensation act.

"Will you please let us have your opinion as to whether there is any proceeding by which the physician could be prosecuted for the fraud thus practiced?"

In addition to the foregoing I am informed that the application for the allowance of the claim set forth in the above mentioned communication was passed on favorably upon hearing, and on the basis of said physician's report, which you state was false, an allowance in the amount of $11.00 for medical services rendered the claimant was made to him and the warrant for said above mentioned sum was turned over to said doctor by the said industrial commission and received by him.

Section 13104 of the General Code reads, in part, as follows:

"Whoever, by false pretense and with intent to defraud, obtains anything of value * * * if the value of the property * * * so procured * * * is thirty-five dollars or more, shall be imprisoned in the penitentiary not less than one year nor more than three years, or, if less than that sum, shall be fined not less than ten dollars nor more than one hundred dollars or imprisoned not less than ten days nor more than sixty days, or both."

Four elements are essential to constitute the crime set forth in the above quoted section. They are stated in State v. Williams, 6 O. N. P. n. s. 406 (which was affirmed by the supreme court in 77 O. S. 468) in the following language:

"First. There must be a false representation as to an existing fact or a past event.

"Second. There must be an intent to defraud.

"Third. There must be a reliance upon such fraudulent representations.

"Fourth. Something of value must be obtained thereby."

It is necessary, then, to determine whether the four essential elements which

must be present to make up the offense of obtaining something of value by false pretense exist in the present case which you have presented for my consideration.

The first requirement, that there must be a false representation as to an existing fact or a past event, is certainly met by proof of the fact that the physician signed a written statement to the effect that the forefinger of claimant's right hand was burned and became infected, which said statement you advise was false and untrue.

The second element is that there must be an intent to defraud. Such an intent means a design, resolve or determination in the mind of the physician to defraud, and its presence must be ascertained from a consideration of the surrounding facts and circumstances, unless the same is admitted to be true by the accused. I shall not attempt to pass upon the sufficiency of the facts that might be shown to prove the intent to defraud in the particular case. However, if you should feel convinced that the physician in question made the false statement with the intent thereby to obtain an allowance for medical services to which he knew he was not entitled under the law, you would be justified in considering that the second element of the offense was present.

The third element refers to the necessity of such false representation being relied upon by the party from whom something of value was obtained. It would seem to be true from the facts you have stated that the industrial commission did rely upon said doctor's statement, since he was given a warrant for an amount sufficient to cover the services rendered by him, and such warrant was issued, as you state, on the basis of the report which he filed with the industrial commission and which stated that his patient was injured in the course of his employment.

The obtaining of something of value, which is called "anything of value" in the statute, is defined by section 12369 G. C., which reads, in part, as follows:

> "In the interpretation of part fourth the term 'anything of value' includes * * * orders, * warrants, checks, * given for the payment of money. * * *"

A warrant for the sum of $11.00 was obtained by said physician from said industrial commission in accordance with the report that he filed, and such receipt by him of same meets the fourth requirement that something of value must be obtained thereby.

I advise you, therefore, that if a physician makes a false statement of facts to you as to the cause of the disability of an employe under the provisions of the workmen's compensation act, with the intent thereby to receive an allowance for medical services to which he knows he is not entitled under the law, and such false and fraudulent representations are relied upon by you and by reason thereof the said physician obtains an allowance for medical services and receives a warrant therefor, said physician is guilty of the crime set forth in section 13104 of the General Code.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

469.

SECRETARY OF AGRICULTURE—IS STATE OFFICER—POWER OF SECRETARY AND BOARD—CIVIL SERVICE.

The secretary of agriculture as created by the act of March 21, 1917, is a state officer. He is ex officio secretary of the board of agriculture, but has functions and performs duties independently of their authority, and in such capacity has much of the power of the department of agriculture.

The provisions in said act, in section 1087-2, do not have the effect of increasing or extending the classified civil service of the state, but simply provide for the continuous application of the civil service law and the continuous authority of the civil service commission to the department of agriculture during and after the change effected by the act.

The acts of the secretary in his capacity as secretary of the board of agriculture are under the authority and require the approval of the board, but his independent acts as secretary of agriculture, in pursuance of the sections of the act not giving the board express authority over the same, are not subject to any approval by the board.

Different sections of the act give authority to the board of agriculture to adopt rules and regulations while other sections confer the same power upon the secretary. In each case each authority acts independently of the other.

COLUMBUS, OHIO, July 25, 1917.

HON. W. E. SHAW, *Secretary of Ohio Board of Agriculture, Columbus, Ohio.*

DEAR SIR:—On June 27th you submit the following for my opinion thereon:

> "House bill No. 115 becomes a law July 1st, and your opinion is respectfully requested on the following questions, relative to certain provisions of this act and the powers and duties of the board of agriculture and the secretary of agriculture.
>
> "Will you define the specific duties of the board of agriculture and the secretary of agriculture under the statutes with the addition of the new sections and amendments effective July 1, 1917?
>
> "Do the provisions of section 1087-2 stating that 'none of the present employes of the present board of agriculture shall be removed, discharged, suspended, reduced in pay or otherwise discriminated against, except in accordance with the provisions of the civil service laws of the state,' apply to those not appointed from lists certified by the civil service commission?
>
> "Must official transactions of the secretary of agriculture have the approval of the board of agriculture before being entered on the records?
>
> "Must rules, regulations, quarantines, etc., be adopted by the board of agriculture, or has the secretary of agriculture the power to adopt such measures?"

An answer to the first of your four inquiries would be of very considerable extent, as the new act you mention contains thirty-five pages of the annual volume of laws, and many sections are still in force of the previous law governing the department, so that the duties about which you inquire are found scattered through several hundred sections of the statutes. It appears, however, from a conversation with you that you do not mean this request to be so extensive, but

only desire your duties and those of the board defined in a general way, and more especially with reference to the division of such duties between the secretary and the board.

It is apparent from an examination of this act that it was intended to substitute the secretary for the board as to the conduct of the principal activities of the department, not in the capacity of a subordinate or as carrying out details of general instructions, but as an original delegation of power. The evidences of this legislative intent are so numerous and so extensive that it is much easier to pick out and ascertain the powers remaining in the board of agriculture than to enumerate those transferred from it to the secretary.

One important section not repealed is section 1082, which provides that:

> "The board of agriculture shall succeed to and be possessed of the rights, authority and power now exercised by the agricultural commission, unless otherwise specifically provided by law. It shall also succeed to and be in control of all records, lands, moneys, appropriations and other property, real or personal, now or hereafter held for the benefit of said agricultural commission. * * *"

An examination of the whole act, however, shows that this section, while not expressly repealed, is considerably affected by the provisions of the new act. The most important function of the board under the express provisions of the new law is found in section 1087, which reads as follows:

> "The board of agriculture is authorized to elect a secretary with the approval of the governor, who shall be known as the secretary of agriculture, and who shall be a man actively identified with agriculture. He shall hold office for two years and until his successor is elected and qualified. But the board of agriculture may remove him any time for cause. He shall be the chief executive officer of the department. He shall appoint all heads of bureaus, experts, inspectors, wardens, clerks, stenographers and all other assistants and employes and shall fix their compensation within the limits prescribed by law. * * *"

This section gives the board authority, with the approval of the governor, to make the appointment of the secretary and remove him, but being appointed it, with other sections, transfers to him the most important duties formerly devolved upon the board.

Subsection 1 of this section is as follows:

> "From and after the taking effect of this act, the secretary of agriculture shall do all work now performed as the duties which, by any of the laws of the state, are placed upon the agricultural commission, and wherever the words 'agricultural commission' are found in the laws of the state, they shall be construed to refer to the secretary of agriculture."

There is nothing for this section to operate on. Section 1082 as amended in 106 O. L. 143, transferred all the power of the commission to the board and left nothing over to give to the secretary in this manner.

In many of the sections the *secretary* is substituted for the *board,* in others the authority is left to the board and is also conferred upon the secretary. In such cases it would be possible for a conflict of authority to arise, but such need not be anticipated as it will be sufficient to consider it when the time comes.

Under section 1092 of the General Code the power is left to the board to pro-

vide a uniform method for the election of directors and officers of agricultural societies receiving support from the state or counties, and to provide rules and regulations under which such societies shall be conducted, and in the same section the board is required to meet with the authorized delegate of such local society for the purpose of consultation upon the wants, prospects and condition of agriculture. This function is confined to the board without any interference by the secretary.

Section 1095-1 of the General Code authorizes the purchase of real estate by the secretary, but the same must be approved by the board; but by section 1096 of the General Code the board *or* secretary, *or* authorized representatives, may confer and meet with the officers of other states and officers of the United States on any matter pertaining to their official duties. It will be noticed that this is in the disjunctive—that it is the board *or* secretary, and presents a case of possible conflict above alluded to.

Section 1100 of the General Code authorizes the board or secretary to conduct investigations, inquiries or hearings for the purposes contemplated in the act, and gives each of them power to administer oaths, certify to official acts, take depositions, issue subpoenas, compel the attendance of witnesses and the production of books, etc.

Section 1101 gives both to the board and to the secretary the right to inspect private books and documents and examine persons under oath, including officers or employes of corporations and partnerships. The secretary is permitted to designate other persons to perform the same duty.

Section 1102 further authorizes the board or the secretary to hold hearings, issue subpoenas, enforce the production of documents, and provides a penalty for refusing to comply with the orders.

Section 1103 provides that in the making of any such investigation, the secretary of agriculture may appoint an agent and prescribe his duties, and confers upon such agent the same inquisitorial powers given to the board and to the secretary.

Section 1119 permits the secretary to appoint a state veterinarian, and in case of an outbreak of disease to appoint temporarily such additional number of assistants as the board of agriculture may approve.

Section 1115 in providing for the killing of infected animals, and appraising and paying for them, provides a review of such action by the board of agriculture at the next regular meeting.

These sections are referred to not as an entire or complete enumeration of the powers left in the board, but as constituting the principal powers and authority left in the board without adverting to the subject of particular bureaus, and while there is no general or well defined plan or idea in the division of the powers of the department these are sufficient to show that the great body of its power is conferred upon the secretary. It is significant that the latter official is not merely the secretary of the board. He is that, but he is principally the *secretary of agriculture,* a distinct office, and while the enumeration of his powers and the conferring of his authority are found commingled in the same act and in the same sections with those of the board of agriculture, it is nevertheless in most cases found distinct and independent, and without discussing this subject further it is left for future inquiry, should the same be necessary, as to details that may hereafter arise.

Your second inquiry refers to the standing of the employes of the present board. Section 1087-2 G. C. provides as follows:

> "All appointments made by the secretary of agriculture under and by virtue of the provisions of this act shall be made with the approval of the

board of agriculture, and none of the assistants and employes now in the employ of the present board of agriculture shall be removed, discharged, suspended, reduced in pay, or otherwise discriminated against, except in accordance with the provisions of the civil service laws of the state."

This section is plainly intended to retain in the department all present employes of the board, but as it apparently goes further and while giving the secretary the power of appointment seeks to control its exercise, I do not now express an opinion on its effect in this respect.

It is, however, not intended by its terms to affect those in the unclassified service of the department, if there be any, who are in the unclassified service.

Your third inquiry is:

"Must official transactions of the secretary of agriculture have the approval of the board of agriculture before being entered on the records?"

The answer is that in so far as he acts as secretary of the board of agriculture he is not different from the ordinary secretary of boards in general. It is his duty to record the acts of the board, which duty he would perform under their control, and they would, after the manner of such bodies, have the approval of their minutes before the same become permanent records. As to his official transactions, however, in his independent capacity of secretary of agriculture the same thing is not true. He acts independently of the board in such cases and their approval is not necessary to give validity either to his acts or to the record evidence of them. As each case arises it will probably be easy to determine from the statute in which capacity he acts.

The records of the board are controlled by section 1099 and section 1105 is amended to provide for stationery for the secretary, thus in a manner indicating that it is necessary for him to use different blank books, etc. His records as to those acts which he does independently of the board should be kept separate from the board's.

Your fourth and last question is:

"Must rules, regulations, quarantines, etc., be adopted by the board of agriculture, or has the secretary of agriculture the power to adopt such measures?"

The answer is found in various sections providing for such regulations, etc. Some of them are committed to the board; most of them to the secretary. It is not considered necessary to go through the entire law and separate the different classes as they be readily distinguished as occasions arise by reference to the different sections under which action is carried on. In one instance that may be cited they are conferred upon the board of agriculture, or retained by it, section 1092 providing:

"* * * The board of agriculture shall provide a uniform method for the election of the directors and officers of all agricultural societies receiving any support whatsoever out of the state or county treasuries, and provide general rules and regulations under which such agricultural societies shall be conducted. * * *"

This is cited merely as one instance in which the board may make rules without the co-operation of the secretary.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

470.

LIQUOR LICENSE—CHANGE OF NAME OF CORPORATION—TRANSFER FEE NOT PROPER.

(1) *Section* 1261-50 *General Code (Sec.* 35 *of the liquor license law) provides for a transfer of a liquor license from one person or corporation to another and for the payment of a license fee.*

(2) *Where the business of John Doe and Sons was purchased by Richard Roe and others, a part of the consideration being that after a certain length of time the name of John Doe should be dropped from the corporation name, and the corporation has filed the proper certificate with the secretary of state changing the name of the concern from The John Doe and Sons Co. to The Richard Roe Company, no transfer of license is necessary or authorized, neither is any transfer fee collectible under the statute.*

COLUMBUS, OHIO, July 25, 1917.

State Liquor Licensing Board, Columbus, Ohio.

GENTLEMEN:—I have your communication of July 10, 1917, which reads as follows:

> "Section 35 of the license law provides for the transfer of a license from one person to another upon the payment of a fee of $50. We have the following situation:
>
> "Some years ago the business of John Doe and Sons was purchased by Richard Roe and others, a part of the consideration being that after a certain length of time the name of John Doe should be dropped from the firm name. The business has been conducted by the John Doe and Sons corporation and the time has arrived when the name must be changed. The corporation filed the proper certificate with the secretary of state changing the name of the concern from John Doe and Sons Company to Richard Roe Company. There is no change in the ownership and there is no change among the stockholders. Under these circumctances, will it be necessary for a transfer fee of $50 to be paid or may the change of name simply be noted upon the license certificate?"

The liquor licensing act, which was passed to carry into effect the constitutional amendment, provides, among other things, for the issuing of a license to applicants found by the board to possess the qualifications prescribed by law. The license is wholly personal. It is a permit to the particular individual or applicant to engage in the business of trafficking in intoxicating liquors under the conditions imposed by the laws of this state on the subject. In most states, being thus a permit to one found to be personally qualified to engage in this business, it has been held that as a matter of right such license was not transferable or assignable, and, in the absence of statutory provision, such is the case. Our liquor licensing law expressly provides for a transfer of the license.

Section 1261-50, General Code, reads:

> "Upon the application of any licensee who desires to sell or transfer his business to another, joined with the application of the latter, and upon the payment of a fee of fifty dollars the county licensing board shall, unless the proposed purchaser or transferee shall not have the qualifications required by law of a licensee, endorse upon the license certificate of

the original applicant the words: 'Transferred to----------,' inserting the name of the transferee with the date, and the person to whom the said license is transferred shall hold the license for the remainder of the said license year, and shall have all the privileges and obligations of the original licensee under the license. The said fee so paid to the county licensing board shall be immediately transmitted to the secretary of the state board, in the same manner as application fees heretofore provided for herein, together with a report of the transfer thereof.

"The said transferee must, however, in the application for transfer, set forth all the facts required to be set forth by an original applicant. The said transferee shall be in all respects qualified by law as is an original applicant.

"Before transfer shall be allowed the applicant must first have presented to the board a sworn statement showing the list of his unsecured creditors, together with their address and the amounts owing. Said statement must also set forth that each one of said creditors has been notified of the application, personally or by registered mail, at least ten days before the application is made. If thereupon complaints are made by the said creditors against the transfer the board shall grant a hearing, after due notice to the applicant as well as to the creditors complaining, and if in the judgment of the board the applicant is intending to avoid the payment of his just debts transfer may be refused."

This is the provision for the transfer of a license where one holding the same makes a sale thereof, complying with the provisions of the section.

Section 1261-52 G. C. provides for a different situation than the one spoken of in your communication. It has application when a licensee has died and in the settlement of his estate there is a disposition of the license under order of the probate court.

I find no other provision of law pertaining to the transfer of a license. It will be noted that section 1261-50 provides for the payment of a fee of $50.00, which is in the nature of a transfer fee and is payable before a licensee can, with the consent of the license board, transfer his license to another person. The section provides that such transferee shall be in all respects qualified by law as is an original applicant. This section certainly implies that when a person or a corporation holding a license, and for some reason desiring to dispose of same, makes the proper application to the license board to sell or transfer his business to another, and upon the board finding that he is properly qualified and consenting thereto, the license theretofore held by such person or corporation is duly transferred to the other person or corporation joining in the application for said transfer.

To transfer property or other right imports that the right, title and interest of one person is surrendered up and turned over to another person. The very word itself means "carrying across." Now in the case you present there is no change of persons. The identity is just the same. The right that they had prior to the change of name was to the same persons at that time that it is after the name has duly been changed. The case of the corporation cited is the same as if the board would issue a license to Ella Smith and soon thereafter she would marry. Certainly it would not be contended that the female was a different or other person because her married name was different from her maiden name. As I understand the case cited, the corporation has merely, by amendment to its articles, changed its name. It remains the same corporation, the same artificial person, possesses the same identity, and, in my opinion, there not only is no necessity, but there is no authority for the transfer of a license that it held under the original name to the newly acquired one.

I am, therefore, of the opinion that under the circumstances cited in your communication there is no authority to exact the transfer fee, nor is there any necessity for a transfer of the license. The licensee continues on the same after as before the change of name. I might suggest that in order to keep your records straight it might be well to note both upon your records and the records of the county board the fact of the change of name. This is merely for convenience.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

471.

AGRICULTURAL EXPERIMENT STATION—LEASING LAND BY BOARD OF CONTROL.

(1) *The sections of our statutes which provide for the Ohio agricultural experiment station (*1170 *to* 1173 *G. C., inclusive) give no express power to the board of control of said station to lease lands for its uses and purposes, but it might have the implied power to so lease lands if this is necessary to enable it to carry out the purposes for which the station was established and to perform the duties which have been conferred upon it.*

(2) *In leasing lands the board of control of the Ohio agricultural experiment station could not make such terms as would create an obligation against the state due and payable on and after the period of two years for which the present general assembly has appropriated money, namely, on and after July* 1, 1919.

COLUMBUS, OHIO, July 25, 1917.

Ohio Agricultural Experiment Station, MR. W. H. KRAMER, *Bursar, Wooster, Ohio.*

DEAR SIR:—I have your communication of July 6th, in which you enclose a certain lease and ask if this lease is properly made out and legal. The lease is too lengthy to quote in full, but for the purposes of passing upon the same it will be sufficient to note that it is a lease made by Mary Viola Mowery of certain lands therein described to the state of Ohio for the use of the agricultural experiment station, for a period of five years commencing on the first day of April, 1917, and ending on the thirty-first day of March, 1922, at an annual rental of $345.00 during the continuance of this lease, said rental to be paid on the thirteenth day of September of each year.

In answering your question I will first notice the lease as to form, and, secondly, will consider the question as to whether the Ohio agricultural experiment station has authority to enter into such a contract as is embodied in the instrument enclosed by you.

So far as the form of the lease is concerned, I am of the opinion that it is correct and embodies all the provisions that are necessary to protect the rights of the state thereunder. Of course, I am assuming that Adam Mowery died intestate and left no person entitled to his property or any interest therein other than Mary Viola Mowery, his widow. I am also assuming that his obligations have all been paid or that there is sufficient personal property to pay the same; otherwise, the interest which he had in the real estate herein leased might be subject to be sold for the payment of debts.

The more serious question involved in the matter of this lease is as to whether the said experiment station has authority in law to enter into a contract such as that set out in the instrument enclosed.

The sections of our statutes which have to do with the said experiment station are 1170 to 1173 G. C., inclusive. Section 1170 G. C. reads as follows:

> "There shall be a state agricultural experiment station for the benefit of practical and scientific agriculture and the development of the agricultural resources of the state. It shall be known as the 'Ohio agricultural experiment station.'"

Section 1171 provides for a board of control of said station consisting of five members.

Section 1171-3 enumerates the powers of the board, and reads as follows:

> "The board of control of the Ohio agricultural experiment station shall be a body corporate, with power to sue and be sued, to contract and be contracted with, to make and use a seal and to alter it at its pleasure. It may receive and hold in trust for the use and benefit of the station a grant, or devise of land, or a donation or bequest of money or other personal property to be applied to the general or special use of the station as directed by the donor."

In looking over the sections of our statutes which have to do with the station I find no express power given anywhere therein to the board to lease lands for the uses and purposes of the station.

Section 1172 G. C. provides as follows:

> "The title of all lands for the use of experiment station shall be conveyed in fee simple to the state, but no title shall be conveyed for such purposes unless the attorney general is satisfied that it is free from defects and incumbrances."

The provisions of this section are to the effect that when lands for the use of the experiment station are conveyed to the state they shall be conveyed in fee simple; and section 1171-3 G. C. provides that the board may receive and hold in trust for the use and benefit of the station a grant or devise of land. The provisions of these two sections would seem to negative the idea that the board has the authority to lease lands for the uses and purposes of the station. If the said board has this power it must be an implied power necessary to enable the station to carry out and perform the duties which are expressly conferred upon it by law. The question is well settled that the grant of a specific power or the imposition of a definite duty confers, by implication, authority to do whatever is necessary to execute the power or perform the duty. Section 1170 G. C. sets forth the object of the agricultural experiment station, which is "for the benefit of practical and scientific agriculture and the development of the agricultural resources of the state." Hence, if your board should find as a matter of fact that, in order to perform the duties thus expressly imposed upon it, it is necessary for it to lease lands for the uses and purposes of the station, then it would have the power so to lease lands; but as a matter of law I cannot say that such implied powers are necessary to enable your board to carry out the purposes for which the agricultural experiment station was established and to perform the duties which have been imposed upon it.

In reference to the power of the board to enter into a contract of lease such as is enclosed for my consideration, I desire to call attention to the fact that this is a lease for five years, the consideration for which being $345.00, payable each and every year on the 30th day of September during the existence of the lease.

Even though the board has the implied power to lease lands for the uses and purposes of the station, has it the power and authority to lease lands under such terms and conditions?

Section 3 of article VIII of the Constitution provides:

> "Except the debts above specified in sections one and two of this article, no debt whatever shall hereafter be created by or on behalf of the state."

Section 2 to which section 3 refers provides that the state may contract debts to repel invasion, suppress insurrection, defend the state in war, or to redeem the present outstanding indebtedness of the state. Section 1 to which reference is made provides that the state may contract debts to supply casual deficits or failures in revenues, or to meet expenses not otherwise provided for. But with these two exceptions the state cannot create a debt, nor can any one on behalf of the state create a debt, and in the two exceptions enumerated the debts must not exceed the sum of seven hundred and fifty thousand dollars.

It is quite evident that the amount to be paid under and by virtue of the contract of lease enclosed by you does not come within the exemptions as set out in sections 1 and 2 of article VIII. But the question naturally arises: Is the obligation entered into by the board of control of the station a "debt" in view of the constitutional use of that term?

In considering section 1 of article VIII we find the inhibition of the constitution as to debts to include both "debts direct and contingent," for the language used is "but the aggregate amount of such debts, direct and *contingent,* * * * shall never exceed seven hundred and fifty thousand dollars." Then if contingent debts are inhibited by the third section of article VIII—and this seems evidently to have been the intention of those who formulated the said constitutional provisions—the next question to consider is as to whether the obligation incurred in the contract of lease is a contingent debt or obligation.

This lease binds the state, through said board, to pay to lessor, Mary Viola Mowery, the sum of $345.00 each and every year during the term of the contract. At the time this contract is executed it would create a present obligation on the part of the state to pay money at a future period. It thus becomes a debt of the state and is inhibited by section 3 of article VIII of the Constitution.

Further, if such a course could be followed by the state boards and departments generally, the hands of each subsequent general assembly would be tied.

Section 4 of article XII of the Constitution provides:

> "The general assembly shall provide for raising revenue, sufficient to defray the expenses of the state, for each year, * * *."

Section 22 of article II of the Constitution provides:

> "No money shall be drawn from the treasury, except in pursuance of a specific appropriation, made by law; and no appropriation shall be made for a longer period than two years."

From the provisions of these two sections it is evident that the entering into of obligations upon the part of the state and the provision for the payment of the same must go hand in hand, and that at the end of every two year period the affairs of the state must be balanced; and further, this matter of providing for the raising of revenues sufficient to defray the expenses of the state and of making specific appropriations to take care of the debts and obligations of the state is a

matter that is entirely within the sound discretion of each legislative body as it meets in each of these two-year periods. But, as said above, if your board and other boards and departments of the state were permitted to enter into obligations, the payment of which is deferred to a time beyond the ending of any two-year period, each succeeding legislature could not exercise its judgment in reference to these matters. It could neither decline to make an appropriation to meet these various obligations year after year, nor could it withhold the tax or revenues sufficient to meet the appropriations.

Each legislative body appropriates a certain sum of money to take care of the obligations and the expenses of the state for the period of two years, and the expenditures of those two years must be kept within the bounds and limitations of the appropriations so made. For example, the present general assembly appropriated a certain amount of money for the uses and purposes of the Ohio agricultural experiment station for two years. Your expenditures for these two years must keep within the amount so appropriated, and you have the right to contract against it for the two years which the appropriation covers, but you have no right or authority to assume that the next general assembly will appropriate money to take care of obligations entered into by you during those two years and which become due and payable beyond the expiration of said two years.

Section 2 of the appropriation act of the present general assembly provides that the sums so appropriated herein "shall not be expended to pay liabilities or deficiencies existing prior to July 1, 1917, or incurred subsequent to June 30, 1919." (107 O. L. 187.) Hence, your entering into an obligation which involves the payment of money for the next five years violates, first, what seems to be the settled financial policy of the state as gathered from the constitutional provisions and from the acts of the legislature itself, and secondly, violates the provisions of section 3 of article VIII.

Hence your board has no authority, in my opinion, to enter into a contract involving the payment of money, a part or all of which will become due and payable on and after the two-year period ending July 1, 1919. I know it might be held that the entering into a contract involving the payment of money within the two-year period would be the creation of a debt and thus be inhibited by section 3 of article VII of the Constitution, but it must be remembered that provisions are already made for the taking care of such an obligation, and hence it cannot be considered as a debt or obligation against the state for which no provision has been made. In other words, the creation of the debt or the obligation and the payment of the same go hand in hand.

I base my argument and conclusions herein upon the decision of our supreme court in the case of The State v. Medbery et al., 7 O. S. 522. This case was well considered by the court; and the arguments used therein are unanswerable and the conclusions reached are absolutely sound. The facts in the case before me differ somewhat from the facts in the Medbery case, but the argument used therein and the conclusion reached can be applied to the facts in the matter before me with still greater force and logic than they could be applied to the facts before the court in that case.

I am not unmindful of the fact that the court in State ex rel. Ross et al. v. Donahey, auditor of state, 93 O. S. 414, distinguished the Medbery case in such a way as would warrant a distinction between the matter now before me and the Medbery case; but, as I view it, there is nothing in State ex rel. Ross v. Donahey, supra, which would warrant a different finding in the matter submitted to me than I have found herein.

Hence answering your question specifically, it is my opinion, first, that the enclosed lease is correct in form; secondly, that there is no express authority in law for the leasing of lands by the board of control of the Ohio agricultural experiment station, but if it is necessary to lease lands to enable it to carry out the

purposes for which it was established and the duties which are imposed upon it, and there is money appropriated by the legislature for such a purpose, then in that event the board of control would have the implied power to lease lands; but, thirdly, this implied power would not warrant the said board in entering into a lease under such terms and conditions as to make obligations due and payable at a period beyond the two years for which the present appropriation was made, namely, on and after July 1, 1919.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

472.

COLLATERAL INHERITANCE TAX—LANDS LOCATED IN ANOTHER STATE—PROCEEDS OF SALE OF SUCH LAND—SHARES OF STOCK OF FOREIGN CORPORATION—OWNED BY RESIDENT OF THIS STATE.

Lands located in another state are not subject to the collateral inheritance tax of this state nor are the proceeds of the sale of such lands subject to such tax by reason of a direction in the will of the owner thereof that such lands be sold and the proceeds distributed by way of legacies.

Shares of stock owned by a resident of this state in a corporation organized under the laws of another state are property within the jurisdiction of this state within the meaning of section 5331 *G. C. and as such are subject to the collateral inheritance tax imposed by said section even though the executors of the estate may have been compelled to pay an inheritance or transfer tax upon such shares of stock to the state under the laws of which such corporation was organized. Persons taking specific bequests of shares of such stock are required to pay the collateral inheritance tax computed at the prescribed rate upon the market value of the shares taken by such bequest over and above the sum of* $500.00.

COLUMBUS, OHIO, July 25, 1917.

HON. J. L. HEISE, *Prosecuting Attorney, Circleville, Ohio.*

DEAR SIR:—As previously acknowledged I am in receipt of your communication of June 22, 1917, asking my opinion with respect to the application of the collateral inheritance tax law of this state to certain bequests made in the codicil to the last will and testament of Josie P. Renick, who died testate, a resident of the city of Circleville, Ohio, July 2, 1916.

As shown by the inventory and appraisement filed in the probate court of Pickaway county, August 19, 1916, the assets of Mrs. Renick's estate consisted of money in bank to the amount of $1,287.37, 264 shares of the capital stock of the Wheeling Steel and Iron Co., a West Virginia corporation located at Wheeling, W. Va., of the appraised value of $36,960.00, 55 shares of preferred capital stock of the United States Steel Co., a corporation organized under the laws of the state of New Jersey, appraised at $6,050.00, 40 shares of the capital stock of the Suburban Brick Company, a corporation organized under the laws of the state of West Virginia, which were appraised as having no value, and 800 acres of land in Morris county, Kansas, of the appraised value of $35,200.00.

It appears from the application, filed by the executors of Mrs. Renick's estate in the probate court of Pickaway county for a determination of the inheritance tax, that the executors, for the purpose of having said 264 shares of the capital stock of the Wheeling Steel and Iron Co. transferred, paid to the state of West Virginia an inheritance or succession tax of five per cent. upon the inventoried value of such shares, amounting to $1,848.00, and that likewise, in order to obtain a

transfer of the 55 shares of the preferred capital stock of the United States Steel Co., they paid to the state of New Jersey an inheritance or succession tax of five per cent. upon the inventoried value of such shares, amounting to $302.50. No tax has been paid to the state of West Virginia with respect to the 40 shares of the capital stock of the Suburban Brick Co. for the reason, as stated in said application, that same is of little or no value. In addition it appears that the executors have paid to the state of Kansas an inheritance tax of five per cent. upon the inventoried value of said 800 acres of land, situated in that state, amounting to $1,565.53, and that said lands have since been sold by the executors for the sum of $30,400.00.

By the codicil to the last will and testament of Mrs. Renick, above mentioned, specific bequests of the shares of stock owned by the deceased in the above mentioned companies are made to a number of persons. For the most part the bequests of such shares of stock are made outright to the respective beneficiaries therein named. In one instance, however, a certain number of shares of stock is bequeathed to one beneficiary with the provision that the dividends accruing on such shares are to be paid to the beneficiary during life, after which said stock is to be equally divided between two other persons. In another instance certain shares of capital stock are bequeathed to a certain person therein named to hold in trust for other persons, while in two other cases the codicil bequeathes certain shares of stock to one person to hold in trust and collect the dividends thereon for the use of other persons, during the lives of such persons, after which such stock goes into the residuary estate of the deceased.

With respect to the real estate in the state of Kansas, the will directs that the same shall be sold by her executors in such tracts or parts as they may deem most advantageous to the estate of the testatrix, at public or private sale, with the further direction that after said executors have converted said real estate and the shares of stock, before mentioned as having been bequeathed in trust with the proviso that upon the death of the beneficiaries to the dividends thereon the same shall become a part of the testatrix's residuary estate, the executors after having paid all debts and the costs of administering the estate, shall distribute and pay the balance remaining in their hands by way of legacies in specific amounts to a number of beneficiaries therein named.

It appears further from the application filed by the executors in the probate court that none of the legatees named in the will or codicil of Mrs. Renick are related to said decedent in either of the degrees named in section 5331 G. C.

The specific questions which have been submitted for my opinion are as follows:

> "1. Is any part of this estate subject to the payment of an inheritance tax in the state of Ohio?
>
> "2. If so, what part thereof, as stated in the inventory, is subject to such inheritance tax?
>
> "3. If any such inheritance tax is to be paid, which of the legatees or devisees are to be charged with the payment of the same?
>
> "4. Are each of the legatees or devisees so to be charged entitled to $500.00 of a deduction before the rate per cent. is calculated?"

In answering your first and second questions it will be necessary to note only the provisions of section 5331 G. C., which reads as follows:

> "All property within the jurisdiction of this state, and any interest therein, whether belonging to inhabitants of this state or not, and whether tangible or intangible, which pass by will or by the intestate laws of this

state, or by deed, grant, sale or gift, made or intended to take effect in possession or enjoyment after the death of the grantor, to a person in trust, or otherwise, other than to or for the use of the father, mother, husband, wife, lineal descendant or adopted child, shall be liable to a tax of five per cent. of its value above the sum of five hundred dollars. Fifty per cent. of such tax shall be for the use of the state; and fifty per cent. of such tax shall go to the city, village or township in which said tax originates. All administrators, executors, and trustees, and any such grantee under a conveyance made during the grantor's life, shall be liable for all such taxes, with lawful interest, as hereinafter provided, until they have been paid, as hereinafter directed. Such taxes shall become due and payable immediately upon the death of the decedent and shall at once become a lien upon the property, and be and remain a lien until paid."

In the first place I take it that the rights and obligations of parties in regard to the payment of a tax of this kind are to be determined as of the time of the death of the decedent and that the tax is to be estimated in reference to property which, in legal contemplation, is within the jurisdiction of the state at the time of the testator's death.

Callahan v. Woodbridge, 171 Mass. 595,
Harper v. Bradford, 178 Mass. 95,
McCurdy v. McCurdy, 197 Mass. 248.

The lands owned by the decedent at the time of her death in the state of Kansas are not as lands properly within the jurisdiction of this state nor subject to the taxing power of the state in any manner.

In point on this question I note the following from the syllabus in the case of People v. Kellogg, 268 Ill. 489:

"For inheritance tax purposes the state takes an interest, at death, in all the property of a resident decedent within its jurisdiction and in all his personal property wherever it is located; but real property in another state is not subject to an Illinois inheritance tax, whether the title thereto passes by will or by the law of descent of the foreign state."

It is only by application of the equitable doctrine of conversion, by reason of the direction in Mrs. Renick's will that the lands owned by her in the state of Kansas should be sold and converted into money, that such property could be considered as personal property for any purpose. With respect to this principle, however, in its application to the questions at hand, it will be noted as a well established rule that succession to real estate is by permission of the state in which it lies and the power of the state to impose a tax affecting real property is restricted to real property over which such state has jurisdiction and the courts have declined to recognize any fiction that will transmute such property into personal property for the purpose of taxation at the domicile of one in another state.

In the case of In the Matter of Swift, 137 N. Y. 77, the court having under consideration the application of the collateral inheritance tax law of the state of New York, held:

"Personal property of a resident decedent out of the state is subject to appraisal for the purpose of taxation under the said act. Real property of a decedent situated out of this state is not subject to such appraisal and the doctrine of equitable conversion cannot be invoked to subject it thereto."

The following is quoted from the syllabus of the court in the case of Connell v. Crosby, 210 Ill. 380, where the court had under consideration questions touching the application of the inheritance tax law of that state:

> "Land situated in states other than Illinois, and belonging to one who was a resident of Illinois at the time of his death, are not subject to our inheritance tax law.
>
> "An inheritance tax upon funds derived from the sale of lands situated in foreign states cannot be collected in a suit at law upon the ground of equitable conversion by will, since the doctrine of equitable conversion is not given effect in courts of law."

To the same point may be noted the cases of McCurdy v. McCurdy and People v. Kellogg, supra.

I am, therefore, of the opinion that no collateral inheritance tax can be legally estimated on the value of the Kansas lands, nor of course on the proceeds thereof realized by the executors in the sale of the same.

The other property set out in the inventory is personal property owned by the deceased in this state and the same is subject to the collateral inheritance tax imposed by our law estimated on the value thereof in the manner directed by the statutes. Nor is the correctness of this conclusion affected by the fact that the executors were compelled to pay to other states a succession or transfer tax on a part of this personal property, to wit, on shares of stock owned by the deceased in corporations organized under the laws of such other states.

Without discussing the legal principles applicable to a consideration of the question, it is generally conceded that stock in a domestic corporation, whether passing by will or by descent, may be subjected to an inheritance tax by the state notwithstanding the owner of such a stock is a non-resident of such state.

People v. Griffith, 245 Ill. 532,
Estate of Palmer, 183 N. Y. 283,
Matter of Bronson, 150 N. Y. 1,
Dickson v. Russell, 78 N. Y. L. 296,
Greves v. Shaw, 173 Mass. 205,
Gardner v. Carter, 74 N. H. 507,
In re Douglass Co., 84 Nebr. 506,
Estate of Culver, 145 Iowa 1.

It is equally well settled, however, that stock in a foreign corporation held by a resident of the state at the time of death is subject to the inheritance tax of that state for the reason that the legal situs of the stock as personal property is at the domicile of the owner and therefore within the jurisdiction of the taxing power of the state.

Estate of Miriam, 141 N. J. 479,
Estate of Cornell, 170 N. J. 423,
State v. Bullen, 143 Wis. 512,
Frothingham v. Shaw, 175 Mass. 59,
Appeal of Gallup, 76 Conn. 617,
People v. Union Trust Co., 255 Ill. 168,
In re estate of Hodges, 170 Cal. 492.

No doubt, the recognition of both the principles of taxation above noted in many cases results in double taxation, as is the case here, but this result it seems infringes no principle of constitutional law.

"There is no constitutional objection to a law which * * * lays a tax according both to the principle of domicil and the principle of situs, or what is practically equivalent, according to both the maxim, 'Mobilia sequuntur personam,' and the actual situs of the property, although double taxation inevitably results if other states in which the decedent was domiciled or in which the property had an actual situs lay the tax according to either or both principles."

Wharton on Conflict of Laws, 2d Ed., Vol. 1, p. 200.
Blackstone v. Miller, 188 U. S. 189,
In re Hodges, supra.

For the above reasons, on consideration of the terms of section 5331 G. C., I am of the opinion that all of the personal property of testatrix set out in the inventory is subject to the collateral inheritance tax law of this state to the extent and within the limitations prescribed by said law.

Applicable to the consideration of your third and fourth questions, it will be necessary to note in addition to section 5331 G. C., above quoted, other sections of the collateral inheritance tax law of this state.

Section 5336 G. C. provides that an administrator, executor or trustee having in charge, or trust, property subject to such law, shall deduct the tax therefrom, or collect the tax thereon from the legatee or person entitled to the property, and that he shall not deliver any specific legacy or property subject to such tax to any person until he has collected the tax thereon.

Section 5338 G. C. provides that if a legacy is given in money to a person for a limited period, the administrator, executor or trustee of the estate shall retain the tax on the whole amount, and that if such legacy is not in money he shall make an application to the court having jurisdiction of his accounts to make an apportionment, if the case require it, of the sum to be paid into his hands by such legatee on account of the tax and for such further order as the case may require.

Section 5333 G. C. provides that when a person bequeathes or devises property to or for the use of father, mother, husband, wife, lineal descendant or adopted child, during life or for a term of years, and the remainder to a collateral heir, or to a stranger to the blood, the value of the prior estate shall be appraised within sixty days after the death of the testator in the manner provided for in the act and deducted together with the sum of $500.00 from the appraised value of such property.

These sections in themselves seem quite clearly to indicate that the separate interests of the respective takers under the will or by descent are separately liable for the inheritance tax and from this it would follow that the deduction of $500.00 is to be made from the value of each separate interest.

Some doubt in respect to this question arises by reason of the provisions of section 5340 G. C., from which it appears that the value of the thing to be taxed is to be ascertained from the inventory of the estate filed in the probate court. From this it might be argued that the estate, or at least so much of it as is subject to the tax, is to be valued as a whole, and if this be the case, any deductions should be made from the whole value so ascertained. It has been held, however, in the cases of Haggerty v. State, 55 O. S. 613, State ex rel. v. Ferris, 53 O. S. 314, and State ex rel. v. Guilbert, 70 O. S. 229, that the tax imposed by the inheritance tax laws of this state is not a tax upon property but is a tax upon the privilege of succeeding to or receiving property, whether such property be received by will or by virtue of the statutes of descent and distribution.

The same theory with respect to the essential nature of the inheritance tax laws is quite generally recognized by the courts of other states.

See:

Estate of Hite, 159 Cal. 392,
Kochersperger v. Drake, 167 Ill. 122,
Wheeting v. Morrow, 151 Iowa 590,
Estate of Mackey, 46 Cal. 79.

Indeed, with respect to our own collateral inheritance tax law, it must be construed as imposing a tax on the privilege of succeeding to property by will or descent and not as imposing a tax upon the property so received, for otherwise the law would constitute a species of property taxation repugnant to the uniform rule enjoined by section 2 of article XII of the state constitution.

I quote the following from an opinion of my predecessor, Hon. Timothy S. Hogan, addressed to Hon. J. W. Smith, prosecuting attorney, Ottawa, Ohio, under date of February 5, 1913 (Report of the Attorney-General for the year 1913, Vol. II, page 1111):

> "This fact, being established, becomes the keynote of the entire law. If the real subject of taxation is the right to inherit, succeed to or receive, then it must be presumed that the legislature intended the value of the right in each instance to be measured by the value of the thing inherited, succeeded to or received and not by the value of the thing *transmitted, devised* or *bequeathed.*
>
> "Therefore, in spite of the use of the inventory in the machinery of assessment, I have reached the conclusion * * * that debts of the decedent and costs of administration of his estate must be deducted from face value thereof as shown by the inventory, and proportionately from the face value of so much of the estate as passes to collateral relatives and strangers to the blood."

Mr. Hogan further addressing himself to the question there at hand says:

> "Having reached the conclusion just stated, it seems to me quite logical to advance a step further for the purpose of answering the question submitted by you and to hold that, when the value of so much of the estate as is transmitted to and received by collateral relatives and strangers to the blood is ascertained in bulk by making the necessary deductions or when the debts and costs chargeable against particular devises and bequests have been properly deducted from the value thereof, that portion of the entire estate which is subject to the collateral inheritance tax should be separated into the various interests, portions, devises or bequests receivable by different persons under the statute or the will or deed of gift and the tax assessed separately against each one of them. This is consistent with the provisions of sections 5333, 5334, 5336 and similar sections. If the tax is to be so separately assessed, it follows as a matter of course, that the deduction of $200.00 (now $500.00) must be made from the ascertained value of each separate share or interest."

I feel that I can agree with the greater part of that which is said by my predecessor in the language above quoted, but to make myself clear I will say

that in my opinion in computing the collateral inheritance tax the interest of each separate legatee subject to the tax constitutes a separate taxable thing and the exemption of $500.00 should be deducted from each of the separate interests and not from the aggregate value of all interests subject to taxation.

This answers your fourth question.

With respect to your third question, it follows from what has been before said herein that each person taking by the will of Josie P. Renick a specific bequest of shares of stock is liable for the collateral inheritance tax to be estimated at the rate prescribed upon the market value of the shares of stock so taken over and above the sum of $500.00. The interest of those taking shares of stock in remainder after the termination of the life interest therein of another, should be valued in accordance with the provisions of section 5333 G. C. and the tax should be estimated on such portion of the value of such interest in remainder as exceeds the sum of $500.00.

In this connection, it will be noted from the provisions of section 5333 G. C. that they are *in terms* applicable for the purpose of ascertaining the value of a subsequent estate in a thing bequeathed when the prior estate or interest therein is not taxable. However, I note that in the case of Dow v. Abbott, 197 Mass. 283, a case construing a similar statute in the collateral inheritance tax law of the state of Massachusetts, there is authority to the point that in determining the value of the subsequent interest here in question section 5333 of the General Code should be applied.

The tax on the particular shares of stock above mentioned, which after becoming a part of the residuary estate of the testatrix are to be sold and the proceeds divided among legatees therein named, should be computed upon the value of the same over and above the sum of $500.00 to each taker diminished by the proportion such stock will have to bear in paying the debts and the costs of administering the estate.

In conclusion it may be observed from what has been before stated herein that no collateral inheritance tax is to be computed on the proceeds of the sale of the Kansas lands.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

473.

Section 11089 *G. C. authorizes the probate judge to charge* $5.00 *in an appropriation proceeding for each day occupied in the trial or trials to the jury, and is not authorized to make such charge upon the hearing of any motions or demurrers, or upon the hearing of the preliminary questions provided for in section* 11046 *G. C.*

COLUMBUS, OHIO, July 25, 1917.

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

GENTLEMEN:—We are in receipt of your request for opinion upon the following question:

> "Reading sections 2978 and 11089 G. C. together is probate judge to tax the five dollars a day mentioned in the latter section, in appropriation proceedings, only for each day taken up by the court in the selection of the jury, the taking of the testimony, the receiving of the verdict, etc., or

is he legally required to tax this per diem fee for every day or part of day occupied in the hearing of preliminary questions, and the passing on by the court of motions, demurrers, etc., in connection with the cause?"

The answer to this question might be placed on either of two bases and would be the same upon each: First, upon a consideration of the statutes governing the methods of condemnation, as it is popularly called, or appropriation, as named in the statute. Second, if the matter be governed by the civil code, directly or by analogy, it could be determined upon a consideration as to whether the preliminary hearing of motions, demurrers, etc., are trials or any part of a trial.

The first is the proper ground upon which to make the decision, as it plainly appears that the civil code does not govern it. We have then recourse to the statutes governing the method of appropriation of property for public uses. The chapter containing the provisions does not create the right to appropriation, or in any manner limit the machinery and method for its exercise. It is chapter 5 of title III of part third of the General Code. Part third is entitled "Remedial," and has to do generally with the practices and proceedings in all courts. Title III is "Procedure in the Probate Court," and chapter 5 is headed "Appropriation of Property." So that you have exclusively a matter of procedure. That this is not the code of civil procedure is perfectly apparent, as the letter is found in the following title, No. 4, under the heading "Procedure in Common Pleas Court." Although the code provisions are found in the chapter so headed, they also apply extensively to proceedings in other courts, but this only by direct reference requiring such application.

There are in the chapters governing probate courts and justices of the peace certain general enactments making the code of civil procedure applicable to certain phases of the practise in those inferior courts, but this never has any application where their special proceedings are especially provided as in this instance. It may also be promised that the purpose of the civil code is generally a method of determination of matters of right between citizens or sometimes between the citizen and the public, but always when that which is involved may be said to be of the nature of litigation. The appropriation of property theoretically is not so. The right to appropriate is not a private right, or not simply a right of the public for relief against an individual. It is something essentially different; it is an exercise of political power whereby the property of the citizen is taken from him for public use, this public, political right being held to transcend any private right, so that the procedure pointed out is the method by which this right is exercised by the public. The procedure does have some of the attributes and is subject to similar forms as that in litigation. This, however, is the machinery pointed out for the exercise of the right, and the fixing of compensation for the property taken, a right to which is secured by the constitution.

That the proceeding provided in this chapter is not under the civil code is demonstrated by the fact that where the legislature consider that proceedings may most expeditiously be in conformity with the code, they so provide, as in section 11048 the trial is to be as in civil actions.

Section 11063 G. C. provides that "bills of exception may be taken and shall be allowed as provided by law in civil cases;" and in the following section it is enacted that proceedings upon the petition in error shall be conducted as in civil cases." These, it will be observed, are after the case has progressed to the stage where the amount of the compensation and damages is to be determined. All steps are in like manner specially provided. The contents of the petition are prescribed and are different from the setting out of causes of action. Everything connected with summons, publication, and such preliminary matters is expressly enacted.

The whole practise is expressly provided. Therefore, you are to look to this act alone for authority to file motions and demurrers. Not only do you have the certainty of statutory construction that it is not a civil action, but the opinion of the supreme court. Summers, J., in rendering the opinion for the court, bearing on many phases of the subject, says:

> "An appropriation proceeding is not a civil action, but a special proceeding."
>
> Railroad Co. v. Tod, 72 O. S. 156.

When we speak of special proceedings we refer to a well-known division and subject of the remedial law. This law is divided by text writers into three classes:

1. Civil actions.
2. Special proceedings.
3. Provisional remedies.

and this division was recognized in the Revised Statutes. The compilers of the General Code have recognized a further division, comprising a portion of what had formerly been considered provisional remedies and which they denote "special actions," making four subdivisions instead of the above three. This added class, or rather redivision, is very useful, as "special actions" included in it are of a different nature from the other special proceedings, as divorce, partition, dower and ejectment, in which the method of proceeding uses all the forms of the civil action.

The appropriation in question is not such special action, but is strictly the special proceeding left after taking out all the special actions from the class. There are, therefore, no demurrers or motions provided by law unless the statute so prescribes, which it does not, but makes another provision calculated to take their place in almost every instance, but not entirely, as will hereafter appear.

Section 11046 G. C. is as follows:

> "On the day named in a summons first served, or publication first completed, the probate judge shall hear and determine the questions of the existence of the corporation, its right to make the appropriation, its inability to agree with the owner, and the necessity for the appropriation. Upon all these questions the burden of proof shall be upon the corporation, and any interested person as shall be heard."

Here are enumerated four subjects which the court is to hear upon the day named in the summons. Now these four subjects are not issues in the case made by any pleadings. Upon an examination of the requirement of the petition (Sec. 11042) it appears that no averment is necessary to be made as to any of these four questions. So that in passing upon these the court is not, in any sense, passing upon a demurrer, or that which by any possibility can be construed as a demurrer to the petition. It will appear further along that this hearing on jurisdictional questions is no part of the trial. It is *sui generis,* the creature of this section in this chapter. It is a determination as to the jurisdiction of the court as to its right and power to proceed. If that right be determined in the affirmative a trial follows. The great purpose of this trial is the determination of one issue of fact, the amount of compensation and damages to be paid to the owner of the property. There are, however, in that trial and in the whole proceeding from

beginning to end, issues of law other than the above jurisdictional questions, or at least such issues may arise, and when they do arise at any step of the case, are for the determination of the court.

See Railroad v. Tod, supra, at p. 166.

Speaking of these preliminary questions the court says:

> "Whether denied or not they do not present issues of fact, but are conditions precedent, prescribed by the legislature, to the right of eminent domain, or to the exercise of such right. and the determination of them by the probate judge is not a trial within the meaning of the statutes relating to motions for a new trial."

Upon the following page, the court says that the preliminary hearing is merely one step in the proceeding, and on page 168 states that the fact that the court of common pleas reverses the judgment of the probate court solely on the grounds of error in the trial, there is a query as to whether or not there must be another hearing and determination of the preliminary question, and the opposite query if the reversal be on the determination of the preliminary question as to whether there should be a new trial on the subject of compensation and damages.

Upon the above statement that other issues of law exist, the same judge in another case in the same volume makes the following statement:

> "Independently of the signification of any of the so-called jurisdictional questions, it is not apparent that the jurisdiction of the probate court is limited to a determination of these questions. The fact that the legislature has seen fit, from considerations of convenience or otherwise, to require the probate judge to determine these questions *in limino* does not necessarily make applicable the maxim *expressio unius est exclusio alterius.*"
>
> Railroad v. Railroad, 72 O. S. 385.

It is, therefore, apparent that there is no demurrer in this proceeding and no motion, and therefore, nothing of the kind to charge for.

As to the preliminary hearing provided by Sec. 11046, the same conclusion applies, if, as above indicated, it is not a trial or part of the trial. Railroad v. Tod, supra, clearly holds that it is not. This would also seem a necessary implication from the statutes.

Looking alone at section 11046 it would seem to have the attributes of a trial, as the burden of proof is spoken of and any interested person is to be heard. Yet it is not a trial, but only an inquiry as to whether there shall be a trial. The trial recognized by the statute is the jury trial.

Section 11048 provides that the owners of each separate tract and each separate right are entitled to separate trials by jury.

Section 11058 provides for a motion for a new trial, which is directed to this last trial alone.

Section 11062 makes further provision as to a new trial. Now suppose such motion be sustained. The new trial at least is a trial, but if the new trial be a trial it follows that the first one also was. There is only one preliminary hearing for all parties. There may be as many trials as there are different parties, and a good many more, for each of them may possibly get one or more new trials.

Section 11050 directly calls the jury trial, the trial: "The court may direct the

order and fix the time of the several trials, and adjourn or continue a trial, etc."

Doubt is cast upon the effect of Railroad v. Tod, supra, by the subsequent decision at the same term of Railroad v. Traction Co., 72 O. S. 429. In the opinion in this case Davis, J. indicates a different view from what is set out in the opinion of Summers, J. in the other case, and if the opinion by Davis stood alone it would have to be conceded that it makes the preliminary hearing a part of the trial. There is no conflict in the two decisions; it is a matter of the opinions solely. One was handed down March 21, 1905. The last one is given as of May 2, 1904, but the year must be a mistake, as reference is made to Railroad v. Tod, as "recently held." It was by the same court, however, consisting of all the same judges, and just six weeks after the other, and as they do not disapprove of anything in the former case, but only distinguish the latter one and still approve the first, we may at least treat both impartially and decide the question before us on the evident import of the statutes, especially as it was not necessary to the decision of the last case to decide the question as to whether the preliminary hearing was part of the trial.

There is then one preliminary hearing, which is to the court. If you call it a trial, it is tried to the court. If the determination is a certain way on all the questions, a jury is drawn and a trial or trials may be had upon another issue. This trial is spoken of throughout the chapters as "the trial."

> "The probate judge shall be allowed to enter a charge of five dollars in the cost bill for each day occupied in the trial of a cause."

This matter seems to get through the stage of a public political proceeding and become a cause when you get to the point of fixing compensation. Then the constitutional right of the citizen arises and a trial by jury is vouchsafed by him by the constitution and the legislature begins to speak of the trial and gives the proceeding the nature of a trial and requires it to assume the form and attributes, as well as the name of a trial.

When section 11089 allows a probate judge to enter a charge of $5.00 in the cost bill for each day occupied in the trial of a case, the "trial" is the trial spoken of in these other sections. The maxim *noscitur a sociis* applies; and for this trial from the time of the assembling of the jury and sending them out to make the view, and upon their return into court at the appointed time, and during the introduction of testimony and argument, and until the return of the verdict, he is entitled to the $5.00 for each day. Such trial is actually in progress.

If, however, an appropriation proceeding were a civil action there would be no authority to charge under this item for the hearing of demurrers and motions. A demurrer is no part of the trial. The demurrer is provided for in the chapter on pleadings, as are also motions. This is at a preceding stage of the case from the trial; the trial takes place always after an issue is made up. The definition of a trial is given in section 11376:

> "A trial is a judicial examination of the issues, whether of law or of fact, in an action or proceeding."

A demurrer is said to be an issue of law, and logically is. The hearing of the demurrer, therefore, upon the application of the above definition of trial, might be said to be a trial, and in an academic sense is so. It is not, however, theoretically so, as is shown by its place in the code, and is not so in the understanding of the profession, and in its practice is not so spoken of. The issues of law referred to in section 11376, 11377 and 11379 are such issues of law as arise at the trial properly

speaking. That is the trial as provided in the code which takes place when you get to the issue and after you have passed the stage of demurrer, which is a pleading and motions which are not. These issues of law might amount to exactly the same as a demurrer. It is said a party may always demur, and may demur orally, and may demur upon the trial or upon the motion for a new trial verbally, which means no more than if a petition does not set out a cause of action, that fact may be urged and called to the attention of the court at any time, but issues of law may also arise and constantly do on matters of fact coming up for the first time upon the introduction of evidence, and these issues are tried to the court; that is, the court always determines them, and is constantly deciding and disposing of them during trials and decides all of them in his charge to the jury, who are required to take the law from the court, no matters of law being submitted to them, but simply questions of fact. The court may also decide a case and render judgment upon the pleadings at the trial, and instead of submitting any questions of fact to a jury, may and sometimes does decide such points of law after the trial statement by counsel and without hearing evidence. In all these respects, issues of law are tried to the court, but in the ordinary and practical understanding of lawyers the argument of a demurrer is not a trial.

You are, therefore, answered as above that the probate judge may charge $5.00 a day in an appropriation proceeding for each day occupied in the trial or trials to the jury.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

474.

MEMBER OF BOARD OF EDUCATION—NO RIGHT TO CONTRACT WITH BOARD TO PUBLISH LEGAL NOTICES OR FURNISH SUPPLIES.

A member of a board of education who is owner and publisher of a newspaper has no right to contract with the board to publish legal notices even though only the legal rate is charged for such publication.

COLUMBUS, OHIO, July 25, 1917.

HON. GEORGE F. CRAWFORD, *Prosecuting Attorney, Greenville, Ohio.*

DEAR SIR:—I have your communication of July 2, 1917, in which you ask my opinion on the following statement of facts:

> "A member of a village school board is the editor and publisher of the only newspaper within the district over which the board of education has jurisdiction. The board of education has its legal notices published in the paper of this member of the board, and pays him the legal rate for such publication. This member, in connection with publishing the paper, does job work in his office and in this capacity has contracted with the board to furnish the board of education with supplies, and has been paid for the same. There is no claim of any fraud on the part of any person, or that the charges were extortionate, or were any more than

would have been made by any other person doing the advertising and furnishing the supplies, the question simply being whether under section 4757 of the Genral Code such contracts can be made."

Section 4757 G. C., to which you refer, reads in part as follows:

"* * * No member of the board shall have, directly or indirectly, any pecuniary interest in any contract of the board or be employed in any manner for compensation by the board of which he is a member except as clerk or treasurer. * * *"

In order to arrive at the proper meaning of said language quoted it might be well to observe not only said section and every part of it, but if there are any other sections *in pari materia* they should all be considered together. That is to say, the sections of the statute which are *in pari materia,* and which refer to the same thing, should be considered together. It might further be said, however, that other sections *in pari materia* should be considered only where there is doubt as to the construction which should be placed upon the language of the section under consideration. The language of section 4757 G. C., that "no member of the board shall have, directly or indirectly, any pecuniary interest in any contract," standing alone, seems clear and explicit, but the other sections of which are *in pari materia* with the above language of said above quoted section are sections 12910 and 12911 G. C.

Section 12910 G. C. provides:

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

Section 12911 G. C. provides in part.

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

That is to say, the prohibitory acts in reference to the purchase of supplies are made punishable by sections 12910 and 12911 of the General Code. So that it is not only unlawful for a member of a board of education to directly or indirectly have any pecuniary interest in any contract, but if he is so interested in a contract for supplies, etc., he shall be punished therefor.

All the above sections have been considered from time to time by this department with the result of a universal holding that in whatever manner the officer was interested in the contract, such contract was void and the money paid thereunder was recoverable.

In Grant v. Brouse et al., 1 N. P. 145, the court holds that when a firm engaged in mercantile business enters into a contract with a board of education, thereby selling certain goods to such board, and one of the members of such firm is also a member of said board, such contract comes within the prohibition of said section 4757 of the General Code, and is void. Voris, J., in the opinion, uses the following language:

> "We are not undertaking to censure anybody, because we believe that in this transaction the board believed that it was discharging a public duty beneficially to the public; that is, it supposed that this was a more advantageous course to take than to obey the law. I have no doubt that the member of the board, who sold these articles, undertook to make a favorable arrangement for the public. Nothing to the contrary is asserted, and it is urged in fact, by the defendants, as a reason why this court should not interfere with its jurisdiction, that no pecuniary injury in fact resulted.
>
> "But we cannot look upon it in this light. The dollar and the cent advantage is the lowest order of consideration that can be urged, when a public wrong, a vicious example is encouraged under high official sanction; the example, the public wrong, the prostitution of public virtue is vastly more than mere matter of dollars and cents. The law was made in the interests of sound public policy, and while in some cases, it may appear to be more advantageous to ignore than to obey the law, yet we think no public officer can violate a direct provision of the law, directing the performance of his duty, or prohibiting certain acts, and have his conduct judicially approved, and where the matter comes before the court it ought to carefully see to it that public policy is upheld. I know of no better way of preserving the virtue of the public than to have its officers understand and act as if they were public servants, always recognizing that a public position constitutes a public trust that must be sacredly carried out."

In Opinion No. 139, Opinions of the Attorney-General for 1915, Vol. 1, p. 267, it was held:

> "The president of a board of education who is also a director and stock holder of a material company, which material company sells its material to the principal contractor dealing with said board of education, has such an interest in said contract as is prohibited by section 4757 G. C."

In Opinion No. 1001, Annual Reports of the Attorney-General for 1914, Vol. 1, p. 848, it was held:

> "A corporation of which a member of the sinking fund trustees or trustees of a municipal library is a stockholder cannot legally sell merchandise to the city with which he is officially connected, or be interested in any way in contracting for the purchase of property, supplies or fire insurance while such member is in office. Such officers may not be interested in contracts during the term for which they were elected, but may after the expiration of their term."

In Opinion No. 1140, Annual Reports of the Attorney-General for 1914, Vol. 2, page 1201, it was held:

> "A contract in excess of $50.00, which is entered into between a board

of education and a coal company, of which one of the members of the board is a stockholder, without advertising and bids, is illegal and contrary to section 12911 G. C."

In The Bellaire Goblet Co. v. City of Findlay et al., 5 O. C. C. 418, it was held:

"Contracts entered into by a board of gas trustees of a municipality and an incorporated company, when a member of the board of gas trustees is at the same time an officer and personally interested in the incorporated company, are against public policy and void."

Seney, J., in the opinion of the court, at page 430, quoting Doll v. State, 45 O. S. 445, makes use of the following language:

"To permit those holding offices of trust or profit to become interested in contracts for the purchase of property for the use of the state, county or municipality, of which they are officers, might encourage favoritism and fraudulent combinations and practices not easily detected, and thus make such officers charged with the duty of protecting those whose interests are confided to them, instruments of harm. The surest means of preventing this was to prohibit all such contracts."

Applying the above rules, then, to your question, there is but one conclusion for me to reach, and that is that a member of a village board of education, who is the editor and publisher of a newspaper within the district has no right to have any pecuniary interest, directly or indirectly, in a contract wherein he is to receive compensation for the publication of legal notices for said board, and that such member has no right to furnish the board of education with supplies during the time he is a member of such board.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

475.

FOREIGN TRUST COMPANIES—THEIR RIGHT TO ACT AS EXECUTOR OR TRUSTEE OF AN ESTATE IN OHIO.

Inasmuch as special provision is made by paragraph (C) of section 736 General Code, empowering the superintendent of banks to issue to a foreign trust company a certificate authorizing it to transact business in this state, a foreign trust company desiring to accept an appointment to act as executor or trustee of an estate in Ohio is not required to comply with the provisions of section 178 General Code, nor would such foreign trust company be required to comply with the provisions of section 183 General Code, especially if it appears that such company would not be required to employ any part of its capital stock in this state in administering the trusts.

COLUMBUS, OHIO, July 27, 1917.

HON. WILLIAM D. FULTON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—Under date of June 13, 1917, you addressed a communication to this department asking for an opinion, in which you say:

"Messrs. Hoyt, Dustin, Kelley, McKeehan & Andrews, of Cleveland, have submitted to this department the following question:

"'Does a trust company, organized under the laws of another state, desiring to accept an appointment as testamentary trustee or executor in this state, have to comply with either or both sections 178 and 183 of the General Code in addition to complying with the provisions of sections 736, paragraph c, 9778 and 9779 of the General Code?'

"Kindly let me have your opinion at the earliest date possible on the above question, and any other questions related thereto."

Your communication does not raise any question as to the powers of trust companies generally, whether domestic or foreign, nor even with respect to their particular power or capacity to act as executor or testamentary trustee of estates. The only question presented by you is whether or not a trust company, incorporated under the laws of another state, must, as a foreign corporation, comply with the provisions of sections 178 and 183, respectively, of the General Code, before exercising trust company powers in this state under appointment as testamentary trustee or executor.

In consideration of this question it is to be noted that with respect to corporations and organizations in this state, trust companies are classed as banks by sections 9702, et seq., of the General Code, which sections were originally enacted as a part of the Thomas banking act, enacted in 1910. By section 10 of said act (now section 9715 G. C.) trust companies and other banking institutions mentioned in section 9702 General Code are brought under the authority and control of the superintendent of banks by the provision that no such corporation shall transact business except such as is incidental and necessarily preliminary to its organization, until it has been authorized by the superintendent of banks.

Section 711 of the General Code, which was likewise a part of the said Thomas banking act, provides more specifically to this end as follows:

"The superintendent of banks shall execute the laws in relation to banking companies, saving banks, saving societies, societies for savings, savings and loan associations, savings and trust companies, safe deposit companies and trust companies and every other corporation or association having the power to receive, and receiving money on deposit, chartered or incorporated under the laws of this state. Nothing in this chapter contained shall apply to building and loan associations."

Sections 9778 and 9779 General Code provide that no trust company, either foreign or domestic, shall accept trusts which may be vested in, transferred or committed to it by an individual or court until its paid in capital is at least $100,000, and until such corporation has deposited with the treasurer of state, in cash or in certain bonds therein designated, an amount not less than $50,000 nor more than $100,000, depending upon the amount of the paid in capital of said company. The treasurer of state is required to hold such funds and securities so deposited with him as security for the faithful performance of the trust assumed by such corporation.

Section 736, paragraph c, General Code, as enacted May 20, 1915 (106 O. L. 361), provides as follows:

"Each foreign trust company desiring and intending to do business in this state shall pay to the superintendent of banks a fee of fifty dollars

for issuance to it of a certificate authorizing it to transact business in this state. Such fee to be paid before such certificate is issued."

Looking now to sections 178 and 183 of the General Code, it will be noted that the former is a license fee law and the latter is an initial franchise tax law applicable in general terms to foreign corporations as a condition of their right to do business in this state. The license fee provided for under sections 178, et seq., G. C., is one graduated upon the amount of the authorized capital stock of the foreign corporation seeking to do busniess in this state, while the initial franchise tax provided for in sections 183 et seq. of the General Code is one fixed by the computation of the fractional percentage upon the proportion of the authorized capital stock of the foreign corporation represented by property owned and used and business transacted in this state, but which fee shall not be less than $10.00 in any case.

With respect to the provisions of sections 183 et seq., prescribing an initial franchise tax on foreign corporations doing business in this state, it may be observed that with respect to a foreign trust company, acting as testamentary trustee or executor in this state, such provisions would not necessarily be operative to impose any tax on such company for the reason that such company would not necessarily employ any part of its capital stock in administering such trust in this state. It will be noted further that both sections 178 and 183 of the General Code, and the sections thereto related, operate only as prescribing certain conditions to the right of a foreign corporation to "do business in this state." Statutes of similar import to the above, applying to foreign corporations of different kinds, have been enacted in practically all of the several states and provisions of these statutes in respect to what constitutes "doing business," within the meaning of the term as therein used, has been construed in many decisions of the courts. In these decisions the courts, for the most part, have refrained from formulating any general rules for determining when a foreign corporation is "doing business" within the meaning of such statutes, but have contented themselves in determining whether, under the facts in particular cases, such corporations are within the statute.

The question has arisen quite frequently with reference to mercantile and other commercial corporations. In so far as any general rule can be gathered from the decisions, as has been pointed out by me in my opinion No. 236 to you under date of May 3, 1917, with reference to the matter of the Rubber Goods Manufacturing Company, the phrase "doing business" within any particular state, as applied to foreign mercantile and commercial corporations, implies corporate continuity of conduct in respect to the business of such corporations, such as might be evidenced by the investment of capital, the maintenance of an office for the transaction of business, and those incidental circumstances which attest the corporate intent to avail itself of the privilege of carrying on business and activities such as appertain to the ordinary business and purpose of the corporation as distinguished from acts simply within its corporate powers.

Cooper Mfg. Co. v. Ferguson, 113 U. S. 727;
Penn Coliers Co. v. MacKeever, 183 N. Y. 98;
Simons-Burke Clothing Co. v. Linton, 90 Ark. 76;
Kilgore v. Smith, 142 Pa. 48;
Caesar v. Cappell, 83 Fed. Rep. 403, 422;
Toledo Commercial Co. v. Glenn Mfg. Co., 55 O. S. 217. 222, 223.

With reference to such foreign corporations, as insurance companies, investment companies, building and loan companies, trust companies and banking companies, however, I am not prepared to hold that the reason and purpose of statutes

of this kind, as applied to such corporations, require such evidence of intended business continuity in order to bring them within the purview of statutes of this kind. As to such companies it seems that any business done, or transaction within the state through any agencies, is "doing business" in such state.

State v. Bristol Savings Bank, 108 Ala. 3;
Dundee v. Mortgage Trust and Investment Company, 95 Ala. 318;
Farrier v. New England Mortgage Security Co., 88 Ala. 270;
Rose v. Kimberly, 89 Wis. 545;
Swing v. Munsen, 191 Pa. St. 582;
Mo. Guarantee v. Cox, 146 Ind. 107;
Casualty Co. v. Banking Co., 12 C. C. (n. s.) 200;
State v. Insurance Company, 24 C. C. 387.

Under paragraph c of section 736 of the General Code, above quoted, a foreign trust company is required to obtain from the superintendent of banks a certificate as a condition to its right to do business in this state and on the considerations just mentioned I am clearly of the opinion that a foreign trust company would have to comply with the provisions of paragraph c, section 736, before it would be authorized to act as executor or testamentary trustee in this state under appointment therein.

With respect to the application of sections 178 and 183 G. C. to the question at hand, it will be noted that the former section specifically provides that it shall not apply to foreign banking, insurance, building and loan or bond investment corporations, while foreign banking, insurance, savings and loan, building and loan and bond investment corporations are expressly exempted from the operation of section 183 of the General Code by the provisions of section 188 of the General Code.

My predecessor, Hon. Timothy S. Hogan, giving effect to the provisions just noted, exempting foreign banking corporations from the application of section 178 and 183 General Code, was of the opinion that foreign trust companies are to be classed as banking corporations within the meaning of these sections and therefore for this reason exempt from the provisions of section 178 and 183 General Code (See Attorney General's Reports for 1914, page 1636; 1913, page 73; 1911, page 789). If the conclusion of my predecessor with respect to this particular can be assumed to be correct, it of course affords a sufficient answer to the question made by you. However, this may be, I am of the opinion that inasmuch as specific provision has been made in the terms of paragraph (c) of section 736 General Code, for granting authority to foreign trust companies to transact business in this state, this authority, when granted pursuant to the provisions of said section, is all that is required and that for this reason the provisions of sections 178 and 183 General Code have no application to such foreign corporations.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

476.

EXEMPTED VILLAGE SCHOOL DISTRICT—CANNOT BE TRANSFERRED TO ADJOINING RURAL SCHOOL DISTRICTS.

There is no provision of law in Ohio whereby territory of an exempted village school district can be transferred to an adjoining rural school district.

COLUMBUS, OHIO, July 27, 1917.

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

DEAR SIR:—In your letter of July 5, 1917, you submit for my opinion the following statement of facts:

> "Kent village school district with territory contiguous both within and without the corporate limits of said village, wholly within this county, is exempt from the supervision of the county district, under authority of section 4688 of the General Code.
>
> "Franklin township rural school district surrounding said village school district, also wholly within this county, is under the control of the county school district, under authority of section 4684 of the General Code.
>
> "It is desired by the boards of education of these districts to transfer territory from said village school district to said township rural school district.
>
> "1st. Can this under the present provisions of the several sections of our General Code, now in force, lawfully be done?
>
> "2nd. If so, how, and what is the proceedure?
>
> "3rd. Does the repeal of section 4693 of the General Code bar such transfer by mutual agreement of said boards?"

General Code section 4688 to which you refer provides when a village school district might originally be exempted from the supervision of the county board of education. It reads as follows:

> "The board of education of any village school district containing a village which according to the last federal census had a population of three thousand or more, may decide by a majority vote of the full membership thereof not to become a part of the county school district. Such village district by notifying the county board of education of such decision before the third Saturday of July, 1914, shall be exempt from the supervision of the board."

General Code section 4688-1 provides under what circumstances a board of education of a village may order a census to be taken of the population of the district. It provides in part:

> "* * * If the census shows a population of three thousand or more in the village school district, and said census is approved by the superintendent of public instruction, then said district shall, upon notification by the district board of education of said village school district, be exempted from the supervision of the county board of education."

Section 4684 provides that each county, exclusive of the territory which is em-

braced in any city school district, and the territory which is embraced in any village school district exempted from the supervision of the county board of education by the provisions of section 4688 and 4688-1 before mentioned, and the territory detached for school purposes from said county, and including the territory attached to said county for school purposes, shall constitute the county school district. That is to say, the territory over which the county board of education has jurisdiction, is all that territory of the county including the territory of any other county which is attached to the county for school purposes, and excluding all that territory within the county which is detached for school purposes; and also excluding any city school district and any exempted village school district.

The county board of education is given authority by section 4696 G. C. to transfer a part or all of a school district of the county school district to an adjoining exempted village school district or to a city school district, or to another county school district. Such transfer can only be made provided at least 50 per cent. of the electors of the territory to be transferred petition for such transfer, and such transfer must be made provided at least 75 per cent. of the electors of the terrritory petition for such transfer; but there is nothing in our school laws which permits territory to be transferred from a city school district or an exempted village school district to a rural school district. When territory is once attached to a city school district, or to an exempted village school district, there is no way under our school laws to detach the same. Prior to the school code which was enacted in 1914, such transfer of territory from one school district to another school district could be made by the mutual agreement of the several boards of education affected, under and by authority of section 4693 G. C.; but said section was repealed when the new school code was enacted, and no similar provision to that contained therein has been enacted in its place.

I must, therefore, advise you that territory of an exempted village school district cannot be transferred to a rural school district.

Yours very truly,
JOSEPH MCGHEE,
Attorney-General.

477.

POWER OF GENERAL ASSEMBLY TO REGULATE THE PRICE OF COAL AND FOOD PRODUCTS.

COLUMBUS, OHIO, July 27, 1917.

HON. H. H. TIMBY, *State Senator, Ashtabula, Ohio.*

DEAR SIR:—You have invited my opinion as to the power of the general assembly of Ohio to fix or to regulate the price of coal. I am glad to be able to comply with your request, in that I have on my own motion caused an investigation to be made of this question. Alarmed at the situation which has been developing in this state, and perhaps elsewhere, during the past few months, and feeling that the power of the state might have to be exerted for its control, I had thought it best to ascertain how far that power might extend.

The opinion which is sent to you is the result of the investigation to which I have referred, and the manner of the treatment of the subject is accounted for thereby I ask you, therefore, to accept this statement as a species of apology for the length of the opinion and the method of approach to the solution of the questions which are discussed therein.

It is obvious that any effort to regulate the price of a commodity by legislation would naturally be ascribed to the exercise of the so-called "police power." On close analysis it would seem that there is really no such thing as police power—or rather that in its broadest sense the police power is merely the power to make laws—the general legislative power. Upon the exercise of any legislative power the constitutions, state and federal, impose certain limitations. Some of these, in which we are primarily intersested, are in the nature of guaranties of individual rights. Thus there is the inviolable right of private property; the right of personal liberty, of which one may not be deprived without due process of law. Growing out of one or the other of these primary and constitutionally guaranteed rights (the exact source being immaterial for present purposes) is the right to make contracts respecting the disposition of property. Whether this a part of one's property rights or an attribute of his personal right of liberty, the right is certainly protected by constitutional limit tations.

But, obviously, there is no such thing as an absolute right to make contracts; for if there were the legislative power would be limited to the control of men in their non-contractual relations.

Unless, therefore, we are to assume that no legislature operating under a written constitution, like those which we have, can in any manner prevent the doing of a thing which may be made the subject of a contract, we must conclude that the right to make contracts is like other rights of personal liberty and property—subject to control by the legislature.

Thus, the constitutionally guaranteed right of personal liberty does not imply that the individual is at liberty to defraud his neighbor, and he may be punished for obtaining money by false pretenses, even though he does this through the medium of a contract.

Logically, therefore, the police power would seem to extend to all contracts, though there may be limitations upon its exercise in all cases.

These propositions are elementary and do not require the support of the multitude of adjudicated cases which might be cited to sustain them. The quotation of the general statements of two of the leading commentators on the general subject, representing two generations, will be sufficient.

"All contracts and all rights, it is declared, are subject to this power;

(citing Fire Insurance Co. v. Railroad Co., 175 U. S. 91, (insurance regulation); Trust Co. v. Krumseig, 172 U. S. 351 (usurious contracts), etc.; and quoting at length from Allgeyer v. Louisiana, 165 U. S. 578, including the following language of Mr. Justice Peckham therein:

" 'In the privilege of pursuing an ordinary calling or trade and of acquring, holding, and selling property * * * must be embraced the right to make all proper contracts in relation thereto, and although it may be conceded that this right to contract in relation to persons or property, or to do business within the jurisdiction of the state, may be regulated and sometimes prohibited when the contracts or busines conflict with the policy of the state as contained in the statutes, yet the power * * * can not extend to prohibiting the citizen from making contracts * * * (outside of the limits and jurisdiction of the state, and which are also to be performed outside of such jurisdiction * * *); and not only may regulations which affect them be established by the state, but all such regulations must be subject to change from time to time, as the general well-being of the community may require, or as the circumstances may change, or as experience may demonstrate the necessity, (Citing the leading early case of Thorpe v. Rutland & Burlington R. R. Co., 27 Vt. 140—a case which will be found very frequently cited in the early decisions of the supreme court of Ohio on the nature of the police power.) * * *.

"The limit to the exercise of the police power in these cases must be this: the regulations must have reference to the comfort, safety, or welfare of society; (citing numerous cases, the general purport of which is to the effect that police regulations can not be purely arbitrary, and must have some reasonable tendency to promote a public as distinguished from a private or a class good.)

" 'Cooley's Constitutional Limitations, 7th Ed., pages 833 et seq.'

"From the mass of decisions, in which the nature of the power has been discussed, and its application either conceded or denied, it is possible to evolve at least two main attributes or characteristics which differentiate the police power; it aims directly to secure and promote the public welfare, and it does so by restraint and compulsion * * * a detailed examination of statutes and decisions * * * will reveal the police power not as a fixed quantity, but as the expression of social, economic and political conditions. * * *"

"The care of the public welfare, or internal public policy, has for its object the improvement of social and economic conditions affecting the community at large and collectively, with a view to bringing about 'the greatest good of the greatest number.' The organized activity of the community is based upon the fact or belief that certain conditions essential or favorable to all alike can not be obtained at all or without great waste and difficulty by private effort, and also that in certain respects individual activity is antisocial, i. e., accomplishes its ends by sacrificing the interests of the mass or of great portions of the community. The state supplies the former defect by collective communal action, and meets the latter by restraint and compulsion exercised over individuals. * * *

"Custom and a sense of propriety demand of the individual that he subordinate and adapt the exercise of his rights to manifest social interests and requirements, and the disregard of this obligation appears as a wrong. Thus most of the self-evident limitations upon liberty and property in the interest

of peace, safety, health, order and morals are punishable at common law as nuisances. It is with reference to these obvious restraints that the maxim has been proclaimed: *sic utere tuo ut alienum non laedas.*

"But no community confines its care of the public welfare to the enforcement of the principles of the common law. The state * * * *exercises its compulsory powers for the prevention and anticipation of wrong by narrowing common law rights through conventional restraints and positive regulations which are not confined to the prohibition of wrongful acts. It is this latter kind of state control which constitutes the essence of the police power. The maxim of this power is that every individual must submit to such restraints in the exercise of his liberty or of his rights of property as may be required to remove or reduce the danger of the abuse of these rights on the part of those who are unskilful, careless or unscrupulous.* * * *

"Broadly speaking, there are, * * * three spheres of activities, conditions and interests which are to be considered with reference to the police power; a conceded sphere affecting safety, order and morals, covered by an ever increasing amount of restrictive legislation; a debatable sphere, that of the proper production and distribution of wealth, in which legislation is still (1904) in an experimental stage, and an exempt sphere, that of moral, intellectual and political movements, in which our constitutions proclaim the principle of individual liberty."

Freund Police Power, sections 3, 8, 15.

The next question which arises is as to whether or not there is any distinction among the various possible terms of a contract with respect to their subjection to the police or legislative power. The constitutions make no such distinction. They do not protect the agreement as to price by express provision to any greater extent than they protect the agreement as to any other possible terms of a contract. So that on principles such as would be applied to the interpretation of any other written instrument it would follow that if it be established that the legislative power may circumscribe other terms of a contract, it may also control this particular term.

However, certain economic theories—or perhaps truths—seem to have crept into the interpretation of our constitutions in this respect at an early date, and a peculiar sancity seems to have been tacitly assumed by writers and courts to be attached to the right by contract to fix the price of a commodity or the charge for a service.

It is probable that the idea underlying the distinction which seems to have been tacitly assumed or vaguely drawn is that price regulation ordinarily can not accomplish the only public end which could be assumed to justify it; that because it is economically unsound and does not work in practice, simply because the producers or possessors of commodities, or those skilled in or equipped for particular occupations, will not part with such commodities or exercise such occupations unless induced to do so by what may appeal to them—not to the legislature—as the assurance of an adequate return, therefore such legislation can not be justified on the ground of public necessity. In other words, if, as will be hereinafter assumed, public necessity is the essential requisite to the valid exercise of the police power, a statute which because of the operation of economic laws would fail to realize its purpose would not satisfy this requirement and would, therefore, not be valid. Stating in in still another way: The somewhat vague distinction that seems to have been supposed to exist here may rest upon the idea that the repeal or amendment of economic laws is not a proper subject for the municipal law, simply because the latter is inadequate to deal with the former.

However, the distinction just described will be found recognized to some extent in the early cases. On this point again it is felt that quotations from the leading text writers will be sufficient.

"In the early days of the common law it was sometimes thought necessary, in order to prevent extortion, to interfere, by royal proclamation or otherwise, and establish the charges that might be exacted for certain commodities or services. The price of wages was oftener regulated than that of anything else, the local magistrates being generally allowed to exercise authority over the subject. The practice was followed in this country, and prevailed to some extent up to the time of independence. Since then it has been *commonly supposed* that a general power in the state to regulate prices was inconsistent with constitutional liberty."

Cooley's Constitutional Limitations, 7th Ed., page 870.

"It is true that popular, legislative and judicial sentiment alike are opposed to the recognition of an indiscriminate power to regulate charges."

Freund Police Power, section 378.

"The English and the early American laws fixing the prices of labor and other commodities in private businesses were never successfully enforced, and either became obsolete soon after their passage or were repealed, and the whole scheme of governmental regulation of prices was abandoned as economically inexpedient. There are few instances in the United States of direct regulation of prices in business of a strictly private nature. There is a strong and prevalent feeling that a general legislative power to regulate private business, to prescribe the conditions under which it may be carried on, and to fix the price of commodities and services would be a deprivation of liberty and property guaranteed under the American constitutional system and would be contrary to the genius of American institutions. * * *

"Whether there is under the American constitutional system a general legislative power to fix prices in private business is an open question. The views of many on questions of economics and expediency, and on the proper functions of the state, would undoubtedly oppose the exercise of such power. But it may well be that a time will come when dominant public sentiment will incline less to the *laissez-faire* and more to the socialistic idea of the state. * * *"

Prof. E. A. Gilmore, University Law School, in the Green Bag, Vol. 17, page 627 (1905).

"It must always be remembered that the circumstances and conditions rendering permissible *so strong an exercise of the police power* as the regulation of rates and prices are not the same as the circumstances and conditions that might justify some other exercise of that power like the regulation of the times, places, or manner in which the business may be carried on."

N. Matthews, Jr., and W. G. Thompson, 15 Harvard Law Review 249, 254 (1901).

The significance of this statement lies in the implicit assumption that the regulation of prices is a "stronger" exercise of the po ice power than other regulations pertaining to the conduct of a business.

"The instinct of modern lawyers is to regard rate regulation as an anomalous encroachment upon the freedom of the individual, confined by our constitution to a small class of so-called 'public callings' which has definitely ascertained limits."

Note, Harvard Law Review, November, 1914, 28 H. L. R., 85.

"A most interesting question, * * * is the right of the government to regulate prices and charges for things and services. The exercise of this power was quite common in past ages, and there appeared to be no well defined limitations upon the power, if any at all were recognized. But under a constitutional and popular government, there must necessarily be some limitation. It is a part of the natural and civil liberty to form business relations, free from the dictation of the state, that a like freedom should be secured and enjoyed in determining the conditions and terms of the contract which constitutes the basis of business relation or transaction. It is, therefore, the general rule, that a man is free to ask for his wares or his services whatever price he is able to get and others are willing to pay, and no one can compel him to take less, although the price may be exorbitant as to become extortionate. * * *."

Tiedeman on State and Federal Control of Persons and Property, Vol. 1, Sec. 96 (1900).

"After the adoption of our federal and state constitutions, it seems to have been generally assumed that such legislation (fixing prices and rates) would be inconsistent with the American idea of constitutional freedom of action. *Not that the forefathers anywhere inserted express provisions against such legislation in their organic laws,* but the supposed inconsistency was drawn indirectly from several constitutional provisions, and because it was *supposed* to be against the general spirit of our institutions. In other words, it was assumed to be a part of the natural and civil liberty guaranteed by American institutions to form business relations and to make contracts free from state interference, and this was thought to include the right of everyone to ask for his wares or services whatever price he was able to get and others were willing to pay."

Address of Gustavus A. Finkelnburg, before Missouri State Bar Association, 32 American Law Review, 501 (1898).

"The spectacle of a government that cannot prohibit a contract merely because two grown persons desire to make it, is so utterly absurd as to be quite beyond the region of discussion if government of any kind is to continue. The wisdom of the particular interference may be debatable, but it is simply ridiculous to assert that a state has no right to inferfere with the individual's right to contract when courts uphold the power of the state to forbid a harmless wager, the contracting of a debt for whiskey, and a promise to pay a larger price for a risky loan of money than for one as secure as the state itself. * * *.

"The most striking instance, however, of the loss of an anchorage in constitutional interpretation is to be seen in Budd v. New York, (143 U. S. 517) * * *, while the sole question was the power of a state to regulate

prices charged by a grain elevator, not one person, counsel or court, seem to have started with the simple inquiry—where is the clause in the constitution which prohibits such a thing? * * *.

"It may be very disagreeable to accept the proposition that the legislature of a state can alter prices; * * * but it is plain this is the case unless there is a restriction imposed by something that is not in the constitution * * *."

Richard C. McMurtrie, in American Law Register and Review, January, 1893, Vol. 32, page 1.

"If the price of wheat cannot be regulated on the ground of property, why are not laws against corners in wheat void on the ground that they interfere with the sacred rights of private property? Against the main proposition of the railway companies in the Granger cases, the possible ground for the decision was indeed stronger than it seemed. It is the same as the broad ground of the common law when it strikes at combinations to raise prices and brands them as illegal—*the ground that price is a public matter*, and regulations of price which the people desire the people can enforce."

William Draper Lewis, 32 American Law Register, page 9 (1893).

The above questions have prepared us for the following observations:

(1.) Though few, if any, courts of standing and authority had down to the end of the first decade of the twentieth century ever actually held that the right of the seller to fix the price was a peculiarly sacred and inviolable right, so that as to ordinary or "private" businesses the power to regulate prices was withheld from the legislature yet that was the general opinion of lawyers and, as will be shown, the tacit assumption of courts. Regulations of sales and businesses, whether private or quasi public, multifarious in their character and affecting practically every other term of the contract of sale excepting that of price had been enacted, yet it was *assumed*—never decided by any important court—that the one element of price was peculiarly sacred. All of the discriminating commentators note that this was a mere assumption and text writers such as Cooley, Tiedeman and Freund either do likewise or merely make the broad statement, without being able to cite a single case in support of it.

(2.) The justification for such an assumption lay, therefore, not in anything which the courts had actually decided, but rather in the reasons which had been assigned particularly by the supreme court of the United States in certain cases for upholding price or rate regulations in those cases. That is to say, the courts, as will be shown sustained certain rate regulations, but sustained them apparently because of certain static facts concerning the nature of the business regulated: the implication being that if those facts had not been present the regulation would have been unconstitutional.

Thus, in the "Elevator Cases" and the so-called "Granger Cases" the supreme court of the United States, adopting Lord Hale's phrase coined by him in his treatis *De Portibus Maris*, suggested that the right to regulate prices and charges existed in some peculiar sense with respect to such businesses as might be charged "with a public interest."

In *Munn* v. *Illinois*, 94 U. S., 113, Mr. Chief Justice Waite's opinion contains the fol**owi**ng: (Page 123.)

"The question to be determined in this case is whether the general assembly of Illinois can, under the limitations upon the legislative power of the states imposed by the constitution of the United States, fix by law the maxi-

mum of charges for the storage of grain in warehouses at Chicago and other places in the state having not less than one hundred thousand inhabitants, 'in which grain is stored in bulk, and in which the grain of different owners is mixed together, or in which grain is stored in such a manner that the identity of different lots or parcels cannot be accurately preserved.' * * *.

"When one becomes a member of society, he necessarily parts with some rights or privileges which, as an individual not affected by his relations to others, he might retain. 'A body politic,' as aptly defined in the preamble of the constitution of Massachusetts, 'is a social compact by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good.' This does not confer power upon the whole people to control rights which are purely and exclusively private, *Thorpe v. R. & B. Railroad Co.*, 27 Vt. 143; but it does authorize the establishment of laws requiring each citizen to so conduct himself, and so use his own property, as not unnecessarily to injure another. This is the very essence of government, and has found expression in the maxim *sic utere tuo ut alienum non laedas*. From this source come the police powers, which, as was said by Mr. Chief Justice Taney in the License Cases, 5 How. 583, 'are nothing more or less than the powers of government inherent in every sovereignity, * * * that is to say, * * * the power to govern men and things.' Under these powers the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good. In their exercise it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, etc., and in so doing to fix a maximum of charge to be made for services rendered, accomodations furnished, and articles sold. To this day ,statutes are to be found in many of the states upon some or all these subjects; and we think it has never yet been successfully contended that such legislation came within any of the constitutional prohibitions against interference with private property. With the fifth amendment in force, congress, in 1820, conferred power upon the city of Washington 'to regulate' * * * the rates of wharfage at private wharves, * * * the sweeping of chimneys, and to fix the rates of fees therefor, * * and the weight and quality of bread,' 3 Stat. 587, section 7; and in 1848, 'to make all necessary regulations respecting hackney carriages and the rates of fare of the same, and the rates of hauling by cartmen, wagoners, carmen and draymen, and the rates of commission of auctioneers,' 9 id, 224, section 2.

"From this it is apparent that, down to the time of the adoption of the fourteenth amendment, it was not supposed that statutes regulating the use, or even the price of the use, of private property necessarily deprived an owner of his property without due process of law. Under some circumstances they may, but not under all. The amendment does not change the law in this particular; it simply prevents the state from doing that which will operate as such a deprivation.

"This brings us to inquire as to the principles upon which this power of regulation rests, in order that we may determine what is within and what without its operative effect. Looking, then, to the common law, from whence came the right which the constitution protects, we find that when private property is 'affected with a public interest, it ceases to be *juris privati* only.' This was said by Lord Chief Justice Hale more than two hundred years ago, in his treatise *De Portibus Maris*, 1 Harg. Law Tracts 78, and has been

accepted without objection as an essential element in the law of property ever since. Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control."

The chief justice thereupon quotes from Lord Hale's treatise respecting the fixing of charges for ferries, wharves and warehouses, citing as to the latter Aldnutt v. Inglis, 12 East 527, in which Lord Ellenborough had said:

"There is no doubt that the general principle is favored, both in law and justice, that every man may fix what price he pleases upon his own property, or the use of it; but if for a particular purpose the public have a right to resort to his premises and make use of them, and he have a monopoly in them for that purpose, if he will take the benefit of that monopoly, he must, as an equivalent, perform the duty attached to it on reasonable terms. * * *."

"It is enough that there exists in the place and for the commodity in question a virtual monoply of the warehousing for this purpose, on which the principle of law attaches, as laid down by Lord Hale in the passage referred to (that from *Deportibus Maris* already quoted), which includes the good sense as well as the law of the subject."

The opinion of the chief justice proceeds as follows: (page 129.)

"In later times, the same principle came under consideration in the supreme court of Alabama. That court was called upon, in 1841, to decide whether the power granted to the city of Mobile to regulate the weight and price of bread was unconstitutional, and it was contended that 'it would interfere with the right of the citizen to pursue his lawful trade or calling in the mode his judgment might dictate;' but the court said, 'there is no motive * * * for this interference on the part of the legislature with the lawful actions of individuals, or the mode in which private property shall be enjoyed, unless such calling affects the public interest, or private property is employed in a manner which directly affects the body of the people. Upon this principle, in this state, tavern-keepers are licensed; * * * and the county court is required, at least once a year, to settle the rates of innkeepers. Upon the same principle is founded the control which the legislature has always exercised in the establishment and regulation of mills, ferries, bridges, turnpike roads and other kindred subjects.' Mobile v. Yuille, 3 Ala. n. s. 140.

"From the same source comes the power to regulate the charges of common carriers, * * *."

The chief justice then referred to the fact that the Chicago grain elevator facilities, so essential to the moving and storage of the crops of the great northwest, were under the actual control of relatively few persons and corporations who were able to and had agreed among themselves as to rates, so that there was actually present in the case a condition of "virtual monoply" in a service absolutely essential to the welfare of the public of the whole United States. Summing up his description of the situation, the chief justice says: (page 132.)

"They stand, to use again the language of their counsel, in the very 'gateway of commerce,' and take toll from all who pass. Their business most certainly 'tends to a common charge, and is become a thing of public interest and use. Every bushel of grain for its passage 'pays a toll, which is a common charge,' and, therefore, according to Lord Hale, every such warehouseman 'ought to be under public regulation, viz., that he * * * take but reasonable toll.' Certainly, if any business can be clothed 'with a public interest, and cease to be *juris privati* only,' this has been. It may not be made so by the operation of the constitution of Illinois or this statute, but it is by the facts."

The foregoing quotation from the opinion of the chief justice is perhaps all that is necessary to bring out the point under discussion. However, to complete the reasoning of the opinion it is appropriate to call attention to the fact that it was asserted by the plaintiffs in error that their warehouses had been established and the capital invested in them before any regulation had been attempted, so that they did not at the time consciously enter a service already stamped by the legislature as public. On this point the chief justice says:

"It matters not in this case that these plaintiffs in error had built their warehouses and established their business before the regulations complained of were adopted. What they did was from the beginning subject to the power of the body politic to require them to conform to such regulations as might be established by the proper authorities for the common good. They entered upon their business and provided themselves with the means to carry it on subject to this condition. If they did not wish to submit themselves to such interference, they should not have clothed the public with an interest in their concerns. The same principle applies to them that does to the proprietor of a hackney-carriage, and as to him it has never been supposed that he was exempt from regulating statutes or ordinances because he had purchased his horses and carriages and established his business before the statute or ordinance was adopted.

"It is insisted however, that the owner of property is entitled to a reasonable compensation for its use, even though it be clothed with a public interist, and that what is reasonable is a judicial and not a legislative question.

"As has already been shown, the practice has been otherwise. In countries where the common laws prevails, it has been customary from time immemorial for the legislature to declare what shall be a reasonable compensation under such circumstances, or, perhaps more properly speaking, to fix a maximum beyond which any charge made would be unreasonable. Undoubtedly, in mere private contracts, relating to matters in which the public has no interest, what is reasonable must be ascertained judicially. But this is because the legislature has no control over such a contract. So, too, in matters which do affect the public interest, and as to which legislative control may be exercised, if there are no statutory regulations upon the subject, the courts must determine what is reasonable. The controlling fact is the power to regulate at all. If that exists, the right to establish the maximum of charge, as one of the means of regulation, is implied. In fact, the common law rule, which requires the charge to be reasonable, is itself a regulation as to price. Without it the owner could make his rates at will, and compel the public to yield to his terms, or forego the use.

"But a mere common law regulation of trade or business may be changed by statute. A person has no property, no vested interest, in any rule of

> the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will, or even at the whim, of the legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances. To limit the rate of charges for services rendered in a public employment, or for the use of property in which the public has an interest, is only changing a regulation which existed before. It establishes no new principle in the law, but only gives a new effect to an old one."

It was on this last point that Mr. Justice Field expressed dissent, stating the belief that because no conscious or express or necessarily implied grant to a public use had been made, and because no special privileges, such as the franchise of eminent domain or the like, had been given by the state to the elevator companies they were not in a public calling and their property was not "clothed with a public interest." He also argues strongly, although without effect in the light of subsequent decisions, for the right to compensation. Speaking of the Alabama case, he denied the dictum therein to the effect that the legislature had the power to "fix the price which one shall receive for his property of any kind," saying:

> "If the power can be exercised as to one article, it may as to all articles, and the prices of every thing, from a calico gown to a city mansion, may be the subject of legislative direction."

In the "Granger cases" *Munn v. Illinois* was merely followed on the points now under discussion. (See 94 U. S., 155, 164, 179, etc.)

This principle, which as stated, of course, operates as a limitation on the power to regulate prices generally, was seemingly at first understood to apply to those businesses which, either by long established custom or by reason of certain natural principles such as monopolistic character of the service, public necessity for it, the exercise of specially granted privileges and the like, had been recognized to be quasi public in character and designated as "public callings." There are, of course, certain peculiar rules applicable to such public service or public utility occupations. One who enters such an occupation undertakes in contemplation of law to serve all who may apply on the same terms. He has declared himself, as it were, a public trustee and his personal services or his property devoted to the uses of such occupation become impressed with a public trust, the obligations of which he cannot evade so long as he continues in the public employment. Authorities are not necessary to illustrate the scope of these peculiar rules.

It was seemingly supposed at the time the supreme court of the United States first used the expression "property charged with a public interest" in connection with the regulation of prices and charges, that the term was merely another way of describing the class of public service occupations. The conclusion was, for a time at least, rather generally assumed that the right to regulate prices and charges by legislation was limited to the prices and charges which might be exacted by one whose business or property was charged with a public trust, i. e., a public service company or individual.

Judge Cooley wrote his treatise on "Constitutional Limitations" not long after these decisions. Of *Munn v. Illinois* he says:(page 870)

> "The ground of the decision appears to be that the employment of these warehousemen is a public or *quasi* public employment; that their property

in the business is 'affected with a public interest,' and thereby brought under that general power of control which the state possesses in the case of other public employments." .

Speaking of the instances of price regulation mentioned by Chief Justice Waite in his opinion, he says:

"Some of the cases here referred to seem plain enough. Ferries are public highways, * * * A hackman exercises a public employment in the public street; * * * The rates of toll, when mills grind for toll, are usually fixed by law; but there is nothing exclusive in this; the parties may make their own bargains, and the legislative rate only controls where the parties by implication have apparently acted in reference to it. In England, formerly, the lords of manors, as mill owners, had exclusive rights; and where an exclusive right exists in one's favor, to compel the public to deal with him, there can be no doubt of the right of the state to compel him to deal fairly with the public. * * *"

"What circumstance shall affect property with a public interest is not very clear. The mere fact that the public have an interest in the existence of the business, and are accommodated by it, cannot be sufficient, for that would subject the stock of the merchant, and his charges, to public regulation. The public have an interest in every business in which an individual offers his wares, his merchandise, his services, or his accommodations to the public; but his offer does not place him at the mercy of the public in respect to charges and prices. If one is permitted to take upon himself a public employment, with special privileges which only the state can confer upon him, the case is clear enough; and it seems to have been the view of both courts in this case, that the circumstances were such as to give the warehousemen in Chicago, who were the only persons affected by the legislation, a 'virtual' monopoly of the business of receiving and forwarding the grain of the country to and from that important point, and by the very fact of monopoly to give their business a public character, affect the property in it with a public interest, and render regulation of charges indispensable. * * *

"In the following cases we should say that property in business was affected with a public interest: 1. Where the business is one the following of which is not of right, but is permitted by the state as a privilege or franchise. Under this head would be comprised the business of setting up lotteries, of giving shows, etc., of keeping billiard tables for hire, and of selling intoxicating drinks when the sale by unlicensed parties is forbidden; also the cases of toll bridges, etc. 2. Where the state, on public grounds, renders to the business special assistance, by taxation or otherwise. 3. Where, for the accommodation of the business, some special use is allowed to be made of public property or of a public easement. 4. Where exclusive privileges are granted in consideration of some special return to be made to the public. Possibly there may be other cases."

The article by Messrs. Matthews and Thompson, in 15 Harvard Law Review, referred to above, contains the following statement: (Page 250.)

"The general rule is that the several state legislatures have the power to regulate the rates or prices charged for the services rendered or commodities sold by persons or corporations engaged in a business affected with a public interest or use.

* * * * * * * * * *

"It would seem as unprofitable to attempt any general definition of

> what constitutes that 'public interest' or 'public use' which renders the business and property to which it attaches subject to state regulation of rates and prices as it is to attempt a definition of the 'police' power itself. * * * Certain broad elements of similiarity in the subject matter of the adjudicated cases, suggested by the expression 'public service companies' now coming into common use, will in some cases serve as a sufficient criterion."

Professor Bruce Wyman, writing in Harvard Law Review for February, 1904, 17 H. L. R., 223, in discussing *Munn v. Illinois*, says:

> "What businesses then, are so affected with a public interest that they are made of such public consequence that the public has an interest in their control? * * * Attempts to enforce public duties in respect to the operation of private businesses must always fail by virtue of the guaranties of our constitutions; * * * Munn v. Illinois, therefore involves the distinction between the regulation permitted in public calling and the police allowed in private calling."

It is true that the writer of this article was speaking to the thesis that actual, as well as economic monopoly was a foundation for the exercise of all power which a state might exercise over a public calling, the title of his article being, "The Law of the Public callings as a Solution of the Trust Problem," and so what he says in interpertation of Munn v. Illinois is well enough on the point on which it is written.

Of course, more might be cited, and under this general heading all the quotations which have previously been made are in point.

It will be seen that Munn v. Illinois does afford ground for the belief that the essential justification for the exercise of the power to regulate prices is that the property or business to which such regulations shall apply be "affected with a public interest" in the sense that they are devoted to a public use."

Historically there never was any basis for such an assumption aside from the implications arising from the language of the Supreme Court of the United States in the early cases. Thus, from carliest times the prices of things which could not possibly be regarded as property charged with a public interest, and the charges in occupations which could not by any stretch of imagination be regarded as public employments, had been regulated by legislation, not only in England but also in this country, and not only under the absolute parlimentary power but also under the limitations of written constitutions.

The opinion in *Munn v. Illinois* itself refers to instances of this kind. Thus, the charges that bakers and chimney sweeps were mentioned by Chief Justice Waite as having been regulated even in the face of constitutionally guaranteed rights and to have been sustained in at least one case. There can be no claim that the business of a baker, for example, is a "public calling" in so far as the definition of what constitutes a "public calling" must be conditioned by the existence of a monopoly, actual or virtual, and yet it has come to be thoroughly established that monopoly is the determining test of what constitutes a public calling. (Gas Light Company v. Zanesville, 47 O. S. 1. See also, generally, Wyman on Public Service Companies and the articles hereinbefore referred to from the pen of that writer.)

The history of price regulation is interestingly set forth in the article by Professor Gilmore already referred to. He mentions as the early history examples of price regulation the Assizes of Bread, of Ale and of Cloth, by which the price and quantity of these articles were fixed with considerable certainty on account of conditions arising from the ravages of the terrible Black Death which devastated England in 1348-9. He refers to the statute of Labourers, fixing wages and passed in 1349; to further price

regulation statutes passed in 1363, 1533, 1543 and 1709. He refers also to the familiar and universal example of usury legislation, for which, however, another historical reason can be given: Originally the taking of usury was an ecclesiastical offense, and probably at the outset such legislation proceeded, as stated by Professor Gilmore, "on the theory that the taking of interest is a privilege (not a right) and which may be accompanied by restrictions."

Coming to the colonial history of this country, he enumerates statutes in Massachusetts and New York regulating the prices of various commodities which were passed in colonial times or during the Revolution.

Some additions to the catalog of regulations enumerated by Professor Gilmore are to be found in a note to United States v. Ohio Oil Co., 34 Supreme Court, 956, 28 Harvard Law Rev., page 85.

The quotation already made from Cooley on Constitutional Limitations shows that the learned author of that leading work must have regarded some of these instances as anomalous or else to be accounted for on purely historical and, therefore, arbitrary grounds. Other writers have simply gone so far as to deny the correctness of Munn v. Illinois. (See Tiedeman, section 96.)

The supreme court of the United States soon had occasion to show what it meant by a "business charged with a public interest," and in the celebrated case of *Brass v. North Dakota* it sustained the regulation of rates in a case where the "public interest" would have little, if any, foundation to rest on if placed on the footing of a public trust.

First, however, there is the case of *Budd v. New York,* 143 U. S. 517, in which Munn v. Illinois was expressly reaffirmed and explained. In that case there was no express departure from the theory of "practical monopoly;" but a discriminating minority of the court, in an opinion written by Mr. Justice Brewer, expressed the fear that this doctrine could be extended to every possible business, and sought to distinguish a public use from a "public interest in the use," saying:

> "There is scarcely any property in whose use the public has no interest. No man liveth unto himself alone, and no man's property is beyond the touch of another's welfare. Everything, the manner and extent of whose use affects the well-being of others, is property in whose use the public has an interest. Take, for instance, the only store in a little village, all the public of that village are interested in it. * * * Does it follow that that village public has a right to control these matters (including price)?
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> * * * * * * * * * *
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> "Surely the matters in which the public has the most interest, are the supplies of food and clothing; yet can it be that by reason of this interest the state may fix the price at which the butcher must sell his meat, or the vendor of boots and shoes his goods?
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> * * * * * * * * * *
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> "The paternal theory of government is to me odious. The utmost possible liberty to the individual and the fullest possible protection to him and his property, is both the limitation and duty of government. If it may regulate the price of one service, which is not a public service, or the compensation for the use of one kind of property which is not devoted to a public use, why may it not with equal reason regulate the price of all service and the compensation to be paid for the use of all property?"

The statute sustained in *Budd v. New York* regulated the prices at which shovelling in connection with the service of elevating grain were fixed.

The Brass case, 153 U. S. 391, forced the court to depart from the test of monop-

oly. This case involved a statute regulating grain warehouses, and in fact declaring all such warehouses to be public warehouses and imposing upon the proprietors thereof such positive public duties as well as fixing rates of storage. Nevertheless, it was shown that the warehouse of the plaintiff in error was but one of three at the same station on a single railroad; that there was actual competition among the three; that there were about six hundred similar elevators in North Dakota owned and operated by over one hundred and twenty-five different owners independent of and in competition with each other; that in point of fact there were at every railroad station in North Dakota at least two competing grain elevators; and that land upon which it was practicable to erect a large number of elevators if needed was available at every station in North Dakota at which grain was marketed. The court dismissed these facts with the short statement that as arguments they were "matters for those who make, not for those who interpert the laws,"and seemed to regard the Munn and Budd cases as finally deciding that the grain elevator business as a business was subject to such regulations as were imposed upon it by legislation of North Dakota.

This decision was rendered by a majority of one of the supreme court of the United States. Mr. Justice Brewer, with whom concurred three other justices, in his dissenting opinion first objected particularly to the compulsory public service feature of the law, which indeed is the weakest feature thereof and one upon which the majority opinion finds but little support. Mr. Justice Brewer then called attention to the fact that the element of monopoly was wholly absent from the case.

This case seemed to throw the subject into some confusion; yet some discriminating commentators on the law began to see that the occupations, businesses and property which, for the purposes of the rule laid down in the "Granger cases" and in *Munn v. Illinois*, were to be regarded as "charged with a public interest" were not limited to the public service occupations.

Thus, as far back as 1893 and before the decision in *Brass v. North Dakota*, William Draper Lewis advanced, in the article from which quotation has already been made, the thesis that "the public as a whole has an interest in *price* not only in the price of railway tickets but in the price of everything sold in the markets of the nation." To support this he calls attention to anti-trust laws and laws against cornering commodities of necessary public consumption, inquiring whether these do not rest for their ultimate foundation upon the postulate of a public interest in price.

Freund in his "Public Power" (written in 1904) commenting upon *Brass v. North Dakota*, sums up his conclusions as follows:

> "(Section 373.) If a greater than the ordinary control is claimed, it should be justified by the peculiar conditions of the business affected.
>
> Omitting those kinds of business which are subjected to a special control in the interest of peace, safety, health and morals, and which involve only the police power in the narrower sense of the term, the following have been classed from time to time as in a special sense public occupations or classes of business; at common law, the business of the carrier, innkeeper, ferryman, wharfinger, miller; the charactic is frequently indicated by the term public or common carrier, etc.; by modern statutes, and in addition to the common law, the business of railroads and the telegraph and telephone, also the management of turnpikes and canals; storage of grain and tobacco; and the business of stock yards; the supply of water, gas, light, heat, and power, through pipes and wires; and banking and insurance; under recent judicial decisions, also the gathering and distribution of news and market quotations.
>
> "While it may be said that the various classes of business mentioned have to do with either transportation, or finance, or the necessaries of life, or the staple products of the community, it does not appear that they have one common characteristic which could explain the special public interest.

"Turning to the special control exercised over them, we find that it assumes one or more of the following forms; the regulation of charges; the requirement of equal service; requirements in the interest of public convenience; and requirements and restraints in the interest of financial security.

"It is then necessary to inquire, to what classes of business each of these requirements applies, and how it is justified by the nature of the business to which it applies.

"(Section 378.) * * * The justification for regulating charges in some particular business would usually be that it constitutes a de jure or a de facto monopoly or enjoys special privileges; but it may also be that the commodity selected is a necessary of life, or that it is essential to the industrial welfare of the community, or that it has been immemorially the subject of regulation. Upon this theory it is possible to account for existing legislation without conceding legislative power with regard to any and all commodities which it may choose to select, and on the other hand to allow for new applications of this power, while subjecting them to an efficient judicial control which will undoubtedly be claimed and exercised. * * *"

Most interesting, however, in this connection is the conclusion of that writer in an eleborate note to *Winchester & Lexington Turnpike Road Co. v. Croxton*, 33 L. R. A. 177 (1896). The whole note might well go in as a part of this opinion, but for the fact that subsequent decisions have greatly clarified the situation, and rendered unnecessary an exhaustive citation of the earlier cases. However, the author of the note, writing as stated in the year 1896 and quite soon after the decision in *Brass v. North Dakota*, concludes as his statement of "the general doctrine" that

"A fair interpertation of the above cases does not limit the doctrine to cases of monopoly or virtual monopoly, but extends it to all cases in which the property is affected with the public interest to such a degree that its regulation is demanded by the public welfare. It is difficult, if not impossible, to find any legitimate test of this except the judgment of the legislature unless the legislative function of declaring public policy is to be transferred to the courts."

This is believed to be an exact and accurate statement of the law. It is the more remarkable because of the date when it was written. At that time, as we have seen, the conclusion of the writer of the note was still regarded as very debatable.

At length, however, the issue was squarely raised in the supreme court of the United States in the now celebrated case of *German Alliance Insurance Co. v. Lewis*, 233 U. S. 389. In this case a majority of the court, speaking through Mr. Justice McKenna, distinctly repudiated the notion, which undoubtedly had theretofore been entertained by large numbers of the lawyers and even the courts of the country, that insofar as the right to regulate prices and charges was dependent upon the property or occupation to which such regulations would apply being "charged with a public interest," such right was limited to those occupations which might be grouped together under the designation of public service employments. The court rather suggested as a definition of what is "property or business charged with a public interest" for the purpose of price regulation, that which makes such public interest virtually dependent only upon the public necessity, which in turn is a matter primarily for the consideration of the legislature.

The court in this case sustained a law of Kansas regulating fire insurance rates and reposing in effect in the superintendent of insurance of that state powers over

fire insurance companies similar in respect of rate making, but not otherwise, to the powers exercised over public utilities by the public utilities commission of this state. The following is quoted from the opinion:

> "The basic contention is that the business of insurance is a natural right, receiving no privilege from the state, is voluntarily entered into, cannot be compelled, nor can any of its exercises be compelled; that it concerns personal contracts of indemnity against certain contingencies merely. Whether such contracts shall be made at all, it is contended, is a matter of private negotiation and agreement, and necessarily there must be freedom in fixing their terms. And 'where the right to demand and receive service does not exist in the public, the correlative right of regulation as to rates and charges does not exist.' Many elements, it is urged, determine the extending or rejection of insurance the hazards are relative and depend upon many circumstances upon which there may be different judgments, and there are personal considerations as well—'moral hazards,' as they are called.
>
> "* * * We may put aside, * * * all merely adventitious considerations and come to the bare and essential one, whether a contract of fire insurance is private, and as such has constitutional immunity from regulation. Or, to state it differently and to express an antithetical proposition, is the business of insurance so far affected with a public interest as to justify legislative regulation of its rates? And we mean a broad and definite public interest. In some degree the public interest is concerned in every transaction constituting the activities of life. But there is something more special than this, something of more definite consequence, which makes the public interest that justifies regulatory legislation. We can best explain by examples. The transportation of property—business of common carriers—is obviously of public concern, and its regulation is an accepted governmental power. The transmission of intelligence is of cognate character. There are other utilities which are denominated public, such as the furnishing of water and light, including in the latter gas and electricity. We do not hesitate at their regulation nor at the fixing of the prices which may be charged for their service. The basis of the ready concession of the power of regulation is the public interest. This is not denied, but its application to insurance is so far denied as not to extend to the fixing of rates. It is said, the state has no power to fix the rates charged to the public by either corporations or individuals engaged in a private business, and the 'test of whether the use is public or not is whether a public trust is imposed upon the property, and whether the public has a legal right to the use which cannot be denied;' or, as we have said, quoting counsel, 'Where the right to demand and receive service does not exist in the public, the correlative right of regulation as to rates and charges does not exist. Cases are cited which, it must be admitted, support the contention. The distinction is artificial. It is, indeed, but the assertion that the cited examples embrace all cases of public interest. The complainant explicitly so contends urging that the test it applies excludes the idea that there can be a public interest which gives the power of regulation as distinct from a public use, which, necessarily, it is contended, can only apply to property, not to personal contracts. The distinction, we think, has no basis in principle. (Noble State Bank v. Haskell, 219 U. S. 104, 55 L. ed. 112, 32 L. R. A. (N. S.) 1062; 31 Sup. Ct. Rep. 182, Ann. Cas. 1912A, 487), nor has the other contention that the service which cannot be demanded cannot be regulated."

Coming now to *Munn v. Illinois*, Mr. Justice McKenna explains, and, it must be admitted, extends the doctrine of that case, speaking of it in part as follows

"That the case had broader application than the use of property is manifest from the grounds expressed in the dissenting opinion. The basis of the opinion was that the business regulated was private and had 'no special privilege connected with it, nor did the law ever extend to it any greater protection than it extended to all other private business.' The argument encountered opposing examples, among others, the regulation of the rate of interest on money. The regulation was accounted for on the ground that the act of parliament permitting the charging of some interest was a relaxation of a prohibition of the common law against charging any interest; but this explanation overlooked the fact that both the common law and the act of parliament were exercises of government regulation of a strictly private business in the interest of public policy, a policy which still endures and still dictates regulating laws. *Against that conservation of the mind which puts to question every new act of regulating legislation, and regards the legislation invalid or dangerous until it has become familiar, government—state and national—has pressed on in the general welfare; and our reports are full of cases where in instance after instance the exercise of regulation was resisted and yet sustained against attacks asserted to be justified by the constitution of the United States. The dread of the moment having passed, no one is now heard to say that rights were restricted or their constitutional guaranties impaired.*"

Naturally enough, *Budd v. New York* and *Brass v. North Dakota* were next considered. Omitting the discussion of them as found in Mr. Justice McKenna's opinion, the following conclusions respecting the trend of the prior decisions of the court were expressed by Mr. Justice McKenna:

"The cases need no explanatory or fortifying comment. They demonstrate that a business, by circumstances and its nature, may rise from private to be of public concern, and be subject, in consequence, to governmental regulation. And they demonstrate, to apply the language of Judge Andrews in *People v. Budd* (117 N Y. 27, 5 L. R. A. 559, 15 Am. St. Rep. 460, 22 N. E. 670), that the attempts made to place the right of public regulation in the cases in which it has been exerted, and of which we have given examples, upon the ground of special privilege conferred by the public on those affected cannot be supported 'The underlying principle is that business of certain kinds hold such a peculiar relation to the public interests that there is superinduced upon it the right of public regulation.' Is the business of insurance within the principle? *It would be a bold thing to say that the principle is fixed. ine astic, in the precedents of the past, and cannot be applied though modern economic conditions may make necessary or beneficial its application.* In other words, to say, that government possessed at one time a greater power to recognize the public interest in a business and its regulation to promote the general welfare than government possesses today.

"We proceed, then, to consider whether the business of insurance is within the principle."

Thereupon, Mr. Justice McKenna traces the history of such legislation in the regulation of fire insurance business or fire insurance companies as had grown up in the several states and had been accepted as of unquestioned constitutionality or, where questioned, had been sustained; such as the requirement of a reserve fund, the prescribing of standard form of contracts (as to which, it will be observed, every possible

item of the contract is not merely regulated but absolutely fixed by law, excepting the one matter of consideration), making the business a franchise and limiting it to corporations, prescribing investments, and concluding with the statement that

> "In other words, the state has stepped in and imposed conditions upon the companies, restraining the absolute liberty which businesses strictly private are permitted to exercise."
>
> "Those regulations exhibit it to be the conception of the lawmaking bodies of the country without exception that the business of insurance so far affects the public welfare as to invoke and require governmental regulation. A conception so general cannot be without cause."

Mr. Justice McKenna then went on to demonstrate that insurance is merely a device by which losses are spread over a large territory. In other words, that it is a social institution rather than an individual one. He concludes as follows:

> "We can see, therefore, how it has come to be considered a matter of public concern to regulate it, and, governmental insurance has its advocates and even examples. Contracts of insurance, therefore, have greater public consequence than contracts between individuals to do or not to do a particular thing whose effect stops with the individuals. We may say in passing that when the effect goes beyond that, there are many examples of regulation. Holden v. Hardy, 169 U. S. 366, (42 L. ed. 780, 18 Sup. Ct. Rep. 383); Griffith v. connecticut, 218 U. S. 563, (54 L ed. 1151, 31 Sup. Ct. Rep. 132;) Muller v. Oregon, 208 U. S. 412, (52 L. ed. 551, 28 Sup. Ct. Rep. 324, 13 Ann. Cas. 957); Mutual Loan Co. v. Martell, 222 U. S. 225) (56 L. ed. 175, 32 Sup. Ct. Rep. 74, Ann. Cas. 1913B, 529); Schmidinger v. Chicago, 226 U. S. 578, (57 L. ed. 364, 33 Sup. Ct. Rep. 182); Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 55 L. ed. 328, 31 Sup. Ct. Rep. 259; Noble State Bank v. Haskell, 219 U. S. 104, 55 L. ed. 112, 32 L. R. A. (N. S.) 1062, 31 Sup. Ct. Rep. 182, Ann. Cas. 1912A, 487.
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> "Complainant feels the necessity of accounting for the regulatory state legislation and refers it to the exertion of the police power; but, while expressing the power in the broad language of the cases, seeks to restrict its application. Counsel states that this power may be exerted to 'pass laws whose purpose is the health, safety, morals, and the general welfare of the people.' This admission is very comprehensive. * * *
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> "But it is said that the reasoning if the opinion has the broad reach of subjecting to regulation every act of human endeavor and the price of every article of human use. We might, without much concern, leave our discussion to take care of itself against such misunderstanding or deductions. The principle we apply is definite and old, and has, as we have pointed out, illustrating examples. And both by the expression of the principle and the citation of the examples we have tried to confine our decision to the regulation of the business of insurance, it having become 'clothed with a public interest,' and therefore subject 'to be controlled by the public for the common good.'
>
> "If there may be controversy as to the business having such character, there can be no controversy as to what follows from such character if it be established. *It is idle therefore, to debate whether the liberty of contract guaranteed by the constitution of the United States is more intimately involved in price regulation than in the other forms of regulation as to the validity of which there is no dispute.* The order of their enactment certainly cannot be considered

an element in their legality. It would be very rudimentary to say that measures of government are determined by circumstances, by the presence or imminence of conditions, and of the legislative judgment of the means or the policy of removing or preventing them. The power to regulate interstate commerce existed for a century before the Interstate Commerce Act was passed, and the commission constituted by it was not given authority to fix rates until some years afterwards. Of the agencies which those measures were enacted to regulate at the time of the creation of the power, there was no prophecy or conception. Nor was the regulation immedate upon their existence. It was exerted only when the size, number and influence of those agencies had so increased and developed as to seem to make it imperative. Other illustrations readily occur which repel the intimation that the inactivity of a power, however prolonged, militates against its legality when it is exercised. United States v. Delaware & Hudson Co., 213 U. S. 366. It is oftener the existence of necessity rather than the prescience of it which dictates legislation. And so with the regulations of the business of insurance. They have proceeded step by step, differing in different jurisdictions. If we are brought to a comparison of them in relation to the power of government, how can it be said that fixing the price of insurance is beyond that power and the other instances of regulation are not? How can it be said that the right to engage in the business is a natural one when it can be denied to individuals and permitted to corporations? How can it be said to have the privilege of a private business when its dividends are restricted, its investments controlled, the form and extent of its contracts prescribed, discriminations in its rates denied, and a limitation on its risks imposed? Are not such regulations restraints upon the exercise of the personal right—asserted to be fundimental—of dealing with property freely, or engaging in what contracts one may choose, and with whom and upon what terms one may choose?

"We may venture to observe that the price of insurance is not fixed over the counters of the companies by what Adam Smith calls the higgling of the market, but formed in the councils of the underwriters, promulgated in schedules of practically controlling constancy which the applicant for insurance is powerless to oppose, and which, therefore, has led to the assertion that the business of insurance is of monopolistic character and that 'it is illusory to speak of a liberty of contract.' It is in the alternative presented of accepting the rates of the companies or refraining from insurance, business necessity impelling if not compelling it, that we may discover the inducement of the Kansas statute; and the problem presented is whether the legislature could regard it of as much moment to the public that they who seek insurance should no more be constrained by arbitrary terms than they who seek transportation by railroads, steam, or street, or by coaches whose itinerary may be only a few city blocks, or who seek the use of grain elevators, or be secured in a night's accommodation at a wayside inn, or in the weight of a five cent loaf of bread. We do not say this to belittle such rights or to exaggerate the effect of insurance, but to exhibit the principle which exists in all and brings all under the same governmental power."

Mr. Justice Lamar, with whom concurred the Chief Justice and Mr. Justice Van Devanter dissented. This dissent shows the full length to which the majority opinion really goes. It draws the line just where the commentators had assumed that it would be drawn, viz: between the regulation of other items of a contract or attributes of a business and the regulation of price. The temptation is to quote this

dissenting opinion, but it is sufficient to observe that it sticks to the theretofore generally (though, as we have shown, by no means universally) accepted (and as we have shown, rather assumed than established) doctrine that is expressed in the following two statements:

(1) That there is an essential difference between fixing price and regulating other elements of a contract.

(2) That the public right to fix prices is limited to the public callings, i. e., property or businesses devoted to a public use.

It will be observed that the foregoing statement of the clash between the majority and the minority of the supreme court in this case is as to the definition of the phrase "charged with a public interest," the majority holding that such phrase was not limited in import to the public callings and the minority contending that it is.

Upon principle, however, I am impressed with the thought that the real decision in the case is better understood if we discard entirely as misleading the qualification expressed in the phrase "charged with a public interest." For if we come to define what that phrase as interpreted by the majority of the court means we must inevitably come to the conclusion that it signifies and extends to any "business," as such, the sociological aspects of which at any given time may take on a preponderant public interest in the eyes of the lawmaking power—not in the first instance at least, of the courts. That is to say, a business is charged with a public interest in the sense that its charges or prices may be regulated whenever a strong and preponderant public sentiment, expressing itself in legislation, finds that the public interest, i e., the public necessity, requires that it shall be so regulated. And the fact of public interest so defined can not be, as Mr. Justice McKenna well says, determined on purely historical grounds nor can the power of the legislature respecting a given business be denied merely because in the remote past such business was not deemed to be, or in point of fact was not, so "charged with a public interest." In short, there is no such thing as a catalogue of businesses which in this sense are "charged with a public interest," whatever may be the case with respect to those which are "public callings." The result of all this is, it is felt, better expressed when we say the test of the power to regulate prices of a given commodity or the charges of a given business is merely the same test that must be applied to the exercise of the police power in any given instance. The question is: Is the public necessity such as reasonably to justify the legislature in assuming the power to regulate the price of a given commodity? If it is, then the police power extends that far and the property or business affected is, for the purpose of the rule, "charged with a public interest." How much simpler it would be merely to leave out this last qualification and to admit, as the minority opinions in the Kansas and North Dakota cases insist is the result of the majority opinions in those cases that the phrase 'charged with a public interest" really has no legal significance other than as a general term descriptive of that justification for the exercise of the police power which may occasion the regulation of prices without regard to any hard and fast classification of occupation or property.

The cases and the other authorities quoted, classified on the basis suggested by the phrase which has been discussed, really present two extreme views,

First, The public has an interest only in the prices or charges of such businesses as constitute public callings, and

Second. That the public has an interest in this sense in price in the abstract, at least in the prices of all commodities and services greatly necessary to the public.

It is believed that the truth lies between these two extremes and can be discovered

best by ignoring entirely the phrase which has been the subject of so much debate. I feel that it is true that almost any business and almost any attribute of any business or any term of any contract relating to any business may, under sufficient facts, invoke the regulatory or police power of the state, and that it is misleadng to try to classify either businesses or terms of contracts with respect to the application of the police power to them.

The so called "police power" may be likened to the individual right of self defense. It is the correlative right which society possesses and may exercise through governmental rules. The individual right of self defense is limited by the rule of necessity. In like manner, in theory at least, the social right of self defense against the aggressions of individuals through so called "police regulation" is limited by the same rule of necessity.

It would seem to be conceivable, therefore, that the power to regulate the price of a commodity is not absolutely limited by any rule which would classify the commodities subject to regulation; but that in the abstract, the power may be said to extend to the regulation of the price of any given commodity when the circumstances —the sociological facts of the moment—give rise to a real public necessity for such regulation. The notion that a power may exist, but may always be conditioned upon the rise of circumstances invoking its exercise, was clearly expressed by the Supreme Court of the United States in the Kansas case and in *Wilson v. New* (the Adamson law case), 243 U. S. 332, wherein Chief Justice White used the following language:

> "It is * * * true that as the right to fix by agreement between the carrier and its employes a standard of wages to control their relations is primarily private, the establishment and giving effect to such agreed on standard is not subject to be controlled or prevented by public authority (at least under the right to "regulate commerce.") But taking all these propositions as undoubted, if the situation which we have described and with which the acts of congress dealt be taken into view, that is, the dispute between the employers and the employes as to a standard of wages, their failure to agree, the resulting absence of such standard, the entire interpretation of interstate commerce which threatened, and the infinite injury to the public interest which was imminent, it would seem inevitably to result that the power to regulate necessarily obtained and was subject to be applied to the extent necessary to provide a remedy for the situation. * * * This must be unless it can be said that the right to so regulate as to save and protect the public interest did not apply to a case where the destruction of the public right was imminent as the result of a dispute between the parties and their consequent failure to establish by private agreement the standard of wages which was essential; in other words, that the existence of the public right and the public power to preserve it was wholly under the control of the private right to establish a standard by agreement. Nor is it an answer to this view to suggest that the situation was one of emergency, and that emergency can not be made the source of power. * * * The proposition begs the question, *since although an emergency may not call into life a power which has never lived, nevertheless emergency may afford a reason for the exertion of a living power already enjoyed.* * * *"

The notion here expressed is not that congress has the power at any time to regulate the wages paid to employes of interstate commerce railroads, but that such power is reserved in congress at all times to be exercised only when the circumstances justify it.

This decision is of tremendous significance. It will be observed that the Chief Justice freely acknowledges that, as an abstract principle, congress has no power to

regulate the wages of employes of interstate commerce carriers; but when such a regulation of wages is necessary in order to keep that commerce going congress is not to be held impotent to meet the situation

Both the Kansas insurance case and the Adamson law case throw a flood of light upon the problem which is under investigation. The cases show there is no such thing as a catalogue of subject-matters with respect to whether or not a given governmental power extends to them. Thus, it will not do to say that the power to regulate commerce possessed by congress stops short of any particular thing which may at a given time in a state of emergency affect that commerce; neither will it do to say that any particular business or any particular attribute of such business is beyond the reach of the police power of the state in any way in which that power may be exercised, subject to the limitations hereinafter to be referred to. In short, the subjects to which any given legislative power may extend are not, as it were, set off from each other by water-tight compartments and it will not do to say that a given power reaches to such and such a compartment but is stopped by a bulk-head from extending to any other compartment.

Therefore, with respect to the matter of price it is simply not true that it is in any peculiar sense withdrawn from that attribute of legislative power which is dignified by the term "police power." It is true, as expressed in one of the articles quoted, that to regulate price is a "stronger" exercise of the police power than to regulate certain other attributes of a business or features of a contract. But the police power does not stop short of price, and there is no barrier, visible or invisible, express or implied, between the police power and the subject-matter of price. The test "charged with a public interest" under the Kansas case shades off into the general test of necessity, and this is the test which applies to the police power generally, whether it be in the regulation of prices or whatnot.

German Alliance Insurance Co. v. Lewis will lack, it is thought, its proper setting unless quotation is made from some of the great cases cited by Mr. Justice McKenna in his opinion. They were all mentioned as illustrative of what amounts to that "public consequence" or "public interest" or "public necessity" which justifies the exertion of the police power in any given case.

The first of them is *Holden v. Hardy*, 169 U. S. 366. In this case the supreme court of the United States, two justices only dissenting, sustained the constitutionality of an act of the legislature of Utah regulating the power of employment in certain mining operations. It was an affirmance of the supreme court of Utah in the case of *Holden v. State*, 14 Utah 71, to which reference will hereafter be made. In the opinion, per Mr. Justice Brown, the following language is found:

> "This right of contract * * * is itself subject to certain limitations which the state may lawfully impose in the exercise of its police powers. While this power is inherent in all governments, it has doubtless been greatly expanded in its application during the past century, owing to an enormous increase in the number of occupations which are dangerous, or so far detrimental to the health of employes as to demand special precautions for their well-being and protection, or the safety of adjacent property. * * *
>
> "The extent and limitations upon this power are admirably stated by Chief Justice Shaw in the following extract from his opinion in *Commonwealth v. Alger*, 7 Cush. 84:
>
> " 'We think it a settled principle, growing out of the nature of well-ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. * * * Rights of property, like all

other social and conventional rights, are subject to such reasonable limitations in their enjoyment as will prevent them from being injurious, and to such reasonable restraints and regulations established by law, as the legislature, under the governing and controlling power vested in them by the constitution, may think necessary and expedient.'

"While this power is necessarily inherent in every form of government, it was, prior to the adoption of the constitution, but sparingly used in this country. As we were then almost purely an agricultural people, the occasion for any special protection of a particular class did not exist. * * *

"While the business of mining coal and manufacturing iron began in Pennsylvania as early as 1716, * * * both mining and manufacturing were carried on in such a limited way and by such primitive methods that no special laws were considered necessary, prior to the adoption of the constitution, for the protection of the operatives, but, in the vast proportions which these industries have since assumed, it has been found that they can no longer be carried on with due regard to the safety and health of those engaged in them, without special protection * * *. (Thereupon are mentioned numerous instances of safety and health legislation culled from the statutes of the several states and decisions thereon.)"

In *Muller v. Oregon*, 208 U. S. 412, the Oregon law limiting the hours of labor of women in certain employments was sustained. The importance of this decision lies in the fact that the court therein, for what is perhaps the first time, laid down a new principle of judicial action applicable to the consideration of questions arising under the police power. This significant principle is stated in the short sentence quoted from the opinion:

"We take judicial cognizance of all matters of general knowledge."

As a matter of fact, the "general knowledge" which the court assumed to have was given to it by a great mass of sociological facts and facts bearing upon the history of the legislation complied for the use of the court by Mr. Louis D. Brandeis, now one of the justices of that court, who acted in that case as *amious curiae* and more particularly as representative of the national consumers league, in which capacity he has quite frequently appeared before the court in defense of legislation like that then involved.

In this same connection the court, per Mr. Justice Brewer, speaks as follows:

"The legislation and opinions referred to in the margin (and furnished by Mr. Brandeis) may not be, technically speaking, authorities, and in them is little or no discussion of the constitutional question presented to us for determination, yet they are significant of a widespread belief that woman's physicial structure, and the functions she performs in consequence thereof, justify special legislation restricting or qualifying the conditions under which she should be permitted to toil. Constitutional questions, it is true, are not settled by even a consensus of present public opinion * * *. At the same time, when a question of fact is debated and debatable, and the extent to which a special constitutional limitation goes is affected by the truth in respect to that fact, a widespread and long continued belief concerning it is worthy of consideration."

Again in the opinion is found the following:

"It is undoubtedly true, as more than once declared by this court, that

the general right to contract in relation to one's business is part of the liberty of the individual, protected by the fourteenth amendment to the federal constitution; yet it is equally well settled that this liberty is not absolute and extending to all contracts, and that a state may, without conflicting with the provisions of the fourteenth amendment, restrict in many respects the individual's power of contract."

Griffith v. Connecticut, 218 U. S., 563, is not of great importance, but the actual decision therein is interesting inasmuch as it sustains the constitutionality of a "loan shark" law somewhat like the one in Ohio. This, of course, embodied a regulation of charges.

In *C. B. & Q. Railroad Co. v. McGuire*, 219 U. S. 549, the supreme court of the United States sustained a statute of Iowa prohibiting railroad companies and their employes from entering into contracts limiting liability for injuries made in advance of the injury received, and providing that the subsequent acceptance of relief association benefits should not constitute satisfaction of the claim for injuries received after the contract. In the opinion of Mr. Justice Hughes the following significant statements appear:

"The legislature, provided it acts within its constitutional authority, is the arbiter of the public policy of the state * * *.

"Freedom of contract is a qualified—and not an absolute—right. There is no absolute freedom to do as one wills or to contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards. *Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community.*"

Quoting from Frisbie v. United States, 157 U. S., at 165, 166, Mr. Justice Hughes lends his approval to the following language:

"It is within the undoubted power of government to restrain some individuals from some contracts. It may deny to all the right to contract for the purchase or sale of lottery tickets; to the minor the right to assume any obligations, except for the necessaries of existence; to the common carrier the power to make any contract releasing himself from negligence; and, indeed, may restrain all engaged in any employment from any contract in the course of that employment which is against public policy. The possession of this power by government in no manner conflicts with the proposition that, generally speaking, every citizen has a right freely to contract for the price of his labor, services, or property."

Then in a rapid summary of decisions under the commerce clause and relating to the police power of the state, Mr. Justice Hughes shows how far the adjudicated cases had gone in sustaining legislative limitations upon the right to contract. Among others he mentioned

"requiring the redemption in cash of store orders or other evidence of indebtedness issued in payment of wages (Knoxville Iron Co. v. Harbison, 183 U. S. 13); prohibiting contracts for options to sell or buy grain or other commodity at a future time (Booth v. Illinois, 184 U. S. 425); * * * making it unlawful to contract to pay minors employed at quantity rates upon the

basis of screened coal, instead of the weight of the coal as originally produced in the mine. (McLean v. Arkansas, 211 U. S. 539)."

Speaking generally of these cases, Mr. Justice Hughes says:

"The principle involved in these decisions is that where the legislative action is arbitrary and has no reasonable relation to a purpose which it is competent for government to effect, the legislature transcends the limits of its power in interfering with liberty of contract; but where there is reasonable relation to an object within the governmental authority, the exercise of the legislative discretion is not subject to judicial review. * * * Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether, in short, the legislative discretion with its prescribed limits should be exercised in a particular manner, are matters for the judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance."

Of course, the supreme court did not have before it a price regulation statute when Mr. Justice Hughes was laying down the foregoing broad principles; but unless there is something peculiarly sacred in the mere subject of price, which seems to be denied in German Alliance Insurance Co. v. Lewis, these principles would apply to such a regulation as well as to any other regulation of contracts which might be made by the legislature under what is vaguely termed the "police power."

It is submitted that Mr. Justice Hughes' language is merely another way of stating the rule of necessity contended for in this memorandum.

The next case in point of time cited by Mr. Justice McKenna in the insurance case is one which has been most frequently cited as stating the modern conception of the police power in general. The reference is to *Noble State Bank v. Haskell*, 219 U. S. 104, and its companion cases collectively known as the "Bank Guaranty Cases." Mr. Justice Holmes' striking phraseology in these cases stands as a landmark in the history of the development of this subject.

The law sustained in this group of decisions subjected all state banks to an assessment for a depositors' guaranty fund. The assessment was compulsory in the sense that it was made a condition of the continuance of the business of banking. The opinion in the first case contains the following succinct language:

"Does the statute deprive the plaintiff of liberty or property without due process of law?"

"In answering that question we must be cautious about pressing the broad words of the fourteenth amendment to a drily logical extreme. Many laws which it would be vain to ask the court to overthrow could be shown, easily enough, to transgress a scholastic interpretation of one or another of the great guaranties in the bill of rights. They more or less limit the liberty of the individual or they diminish property to a certain extent. We have few scientifically certain criteria of legislation, and as it often is difficult to mark the line where what is called the police power of the states is limited by the constitution of the United States, judges should be slow to read into the latter a *nolumus mutare* as against the lawmaking power.

"* * * There is no denying that by this law a portion of its (the plaintiff's) property might be taken without return to pay debts of a failing rival in business. Nevertheless, notwithstanding the logical form of the objection, there are more powerful considerations on the other side. In the

first place, it is established by a series of cases that an ulterior public advantage may justify a comparatively insignificant taking of private property for what, in its immediate purpose, is a private use. * * *

*"It may be said in a general way that the police power extends to all the great public needs. * * * It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare.* * * *

"It is asked whether the state could require all corporations or all grocers to help to guarantee each other's solvency, and where we are going to draw the line. But the last is a futile question, and we will answer the others when they arise. With regard to the police power, as elsewhere in the law, lines are pricked out by the gradual approach and contact of decisions on the opposing sides. * * *

"There are many things that a man might do at common law that the states may forbid. He might embezzle until a statute cut down his liberty. We cannot say that the public interests to which we have adverted, and others, are not sufficient to warrant the state in taking the whole business of banking under its control."

In *Mutual Loan Co. . Martell*, 222 U. S. 225, the validity of a regulation of the assignments of wages was sustained. The following appears in the unanimous judgment and opinion of the court delivered by Mr. Justice McKenna:

"This court has had many occasions to define, in general terms, the police power and to give applications. In *Chicago, B & Q. R. Co. v. Illinois*, 200 U. S. 561, 592, it was said that 'the police power of a state embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals or the public safety;' and that the validity of a police regulation 'must depend upon the circumstances of each case and the character of the regulation, whether arbitrary or reasonable, and whether really designed to accomplish a legitimate purpose.'

"In Bacon v. Walker, 204 U. S. 311, 318, it was decided that the police power is not confined 'to the suppression of what is offensive, disorderly, or unsanitary,' but 'extends to so dealing with the conditions which exist in the state as to bring out of them the greatest welfare of its people.'

"In a sense, the police power is but another name for the power of government, and a contention that a particular exercise of it offends the due process clause of the constitution is apt to be very intangible to a precise consideration and answer. * * * Legislation cannot be judged by theoretical standards. It must be tested by the concrete conditions which induced it, and this test was applied by the supreme judicial court of Massachusetts in passing on the validity of the statute under review. * * *

"We cannot say, * * * that the statute as a police regulation is arbitrary and unreasonable and not designed to accomplish a legitimate public purpose. We certainly cannot oppose to the legislation our notions of its necessity, * * *."

Schmidinger v. Chicago, 226 U. S. 578, is a case which comes close to the exact problem now under consideration. It sustained an ordinance of the city of Chicago enacted under legislative authority fixing standard sizes for loaves of bread and prohibiting the sale of other sizes. As has been seen, unless there is some kind of a line between such a regulation and the fixing of the price of the loaf which stands as a hard and fast barrier to the further extension of the police power, what was said in this case ought to be apt in connection with the present problem.

Mr. Justice Day used the following language:

> "The making and selling of bread, particularly in a large city, where thousands of people depend upon their supply of this necessary of life by purchase from bakers, is obviously one of the trades and callings which may be the subject of police regulation. This general proposition is conceded by counsel for plaintiff in error, but it is contended that the limitation * * * is such an unreasonable and arbitrary exercise of legislative power as to render it unconstitutional and void. This court has frequently affirmed that the local authorities entrusted with the regulation of such matters—and not the courts—are primarily the judges of the necessities of local situations calling for such legislation * * *.
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> "It is further urged that this ordinance interferes with the freedom of contract * * *. This court has had frequent occasion to declare that there is no absolute freedom of contract. The exercise of the police power fixing weights and measures and standard sizes must necessarily limit the freedom of contract which would otherwise exist. Such limitations are constantly imposed upon the right to contract freely, because of restrictions upon that right deemed necessary in the interest of the general welfare. * * *."

There are limitations on the exercise of this power, as has been intimated, but before passing to them it is only fair to note the existence of somewhat numerous state decisions, which cannot be perfectly harmonized with the Lewis case.

In the first place, there are certain cases expressly holding that the business of mining and marketing coal is not one "charged with a public interest." A careful examination of these cases in this connection is thought to be pertinent.

Curiously enough, the first of them is the state court decision in *Holden v. Hardy*, supra. In sustaining the law regulating the hours of labor in certain mines the Supreme Court of Utah expressly disclaimed placing its decision upon the ground under consideration, using the following language:

> "We do not agree with the defendant's counsel that the business of mining is affected with a public interest, and the legislature had the power to pass the law for that reason. Mines are used by private persons or corporations, who have the exclusive use and control of them, as a farmer may own his farm, and have the exclusive use and control of it. The fact that the business may benefit the public does not give the public any interest in the mine or its business, or affect it with a public interest. It is not like the railroad business. Such property and business are owned by a private corporation, but the use of the road is in the public. * * * The same may be said of similar other classes of business affected with a public *use and* interest.
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> "On this point the court said in the last cited case: In re Jacobs (98 N. Y. 98), 'Although the legislature may declare it to be public, that does not necessarily determine its character * * *.'"

The next one of them is *Millet v. People*, 117 Ill. 294. This was a case just like *In re Preston*, 63 O. S. 428, in which an anti-screen law was held unconstitutional. The decision in the case is, of course, greatly discredited by such authorative decisions as *McLean v. Arkansas*, cited in some of the above quotations, and *Rail and River Coal Co. v. Yaple*, 236 U. S. 338. In other words, these decisions are merely not good law, and the supreme court of the United States has held that they are not good law. For example, the Millett case held that the police power was not competent to deal with the relation of employer and employe in the mining business because such a

regulation does not "have reference to the comfort, safety and welfare of society," in which respect the decision is clearly erroneous. But in the opinion in the Millet case the following language is used:

> "The main reliance of the counsel representing the state, to sustain the ruling below, seems, however, to be on the ground that mining for coal is affected with a public use, so that it may be regulated by law, like public warehouses, * * *. It cannot be claimed that mining for coal was, by the common law, affected with a public use, and therefore specially regulated by law, like the business of inn-keepers, common carriers, millers, etc.; and, in our opinion, it is not, like the business of public warehousing, within the principle controlling such classes of business. The public are not compelled to resort to mine owners any more than they are compelled to resort to the owners of wood, or turf, or even to the owners of grain, domestic animals, or to those owning any of the other ordinary necessaries or conveniences of life which form a part of the commerce of the country. The owner of a coal mine is under no obligation to obtain a license from any public authority, and therefore when he chooses to mine his coal he exercises no franchise. We are aware of no case wherein it has been held that the owner or operator of a coal mine stands on a different footing, as respects the control and sale of his property, than the owner or operator of any other kind of property in general demand by the public."

The next case is also an Illinois case. It is that of People v. Steele, 231 Ill. 341; 14 L. R. A. 361. The Illinois supreme court in this case held unconstitutional a statute regulating the sale of theatre tickets by speculators. In this case the Millet case was referred to with approval. In speaking of the general question of what is "business affected by a public interest" the court uses the following language:

> "The fact that a license is required does not make the business a *public employment*. The cases where a business has been regarded as affected with a public interest have been cases where the person or corporation engaged in the business was acting under a franchise or cases affecting trade and commerce, where either there has been a virtual monopoly of means of transportation or methods of commerce * * *, or where from the nature of the business, in its regular course, the person carrying it on was necessarily entrusted with the property or money of his customers * * *, or where the business has been conducted in such a manner that the public and all persons dealing in the products concerned have adapted their business to the methods, so that such methods have become necessary to the safe and successful transaction of business."

These decisions are usually cited as authority for the proposition that the business of coal mining is not "affected with a public interest." (See Ruling Case Law under the heading "Constitutional Law").

As to the business of mining coal, Professor Wyman, in his excellent work on "Public Service Corporations," without citing any cases, says:

> "It would be going too far doubtless at the present time to claim that it is accepted law that natural limitation of a public necessity necessarily makes its general sale public employment. So long as those who have virtual monopoly of the antracite coal fields are left free to charge what prices they please, the principle is in abeyance. * * * But it may be that in the fullness of time these now all too powerful purveyors to public needs will be brought within this law and subjected to public regulation." (Sec. 91.)

In another part of his treatise he mentions coal yards as private enterprises, as distinguished from public callings, citing the opinions of justices, 182 Mass. 685, as a case in point. In that case it was held that a law conferring upon cities and towns authority to establish and maintain municipal fuel and coal yards, or to purchase coal and wood for the purpose of selling it to their inhabitants or others for fuel would be unconstitutional, although in case of a great scarcity of fuel, creating wide spread and general distress which could not be met by private enterprise and could be met by the interposing agency of government, such a measure as a temporary one for the period of the emergency might be sustained.

This case is interesting because in part it fits in with the remark of Chief Justice White in the Adamson law case, which was that what might not be justified under the rule of public necessity under one set of facts might be, at another time and under special circumstances like the conditions brought about by the war, held proper. It will be observed, however, that on the main point the question was not exactly whether a fuel yard was an enterprise affected with a public interest, but whether selling coal was a proper governmental activity.

In so far as Professor Wyman relies upon this case to establish the conclusion elsewhere expressed, that it is too early to say that the coal business is affected with a public interest in any sense, his conclusion is weakened by the fact stated by him in another section, that mining corporations have in some states been given the right of eminent domain. (See section 63, citing Tanner v. Treasury, etc. Co., 35 Colo. 593, 4 L. R. A. (N. S.) 106) Baillie v. Larson, 138 Fed. 177; DeCamp v. Hibernia R. R Co., 47 N. J. L. 43).

Professor Wyman's whole work and his other writings which have been referred to from time to time in this memorandum were written with a view to bringing out the essential truth that instead of the grant of the right of eminent domain or similar privileges being the foundation of a public interest in a business, the public interest was the foundation of the right of eminent domain. In other words, business does not become charged with a public interest by being granted the right of eminent domain, in its aid, but before the legislature can constitutionally grant this public right to a business it must be a public calling. The taking of private property under the power of eminent domain must be for a public use, and if coal mining is not a public use, then it is unconstitutional to grant the right to a mining company. It will not be necessary to develop this point as it has become familiar to the modern lawyer, though it was for a long time misunderstood. The point is nowhere better stated than in section 50 of Professor Wyman's work:

> "That legal privileges frequently accompany public employment is the first thing that has struck many observers as characteristic of the class. * * * Such legal monopoly has been said to carry with it the consequent obligation of public service. To aid in the construction of its work, it will frequently be found that eminent domain has been given to the public service companies conducting the business; and here again it is often said that the acceptance of such a special privilege creates obligation to serve the public. * * * It is, of course, true, that in the case of the most of the public services some one of these privileges will ordinarily be found in any particular case. * * * One insuperable difficulty with this common explanation * * * is that there are a considerable number of public employments always recognized as such, which have no such public privileges whatsoever. What is perhaps of even greater significance is that there are very many cases in which the grant of special rights, such as exclusive franchises, eminent domain * * * to a business concern of private character is held to be wholly void upon the ground that such special rights may only be given to such enterprises as are public in character. (Citing Brown v. Gerald,

100 Me. 351, 70 L. R. A. 472). It would seem, therefore, that the effect has sometimes been mistaken for cause here; that although many of these special privileges often accompany public employment, the truth is that these very privileges could not have been validly granted unless these businesses were public in character. It is submitted, therefore, without going into more detail about the matter, that under our constitutional system no special privileges can be granted except for a public purpose. Unless there is public interest apparent the grant is void. * *"

This reasoning of Professor Wyman is believed to be absolutely sound, even though it is not consistent with some rather generally held views. If it is sound, then it would follow that if the right of eminent domain can be constitutionally conferred upon a coal mining company, the business of that company is not only affected with a public interest but is also devoted to a public use; and inasmuch as that use and that interest must pre-exist the grant of the power of eminent domain, it is clear that they exist whether the power has been granted or not.

Therefore, on the authority of the decisions cited by Professor Wyman, coupled with his reasoning in paragraph 50, his later general statement that it can not be safely asserted that coal mining is a public calling is made out over-cautious at the least.

Professor Freund in his work on the police power does not mention the eminent domain cases, probably because all but one of them at any rate were decided since his book was published. He does note, however, under section 373 of his work that

"In Germany mining is also treated as a business affected with a public interest. * * * Land may be condemned in order to allow the opening of mines. * * * This privilege is also recognized in France. * * *."

It might be remarked that the mere fact that we are operating under a written constitution does not make the conditions justifying the extension of the power of eminent domain different in this country from what they would be, on grounds of policy at least, in Germany or France.

In view of all that has been said in this last connection and in view of the new or rather the clearer definition of "affected with a public interest" set forth in *German Alliance Insurance Co. v. Lewis*, the following propositions regarding those cases in which the courts have held that the coal business is not affected with a public interest are submitted:

(1) In the first place, the remark in the Utah decision is pure obiter. The statute was sustained on other grounds. Therefore, what was said was not necessary to the decision of the case. Moreover, it is a mere naked expression of opinion without reason or authority in support of it.

(2) The decision in the first Illinois case was itself erroneous as tested by the more recent decisions of the supreme court of the United States. This deprives anything that the court may have said in the course of the opinion of any weight whatsoever.

(3) Considered even as dicta the remarks of the Utah and Illinois courts are based upon the generally prevailing contemporaneous understanding of the rule in Munn v. Illinois, namely, that in order to be affected with a public interest a business must be a public calling or, put in another way, that before the state may regulate the price of a commodity the seller of the commodity must be under obligation to sell to all who may apply. But this notion, based as it was solely upon Munn v. Illinois, a decision of the supreme court of the United States, was finally and definitely

exploded in German Alliance Insurance Co. v. Lewis, wherein it was held that the right to regulate prices was not necessarily commensurate only with the right to exact a public fee.

(4) Even as dicta on the point of public callings, these decisions are erroneous if it is true, as it has been held, that the right of eminent domain may be granted to a coal mining company. For before such right can be granted to such company it must appear that the business of the company is quasi public in character and not "purely private."

On the test of a "public calling" see particularly the Pipe Line Cases, 234 U. S 548, in which it was held that congress in the regulation of interstate commerce could require the owner of an interstate pipe line to serve all who might apply at a rate to be regulated by the interstate commerce commission, even though he might have built his pipe line for the purpose of transporting his own property, if in connection with such business and as a necessary part of it he was engaged in purchasing rather than producing crude oil so that the oil actually passing through the pipe line was the product of various producers, though technically purchased by the proprietor of the line before transportation.

The decisions of the Ohio supreme court on the nature and extent of the police power teem with expressions quite consistent with the most advanced ground taken by the supreme court of the United States. That is to say, wherever the supreme court of Ohio has *sustained* the constitutionality of a law or an ordinance, it has done so on the ground established by the above decisions; that there is no absolute personal liberty and no absolute right of property in the sense that they can be successfully opposed to a purely prospective regulation under the police power. Some of the more recent cases along this line are *Bloomfield v. State*, 86 O. S. 253; *Mirick v. Gime*, 79 O. S. 174; *Sanning v. Cincinnati*, 81 O. S. 142; *State v. Gage*, 72 O. S. 210; *State ex rel. v Creamer*, 85 O. S. 349; *In re Hawley*, 12 N. P. n. s. 1, (affirmed by the supreme court without report); Phillips v. State, 77 O. S. 214.

On the other hand, there are some cases, most of them are early but some of them quite recent, in which the supreme court of Ohio has held unconstitutional attempted exercises of the police power, on the ground that they unnecessarily and arbitrarily interfered with purely private rights or that they violated the requirement that government is instituted for the equal protection and benefit of the people (Article 1, Section 1 of the Ohio Constutition), or denied the "equal protection of law" (14th Amendment to Federal Constitution). Among such are the following:

In *State v. Boone*, 84 O. S. 346; 85 O. S. 313, the requirement that physicians, for the purpose of vital statistics, conduct independent inquiries and ascertain and report facts which they would not ordinarily learn in the practice of their profession, all without compensation, held to be an unreasonable and arbitrary exercise of the police power.

Williams v. Preslo, 84 O. S. 328 (holding that an act making bulk sales from stocks of goods presumptively fraudulent was unconstitutional).

Cleveland v. Construction Co. 67 O. S. 197 (denying the power of the legislature to fix the number of hours that shall constitute a day's work on the public works).

In re Preston, 63 O. S. 428 (holding first Ohio antiscreen law unconstitutional).

Palmer & Crawford v. Tingle, 55 O. S. 423 (holding a law giving mechanics, subcontractors and material men a lien on the property of the owner unconstitutional).

In re Steube, 91 O. S. 135, (holding sales by weight law unconstitutional as an unreasonable and burdensome regulation).

The subsequent history of the subject matters involved in some of these cases in the supreme court of this state is very interesting. For example, Williams v. Preslo, supra, was virtually, though not expressly, over ruled in Steele, etc., Co. v. Miller, 92 O. S. 115. It is true that this decision refers to the intervening constitutional amendment of 1913 as special authority for the enactment of legislation of this kind

(bulk sales); nevertheless, it must be apparent even to the casual view that the question involved in such cases is really a federal question arising under the 14th amendment. The supreme court has come very close to acknowledging more than once that the guaranties of the Ohio bill of rights are substantially the same in effect as those of the 14th amendment (see State v. Ferris, 53 O. S. 314). Class legislation and so-called arbitrary and unreasonable exactions are just as much condemned by the federal constitution as they are by the state constitution. It would follow, therefore, that an amendment to the state constitution would not be enough to sustain legislation that had been condemned upon grounds common both to the federal and to the state constitutions. Indeed, in the Miller case in 92 O. S., Johnson, J., delivering the opinion of the court, acknowledges again that

> "The guaranties of sections 1, 2 and 19 of the bill of rights in the constitution of Ohio are similar to those contained in the amendment to the federal constitution referred to."

Therefore, it is submitted that the Miller case is virtually a reversal or overruling of the Preslo case, and indeed that the court regarded it as such is rather clear from a reading of the entire opinion.

In re Preston, supra, is a peculiar decision, in that a careful perusal of the opinion of Shauck, J., in the case fails to show affirmatively on what ground the anti-screen law was held to be unconstitutional. Assuming, however, that it was upon the ground that an anti-screen law is beyond the police power of the state, the decision is, of course, discredited by the subsequent decisions of the supreme court of the United States which have previously been referred to.

Palmer & Crawford v. Tingle, supra, was discredited almost before it had become familiar law. The supreme court of the United States, in the case of Great Southern Fire-proof Hotel Co. v. Jones, 193 U. S., 532—a case arising under the same statute but before the Palmer case had been decided (i. e., the case arose before the state decision was rendered, though the supreme court of the United States decided the case after that decision was rendered), held that in that particular case it was not bound by the state decision which had not been rendered when the case arose and proceeding to decide the case for itself, held that so far as federal questions were concerned the sub-contractors' lein statute was constitutional. Inasmuch as the federal questions and the state questions were substantially the same, it will be seen that the supreme court of the United States simply disagreed with the state court on the real merits of the case.

Of course, Palmer v. Tingle is further discredited by the fact that the amendments of 1913 to the Ohio constitution have made it possible, so far as the state constitution is concerned, to pass the kind of laws condemned in that decision. In this same connection see *Stange v. Cleveland*, 94 O. S. 377, which sustains substantially the same relation to *Cleveland v. Construction Co.* that the later bulk sales law case sustains to *Williams v. Preslo*.

It would seem that the *Steube* case in 91 O. S. is recent enough to remain unimpeached, and indeed it has not thus far been overruled in any way. However, see *Williams v. Sandles*, 93 O. S. 92, sustaining the constitutionality of a law authorizing the condemnation and confiscation of false measures.

In all these more recent cases the leading decisions of the supreme court of the United States above referred to are cited as authorities. It seems reasonably clear that the disposition of our supreme court is, and always has been, to follow the lead of the supreme court of the nation, and in view of repeated dicta respecting the similarity in effect of the 14th amendment, on the one hand, and certain guaranties of our own bill of rights, on the other hand, it would seem reasonable to suppose that there is no peculiar state constitutional restriction on the exercise of the police power.

In point of fact this must necessarily be true. The first section of our own bill of rights, which declares that government is instituted for the equal protection and benefit of the people, is the one which has been most frequently relied upon by our own supreme court in holding various police regulations unconstitutional. The reasoning is that if a law is for the benefit of a given class only, or if it has no reasonable apparent relation to the welfare of the public as a whole, it violates the implied restraint of this section of the bill of rights.

This is nothing more than another way again of stating the principle of necessity which is contended for in this opinion. The necessity which may properly invoke an exercise of the police power must, of course, be a public necessity. The necessities of a small class, if sharply set over against the necessities of the public at large, can not constitute the kind of necessity which may invoke the polic power.

None of these decisions, it will be observed, is directly in point. Those coming nearest to a price regulation were *In re Preston* and *Cleveland Construction Co. v. Cleveland.* The first of these was apparently held unconstitutional because the interest or necessity which the anti-screen law attempted to serve was that of a small class, namely, the miners and loaders of coal. The second was stricken down on somewhat similar grounds.

But no such argument could be employed to strike down a law regulating the price of coal. That would not be "class legislation." It is true that a particular class would be restrained by the law, but the interest to be served is clearly the interest of the public at large, for everybody is interested in the price of coal, just as everybody who engages in commercial transactions or owns property is interested in the rates of fire insurance, which were the subject of the decision in German Alliance Insurance Co. v. Lewis, supra.

In other words, it seems possible, even acknowledging the Preston case and the Cleveland case to be good law in Ohio today, to draw a distinction between wage regulation in a particular occupation or class of occupations, the public interest in which is comparatively remote, and the regulation of the price of a commodity of general—not to say universal—public consumption. It is very clear that a great many more people are interested in the price of coal, for example, than possibly can be interested in the wages paid on public works or in the method of compensating miners and loaders of coal. Academically this may not be true, but practically it is.

So it is that although we may not be ready to accept without reservation William Draper Lewis' broad assertion that price is always a matter of public interest, we can see clearly that the price of coal is at all times, and especially in war times, very much more a matter of public interest than the wages of laborers on public works or miners and loaders of coal.

There are some decisions in Ohio and in other states (with respect to which latter the length of this opinion precludes exhaustive citation) which embody the earlier, and perhaps justifiable, erroneous idea of what was decided in *Munn* v. *Illinois.* That is to say, there are intimations along the line to the effect that price regulation and certain other classes of police regulations of a "stronger" character are limited to the public callings. It is believed, however, that a careful examination of every case of this character decided between *Munn v. Illinois* and *German Alliance Insurance Co. v. Lewis* will show that the former case is the authority for the conclusion reached or the intimation suggested. It is believed that the Ohio supreme court would undoubtedly follow *German Alliance Insurance Co. v. Lewis.*

In this connection the case of State v. Howard (Neb. 1914), 147 N. W. 689, is very interesting. This case sustained the constitutionality of an act regulating insurance and in particular prescribing a standard form of policy. It seems that an earlier statute of the same type had been held unconstitutional by the circuit court.

of the United States (183 Fed. 636), but in the meantime the Lewis case had been decided.

Speaking of this case the Nebraska court says:

> "It is probably true that the dissenting opinion (hereinafter referred to) expresses views which have heretofore been generally held by most lawyers, and that strict adherence to the doctrine of most of the cases intervening between the Granger cases and Noble State Bank v. Haskell would have made the dissenting opinion, the opinion of the court; however, we are living in an era of advancing economic conditions, and one of the chief glories of the common law is and has been that it is not fixed and certain from generation to generation, but that it follows the trend of the times and meets cases as they arise."

As stated, there is every reason to suppose that the supreme court of Ohio would in like manner accept *German Alliance Insurance Co. v. Lewis* as the same kind of a landmark in the law as it was characterized to be by the Nebraska court.

There remains to be considered the effect of article II, section 36 of the constitution of Ohio, sometimes called the "conservation of natural resources provision." It is as follows:

> "Laws may be passed to encourage forestry, and to that end areas devoted exclusively to forestry may be exempted, in whole or in part, from taxation. Laws may also be passed to provide for converting into forest reserves such lands or parts of lands as have been or may be forfeited to the state, and to authorize the acquiring of other lands for that purpose; also, to provide for the conservation of the natural resources of the state, including streams, lakes, submerged and swamp lands and the development and regulation of water power and the formation of drainage and conservation districts; and to provide for the regulation of methods of mining, weighing, measuring and marketing coal, oil, gas and other minerals."

It will be observed that power is expressly delegated to the general assembly to regulate the method of mining, weighing and marketing coal. It might be argued, on the maxim that the expression of one thing is the exclusion of others, that the people by expressly conferring these powers respecting the coal business intended to withhold the power to regulate anything except methods, and therefore, to withhold the power to regulate prices. This, however, is not the case. In the first place, the maxim that the expression of one thing is the exclusion of others can not be applied to article II of the constitution, which starts with a delegation of all legislative power to the general assembly, coupled with the reservation of certain legislative powers to the people.

In this connection many authorities might be cited, but that would unnecessarily burden this opinion. It is enough to say that no purpose to limit or restrict powers of the legislature is discernible in the amendments of 1913. If what has been said thus far is correct, the legislature had the power—subject to the arising of the necessary economic or sociological facts—to do what is now questioned prior to the amendments of 1913. Unless, therefore, we give to these amendments the effect of diminishing the legislative power of the state, it would follow that they cannot be so interpreted as to deny the particular power under consideration.

On the whole, then, it does not appear that the supreme court of Ohio would feel itself bound to strike down a law regulating the price of coal passed in the light of war conditions, on the short ground that the power to pass such a law did not exist at all.

In conclusion on the general point we refer again to the old case of *Yuille v. Mobile*, 3 Ala., 137. This is a case on the question of "affecting a public interest," and it is remarkable because it was decided long before this phrase had been coined for general use in *Munn v. Illinois*. The question presented was as to the validity of an ordinance regulating the assize of bread. It had its particular origin in an arrest for violating the ordinance in respect of its requirement as to the weight of a loaf of bread—a case like *Schmidinger v. Chicago*, supra. However, the ordinance clearly had at least an indirect effect upon the price of bread, and it is very certain that the court had this point in mind in considering its validity. Moreover, the charter of the city expressly authorized the regulation of the price of bread.

Ormond, J., used the following language in the course of the opinion:

> "It is strenuously contended * * * that no such power exists, because * * * it would interfere with the right of the citizen to pursue his lawful trade or calling in the mode his judgment might dictate. Doubtless, under the form of government which exists in this and the other states of this union, the enjoyment of all the rights of property, and the utmost freedom of action which may consist with the public welfare, is guaranteed to every man, and no restraint can be lawfully imposed by the legislature in relation thereto, which the paramount claims of the community do not demand, or which does not operate alike on all. Free government does not imply unrestrained liberty on the part of the citizen, but the privilege of being governed by laws which operate alike on all. It is not therefore, to be supposed that in any country, however free, individual action cannot be restrained, or the mode, or manner of enjoying property, regulated.
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> "There is no motive, however, for this interference on the part of the legislature with the lawful actions of individuals or the mode in which private property shall be enjoyed, unless such calling affects the public interest, or private property is employed in a manner which directly affects the body of the people.
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> "Where a great number of persons are collected together in a town or city, a regular supply of wholesome bread is a matter of the utmost importance; and whatever doubts may have been thrown over the question by the theories of political economists, it would seem that experience has shown that this great end is better secured by licensing a sufficient number of bakers and by an assize of bread, than by leaving it to the voluntary acts of individuals. *By this means a constant supply is obtained without that fluctuation in quantity which would be the inevitable result of throwing the trade entirely open, and the consequent rise in price, when from accident or design a sufficient supply was not produced.* The interest of the city in always having an abundant supply will be a sufficient guaranty against any abuse of the right to regulate the weight, the consequence of which would be to drive the baker from the trade. * * *
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> "The legislature having full power to pass such laws as is deemed necessary for the public good, their acts cannot be impeached on the ground that they are unwise, or not in accordance with just and enlightened views of political economy, as understood at the present day. The laws against usury, and quarantine, and other sanatory regulations, are by many considered as most vexatious and improper restraints on trade and commerce, but so

long as they remain in force, must be enforced by courts of justice; arguments against their policy must be addressed to the legislative department of the government. * * *"

For a long time the disposition was to explain this case away and to insist that it did not decide that the price of bread might be regulated. Many of the articles and decisions referred to in this brief and occurring in point of time between the elevator case and the insurance case take this view. The reasoning of the court, however, is not susceptible to such a narrow interpretation, and it is put here to show the remarkably clear vision with which at the early date it was rendered (1841) the true rules which have since come to be established were grasped.

Taking the Yuille case and the insurance case together we have a rule that fits the question under consideration like a glove. Cannot all those things be said of the general public today that were said of the inhabitants of Mobile by the supreme court of Alabama in the Yuille case? Is it not true at this very moment that there is in the supply of coal "that fluctuation in quantity which would be the inevitable result of throwing the trade entirely open" and the "consequent rise in price when from accident or design a sufficient supply was not produced?" Is there not, therefore, the kind of a "public interest" in the price and supply of coal which in respect to the inhabitants of Mobile the supreme court of Alabama discerned regarding the price of bread in that city?

The Yuille case was cited with approval in the elevator case, as we have seen, and it is this passage in the opinion which justifies the interpretation of that decision, or perhaps the extension of it, that was ultimately arrived at in the Kansas case.

Returning now to Ohio, there is perhaps one respect in which the Ohio supreme court is not in accord with the supreme court of the United States, and for very proper reasons:

Without quoting any decisions it is sufficient to state that the state court has repeatedly asserted the judicial right to examine the question which we have designated as the question of necessity. The supreme court of the United States has taken the view that whether or not the sociological facts are such as to evoke particular police regulations is a matter about which the judgment of the state legislature is conclusive, or virtually so; yet that court has not always acted on this principle, as witness the bakeshop case, Lochner v. New York, 198 U. S., 45.

But while in this and other earlier cases the court has stricken down police regulations on the ground that there was no discerned relation between their provisions and the public welfare, yet in the later cases the statement has frequently been made that the judgment of the state legislature would not be inquired into or disputed by the court. Cases more recent than the Kansas case could be cited to this effect. Among them is the "Blue Sky Law" decision, coming up from Ohio. (Hall v. Geiger-Jones Co., 242 U. S., 539.)

One of the reasons for this attitude on the part of the supreme court of the United States is that it will not undertake to say, in opposition to the views of the state legislature, what the facts in a given state may be, as that is a matter of local, as distinguished from general, cognizance. This reason does not apply in its full force to the attitude of the supreme court of Ohio. Therefore, one can justify the repeated assertion by our own court, which is even carried into some of its more recent decisions, such as the Steube case, that it will not let the legislature be the final judge as to the matter of public necessity, or public welfare, or public benefit, or whatever one may term the requisite condition to the proper exercise of the police power. What has been said, therefore, about the probable attitude of the supreme court of Ohio toward a law that under consideration must be taken with this one qualification; yet it is believed that the facts respecting the coal industry are so plain, and the conclusion that a real public interest as distinguished from a mere class interest is in-

volved is so inevitable, that the supreme court of this state could not find itself able to say that such a law would be an unreasonable, unnecessary or arbitrary enactment.

All legislative power is subject to limitations. The police power, as has been stated, is subject to at least one peculiar limitation, viz.: the rule of necessity. Perhaps another way of stating the same thing—perhaps a distinct idea is expressed in the statement that the police power must not be unreasonably or arbitrarily exercised.

In reality, however, this is not an implied limitation but the result of express limitation, such as the following:

Article I, section 2 Constitution of Ohio:

> "All political power is inherent in the people. Government is instituted for their equal protection and benefit. * * *"

This provision is the one which is substantially the equivalent of that one of the 14th amendemnt to the federal constitution which prohibits the states from denying to persons within their respective jurisdiction the "equal protection of the law." As we have seen, there is no idea of class legislation which can be successfully asserted against the proposed law.

> "Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war, etc." (Article I, section 19, Constitution of Ohio.)

Of course, it has been held numerous times that this section does not limit a proper exercise of the police power. Nevertheless, as we shall see, it may come into play in case of an improper exercise of such power. In such cases it has the same kind of an operation as that other phrase of the 14th amendment which prohibits the state from depriving persons of liberty or property without due process of law

The idea involved is that if the police power is unreasonably or arbitrarily exercised, inasmuch as in its very nature it involves the taking of private property and the deprivation of personal liberty *pro tanto*, it violates these limitations. As suggested, this may be simply another way of stating the rule of necessity. As now to be discussed, however, it has another implication. We are speaking of the fixing of prices. The maxim now under consideration has been given familiar operation in the case of railroad rate regulations. Courts have uniformly held that the rates fixed must be reasonable and compensatory; as soon as they become confiscatory they constitute a taking of private property without due process of law, etc. Even as a war measure the general assembly of this state can not fix confiscatory prices and compel sales at such prices without affording compensation to the sellers.

But so long as the rates or prices fixed are reasonable and compensatory no such taking is involved as necessitates making compensation, and the police power, as stated, may deal with the situation.

There are numerous authorities to this general effect, as has been stated. The succinct language of Mr. Justice Holmes in the Kansas Bank Guaranty cases, which has been quoted, is an excellent expression of the rule.

In one view of the case it would seem that the idea of taking private property for public use is not present at all if there is no compulsion upon the rendition of services or sale of commodities, such as is exercised in the case of the public callings. A railroad company, for example, must serve all who apply upon equal terms, and if rates are fixed, then it must either go out of business entirely or make those rates applicable to all. In other words, there is more than one kind of compulsion in the case of the public callings: (1) The compulsion to render the service; and (2) The compulsion to adhere to the established rates.

But if coal mining be not a public calling, and if the proposed legislation does not compel the sale of coal at the prices fixed, but should leave the option to sell or not to sell in any particular case open to the choice of the owner or producer of the coal, it is easy to see how it might be argued that there would be no taking of the property in the mere fixing of prices. That is to say, the legislature fixes, or provides for fixing, the price, to be sure, but so long as it does not compel sales at the price as it compels the services of public utilities at the established rate, there is no taking of property.

It must be conceded that there is a difference in the degree to which property would be taken by an unreasonable price fixed by the legislature for the sale of coal and by an unreasonably low rate fixed by the legislature for the transportation of commodities of commerce, respectively. The distinction, however, is not so important as would at first blush. For after all, property in the hands of the owner and intended for sale is of value to him only in so far as he may deal with it by selling it. To prohibit the sale of such property except at a figure which will not compensate the owner for his outlay in its acquisition and give him a reasonable profit whereby he may sustain his own life, is in the ultimate analysis just as much a taking of that property as if a certain quantity of the thing itself were taken in the specie. It would be idle to argue that the option still remained with the owner of the coal to sell or not to sell as he might choose. The fixing of an unreasonably low price, by preventing him from using the coal for the only purpose for which he could use it to advantage, would force a loss upon him and thus take his property.

Therefore, it is believed that even though the coal business may not be a "public calling" nor treated as such in the legislation proposed, yet the power to fix prices in this manner is qualified or limited by the requirement that the prices so fixed must be reasonable.

The further development of this theme is not necessary as the criteria of reasonableness, as applied to rate making, have been worked out in some detail in the railroad rate cases. It is enough to state that these principles would apply to the regulation of the price of any commodity under the power now under discussion.

Of course, there are other limitations upon the exercise of this power. One of them arises from the fact that a regulation of price is a regulation of commerce. The state's power in this respect does not extend to the regulations of interstate commerce.

There are, of course, two fields of regulations respecting interstate commerce matters: One, which may be designated as the field of exclusive congressional jurisdiction, may not be entered by the states at all; the other, which may be referred to as that of concurrent legislative cognizance, is one which may be occupied by the states unless and until congress has occupied the field.

Of course, there is the third field of exclusive state cognizance, namely, the regulation of such commerce as is purely intra-state.

The test for determining whether or not a regulation of commerce which may conceivably be interstate is within the exclusive jurisdiction of congress or the concurrent jurisdiction of the states is furnished by the directness of the regulation. The question is: Does the proposed state law directly burden interstate commerce? If it does, the state can not act at all; but if it amounts to merely an indirect or incidental regulation of such commerce, the state may, under its police power, act unless and until congress has occupied the field.

It would seem that nothing could be a more direct burden upon or regulation of interstate commerce than the fixing of prices of commodities sold in interstate commerce transactions.

Therefore, if the state of Ohio contemplates regulations fixing the price of coal, such legislation must be carefully limited so as to not apply to interstate commerce. Thus the price of coal at the mines may be fixed, but not in such way as to affect such a sale on a contract calling for immediate transportation to a point outside of the

state; on the other hand, the price of coal at the distribution point may be regulated but not in such a way as to affect contracts calling for the immediate importation of a specific and designated quantity of coal from a point outside of the state. Moreover, under the original package doctrine the price of coal which has actually been transported from a point outside of the state to a point within the state prior to its sale can not be regulated so as to apply to a sale of such coal by the importer in the original package of importation, such as a carload lot. But when coal has come into the state from outside and has become commingled with the general mass of property in the state, and the original package of interstate transportation is broken up and the coal is sold piece-meal as it were, such sale is subject to the exclusive control of state legislation.

Of course, another limitation which must be applied in this case is that respecting the impairment of the obligations of contracts.

No state regulation of prices could apply to and govern the consideration of a contract entered into prior to the date when such a law would become effective. Cases which have been previously cited, however, show clearly that the obligation of a contract entered into after a law becomes effective is not impaired by that law, but that the law itself enters into and becomes a part of the obligation of the contract, which must be deemed to have been made with reference to it. Putting it in still another way: the state, under its police power, may prohibit future contracts, but may not affect the obligation of existing contracts.

In conclusion, therefore, it is submitted that the power to regulate the price of coal, which is a commodity a supply of which is necessary to the preservation of the public health and for the economic welfare of the public generally, exists whenever a situation develops which, in the judgment of the legislature, makes such a regulation necessary; that the legislature is the first judge of the occasion of the exercise of its power; but that the occasion and extent to which the power is exercised is subject to review by the courts, so that no unreasonable or arbitrary action may be taken and the price fixed, must be adequate; that the state legislature must limit its acion to intra-state transactions, and may not by its legislation impair the obligations of subsisting contracts; that a state of war is an abnormal condition which on its face would seem to justify the legislature in the exercise of such power, even if its judgment as to the occasion for such exercise is subject to review; and that generally, subject to the foregoing limitations, a law regulating the price of coal may be passed at the present time.

While you do not specifically ask my opinion as to food products, nevertheless following the line of authorities hereinbefore set forth it will be readily seen that the legislature would be authorized to regulate the price of food products as well as the price of coal.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

4 78.

CRUDE GASOLINE — MUST BE INSPECTED BEFORE SOLD TO REFINERIES.

Section 865 General Code requires that high powered crude gasoline, manufactured from natural gas by a fuel supply company, must be inspected before it is sold by such company to refineries.

COLUMBUS, OHIO, July 27, 1917.

HON. CHARLES L. RESCH, *State Inspector of Oils, Columbus, Ohio.*

DEAR SIR:—I have your letter of July 11, 1917, as follows:

> "At Sugar Grove, Ohio, the Ohio Fuel Supply Company have a plant at which they manufacture gasoline from natural gas. This gasoline is very high powered and is sold by these poeple to refiners, where it is mixed with other products and put on the market as gasoline. They call this product which thay make crude gasoline. The question has arisen as to whether or not this crude gasoline should be inspected at the first named plant before it is sold by them to a refiner. Inasmuch as the refiner has the finished product inspected the argument presented that it should not be necessary to subject the crude product to inspection.
>
> "In this connection I would call your attention to section 865 of the General Code which prescribes that 'gasoline, petroleum-ether or similar or like substances, under whatever name called, whether manufactured within this state or not, having a lower flash test than provided in this chapter for illuminating oils, shall be inspected by the state inspector of oils. * * * Whoever sells or offers for sale any gasoline, petroleum-ether or similar or like substance not stamped as provided in this chapter shall be fined not more than one thousand dollars or imprisoned in the county jail not exceeding twenty days or both.'
>
> "Kindly let me have your opinion as to whether or not the provisions of section 865 General Code above quoted make it necessary to inspect this crude gasoline at the Sugar Grove gasoline plant prior to its sale by that company to a refiner?"

You also inform me that the gasoline in question has a "lower flash test" than is provided for illuminating oils and that while this gasoline is very high powered, it can be used in the operation of automobiles, etc.

Section 865 G. C. reads:

> "Gasoline, petroleum-ether or similar or like substances, under whatever name called, whether manufactured within this state or not, having a lower flash test than provided in this chapter for illuminating oils, shall be inspected by the state inspector of oils. Upon inspection, the state inspector shall affix by stamp or stencil to the package containing such substance a printed inscription containing its commercial name, the word 'dangerous,' date of inspection and the name and official designation of the officer making the inspection. For such inspections, the state inspector shall receive the same fees as for the inspection of oils, which shall be paid into the state treasury, as herein provided for other fees. Such fees shall be a lien on the gasoline, petroleum-ether or similar substance so inspected. For such inspection, deputy inspectors shall receive the same fees and shall make monthly report

of such inspections, as provided herein for the inspection of oils. Whoever sells or offers for sale any gasoline, petroleum-ether or similar or like substance not stamped as provided in this chapter shall be fined not more than one thousand dollars or imprisoned in the county jail not exceeding twenty days or both."

The product manufactured at the Ohio Fuel Supply Company is usually "gasoline" and inasmuch as it has a "lower flash test" than is provided for illuminating oils, it comes squarely within the provisions of section 865 G. C. The penalty provided by section 865 falls upon a person who "sells or offers for sale any gasoline * * not stamped as provided in this chapter". This penalty is not for the sale of gasoline in the retail market but simply for the sale. The Ohio Fuel Supply Company, in the case submitted, undoubtedly sells this gasoline to the refineries and while I am not unmindful of the argument that could be presented for an opposite construction of the statute, I am of the opinion that the law requires that the gasoline referred to be inspected by your department prior to its sale by the Ohio Fuel Supply Company to the various refineries.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

479.

DEPUTY OIL INSPECTOR—TRAVELING EXPENSES AUTHORIZED UNDER SECTION 849 G. C.

Section 849 General Code, allowing deputy oil inspectors their actual and necessary traveling expenses, authorizes the payment to them of all expenses incurred while absent from their home and while engaged in their official duties. This includes railroad fare, lodging, meals and other actual and necessary expenses which may be incurred by them in the performance of their duties while they are traveling about the state.

COLUMBUS, OHIO, July 27, 1917.

HON. CHARLES L. RESCH, *State Inspector of Oils, Columbus, Ohio.*

DEAR SIR:—I have your letter of July 11, 1917, as follows:

"I beg to call your attention to section 849 of the General Code relating to fees of deputies of this department. You will note that this section provides that each deputy inspector of oils shall receive certain fees and 'his actual and necessary traveling expenses incurred while engaged in the discharge of the duties of his office.'

"Kindly advise just what items of expense may be properly charged by the deputy inspector under this section."

Former Attorney-General Hogan, under date of May 8, 1911, rendered an opinion to Hon. E. M. Fullington, auditor of state (found in Annual Report of the Attorney-General, 1911-1912, Vol. 1), in which he said:

"When an inspector is assigned to inspect an association in a city other than that of his residence, whether that city be the capital of the state or not,

all expenses incurred by him while absent from his home are, in my opinion, 'traveling expenses.' "

This is the view frequently taken by this department in construing statutes that allow to officials their actual and necessary expenses. I beg to advise you, therefore, that section 849 of the General Code authorizes the deputy oil inspectors to charge and receive all expenses incurred by them while absent from their home and while engaged in their official duties. This includes railroad fare, lodging, meals and other actual and necessary expenses which may be incurred by them in the performance of their duties while they are traveling about the state.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

480

COSTS—INCURRED IN DETERMINING SANITY OF PERSON CHARGED WITH CRIME—HOW PAYABLE—COSTS IN CRIMINAL CASE WHEN PRISONER RECOVERS SANITY—AND WHEN HE DOES NOT RECOVER—HOW PAYABLE.

The costs incurred in determining whether or not a person is sane under section 13806 *General Code are part of the costs in the criminal case. Witness fees are payable out of the county treasury under section* 3014 *G. C. If the prisoner does not recover his sanity and the indictment is nollied, the officers' fees are payable as in cases of state failure. If the prisoner does recover his sanity and the trial proceeds upon the indictment and the prisoner is acquitted, the officers recover their fees as in cases of state failure. If the priosner is convicted and sentenced to the penitentiary or reformatory, the costs are paid by the state.*

COLUMBUS, OHIO, July 27, 1917.

HON. TOM A. JENKINS. *Prosecuting Attorney, Ironton, Ohio.*

DEAR SIR —I have your letter of July 3, 1917, as follows:

"The question has arisen in our county with reference to costs.

"We had one John Smith, indicted for arson and shooting with intent to kill. He feigned insanity. An inquest was held by the probate judge and physicians unanimously found that he was sane, and that he was feigning. Later when his case was set for trial in the common pleas court his attorneys made application for an investigation as to his insanity under section 13608 of the General Code. The case was a very bitterly contested one and continued over three days. There were a great number of witnesses examined and the costs amounted to considerable. The question arose at the outset of the case with reference to how the costs should be paid. I maintain that the costs should be paid by the defendant, especially should the jury find him to be sane. No costs were paid. The witnesses had their attendance marked and it rests there. The jury found the accused to be insane and he was later sentenced to the Lima State Hospital, where he is now confined. We are at a loss to know how these costs should be paid. I thought probably your department might have had this question up before. In any event we would

be glad to have an opinion of your department as to who should pay the costs under the circumstances."

Sections 13608, 13609, 13610 and 13611 G. C. read:

"Sec. 13608. When the attorney of a person indicted for an offense suggests to the court in which such indictment is pending, and before sentence, that such person is not then sane and a certificate of a reputable physician to that effect is presented to the court, such court shall order a jury to be impaneled to try whether or not the accused is sane at the time of such impaneling. Thereupon a time shall be fixed for a trial, a jury shall be drawn from the jury box and a venire issued, unless the prosecuting attorney or the attorney of the accused demand a struck jury, in which case such jury shall be selected and summoned as required by law. The jury shall be sworn to try the question whether the accused is or is not sane and a true verdict given according to the law and the evidence, and, on the trial, the accused shall hold the affirmative.

"Sec. 13609. If three-fourths of the jurors provided for in the next preceding section agree upon a verdict, their finding may be returned as the verdict of such jury, and a new trial may be granted on the application of the attorney of the accused, for the causes and in the manner provided in this title

"Sec. 13610. If three-fourths of the jurors do not agree, or the verdict is set aside, another jury shall be impaneled to try the question. If the jury find the accused to be sane and no trial has been had on the indictment, a trial shall be had thereon as if the question had not been tried. If the jury find him to be not sane, that fact shall be certified by the clerk to the probate court, and the accused, until restored to reason, shall be dealt with by such court as upon inquest had. If he is discharged, the bond given for his support and safe-keeping shall contain a condition that, when restored to reason, he shall answer to the offense charged in the indictment or of which he has been convicted, at the next term of the court thereafter and abide the order of such court.

"Sec. 13611. When restored to reason the accused may be prosecuted for an offense committed by him previous to such insanity, or sentenced on a conviction had previous thereto."

In the case you refer to, the jury found the prisoner to be insane and he was sentenced, I take it, to the Lima State Hospital by the probate court.

It will be noted in this case that the prisoner was not acquitted. The trial was simply halted and the special jury having found him insane he was committed to the Lima State Hospital. Under the provisions of section 13611 he may be tried again for the offense as soon as he is restored to reason. The indictment remains.

The trial of the accused, under section 13608, is a part of the criminal proceedings directed against the accused and provided by statute, between the indictment and the trial, and the costs of the same should, I think, be included as a part of the costs in the criminal case. Surely if the jury found the defendant sane and the trial proceeded to its proper conclusion, it would not be claimed that the costs incurred in this special proceeding were not costs incurred in the case. The fact that the jury found the prisoner insane instead certainly does not alter the character of the proceeding and it is therefore my belief that the costs incurred are a part of the costs in the case. The crime of which the prisoner stands accused is a felony and the case is a "criminal cause" under section 3014 of the General Code, which reads:

"Each witness attending under recognizance or subpoena, issued by

order of the prosecuting attorney or defendant, before the court of common pleas, or grand jury, or other court of record, in criminal causes, shall be allowed the following fees: For each day's attendance one dollar, and five cents for each mile, the same as in civil causes, to be taxed in only one cause, when attending in more causes than one on the same days, unless otherwise directed by special order of the court. When certified to the county auditor by the clerk of the court, fees under this section shall be paid from the county treasury."

The trial of the prisoner as to his sanity under section 13608 I have already held is a part of the criminal proceeding and therefore is included within the meaning of the term "criminal cause" as used in section 3014 G. C. The witness fees, therefore, should be paid out of the county treasury under this section.

Whether or not the county is to be reimbursed by the state will depend upon the final outcome of the case. If the prisoner is restored to reason, the state may proceed to trial upon the indictment and if he is convicted and sentenced these witness fees and the other costs in the case will be paid by the state. If he is acquitted the case will be treated as a "state failure" and officers may be allowed fees by the county commissioners accordingly. If the prisoner is not restored to reason, the indictment will in all probability be nollied. This, according to opinion No. 98, rendered by this department under date of March 10, 1917, to Hon. C. M. Caldwell, prosecuting attorney, Waverly, Ohio, is also a "state failure" and in such event the fees of officers may be paid as in such cases.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

481.

TAX COMMISSION—MUST CERTIFY ITS DETERMINATIONS TO PERSON IN WHOSE NAME PROPERTY IS LISTED—RIGHT OF PROPERTY OWNER TO HAVE DETERMINATIONS OF COMMISSION REVIEWED IN COMMON PLEAS COURT.

Section 5611-1 *G. C., as enacted in* 107 *O. L.* 550, *requires the tax commission of Ohio to certify to the person in whose name the property valued by it is listed as to all determinations made by such tax commission, after said act went into effect. The provisions of said section with reference to the time such certification must be made is directory in this that such certification of the actions of the tax commission to the persons in whose name the property is valued may be made after the action of the board is certified to the county auditor, but the certification to the person in whose name the property is listed, if not made at the time the action of the board is certified to the county auditor, should be made within a reasonable time thereafter.*

Section 5611-2 *General Code, as enacted in said act above referred to, authorizes the persons therein specified to have a review of the determinations of the tax commission with respect to the valuation of property made since said act went into effect, by the common pleas court on petition in error, filed in such court within thirty days after notice of the action of the tax commission is certified in the manner provided by section* 5611-1, *and, not deciding whether it was the legislative intention, in the enactment of said act, to confer upon the common pleas court jurisdiction to review determinations made by the tax commission with respect to the valuation of property for years prior to* 1917, *said section* 5611-2 *General Code authorizes the person indicated in said section to institute proceedings in error in the common pleas court to review determinations made by the tax commission valuing property for taxation for the year* 1917, *though such determinations were made prior to the time said act went into effect, provided petition in error in such cases is filed in the common pleas court within thirty days after the time said act went into effect.*

COLUMBUS, OHIO, July 27, 1917.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I have your favor of July 11, 1917, asking opinion of me on a question stated by you as follows:

> "The commission respectfully requests your opinion as to the effect of senate bill No. 227, passed March 21, 1917, and approved March 30, 1917, upon the proceedings of the commission with reference to the assessment and certification of the property of public utilities for the year 1917.
>
> "The general law provides that public utilities shall file reports with the tax commission on or before the first day of March. The commission is required to fix the value of the property of such companies on the second Monday of June and is required to apportion the same to the various counties and certify such apportionment on the second Monday of July. The commission desires to know whether or not it will be required for this year to comply with section 5611-1 of the above act and certify its action as to the assessment of public utility property to the person in whose name the property is listed, or sought to be listed, at the same time and in the same form in which such action is certified to the county auditor.
>
> "The work of preparing the apportionment sheets was practically completed before the commission's attention was called to the passage of this act and most of it was completed before the act became effective.

"The commission desires to know whether upon application, as provided in section 5611-2 of the above act, it is required to deliver to the person or persons making the application a certified transcript of the final order and the evidence in the proceedings upon which such order is based, as to the value of public utility property for the year 1917."

The act referred to in your communication is found in 107 O. L. p. 550, and was enacted March 21, 1917, and filed in the office of the Secretary of State March 31, 1917. The act is as follows:

"Section 5611-1. Whenever the tax commission of Ohio determines the valuation, or liability, of property for taxation, whether in case of an original valuation or other original proceeding of such board, or in case of a determination of an appeal from the decision of a county board of revision, it shall, by registered mail, certify its action to the person in whose name the property is listed, or sought to be listed, at the same time and in the same form in which such action is certified to the county auditor, and such determination shall become final and conclusive for the current year, unless reversed, vacated, or modified as hereinafter provided.

"Section 5611-2. The proceeding to obtain such reversal, vacation or modification shall be by petition in error filed in the court of common pleas, instituted by the person or persons in whose name the property is listed for taxation, or by any person or official authorized to file a complaint against any valuation or assessment under the provisions of section 5609 of the General Code. In case of original proceedings or valuations by the tax commission of Ohio, such proceedings shall be instituted in the common pleas court of the county in which the property is located, or if located in more than one county, then in the county in which the greater amount of the property in question is located as shown by the apportionment of such commission, and in such case the court shall review the determination of the commission as to all the property in each such county and the apportionment of the value thereof. In case of a determination of an appeal from the decision of a county board of revision such proceeding shall be instituted in the common pleas court of the county in which such complaint was originally filed.

"Such petition in error shall be filed within thirty days after notice is served as provided in section 5611-1, provided that in case of determinations made prior to the taking effect of this act, such petition may be filed within thirty days after this act takes effect, and the county auditor of the county in which such petition is filed, and the tax commission of Ohio, shall be made defendants, and, unless waived, summons in error shall be issued and served as in other cases, upon such auditor and upon the chairman and clerk of the tax commission of Ohio. The tax commission shall, upon written demand of the person or persons, filing such petition, made at or before the filing thereof, deliver to such person or persons within thirty days thereafter a certified transcript of the final order and the evidence in the proceedings upon which such order is based, which transcript shall forthwith be filed by the plaintiff in error with the clerk of the court in which such proceeding is pending, and the court may call witnesses and consider other evidence in addition to such transcript in the hearing of such petition in error. The prosecuting attorney of the county shall represent the county auditor in such proceeding. Either party shall have the right to prosecute error as in other cases. The court may permit any interested party to intervene by cross-petition. No determination of the tax commission as to the value

of property for taxation shall be reversed, vacated, or modified unless it is shown by clear and convincing evidence that the value of the property, as determined by the tax commission, is not the true value in money of such property.

"Section 5611-3. In case of the institution of such proceeding, liability for taxes upon the property in question, and for non-payment of taxes within the time required by law, shall relate back to the date of the original valuation or determination, and liability for taxes and for any penalty for non-payment thereof within the time required by law, shall be based upon the valuation as finally determined."

As will be observed from its terms, this act is an original act supplementing section 5611 General Code, which prescribes the jurisdiction of the tax commission to hear complaints on appeal from the county board of revision. The act being original in its nature, we are not called upon, with respect to either of your questions, to consider the provisions of section 26 General Code, which under certain conditions limits the effect of statutes amending or repealing existing statutes on pending causes or proceedings. This act, therefore, speaks without qualification from the day that it went into effect as a law, to wit: on June 30, 1917.

With respect to your first question, the act requires that as to all determinations made by you after the law went into effect, you shall by registered mail certify your action to the person in whose name the property valued is listed or thought to be listed, at the same time and in the same form in which such action is certified to the county auditor.

Answering your first question specifically, therefore, I am of the opinion that section 5611-1 General Code, above quoted, requires you to comply with its provisions with respect to the certification of your action to the person in whose name the property valued by you is listed, as to all determinations made by you since the law went into effect. Conformable to the general rule applicable to the construction of statutes of this kind, however, I am inclined to the view that the provisions of this section, in so far as it prescribes the time at which you are required to certify your action to the person in whose name the property valued by you is listed, is directory and that you are permitted to certify your action to such person after your certification is made to the county auditor, and in a reasonable time thereafter.

With respect to your second question, it will be noted that by section 4 of article IV of the state constitution, a common pleas court is authorized to receive such jurisdiction as may be conferred upon it by law, and this would include jurisdiction conferred upon such court to revise, on petition in error or otherwise, findings and decisions made by administrative boards.

Hocking Valley Railway Co. v. Public Utilities Commission, 92 O. S., 9, 14.

Section 5611-2 General Code confers jurisdiction on the common pleas court to review the determinations made by you with respect to the vaulations of property for taxation by petition in error filed in said court. As to such determinations made by you after the law went into effect, this section requires the petition in error to be filed within thirty days after receipt, by the party becoming plaintiff in error, of the notice prescribed by section 5611-1 and with respect to determinations made by you prior to the time the act took effect it is required that such petition in error be filed within thirty days after the time the act took effect. I know of no principle of constitutional law which inhibits the enactment of legislation providing a right of appeal or right of review by proceedings in error with respect to decisions or findings of a board or tri-

bunal made before such legislation goes into effect. On the contrary, legislation of this kind has ben recognized as valied where a reasonable time is given to perfect the appeal or proceedings in error after such law becomes effective.

State Counsel Jr. O. U. A. M. vs. National Counsel, Jr., 79 N. J. Equity, 193;
See Marinda v. Dowlin, 4 O. S., 500;
Lafferty v. Shinn, 38 O. S., 48;
Canaan township v. Board, etc., 46 O. S., 694.

Making direct answer, therefore, to your second question, I am of the opinion that the persons specified in section 5611-2 have a right to institute proceedings in error with respect to determinations as to values of public utility property for the year 1917 and that upon application you are required to deliver to the person or persons making the application a certified transcript of the final order and the evidence in the proceedings upon which your finding is based.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

482.

TEACHER—ONE YEAR CERTIFICATES—ENTITLED TO THREE.

Every teacher is entitled to three effective one-year certificates so that when two or more one-year certificates are issued in any one year all will count as but one in making up the sum total of three.

The three one-year certificates mentioned in section 7821 *G. C. must be issued in three separate years to make up the limit allowed.*

COLUMBUS, OHIO, July 30, 1917.

HON. CHESTER PENDLETON, *Prosecuting Attorney, Findlay, Ohio.*

DEAR SIR:—Your letter of June 27, 1917, submits for my opinion the following statement of facts:

"On April 17th, at the request of our county superintendent of schools for an opinion as to whether under section 7821 of the General Code three-one-year certificates are all that may be issued to one person or whether more than three such certificates may be issued provided not more than two of them have been actually used, I replied with an opinion to the effect that the language of the section seemed to me to be very definite in limiting to three the number of one-year certificates to be issued to any one person, and that I saw no justification for holding that more than three such certificates could be issued.

"Since then my attention has been called to a letter from your office dated June 2, 1917, and written to Mr. Harold Gassman, of Arcadia, which seems to indicate what you have come to a different conclusion regarding this section of the General Code, and are placing a more liberal construction on it.

"Under the circumstances, I am asking you to kindly give me your written opinion on this question."

The letter of Harold Gassman, to which my letter of June 2, 1917, was an answer, reads as follows:

> "In June, 1915, I secured a one-year certificate at Bowling Green, Ohio.
> "I secured a position as teacher in Hancock county for 1915-16 which made it necessary to secure another one-year certificate in Hancock county at Findlay, Ohio, August, 1915.
> "In March, 1916, I secured another on-year at Findlay, Ohio, and taught the term of 1916-17. The examiners of Hancock county now refuse to grant me another one-year certificate.
> "I think I am entitled to another certificate, as I used only two certificates granted. Please advise if I am correct."

Section 7821 G. C. provides in part that:

> "*County boards of school examiners* may grant teachers certificates for one year * * which shall be valid in all villages and rural school districts *of the county wherein they are issued.* Not more than three one-year certificates * * * may be issued to any one person * * *. Such certificate shall be valid for one year * * * from the *first day of September following the day of examination.*"

Section 7829 G. C. provides that:

> "Three kinds of teacher's certificates *only* shall be issued by county boards of school examiners, which shall be styled respectively 'teacher's elementary school certificate,' valid for all branches of study in schools below high school rank, 'teacher's high school certificate,' valid for all branches of study in recognized high schools and for superintendents and 'teacher's special certificate,' valid in schools of all grades, but only for the branch or branches of study named therein."

Section 7830 G. C. provides that no person shall be employed as a teacher in any village or rural school district who has not obtained from a board of examiners having legal jurisdiction a certificate as therein set forth.

By legal jurisdiction is meant that the board of examiners issuing such certificate must be the board of examiners of the county in which is located the village or rural school district in which the teacher appearing before the board of examiners desires to teach.

Section 7824 G. C. provides that county boards of school examiners, at their discretion, may issue certificates without formal examinations to holders of certificates granted by other county or city boards of school examiners. The one-year certificate, about which inquiry is made, is what is designated as a "teacher's elementary certificate" and can only be issued by the board of education of the county in which is located the district in which such teacher desires to teach and shall be valid throughout said county from the first day of September following the day of the examination which is attended by such teacher. So that when the teacher in question secured a certificate from the county board of examiners of Wood county, Ohio, in June, 1915, said certificate was secured from the county board of school examiners of said Wood county and was valid only in Wood county, but was valid from the first day of September, 1915, and when the said teacher desired to teach school in a school district in Hancock county, it became necessary for him to secure a certificate from the county board of school examiners of said Hancock county. Hancock county board of school examiners could issue him a certificate without examination,

as provided by section 7824, above mentioned, or it could permit him to take an examination as any other teacher, but whether such certificate was issued with or without such examination, it could only be dated from September 1, 1915, that is, from the same date which appeared on the certificate issued to him by the Wood county board of school examiners, and both certificates covered the identical period—from September 1, 1915, to August 31, 1916.

Certificates are issued only for periods certain, as for one, three or five years, and the certificate or certificates mentioned which had been issued to Harold Gassman were for all intents and purposes but one certificate, for but one certificate could be effective in any one year. When said Harold Gassman secured his certificate in March, 1916, that certificate covered the year from September, 1916, to August 31, 1917, and was in effect his second certificate, and he was therefore entitled to one more certificate under section 7821 G. C.

The effect of the above may be better illustrated by the following: Suppose a teacher should apply for a school in three different counties. In each county he would have to secure a certificate. If each certificate issued in each county would count in making up the number of three, then the three certificates could all be issued in any one year and each be effective, for a teacher is entitled to three effective certificates. I do not understand that to be the law. For but one certificate can be effective in any one year, as all must date from September 1st, which is the date certain, and the three certificates must of necessity, in order to be effective, be issued in three separate years. It is not necessary that they be issued in three consecutive years, but when two or more are issued in any one year they count only as one certificate in making up the sum total of three, as provided by General Code section 7821.

Suppose again that the teacher, in endeavoring to secure a three-year certificate shall take several examinations in one year and each time only receives a one-year certificate. Would he be barred from further examination simply because he attempted to receive a higher grade certificate in one year? Each certificate so issued shall be valid for one year, so that if all must count in making up the three, would it not argue that when one was in force none other could be issued covering the same time?

All the above brings me to the conclusion that all the certificates issued in one year count only as one certificate and I advise you that the three one-year certificates mentioned in section 7821 must be issued in three separate years to make up the limit allowed.

Yours very truly,
JOSEPH MCGHEE,
Attorney-General.

483.

CHILD—IN CUSTODY OF JUVENILE COURT OR TRUSTEES OF CHILDREN'S HOME—UPON ADOPTION REMAINS WARD UNTIL IT BECOMES OF LAWFUL AGE.

1. *Where a child in the custody of the juvenile court is legally adopted under section 8030 G. C., such child for all necessary purposes of discipline and protection remains a ward of such court until the child attains the age of twenty-one.*

2. *Where a child in the custody and control of the trustees of the children's home is adopted, such control continues until such child becomes of lawful age.*

COLUMBUS, OHIO, July 30, 1917.

HON. H. H. NEEDLES, *Probate Judge, Sidney, Ohio.*

DEAR SIR:—I have your communication of July 6, 1917, wherein you state:

"Section 8030 General Code provides that when this court makes an order of adoption that 'The natural parents * * * shall be divested of all legal rights and obligations in respect to the child, and it be free from all legal obligations of obedience and maintenance in respect to them. Such child shall be the child and legal heir of the person so adopting him or her, entitled to all the rights or privileges and subject to all the obligations of a child of such person begotten in lawful wedlock.'

"Under this section it seems that the adopted parent would have complete control free from supervision of any board of trustees of any home where the child was adopted from a children's home, and free from the supervision of a juvenile judge where the child was a ward of the court.

"Section 3093 G. C. provides: * * * 'and if such child is placed out, indentured or *adopted*, such control shall continue until such child becomes of lawful age.'

"The section as to the continuance of the guardianship of the juvenile court provides similarly that it continues until the child becomes of age.

"There seems to be a conflict between the adoption statute and these statutes where guardianship continues and we have been losing good homes for some of these children because of the possibility of the latter statutes giving control to boards and courts even after adoption, thus making the adoption contract one sided.

"My question is, what rights, if any, have the board of trustees of a children's home over a child in their institution after it has been legally adopted? Same as to a child who is a ward of a juvenile court and has been legally adopted?"

Section 8030 G. C. provides:

"The natural parents, except when such child is adopted under the provisions of sections eighty hundred and twenty-six and eighty hundred and twenty-seven, by such order shall be divested of all legal rights and obligations in respect to the child, and it be free from all legal obligations of obedience and maintenance in respect to them. Such child shall be the child and legal heir of the person so adopting him or her, entitled to all the rights and privileges and subject to all the obligations of a child of such person begotten in lawful wedlock. But on the decease of such person and the subsequent decease of such adopted child without issue, the property of such adopted parent shall descend to his or her next kin, and not to the next kin of such adopted child."

The preceding sections 8024 et seq. provide the procedure for the adoption of a minor child. Under these sections the adopted child possesses the legal status of a child of the adopter. The adopting parent stands in the relation of the natural parent to the adopted child, but I do not think that the adopting parent would have complete control of such minor child free from the supervision of any board of trustees or any home, or free from the supervision of a juvenile judge, when the child so adopted was adopted respectively from a children's home or where the child was the ward of such juvenile court.

Section 1643 of the juvenile court act provides:

"When a child under the age of eighteen years comes into the custody of the court under the provisions of this chapter, such child shall continue for all necessary purposes of discipline and protection, a ward of the court, until he or she attain the age of twenty-one years. The power of the court over such child shall continue until the child attains such age."

In the case of Children's Home v. Fetter, 90 O. S. 110, habeas corpus was brought by a parent against the children's home for the custody of a child which had been committed o the children's home by the juvenile court of Marion county. Newman, J., at page 127, in dismissing the application for the writ, uses the following language:

> "The legislature in the exercise of its police power, in order to protect children and to remove them from evil influences, has established the juvenile court. When proceedings are regularly had in that court and there is a finding that the child is delinquent it becomes a ward of the court. In the interest of the child and in the interest of society, the court can commit its custody to strangers or to an institution for its moral training and education over the objection of the parents. The presumption is that the juvenile court of Marion county, when it committed Howard Fetter to the children's home, was acting with reference to the best interests and welfare of the child. It is in the power of that court, if it deem it advisable, to restore the child to its parents. But there is no authority for any other court to interfere, in an independent proceeding, with the custody of the child thus entrusted by law to the jurisdiction of the juvenile court."

Section 3093 G. C. provides:

> "All inmates of such home who by reason of abandonment, neglect, or dependence have been admitted, or who have been by the parent or guardian voluntarily surrendered to the trustees, shall be under the sole and exclusive guardianship and control of the trustees during their stay in such home, until they are eighteen years of age, and if such child is placed out or adopted such control shall continue until such child becomes of lawful age. A child shall be deemed abandoned, if at any time the parents or persons having control thereof are in arrears for his or her board for a period of one year or more. Payment of such board thereafter shall not reinstate such parents or persons in the control or guardianship of such child, unless such board shall deem it wise."

From this section it appears that all inmates of such home admitted as herein provided shall be under the sole and exclusive guardianship and control of the trustees during their stay in such home until they are eighteen years of age and if such child is placed out or adopted, such *control* shall continue until such child becomes of lawful age. This section, as now found in the Code, was enacted as found in 103 O. L. p. 864, passed April 28, 1913. Section 1643, above quoted, was passed by the same general assembly and is found in 103 O. L. 864, and passed April 28, 1913. Section 8030, above quoted, is found in 88 O. L. 556, and was passed May 4, 1891. Since under the provisions of the adoption statute the adopted parent stands in the same relation as the natural parent, I can see no conflict between the provisions of such statute and the provisions of either the children's home or the juvenile court statutes. An adopted child coming into the jurisdiction of the juvenile court would be dealt with as provided by law and there would only be such interference with the rights of the adopted parents as would necessarily arise with the rights of a natural parent under the same circumstances. The fact that the adoption was effected subsequent to the acquirement of jurisdiction by the juvenile court would make no difference. This conclusion is strengthened by the fact that the juvenile statute was passed long after the adoption statute and must have been in contemplation thereof, and this statute makes the child coming into the custody of the juvenile court a ward of such court for all necessary purposes of discipline and protection until such child attain the age of twenty-one years.

As far as the case of a child being adopted from a children's home is concerned, section 3093 in plain terms states that the child so adopted shall remain under the control of the children's home authorities until such child becomes of lawful age and when a child is adopted out of the children's home it must necessarily be adopted with full concurrence of such provisions of the law.

In the case of Purinton v. Jamrock, 195 Mass., 187, the last paragraph of the syllabus reads as follows:

> "Where a child in the custody of the state board of charity is adopted legally by persons who are found suitable to have custody of him and charge of his education, the child under the provisions of St. 1903, c. 334, sec. 3, still remains in the custody of the state board of charity until he attains the age of twenty-one years or that board shall discharge him from its custody when the object of his commitment has been accomplished."

This is the only case that I find which directly bears upon this question and I think it clearly states the law.

Answering your questions specifically, then, it is my opinion that a board of trustees of a children's home retains the guardianship and control of a child adopted out of said home for the purpose of securing the well being and progress of such child when such child is adopted out of such institution. It is further my opinion that when a child, a ward of the juvenile court, is adopted, such adoption is in contemplation of the provision of statute which gives power to such court over such child until he attains the age of twenty-one years.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

484.

SUSPENDED SCHOOL DISTRICT—WHEN SAME MAY BE RE-ESTABLISHED UPON MOTION OF BOARD OF EDUCATION—WHEN COMPELLED TO RE-ESTABLISH SAME.

At any time the enrollment of a suspended school district shows twelve or more pupils of lawful school age, the board of education may, upon its own motion, re-establish such school.

When a petition, asking for the re-establishment of a school, and which is signed by a majority of the voters of a suspended school district, is presented to a board of education in which school district the enrollment shows twelve or more pupils, the board of education must re-establish such school.

COLUMBUS, OHIO, July 31, 1917.

HON. E. E. LINDSAY, *Prosecuting Attorney, New Philadelphia, Ohio.*

DEAR SIR:—I have your communication of July 7, 1917, wherein you ask my opinion on the following statement of facts:

> "The latter part of section 7730 of the General Code, as amended March 21st last, contains the provision 'that any suspended school as herein provided, shall be re-established by the suspending authority upon its own initiative, or upon a petition asking for re-establishment, signed by a majority of the voters of the suspended district, at any time the school enrollment of the said suspended district shows twelve or more pupils of lawful age.'

"The first paragraph of this section provides generally for the suspension of any or all schools in a village or rural school district. Then follows a provision requiring the suspension of schools when the average daily attendance for the preceding year has been below ten.

"There is no question in my mind but what the proviso above quoted refers to schools that have been suspended by reason of the daily attendance being below ten, but there is some question whether it refers to schools having been suspended for other reasons under the provision of the first paragraph of said section.

"One of our rural boards of education suspended three schools last year and transported the pupils in each district to a centralized school, not because of the attendance in such schools having been below ten, but because of better and cheaper accommodations at the centralized school.

"Petitions have now been filed with the board under the provisions of this section, first above quoted, by majority of the voters of such suspended districts, asking to have such schools re-established. The board does not want to grant petition unless it is compelled to by reason of said proviso.

"I would like to have your opinion as soon as possible as to whether this provision applies to schools suspended for reasons other than the average daily attendance having been below ten."

I am advised, in response to my inquiry for further information, that there has been no vote in said school district on the question of centralization and that the centralized schools to which you refer is, in effect, a consolidated school.

Your inquiry involves a consideration of section 7730 G. C., which section was amended in 107 O. L., p. 638, and reads as follows:

"The board of education of any rural or village school district may suspend any or all schools in such village or rural school district. Upon such suspension the board in such village school district may provide, and in such rural school district shall provide, for the conveyance of all pupils of legal school age, who reside in the territory of the suspended district, to a public school in the rural or village district, or to a public school in another district. When the average daily attendance of any school for the preceding year has been below ten, such school shall be suspended and all of the pupils of legal school age, who reside in the territory of the suspended district, transferred to another school or schools when the county board of education so directs the board of education of the village or rural district in which said school is located. Notice of such suspension shall be posted in five conspicuous places within such village or rural district by the board of education of such village or rural district within ten days after the county board of education directs the suspension of such school; provided, however, that any suspended school as herein provided, shall be re-established by the suspending authority upon its own initiative, or upon a petition asking for re-establishment, signed by a majority of the voters of the suspended district, at any time the school enrollment of the said suspended district shows twelve or more pupils of lawful school age. Any school district that is entitled to state aid for salary of teacher according to provisions of sections 7595 and 7595-1, when such schools are not consolidated, or centralized, shall receive the same amount of state aid after such schools are consolidated or partly consolidated, but to be applied to the cost of transportation of pupils to consolidated school, or schools, or for salary of teachers and the transportation of pupils."

Prior to the time said section was last amended, or as it was amended in 106 O. L. 396, it read as follows:

> "The board of education of any rural or village school district may suspend any or all schools in such village or rural school district. Upon such suspension the board in such village school district may provide, and in such rural school district shall provide, for the conveyance of pupils attending such schools, to a public school in the rural or village district, or to a public school in another district. When the average daily attendance of any school for the preceding year has been below ten, such school shall be suspended and the pupils transferred to another school or schools when directed to do so by the county board of education. No school of any rural district shall be suspended until ten days' notice has been given by the board of education of such district. Such notice shall be posted in five conspicuous places within such village or rural school district; provided, however, that any suspended school as herein provided, may bet re-established by the suspending authority upon its own initiative, or upon a petition asking for re-establishment, signed by a majority of the voters of the suspended district, at any time the schoo' enrollment of the said suspended district shows twelve or more pupils of lawful school age."

It is noticeable that there is little change in the said section outside of the last sentence which was added to the amendment in 107 O. L., and which is entirely new matter, but apart from said last sentence the changes are in phraseology only, with the exception of the word "may" as used in the phrase "may be re-established" is changed to the word "shall," but, as will be hereinafter noted, that the change of said word does not give the section a different effect. Said section, as it was amended in 106 O. L. 396, was construed in the case of the State of Ohio ex rel John Meyers, v. The Board of Education of the rural school district of Spencer township, Lucas county, 95 O. S. ——, decided February 13, 1917, in which case it was an admitted fact that the enumeration showed more than twelve pupils in such suspended district, and that the schools were suspended not because there was not sufficient pupils to permit a school, but because the board determined to transport what pupils there were to the consolidated school. Johnson, J., in delivering the opinion of said court, used the following language:

> "The controversy in this case concerns the construction of the proviso contained in section 7730 General Code, which was passed May 27, 1915, (105 O. L. 398). Pertinent parts of the section are as follows:
>
> " 'The board of education of any rural or village school district may suspend any or all schools in such village or rural school district. * * * When the average daily attendance of any school for the preceding year has been below ten, such school shall be suspended and the pupils transferred to another school or schools when directed to do so by the county board of education. No school of any rural district shall be suspended until ten days' notice has been given by the board of education of such district, * * * provided, however, that any suspended school as herein provided, may be re-established by the suspending authority upon its own initiative, or upon a petition asking for re-establishment, signed by a majority of the voters of the suspended district, at any time the school enrollment of the said suspended district shows twelve or more pupils of lawful age.'
>
> "The relator contends that upon the filing of the petition referred to by a majority of the voters of the suspended district the provision for re-establishment is mandatory, and that the word 'may' should be construed to mean 'shall.'

"The school code now in operation was passed February 5, 1914, (104 O. L. 103). The sections of the General Code which are therein amended do not appear in the act in their consecutive order, but sections 4726 and 7730, are found on the same page. By the provisions of section 4726, it is enacted that a rural board of education may submit the question of centralization and upon the petition of not less than one-fourth of the qualified electors of such rural district, or upon the order of the county board of education, must submit such question to the vote of the qualified electors of such rural district, at the general election or special election called for that purpose.

"It is further provided in that section that if the proposition fails, the question shall not be again submitted to the electors of such rural district for a period of two years, except upon the petition of at least forty per cent of the electors of such district.

"Section 7730, as there amended, did not contain the proviso involved in this case. At the succeeding session of the legislature the proviso was added to that section.

"It will be observed that the only provisions for centralization are found in section 4726, in which the method by which centralization can be had is specifically described. By those provisions the matter of centralization is required to be left to a vote of the people.

"By the provisions of section 7730, the board of education of any rural or village district may suspend any or all schools in the district and in a village district may provide, and in rural districts shall provide, for the conveyance of pupils attending such schools to a public school in the rural or village district or to a public school in another district.

"It will be observed that in this section there is no reference to centralization nor to the abolition entirely of the suspended district. The use of the term 'suspension' necessarily implies the possibility of a revivor or re-establishment, and the terms of the proviso indicate, of course, that the legislature contemplated the reopening of any 'suspended school.'

"Now, consider the terms of the proviso. It enacts that any suspended school 'may be re-established by the suspending authority upon its own initiative.' Here is an explicit and plenary grant of power to the board of education of the rural or village district to re-establish the school. The grant could not be more comprehensive. Then follows the language 'or upon a petition asking for a re-establishment, signed by a majority of the voters of the suspended district at any time the school enrollment shows twelve or more pupils of lawful school age.'

"There are some well settled rules of construction which we think must be applied to the proviso in question and which control. It must be construed as a whole and given such interpretation as will give effect to every word and clause in it. No part should be treated as superfluous unless that is manifestly required, and the court should avoid that construction which renders a provision meaningless or inoperative. * * *

"The first clause confers upon the board absolute authority to re-establish the suspended school on its own initiative. * * * By this last clause, it is provided that the district may be re-established upon a petition signed by a majority of the voters of the district, but under the first clause the same board might re-establish the school on the petition of a small minority, or upon no petition at all. We cannot conceive, and we find nothing in the language to indicate, that the legislature enacted the additional clause without any purpose whatever in view.

"We think it clear that the legislature intended that the word 'may' when

applied to the last clause in the proviso should be held to be mandatory. It intended to secure to the residents of the rural and village school district, which has 12 or more pupils of lawful school age, the privileges of the residents of other such districts which have not been centralized by the affirmative vote of the people pursuant to the statute hereinbefore referred to."

But the legislature, as noted above, when it amended said section 7730, as found in 107 O. L. 638, changed the word "may" to "shall" so that whatever might have been argued in reference thereto prior to the time of the amendment would fall following said amendment and also following the decision of the supreme court in the case above noted.

I must therefore advise you that at any time the school enrollment of a suspended district shows twelve or more pupils of lawful school age, the board of education may, upon its own initiative, re-establish such school and upon a petition signed by a majority of the voters of such suspended district such board shall re-establish such school, whether such suspension was caused on account of lack of attendance or from any other reason.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

485.

STATE ARMORY BOARD—HOW ARCHITECTS SHOULD BE PAID FOR SERVICES UPON AKRON ARMORY.

The state armory board having paid to contractor from $50,000.00 *contributed by citizens of Akron such an amount as not to leave sufficient in said fund to pay balance due architects, said balance due said architects should be paid from appropriation made for state armory.*

COLUMBUS, OHIO, July 31, 1917.

HON. GEORGE H. WOOD, *Adjutant General of Ohio, Columbus, Ohio.*

DEAR SIR:—You have submitted to me bill presented by Messrs. Harpster & Bliss, architects of Akron, which bill is presented to the Ohio state armory board for balance due for architectural services, in the sum of $250.00, on the armory at Akron. Said bill is as follows:

"To architectural services on armory at Akron as per original contract, 5% of $50,000.00 ..... $2,500 00

CREDIT

"Feb. 17, 1916, payment on account	$2,000 00	
"Aug. 26, 1916, payment on account	250 00	
		2,250 00
Balance due on contract		$250 00"

And you inquire whether or not the account can be paid.

Together with the bill submitted, you also submitted a letter from Messrs. Harpster & Bliss under date of July 11, 1917, which is to the following effect:

"We desire to submit to you a statement in regard to a contract we had with the state armory board for acting as associate architects in the preparation of plans and specifications for the Akron armory. The Akron armory as you may know was erected from funds provided by the state and a donation to the state of $50,000 by the citizens of Akron, Ohio. Our contract with the armory board was made January 14, 1913, when the board passed a resolution as follows:

" 'RESOLVED: That if the board proceeds within one year to build a state armory at Akron, Ohio, under the plans this day submitted by architects Harpster & Bliss and architect Best or similar plans, then architects Harpster & Bliss of Akron are hereby commissioned as associate architects to act under the armory board's directions and with its architects in the construction of said armory on the further condition that their compensation be paid entirely from funds donated towards said armory and that their compensation for plans, specifications and superintendence does not exceed 5 per centum of the sum so donated.'

"The building project was held up for 2 years or more and at a meeting of the armory board on June 12, 1915 our contract with the board was renewed as a resolution passed on that date by the board will show, which is as follows:

"AKRON ARMORY: The board considered all the details of the tentative plans and preliminary sketches made by the board's architect and Mr. Harpster of Akron, and thereafter it was unanimously

" 'RESOLVED: That the board's architect and Harpster & Bliss, architects of Akron, Ohio, proceed to complete plans and specifications for the Akron armory, in consonance with instructions received by them today from the board; said completed plans and specifications to be reported to the board as soon as practicable.

" 'RESOLVED FURTHER: That the commission heretofore granted to architects, Harpster & Bliss, to work in connection with the board's architect, on the Akron armory, be and hereby is renewed on the basis heretofore granted for the work that may be hereafter carried on in connection with an armory at Akron, to be built from joint funds as now proposed, namely: the $50,000.00 contribution from citizens of Akron and such state funds as may be provided by law.'

"The arrangement agreed upon between the board's architect, Colonel Best, and ourselves, and which was consequently followed, that the plans, specifications and details were prepared by our firm and the matter of superintendence was left to Colonel Best. This arrangement was carried out until Colonel Best was called to the front and the armory board requested our firm to take full charge in the matter of superintendence until Colonel Best would return or until his successor would be appointed. For a period of two and one-half months from July to September and for which we rendered a bill to the armory board for two and one-half months' service amounting to $250.00 which the armory board at their last meeting approved and allowed for payment. They had previously paid us on account as follows:

" 'February 17, 1916---------- $2,000.00
" 'August 26, 1916---------- 250.00

" '$2,250.00'

leaving a balance of $250.00 on the original contract price.

"At the last meeting of the armory board, resolutions were passed as follows:

" 'AKRON ARMORY: That the bill of Harpster & Bliss, architects,

for services as superintendents of Akron armory for two and one-half months July, August and September, 1916, amounting to $250.00 be allowed for payment.

" 'RESOLVED FURTHER: That the bill of Harpster & Bliss for $250.00 for balance claimed by them as associate architects as per original contract, be not allowed for payment because same could only be paid from donated funds for construction of said armory and balance of donated fund for said purposes is at present insufficient.'

"As you will note from the last resolution, the balance of our original contract was not allowed on account of their having exhausted the donated fund. Such a situation is of course entirely unfair to us as we had no charge in any way of dispensing of the moneys in the board's hands and it was not our fault that out of the donated fund they made payments to the general contractor which should have properly come out of the state funds and left sufficient to pay the balance due us.

"We will appreciate your kindness most cordially if you will take this matter up with the attorney-general's office and see if there is not some way by which we can be paid the balance due us on our contract."

It would appear from the letter of Messrs. Harpster & Bliss that they were to be paid five per cent. of the amount contributed by the citizens of Akron, to wit, the sum of $50,000.00, five per cent. of which would of course amount to $2,500.00, upon which they have received $2,250.00; that upon the presentation of the bill for the balance of $250.00 it was not allowed by the state armory board "because same could only be paid from donated funds for construction of said armory and balance of donated fund for said purposes is at present insufficient."

It appears that payment for the armory at Akron was from two sources—the state of Ohio and $50,000.00 contributed by the citizens of Akron, and from what is said in the letter of Messrs. Harpster & Bliss it would appear that the estimates when drawn were drawn out of the amount contributed by the citizens of Akron to such an extent as to exhaust the fund without taking care of the balance due Messrs. Harpster & Bliss, whereas it would have been equitable not to have drawn upon the entire sum contributed by the citizens of Akron, thus exhausting the fund, but rather the sum of $250.00 should have been left in said fund and the amount contributed by the state should have been drawn upon.

If I am correctly informed the $50,000.00 contributed by the citizens of Akron was never paid into the state treasury but was held as a trust fund and that consequently, of course, said sum of $50,000.00 was not commingled with the amount appropriated by the state.

However, it is only fair to consider as done that which ought to have been done and if through inadvertance the entire sum contributed by the citizens of Akron was distributed without taking care of the balance of $250.00 due Messrs. Harpster & Bliss under their contract, it would seem to me that it would only be fair and equitable to pay said $250.00 from the balance of the appropriation on hand for the purpose of the Akron armory. In so doing the state would in no way suffer any loss, but would have carried out the fair agreement of the state armory board.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

486.

PROBATION OFFICER—SALARY—FROM WHAT FUND PAYABLE.

The proper fund mentioned in section 1671 *General Code is considered to be a juvenile court fund from which all the expenses of the juvenile court is paid and such expenses include the salary of the probation officer.*

Section 1682 *G. C. makes provision for the payment of all necessary incidental expenses of the juvenile court and its officers and the probation officer is considered an officer of such court.*

COLUMBUS, OHIO, August 1, 1917.

HON. J. ARTER WEAVER, *Probate Judge, Bryan, Ohio.*

DEAR SIR:—I beg to reply to your letter of June 15, 1917, and give you my opinion on the question therein propounded.

> "I would like to appoint a probation officer in Williams county. There has never been any in this county. Would like to know if there has to be special fund set aside by the county commissioner before any appointment can be made or if said officer is paid out of the general fund.
>
> "As I understand the law, the probate judge can appoint and fix the salary of a probation officer, said officer to serve during the pleasure of the judge. What section of the General Code governs his expenses?"

General Code section 1662, as amended 107 O. L. p. 19, provides as follows:

> "The judge designated to exercise jurisdiction may appoint one or more discreet persons of good moral character, one or more of whom may be a woman, to serve as probation officers, during the pleasure of the judge. One of such officers shall be known as chief probation officer and there may be one or more assistants. Such chief probation officer and assistants shall receive such compensation as the judge appointing them may designate at the time of the appointment, but the compensation of the chief probation officer shall not exceed three thousand dollars per annum and that of the assistants shall not exceed fifteen hundred dollars per annum. The judge may appoint other probation officers, with or without compensation, but the entire compensation of all probation officers in any county shall not exceed the sum of forty dollars for each full thousand inhabitants of the county at the last preceding federal census. The compensation of the probation officers shall be paid by the county treasurer from the county treasury upon the warrant of the county auditor, which shall be issued upon itemized vouchers sworn to by the probation officers and certified to by the judge of the juvenile court. The county auditor shall issue his warrant upon the treasury and the treasurer shall honor and pay the same, for all salaries, compensation and expenses provided for in this act, in the order in which proper vouchers therefor are presented to him."

By the provisions of the section above quoted, you will note the judge of the juvenile court may appoint a probation officer and that said appointment shall hold during the pleasure of the judge; that the compensation for such probation officer is designated by the probate judge at the time of his appointment and that said compensation shall be paid by the county treasurer upon the warrant of the county auditor, which shall be issued upon itemized vouchers sworn to by such probation officer and certified to by the judge of the juvenile court.

It is provided in the last sentence of said section above quoted that the expenses

provided for in this act shall be paid by the county treasurer upon the warrant of the county auditor and I shall speak of said expenses further in this opinion.

General Code section 1671 provides that the county commissioner shall transfer to the *proper fund,* from any fund or funds of the county, such sums as may be necessary to pay the probation officers and said section also makes provision for the expenses of the court.

There is no provision of law which creates a juvenile court fund, as such, but I am advised that in practice it has been the custom for the judge of the juvenile court to make requisition each year to the board of county commissioners for a sum sufficient to pay the expenses of such court for the ensuing year, and that said sum is placed in a separate fund usually denominated "the juvenile court fund," which last mentioned fund has been understood to be the "proper fund," as mentioned in said section 1671 G. C.

General Code section 1683 provides that all fees and costs in juvenile cases, together with such sums as are necessary for the incidental expenses of the court and its officers, shall be paid from the county treasury upon itemized vouchers certified to by the judge of the juvenile court, and section 1683 provides that the juvenile court chapter of our laws shall be liberally construed to the end that proper guardianship may be provided for the children in order that they may be educated and cared for, as far as practicable, in such manner as best subserves their moral and physicial welfare. The expenses necessary to carry out the provisions of said sections or to properly run the juvenile court would include not only the fees and costs which are taxed in the several cases, but such necessary incidental expenses of the court or its officers, and the probation officer being an officer of the juvenile court, his necessary expenses would be included in the above provision.

It is not necessary that the county commissioners pass upon the compensation and expense accounts of the probation officers, for it is provided in section 2570 that where the amount due is fixed by an officer or tribunal authorized by law, the commissioners need not pass upon the same. In this case the amount of compensation is fixed by the juvenile judge and the expense accounts are sworn to by the probation officer and certified to by the juvenile judge, and a warrant therefor is issued by the county auditor and paid by the county treasurer without any action on the part of the board of commissioners. To the same effect is the provision of General Code section 2460, which authorizes payment otherwise than upon the allowance of the county commissioners, when the amount is upon the proper certificate of the tribunal allowing the claim. In this instance the tribunal is the juvenile judge and the claims are the compensation and the necessary expenses of an officer of the juvenile court.

It is also proper for me to mention that this department held in opinion No. 93, a copy of which is enclosed to you herewith, that the probation officer might be appointed as one of the assistants to the juvenile judge not under civil service.

Answering your several questions, then, in the order in which they are contained in your inquiry, I advise you, first, that a special fund is set aside by the board of county commissioners and if the board of county commissioners should refuse to appropriate or set same aside, action in mandamus will lie the same as for any other appropriation, from which fund the expenses of the juvenile court is paid, and in practice the said fund is usually denominated the juvenile court fund and is understood to be the proper fund as mentioned in section 1671 G. C.; and that it is not necessary to wait until such fund is created but said appointment can be made at once.

Second. Section 1682 of the General Code makes provision for the expenses of the probation officer, he being considered an officer of the juvenile court.

I am also enclosing herewith copy of house bill No. 19, found in 107 O. L., page 19, as per your request.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

487.

SUPERINTENDENT OF BANKS—POWER TO APPOINT EXAMINERS TO EXAMINE APPLICANT—PRIOR TO 1917—POWER TO CHARGE EXPENSE OF EXAMINATION TO APPLICANT—PRIOR TO AND AFTER 1915.

1. *Prior to* 1917, *the superintendent of banks, "commissioner" under the blue sky act, had no implied power to appoint examiners to make examinations of applicants but was limited to persons appointed as "clerks" under said act, or possibly, as "examiners" under the banking laws; and in either event such appointments, if special, and the compensation of appointees, required the approval of the governor. Firms or corporations could not legally be so appointed.*

2. *Prior to* 1915 *there was no authority of law for charging to the applicant any part of the expense of the examination under said act.*

3. *Under the amendment of* 1915, *part or all of the compensation of a special clerk or examiner, appointed to make a particular examination, might be charged to the applicant and no part of the salary of a regular clerk or employe could be so charged.*

4. *The state has no pecuniary claim on account of the violation of any of the above principles.*

COLUMBUS, OHIO, August 1, 1917.

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

DEAR SIR:—Your letter of recent date requested my opinion upon the following questions:

> "1. Under the provisions of the blue sky laws prior to their amendment in 1917, by what method might the superintendent of banks cause investigations and examinations to be made of concerns seeking license to sell securities or lands in the state of Ohio?
>
> "What I am desirous of knowing specifically is whether he was bound under the banking laws to assign the regular examiners authorized under said laws to be appointed, or whether he had the right to appoint or assign persons or firms other than such examiners to make said investigations under the blue sky laws.
>
> "2. Prior to the amendment of said blue sky laws in 1915, was there any authority to collect the expenses of such examinations from the concerns examined?
>
> "3. Under said amendments of 1915, what should the expense collected from the persons or firms investigated include—salary and traveling expenses both, or simply traveling expenses?"

The blue sky act was passed in 1913 (103 O. L., 743), amended in 1914 (104 O. L., 119), in 1915 (106 O. L., 360), and has been recently amended again. Your questions however, relate to the law as it existed from time to time prior to the most recent of these amendments in 1917.

As to your first question the original act provided in section 16 thereof (section 6373-16) as follows:

> "Said 'commissioner' shall have power to make such examination of the issuer of the securities or the owner of the property, named in the two preceding sections, and of such securities or property, as he may deem advisable * * *."

As further reflecting upon the scope of the meaning of this clause as it occurs in the original act, the following other provisions of that act may be noted:

"Before such license shall be issued to any dealer, there shall be filed by him with the superintendent of banks, herein termed the 'commissioner' * *. *." (Section 3 of the original act, section 6373-3 G. C.)

This provision is the only one which determines the identity of the "commissioner," to whom repeated reference is made in the act, until we get to the last section thereof, which is designated as section 6373-24, wherein this designation is abandoned and the superintendent of banks is referred to by his official title, as follows:

"The superintendent of banks is hereby authorized to appoint such clerks as are actually necessary to carry out the provisions of this act and to fix their salaries; such appointments and salaries to be subject to the approval of the governor. All fees received hereunder by the 'commissioner' shall be deposited by him with the treasurer of state * * *. The sum of seven thousand five hundred dollars is hereby appropriated * * * for the payment of the salaries and expenses necessary to carry out the provisions of this act."

I know of no other provision of the original act of 1913 which in any way sheds light upon the answer to your first question.

All of these sections were amended in 104 O. L., 119. The amendment of section 6373-3 does not affect that part of it which has been quoted. It still remained the only section in the law which made the superintendent of banks the "commissioner" for the purpose of the act.

Section 16 was amended in respects also immaterial to your present inquiry. It still gave to the "commissioner" the same power of examination which was given by the same section in the original act.

Section 24 was amended in respects in some degree material in that it expressly authorized the appointment of an assistant commissioner and the temporary provision for the appropriation was properly dropped. As amended, the section provided as follows:

"The superintendent of banks, as 'commissioner' under this act, is hereby authorized to appoint an assistant commissioner and such clerks as are actually necessary to carry out the provisions of this act and to fix their salaries; such appointments and salaries to be subject to the approval of the governor. Subject to the supervision of such 'commissioner,' the assistant commissioner may perform all the duties imposed upon, and have all the powers granted to such 'commissioner' under the provisions of this act. All fees received hereunder by the 'commissioner' shall be deposited by him with the treasurer of state upon the warrant of the auditor of state."

The 16th section was the only one of those under consideration which was amended in 1915 and the amendments then made were material so far as some of your questions at least are concerned. As so amended the section provided as follows:

"Said commissioner shall have power to make such examination of the issuer of the securities, or of the property named in the two next preceding sections, at any time, both before and after the issuance of the certificate hereinafter provided for, as he may deem advisable. When in the discretion of the commissioner all or any part of the expense of such examination should be paid by the applicant for such certificate, such applicant shall deposit with the commissioner such sum of money as the commissioner may order, out of which said sum the commissioner shall pay that portion of the

expense of such examination as the commissioner determines said applicant should pay. The commissioner shall render to the applicant an itemized statement of the expenditure and a proper record thereof shall be kept. * *"

As I have stated, there was no provision prior to 1917 in the blue sky law expressly authorizing the commissioner therein named, or the superintendent of banks, as such, to appoint examiners. He was authorized to appoint clerks and later an assistant commissioner, both subject to the approval of the governor. But any power that he had to appoint examiners would have to arise in one of three possible ways:

"(1.) By express authority of the law defining the powers of the superintendent of banks, as such.

"(2.) By implication from express grant of the power to examine vested in him as commissioner under the blue sky law.

"(3.) As reflecting only upon the power to pay compensation of examiners and not upon the power of examiners or the power of the head of the department to delegate any of his authority, the provisions of any appropriation bill that may have been passed and may have authorized the employment of examiners in the blue sky department might be consulted."

The first problem is to decide whether the power to appoint examiners and delegate dutie to them can or must be implied from the blue sky law itself, in the absence, which has been noted, of any express authority in that law to do so.

When a grant of power is in question, the rule of strict construction, which is stated in the maxim that the expression of one thing is the exclusion of all others, applies generally, subject, perhaps, to the exception that where a duty is imposed by law upon an officer and the nature of that duty is such that he cannot be reasonably expected to discharge the duty in person, he has enough implied power to appoint clerks and assistants to justify the exercise of such a power of appointment if the necessary funds to pay the compensation of such assistants are appropriated. Many of the officers of the state are employing assistants under no other authority than this. Such assistants have no power of their own, nor in law does the head of the department delegate any powers to them. In contemplation of law their acts are those of the head of the department and he is answerable for them. In the first instance, he would have to pay their compensation, but the making of an appropriation for such compensation absolves him from that duty.

However, if there is an implied power to appoint assistants, when the very nature of the duties imposed upon the head of the department is such as to make it impossible for one person to attend to all the details of the work, such power arises only when it is necessary to bring it into being in order to supply what would otherwise be a deficiency. That is to say, the general assembly, by imposing duties of that character, will be deemed to have intended that he should have enough power to discharge those duties.

Where statutes exist expressly granting such power, such statutes are the source thereof and the power is no longer an implied but an express one. In the case now under consideration, the superintendent of banks had some power to appoint examiners and the question arises as to whether or not the general assembly intended that examiners who should do the work devolving upon the department under the blue sky law should be those whom the superintendent of banks was authorized to appoint in his general capacity.

Section 712 of the General Code, as amended in 103 O. L., 61-384, provided as follows: (It not being necessary for the present purposes to determine which of these two sections controls, as they are identical for present purposes.)

> "With the approval of the governor the superintendent of banks may employ from time to time the necessary clerks and examiners to assist in the discharge of the duties imposed upon him by law. With such approval he may remove any such clerks or examiners."

This language is broad enough to authorize the employment of examiners to assist the superintendent of banks in the discharge of any duty imposed upon him by law, as well as the duty of making examinations under the banking law. It is true that as originally enacted, and even as amended in 1913, the general assembly probably did not contemplate the employment of examiners under this section otherwise than for the purpose of examining banks. This is particularly true in that such examiners were at all times prohibited by section 717 of the General Code from being "interested directly or indirectly in any national banking association or in any bank or other corporation or association under their supervision" or from being "engaged in the business of banking" (103 O. L. 384). Of course, even this language is broad enough to include corporations other than banks, if a very liberal interpretation be given to it. However, I am inclined to the opinion, so far as official qualification is concerned, that that was a matter to be determined with respect to the examiners in the department of banks by their several relations with banking institutions and such other institutions as might be under the supervision of the department otherwise than by virtue of the blue sky law.

In spite of this conclusion, however, it may be that it would be lawful for the superintendent of banks to detail one of the examiners appointed by him under section 712 of the General Code to perform any service devolving upon the department by virtue of the blue sky law. At any rate, the "clerks" mentioned in section 24 of the blue sky law might have been so employed. Therefore no necessity for any implied power of appointment exists under the blue sky law. Inasmuch as implied power comes into existence only through necessity, and inasmuch as there is an express grant of power in section 24 of the blue sky law to appoint certain kinds of assistants, I arrive at the conclusion that no implied power to appoint examiners devolves upon the department of banks as commissioner under the blue sky law.

In interpreting your question, then, and especially that part of which where you refer to "the regular examiners" as referring to examiners or clerks appointed with the approval of the governor, your first question would have to be answered by stating that the first alternative, as framed by you, is a correct statement of the law. That is to say, any examination service performed by the superintendent of banks as "commissioner" under the blue sky law would, prior to the amendment of 1917, if not performed by the superintendent himself or by the assistant commissioner or by some one employed as a clerk under section 6373-24, have to be performed by one appointed as examiner under section 712 of the General Code, subject to the approval of the governor, as therein provided. Inasmuch, however, as section 6373-24 also requires the approval of the governor, it would seem to follow that if the governor should approve a particular appointment, though there might be some informality or defect in respect of the designation of the position, either section would be satisfied and the appointment would be valid. There is no limit under either section as to the number of clerks or examiners who might be appointed by the superintendent of banks in either capacity. In this sense I do not understand that there was any such thing as a "regular examiner." Examiners might be appointed from time to time and discharged from time to time, subject to such civil service regulations as might have been applicable. I find no authority, however, in any of the sections for the appointment or assignment of "firms" to conduct examinations for the superintendent of banks in any capacity.

These things being true, I have not investigated the appropriation bills of the

years covering the period of time to which your question relates as any appropriations therein made would be referable to and therefore controlled by the general provisions of law as I have referred to them.

I have also ignored the provisions of section 742-1 et seq. of the banking laws, which authorize the superintendent of banks, as a liquidating officer, to appoint other examiners and special deputy superintendents. These provisions manifestly have nothing to do with the current operations of the banking department nor, of course, with its activities under the blue sky law.

My answer to your first question is, therefore, that under the laws applicable to the subject the superintendent of banks was without authority, prior to the amendments of 1917, to appoint any person to perform services of the kind referred to by you otherwise than with the approval of the governor.

Your second question relates to the condition of the law prior to the amendments of 1915, which, as has been stated, changed the 16th section of the blue sky law, but neither of the other two sections referred to. The changes made in 1915 expressly authorized the collection of certain examination expenses from the concerns examined. Prior to that time there was no authority to do this, and this statement constitutes an answer to your second question.

The provisions of the 1915 amendment do not furnish a very clear and satisfactory answer to your third question. The thing that may be charged by the commissioner to the applicant thereunder is not the expense of an examiner, but the "expense of the examination," yet the commissioner is required to render to the applicant an "itemized statement of the expenditure" and to keep a proper record thereof. The whole provision contains intimations in both directions. I believe, however, that the section may fairly be interpreted in the light of the provisions of section 720 and 735 of the group of sections of the General Code applicable to the superintendent of banks generally. These provide for special examinations requested by a banking association. The first of these sections provides generally that the "expenses thereof shall be paid by the corporation making the request." Section 735 provides as follows:

> "When an examination is made at the special instance and request of such corporation * * * the expense incurred and the services performed shall be paid by the one examined, and the charges collected shall be paid into the state treasury by the superintendent of banks to the credit of the banking fund."

The legislature will be deemed, I think, to have had this scheme in mind in framing the 1915 amendment to the blue sky law. The effect of the section which has just been quoted is the primary meaning of the general phrase "expenses of such examination" as used in section 6373-16. That is to say, this phrase includes something more than the expense of the examiner and really refers to all the cost to the state of making the examination. This would naturally include the cost of the personal services involved.

There is a principle established with reference to the apportionment of the cost and expense of a local improvement by assessment which, I think, comes in here. That principle is that where the services of a public employe receiving a salary from the public treasury are used in connection with the specific improvement, no part of such salary can be included in the assessment; but where a person is specially employed for services in connection with an improvement, his compensation may be included therein.

Longworth v. Cincinnati, 34 O. S. 101;
Spangler v. Cleveland, 35 O. S. 469.

These cases were decided on general principles applicable to the present case.

I am of the opinion, therefore, that where, with the approval of the governor, the superintendent of banks especially appointed a "clerk" or "examiner" to act under the sections under consideration, as to a particular examination, his compensation, as likewise fixed, might lawfully have been included in the amount required to be paid by the applicant. But where persons regularly employed on salaries payable from the state treasury were used to make such examinations, no part of such salaries could lawfully be so included.

Your questions suggest that it may have been the practice of the superintendent of banks, acting under the blue sky law, prior to the amendment of 1915, to collect expenses of examinations from the concerns examined. Such practice, while not authorized, as I have said, would not in any way affect the validity of the examinations made nor of the determinations of the commissioner in accordance therewith. Nor would it subject the superintendent of banks to any liability running to the state. So long as the commissioner and the applicant might agree upon such a plan the state would have no cause for complaint, on pecuniary grounds at least, however dangerous and reprehensible the practice might seem to be on other grounds.

Your question also suggests the possibility that prior to the amendment of 1917 persons and firms, other than those who, as I have held could lawfully be appointed as examiners, were used by the superintendent of banks, acting as commissioner under the blue sky law, for such services. If any money was drawn from the state treasury to pay such person, I doubt the liability of such person to refund the money so drawn; because the only defect in the procedure in appointment would be that the approval of the governor was not secured. If the person in question actually acted as examiner the services would have been rendered and, if regarded as an officer, his status would have been that of a *de facto* officer; if regarded as an employe, it might be argued that his whole employment was a nullity because of the lack of the jurisdictional requisite of approval by the governor. On the whole, however, I do not think there could be any recovery of such moneys from persons who actually rendered the services and acted as examiner, even though the approval of the governor for his appointment was not obtained.

Strictly, there might be more question about the employment of a firm, as there was no authority whatsoever for such a practice. However, where the services have been rendered and the firms have been paid out of the state treasury, I would advise against a finding for recovery unless there has been a gross abuse of official authority.

In case any such authorized appointment or employment was made, and compensation therefor was paid under a voluntary arrangement between applicant and the commissioner by the former, then the statement above made respecting the lack of any complaint on the part of the state on pecuniary grounds would hold good.

I express no opinion herein, however, as to any other possible aspects of such arrangement entered into before the amendment of section 6373-16 legalizing the practice.

Yours very truly,
JOSEPH MCGHEE,
Attorney-General.

488.

FEDERAL FARM LOAN BONDS—PROPER SECURITY FOR PRIVATE TRUST FUNDS.

Federal farm loan bonds are a proper security for the investment of all private trust funds, unless the instrument creating the trust by its terms forbids such investment.

Whenever, under the laws of Ohio, it is necessary for a trustee to obtain, from the court having jurisdiction over the trust, authority to invest trust funds, the court is warranted in authorizing such investment to be made in federal farm loan bonds.

COLUMBUS, OHIO, August 1, 1917.

HON. JAMES M. COX, *Governor of Ohio, Columbus, Ohio.*

DEAR GOVERNOR:—On July 17, 1917, I received the following request from you, for my opinion:

> "On inquiry from the Hon. W. G. McAdoo, secretary of the treasury of the United States, permit me to request of your office a ruling as to the character of federal farm loan bonds from the standpoint of investment therein of private trust funds.
>
> "Do these bonds come within the purview of section 11214 of the General Code of Ohio, which provides for the investment of private trust funds in 'certificates of indebtedness, of the United States?'
>
> "Certain amendatory legislation was enacted by the 82nd Ohio general assembly (H. B. 463 and S. B. No. 183) to facilitate investment in farm loan bonds by banks and trust and insurance companies, but no reference is made, it seems, to investment therein of trust funds of a private nature."

Federal farm loan bonds, issued, or to be issued, under authority of the federal farm loan act, may be briefly described as follows: These bonds may be issued by any federal land bank, with the approval of the federal farm loan board, in denominations of $25, $50, $100, $500 and $1,000. The interest rate cannot exceed 5%. The bonds can only be issued when the applicant bank tenders to the farm loan registrar of the district as collateral security, first mortgages on farm lands or United States government bonds, in an amount equal to the bonds proposed to be issued.

The act provides, among other conditions, as to mortgages which are taken by federal land banks, which mortgages, as above stated, are used as collateral security for federal farm loan bonds:

> "Section 12. That no federal land bank organized under this act shall make loans except upon the following terms and conditions:
>
> "First. Said loans shall be secured by duly recorded first mortgages on farm land within the land bank district in which the bank is situated.
>
> "Third. No loan on mortgage shall be made under this act at a rate of interest exceeding six per centum per annum, exclusive of amortization payments.
>
> "Fourth. Such loans may be made for the following purposes and for no other.
>
> "(a) To provide for the purchase of land for agricultural uses.
>
> "(b) To provide for the purchase of equipment, fertilizers and live stock necessary for the proper and reasonable operation of the mortgaged farm; the term 'equipment' to be defined by the federal farm loan board.

"(c) To provide buildings and for the improvement of farm lands; the term "improvement" to be defined by the federal farm loan board.

"(d) To liquidate indebtedness of the owner of the land mortgaged, existing at the time of the organization of the first national farm loan association established in or for the county in which the land mortgaged is situated, or indebtedness subsequently incurred for purposes mentioned in this section.

"Fifth. No such loan shall exceed fifty per centum of the value of the land mortgaged and twenty per centum of the value of the permanent, insured improvements thereon, said value to be ascertained by appraisal, as provided in section ten of this act. In making said appraisal, the value of the land for agricultural purposes shall be the basis of appraisal and the earning power of said land shall be a principle factor."

The following provisions of the act as to the federal farm loan bonds may also be noted.

"Section 21. That each land bank shall be bound in all respects by the acts of its officers in signing and issuing farm loan bonds, and by the acts of the federal farm loan board in authorizing their issue.

"Every federal land bank issuing farm loan bonds shall be primarily liable therefor, and shall also be liable, upon presentation of farm loan bond coupons, for interest payments due upon any farm loan bonds issued by other federal land banks and remaining unpaid in consequence of the default of such other land banks; and every such bank shall likewise be liable for such portion of the principle of farm loan bonds so issued as shall not be paid after the assets of any such other land banks shall have been liquidated and distributed: PROVIDED, That such losses, if any, either of interest or of principle shall be assessed by the federal farm loan board against solvent land banks liable therefor in proportion to the amount of farm loan bonds which each may have outstanding at the time of such assessment.

"Every federal land bank shall by appropriate action of its board of directors, duly recorded in its minutes, obligate itself to become liable on farm loan bonds as provided in this section.

"Every farm loan bond issued by a federal land bank shall be signed by its president and attested by its secretary, and shall contain in the face thereof a certificate signed by the farm loan commissioner to the effect that it is issued under the authority of the federal farm loan act, has the approval in form and issue of the federal farm loan board, and is legal and regular in all respects; that it is not taxable by national, state, municipal, or local authority; that it is issued against collateral security of United States government bonds, or indorsed first mortgage on farm lands, at least equal in amount to the bonds issued, and that all federal land banks are liable for the payment of each bond."

"Section 26. That every federal land bank and every national farm loan association, including the capital and reserve or surplus therein and the income derived therefrom, shall be exempt from federal, state, municipal and local taxation, except taxes upon real estate held, purchased, or taken by said bank or association under the provisions of section eleven and section thirteen of this act. First mortgages executed to federal land banks, or to joint stock land banks, and farm loan bonds issued under the provisions of this act, shall be deemed and held to be instrumentalities of the government of the United States, and as such they and the income derived therefrom shall be exempt from federal, state, municipal, and local taxation.

"Section 27. That farm loan bonds issued under the provisions of this act by federal land banks or joint stock land banks shall be a lawful investment for all fiduciary and trust funds, and may be accepted as security for all public deposits."

The act is quite long and I deem it unnecessary to call the attention to further details. An exhaustive opinion as to its constitutionality has been rendered by Hon. Charles E. Hughes, under date of May 4, 1917, addressed to Alexander Brown & Sons of New York, the concluding paragraph of which is:

"My conclusion is that the farm loan bonds to be issued by the federal land banks organized and controlled as provided in the federal farm loan act will be when duly issued and paid for, valid securities, constituting as declared by congress, instrumentalities of the government of the United States, and that they and the income derived therefrom will be exempt as provided in the act from federal, state, municipal and local taxation; and further that, with respect to bonds duly issued and paid for under this exemption, it will constitute a continuing exemption which cannot be withdrawn by subsequent legislation."

Justice Hughes also states in his opinion (in speaking of federal land banks):

"These farm loan bonds are a lawful investment for all fiduciary and trust funds (subject to the laws of the several states), and may be accepted as security for all public deposits."

and further, in speaking of the nature of the obligation created by these bonds, it is stated:

"And while the act does not in terms provide that the United States shall be liable on these farm loan bonds, the act does contain the explicit provision that these bonds must 'be termed and held to be instrumentalities of the government of the United States. * * *.'

"Taking into consideration, the facts which have been stated with respect to the organization and control of the federal land banks, I am of the opinion that the farm loan bonds which are about to be issued by these banks under the authority and direction of the federal farm loan board by virtue of the powers conferred by congress, and which have been expressly declared by congress to be instrumentalities of the federal government, must be regarded as obligations having the support of the good faith and credit of the United States. And while such obligations, because of the nature of sovereignty, confer no right of action against the United States, without its consent, being 'only binding on the conscience of the sovereign,' and hence in this aspect invite reliance on the sense of justice of congress, still the actual relation of the government to the issue of these bonds affords additional ground for sustaining their validity."

The above quotations from the federal farm loan act and from the opinion of Justice Hughes show the very high character of security afforded by these bonds. While they are not, as stated in my opinion of March 2, 1917, to the superintendent of banks, what are commonly known as United States government bonds, they are bonds, secured by first mortgages on real estate, or by United States government bonds, and, as stated by Justice Hughes, are instrumentalities of the federal govern-

ment and are obligations having the support of the good faith and credit of the United States. Further, "they are a lawful investment for all fiduciary and trust funds."

My opinion is, that unless there is some prohibitive provision of our Ohio laws, any trustee may invest trust funds in these bonds, and, under the general rules of law relating to investment of trust funds, he would be fully protected.

> "Speaking very generally, in passing upon the subject of the proper discharge of his duties by a trustee, it has been said that the true question is whether, considering all the circumstances, he has displayed such prudence and diligence in conducting the affairs of the trust as men of average prudence and discretion would employ in their own affairs. (Bispham's Principles of Equity, section 140).
>
> "Mortgages on real estate have always been regarded as proper investments for trustees, especially in the United States. (Bispham's Principles of Equity, section 141).
>
> "There can be no doubt that mortgages on real estate are considered proper investments in the United States, and perhaps they are the only investments which are not objectionable in some one of the states * * * but mortgages upon estates of inheritance, taken with proper caution as to the amount and the title, have been named in all the states as proper and safe investments; so that the question in the United States is whether the security is in fact what is called *'Security upon real estate.'* " (Perry on Trusts and Trustees, section 458).

> "A trustee ought not as a rule to invest in second mortgages. Trustees ought to invest in government or state securities, or in bonds and mortgages on unincumbered real estate The rule is not inflexible, but subject to the higher rule that the trustees are always to employ such care and diligence in the trust business as careful men of discretion and intelligence emp oy in their own affairs." (Perry on Trusts and Trustees, 6th Ed., Sec. 452).

Federal farm loan bonds are secured by first mortgages on real estate, and may be classed as bonds secured by real estate, and, in addition, as bonds having the support of the good faith and credit of the United States. Even if congress had not expressly provided that these bonds are lawful investment for trust funds, they would fall within the class of proper investments for trustees. That is, an investment made by a trustee in such bonds, unless prohibited by statute or by the terms of the trust, would relieve the trustee from personal liability in case of loss.

Statutes prescribing certain investments for trustees are generally regarded as enacted in the interest of the trustee. The trustee is liable personally for any loss of trust funds attributable to his neglect or unwise or unfaithful administration of the trust, but if he makes investments, in good faith, in securities authorized by statute or by the court, he is free from personal liability. If the statute or the instrument creating the trust prescribes certain investments the trustee can make others, but he generally does so at his peril.

> "In a few states, there are statutes authorizing trustees to invest in a particular manner, and excusing them from responsibility if their investments are made in good faith in the prescribed securities. * * * But it has been held that trustees are not confined to these funds; that the acts are for their benefit; that they can elect other kinds of investment, but will be responsible for losses." (Perry on Trusts and Trustees, section 459, 6th edition).

The same rule applies also where the instrument creating the trust specifies the securities in which the funds are to be invested. If the instrument creating the trust does not specify the securities but directs the trustee to invest in such manner as he may deem best, then the general rule as first given applies, in Ohio, under the case of Willis v. Brancher, 79 O. S. 290. In that case a trustee under a will invested trust funds in the stock of a state bank, which failed. The trustee having exercised good faith, prudence and diligence was relieved from personal responsibility, the court holding that section 11214, referred to in your request and thereafter quoted and referred to, is permissive, and only applies when the instrument creating the trust did not specify the manner of the investment or vest discretion in the trustee, and to cases of statutory trustees when no other provision as to investment was made.

Under the general law and this decision there can be no question that where a trustee is vested with discretion as to the investment, he may invest in federal farm loan bonds and be fully protected.

Coming now to the statutes of Ohio bearing upon your request I find the following:

Section 10843 provides for investment of unclaimed money by an executor or administrator and is as follows:

> "If a sum of money directed by a decree or order of the court to be distributed to heirs, next of kin, or legatees, or by a judgment or decree of court in favor of a creditor, remains for six months unclaimed, the executor or administrator shall loan it on bond or mortgage, as the court directs, to accumulate for the benefit of the persons entitled thereto. Such loan shall be made in the name of the judge of the court for the time being, and be subject to the order of the judge and his successors in office as hereinafter provided."

Under this section an executor or administrator *must* apply to the probate court for authority to make the investment, no matter in what security he wishes to invest and the court undoubtedly has just as much authority to authorize an investment under this section in Federal Farm Loan Bonds, as in United States Bonds, or any mortgage on real estate.

Section 10933 General Code (107 O. L. 405) provides for the duties of guardians of minors. Paragraph 7 of this section governs investments by such guardians, and is as follows:

> "7. Within a reasonable time after he receives it, to loan or invest money of his ward, in notes or bonds, secured by first mortgage on real estate of at least double the value of the money loaned or invested. The buildings thereon if any must be well insured against loss by fire and so kept by the mortgagor for the benefit of the mortgagee, until the debt is paid. On failure so to do, the mortgagee shall insure them and the expense to him be prepaid by the mortgagor and be a lien on the property concurrent with the mortgage. Or he may invest such money in bonds of the United States, or of a state on which default has never been made in the payment of interest, or bonds of a county or city in this state, issued in conformity to law; or, with the approval of the probate court, in productive real estate within this state, the title to which must be taken in the name of the ward. He also shall manage such investments, and when deemed proper, change them into other investments of the above classes. No real estate so purchased shall be sold by the guardian, except with the approval of the probate court. If the guardian fails to loan or invest money of his ward within reasonable time, he must account on settlement for such money and interest thereon, calculated with annual rests;"

I think that federal farm loan bonds come fairly within the specification: "bonds, secured by first mortgage on real estate of at least double the value of the money loaned or invested. The buildings thereon, if any, must be well insured against loss by fire and so kept by the mortgagor for the benefit of the mortgagee until the debt is paid. * * *"

Federal farm loan bonds are bonds secured by first mortgage on real estate, and the provisions of the federal act as to the value of the land, it seems to me, are higher than the Ohio statute. Our statute makes absolutely no provision as to the class of real estate upon which the loan is to be made, whether improved or unimproved, whether under cultivation or not; nor is there any restriction as to persons to whom a loan can be made, nor as to the amount of the same. These matters are carefully covered by the restrictions as to federal farm loan mortgages.

Section 10933 provides that the real estate is to be worth double the value of the money loaned. No method of appraisal is required, therefore this provision is largely directory, and if the guardian used good faith in estimating the value of the real estate, but had defective judgment, he would be excused; for no method is provided for ascertaining the value of the land.

Under the federal act a careful and rigid appraisal is provided for. Section 10933 is silent as to whether the loan is to be made on improved or unimproved real estate and therefore contemplates a loan of fifty per cent. on the real estate and fifty per cent on the improvements, thus, if a loan was desired on a farm, the land being valued at $1000.00 and the buildings thereon at $2000.00, a guardian, under section 10933, could loan $1500.00 while on the same farm a loan from a federal land bank could be obtained for not more than $900.00, namely fifty per cent., or $500.00 on the land, and twenty per cent., or $400.00 on the improvements. Only permanent, insured improvements can be included in a federal farm loan; this is not provided for under section 10933. The provision as to insurance on property covered by a federal farm loan mortgage is also more strict than the guardian statute. Paragraph nine of section 12, of the federal farm loan act provides, in part:

> "Every borrower shall undertake to keep insured to the satisfaction of the federal farm loan board all buildings the value of which was a factor in determining the amount of the loan. Insurance shall be made payable to the mortgagee as its interest may appear at time of loss, and, at the option of the mortgagor and subject to general regulations of the federal farm loan board, sums so received may be used to pay for reconstruction of buildings destroyed."

My opinion therefore is that under paragraph 7 of section 10933 the guardian of a minor may invest the money of his ward in federal farm loan bonds, as they are "bonds secured by first mortgage on real estate of at least double the value of the money loaned or invested." and the conditions as to insurance under the federal act fully comply with those of section 10933.

By section 10991, the laws relating to guardians for minors and their wards are made applicable to guardians for idiots, imbeciles and lunatics, except as otherwise provided, and as no separate provision as to investments is made, investments by such guardians would be controlled by section 10993, and investment in farm loan bonds is authorized. Like provision as to guardians for drunkards is made by section 11011; and by section 11021 as to trustees for a non-resident minor, idiot, lunatic or imbecile. No provision is made as to investments by trustees for persons owning property in this state who have not been heard of for such time as raises a presumption of death; such trustee would probably be governed in the matter of investments by section 11214:

This section 11214 is a general law and provides as follows:

> "When they have funds belonging to the trust which are to be invested, executors, administrators, guardians and trustees, may invest them in certificates of the indebtedness of this state, of the United States, or in such other securities as the court having control of the administration of the trust approves. When money coming into the hands of an executor, administrator, trustee, agent, assignee, attorney, or officer is stopped therein by reason of litigation for more than six months, he may invest it during such detention in the manner that trust funds are now authorized by law to be invested, or as the probate or other court having jurisdiction of the pending litigation, or person aforesaid, directs."

This statute was considered by our supreme court in the case of Willis v. Brancher, 79 O. S. 291. On page 298 the court, in speaking of this section, says:

> "It is perhaps enough to say of this statute that it is permissive. It provides for situations where the instrument constituting the trust does not otherwise provide. Undoubtedly it indicates a general policy; a policy of carefulness in the handling of trust funds; it points out a course free from risk, and affords a certain sure method by which the trustee may secure an affirmation of the legality of his investment in advance. So that, as a matter of prudence, resort to the methods indicated may be strongly commended. But the statute does not afford any special aid in determining the question involved in the case at bar, unless it be ascertained that the will gives no added authority to the trustee."

This section gives a wider range of investments than section 10933, but, when investment is made under it, instead of 10933, the authority of the probate court must be obtained. It may be that under this section it is only necessary to obtain the approval of the court when the investment is in other securities than certificates of the indebtedness of this state or of the United States; but it is not necessary to go into that question. The opinion of the court in the last cited case makes it plain that this section, if mandatory at all, only applies to trusts where the instrument creating the trust neither specifies the securities in which investment is to be made, nor vests the trustee with discretion as to investments, and as to statutory trustees where the statute makes no provision as to the investments; it does, however, and this was probably the purpose for the enactment, widen the list of securities in which guardians and other trustees may invest, so as to include any security which meets the approval of the court. Investment in farm loan bonds could undoubtedly be made under this section by any trustee (unless the terms of the instrument creating the trust prohibited). If approved by the court, just as such investment could be made under it in United States government bonds; and, in any case which makes resort to this section necessary, as federal farm loan bonds answer every requisite for an investment by a trustee, and as they are authorized by section 10933, as investments for guardians, any court having jurisdiction would probably approve any application to invest in such bonds.

My conclusion is that federal farm loan bonds are a proper security in which all private trust funds may be invested unless the instrument creating the trust by its terms prohibits such investments and that wherever it is necessary under our laws for a trustee to obtain authority to invest trust funds from the court having jurisdiction of the trust, the court is warranted in authorizing such investment to be made in federal farm loan bonds.

I have not found it necessary to consider the two acts of the 82nd general assem-

bly referred to in your request namely senate bill No. 183, making federal farm loan bonds a lawful investment for the funds of insurance companies; and house bill No. 463, including such bonds in the list of securities in which commercial banks, savings banks and trust companies may invest; for the reason that the first act has no bearing whatever upon the question under consideration. As to house bill No. 463, it is sufficient to say that this act has to do primarily with investments for the funds of banking corporations, which investments are prescribed by statute. Under it trust companies may invest trust funds in federal farm loan bonds as well as in other securities mentioned in the act but this privilege is granted to them not as trustees but as banks. It is not probable that the legislature would have authorized such investment by trust companies as trustees and deny it to trustees other than trust companies. The only reasonable inference is that the legislature recognized federal farm loan bonds as proper investments for all trustees (as they are) and therefore gave to trust companies express authority to invest in them, which express authority it was necessary for such companies, being banking corporations to have.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

489.

APPROVAL—FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN FAIRFIELD, HARRISON, LAKE, OTTAWA, STARK, TUSCARAWAS AND WYANDOT COUNTIES.

COLUMBUS, OHIO, August 3, 1917.

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

DEAR SIR:—I have your communication of July 27, 1917, in which you enclose a number of final resolutions in reference to the improvement of certain highways and ask my approval of the same. The resolutions are for the following improvements:

"Fairfield county—Section 'M-2' of the Cincinnati-Zanesville road, I. C. H. No. 10.

"Harrison county—Section 'P' of the Steubenville-Cambridge road, I. C. H. No. 26.

"Lake county—Section 'B' of the Euclid-Chardon road, I. C. H. No. 34.

"Ottawa county—Section 'G' of the Port Clinton-Marblehead road, I. C. H. No. 440.

"Stark county—Section 'G' of the Ravenna-Louisville road, I. C. H. No. 74.

"Tuscarawas county—Section 'D' of the Canton-Canal Dover road, I. C. H. No. 70.

"Wyandot county—Section 'A' of the Upper Sandusky-Tiffin road, I. C. H. No. 266."

I have examined these final resolutions carefully and find them all correct in form and legal and am therefore returning the same to you with my approval endorsed thereon.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

490.

CITY ORDINANCE—ENTITLED TO SAME RESPECT AS GENERAL LAWS OF STATE—WHEN SAME ARE NOT IN CONFLICT.

In those cases in which an ordinance of a municipality does not conflict with the general laws of the state, the ordinance is entitled to as much respect and is as much a legal regulation within the limits of the municipality as a police regulation passed by the legislature.

COLUMBUS, OHIO, August 3, 1917.

HON. CALVIN D. SPITLER, *Prosecuting Attorney, Tiffin, Ohio.*

DEAR SIR:—I have your communication of July 13th in which you enclose a letter received by you from the mayor of Tiffin asking for my opinion in reference to the matter therein set out. The letter from the mayor of Tiffin reads as follows:

> "The question has arisen as to whether or not prosecutions can be had in the city of Tiffin under the so called dimmer ordinance since the passage of the new state auto light law.
>
> "Will you be so kind as to procure an opinion concerning the same from the attorney-general?"

Section 2 of the ordinance about which the mayor makes inquiry reads as follows:

> "That it shall be unlawful for anyone to operate a motor vehicle or other vehicle upon the streets of said city having or using a head light and reflector thereon without the use of a dimmer or other mechanical contrivance to prevent the glare of said light and reflectors from blinding the eye; said dimmer or other mechanical contrivance to be so adjusted and used as to enable persons upon the streets of said city to see objects as well as if no head-lights with reflectors were in use on such vehicle"

The section of the General Code which has to do with the same matter is section 12614-1 (107 Ohio Laws, page 540.) The section reads as follows:

> "It shall be unlawful for any person to drive or propel any automobile or other vehicle upon the public highways of the state in the night season if said vehicle is equipped with any acetylene, electric or other brilliant headlight or any other light, the rays of which shall be intensified by any parabolic or condensing reflector, unless such headlight or other light when approaching another automobile or vehicle at a distance of not less than seven hundred feet, shall be dimmed, controlled, deflected or so adjusted that at a distance of two hundred feet or more in front of such vehicle, no part of the intensified rays of light shall be visible more than three and one half feet above the surface of the highway, and remain so until the approaching vehicle passes by. Any person guilty of such unlawful act, upon conviction thereof, shall be fined not more than twenty-five dollars for the first offense and not less than fifty dollars nor more than one hundred dollars for the second offense."

It will be noted in comparing the ordinance with the statute, that the ordinance

does not conflict with the statute. Hence, the proposition is as to whether under these circumstances prosecutions can be had under the city ordinance. I am of the opinion that prosecutions may be had under such city ordinance.

Section 3632 of the General Code provides, in part, as follows:

> "To regulate the use of carts, drays, wagons, hackney coaches, omnibusses, automobiles, and every description of carriages kept for hire or livery stable purposes; * * *."

From this section, it is evident that municipalities are given authority to legislate in reference to the matter of automobiles.

Dillon, in his work on Municipal Corporations, lays down the law in reference to the matter suggested in the mayor's communication as follows: Section 633.)

> "We concur in the opinion, that there are many acts of such a nature that they may, if the legislature has so provided, be an offence against the state at large, and also against the special and local government of the municipality. Accordingly, where an act is prohibited both by statute and by ordinance, it may constitute two offences, one against the state and the other against the city or town, and where such is the case a conviction of one may not be pleaded as constituting former jeopardy when the offender is prosecuted for the other, and where such is the case the weight of authority also seems to hold that power to enact ordinances with reference thereto may be included in the general powers conferred on cities and towns by statute."

In *Koch* v. *The State*, 53 O. S. 433, the court say in the syllabus as follows:

> "A former conviction before a mayor for the violation of an ordinance is not a bar to the prosecution of an information charging the same act as a violation of a statute."

And the court in the opinion hold as follows:

> "In the probate court an information was filed against the plaintiff in error charging him with a misdemeanor, it being an offense against a statute. To this he pleaded in bar a former conviction before the mayor o Akron for the same act, it being also a violation of an ordinance of said city. A demurrer to the plea was sustained.
>
> "The ruling is in accord with the general course of decisions. Bloomfield v. Trimble, 54 Iowa, 399; Minnesota v. Lee, 29 Minn., 445; Robbins v. The People, 95 Ill., 175; Cooley's Const. Lim., 239."

In *Schell* v. *DuBois*, 94 O. S. 93, the court, in passing upon a question presented to it in said case used the following language: Page 103.)

> "Manifestly this ordinance had no other object in view than to protect the public. A police regulation, duly and legally passed by a municipal corporation, 'not in conflict with general laws,' is entitled to as much respect and is as much a legal regulation within the limits of the municipality as a police regulation passed by the legislature."

And on page 109 of the opinion the court lays down the following proposition:

> "Such an ordinance must be reasonable and must not conflict with general laws."

From all the above, it is my opinion that prosecutions may be had under the city ordinance of Tiffin, notwithstanding the fact that the general assembly has legislated upon the same subject. In legislating upon this subject, the general assembly did not forbid municipalities from legislating upon the same subject. And, as is shown in section 3632 G. C. above quoted the general assembly has given general power to municipalities to legislate in reference to automobiles.

Hence, answering the question specifically, it is my opinion that inasmuch as the city ordinance does not in any way conflict with the general law of the state upon the same subject, prosecutions may be had under the said ordinance notwithstanding the fact that the general assembly has legislated upon the same subject matter.

Very truly yours,
JOSEPH MCGHEE,
Attorney General.

491.

BOARD OF EDUCATION—CREATION OF NEW SCHOOL DISTRICT FROM ONE OR MORE DISTRICTS—NOTICE MUST BE GIVEN SUCH DISTRICTS—NOT NECESSARY TO FILE MAP WITH AUDITOR—EFFECT OF PETITION TO FORM NEW DISTRICT FILED BY MAJORITY OF ELECTORS.

(1) *The county board of education may create a new school district from one or more districts or parts thereof, as provided by General Code section 4736, and shall file with the board or boards of education from which the territory is taken a written notice of such proposed arrangement. The electors of the territory of the new district have thirty days time from the filing of such written notice to remonstrate against such proposed arrangement.*

(2) *In the creation of a new school district by a county board of education it is not necessary to file a map with the county auditor showing the boundary of the territory transferred.*

(3) *A petition filed by a majority of the electors of the territory, asking the county board to form such district, has no legal effect. The only provision for the filing of a petition for the transfer of territory is section 4696 G. C. and that applies to the transfer of territory from one county school district to another county school district, or to an exempted village or city school district.*

COLUMBUS, OHIO, August 3, 1917.

HON. CALVIN D. SPITLER, *Prosecuting Attorney, Tiffin, Ohio.*

DEAR SIR:—In your several letters you submit for my opinion the following statement of facts:

> "On March 24, 1917, there was filed with the board of education of Seneca county a petition signed by approximately 88 per cent. of the male electors of the territory, asking the board to form a new school district to be known as the 'Cromer's rural school district.'
>
> "On April 20, 1917, petitions were filed, bearing the names of 49 of said electors in said territory, requesting that their names be withdrawn from the remonstrance which they had signed against the proposed school district.
>
> "On April 21, 1917, a remonstrance was filed containing the names of 136 electors in the territory affected. The question is, whether the 49 names should be deducted from the 136 names, and whether or not a majority of the qualified electors had signed the remonstrance; in other words, did the

49 signers have the right to withdraw their names from the remonstrance voluntarily and without first obtaining the consent of the other signers to said petition?"

Said territory is described as follows:

"Beginning with the center of section nine of Hopewell township; thence north on the half section line to the center of section four Hopewell township; thence west on the half section line to the middle of the west line of said section four of Hopewell township, thence north on the section line to the northwest corner of section sixteen of Liberty township, thence east to the middle of the north section line of section thirteen, Liberty township; thence south on the half section line to the center of said section thirteen; thence east on the half section line to the middle of the east section line of said section thirteen; thence south on the township line to the middle of the east section line of section twenty-five, Liberty township; thence east on the half section line to the middle of the Sandusky river; thence along the middle of the Sandusky river to a point where the said line crosses the east and west half section line of section eight of Clinton township; thence west to the point of beginning, embracing approximately 27 square miles.

"The board of education on the 24th day of March, 1917, passed the following resolution:

"RESOLUTION,

"TRANSFERRING TERRITORY TO CREATE A NEW SCHOOL DISTRICT.

"Item 1.

"In accordance with sections 4692 and 4736 of the General Code, 105-106 Ohio Laws, page 397, be it RESOLVED, that certain territory now being parts of Hopewell, Liberty, Pleasant and Clinton townships rural school districts, Seneca county, Ohio, above described and mapped and designated by a map filed herewith and with the auditor of Seneca county, be and the same is hereby transferred from the said township and united to form a new school district for school purposes.

"Item 2. Be it

"RESOLVED, that the territory so transferred and mapped, and united, shall be known as the 'Cromer's rural school district.'

"Item 3. Be it

"RESOLVED, that the equitable division of school funds be made as follows:

"All funds collected and distributed from the February settlement, 1917, shall belong to the respective boards of education as heretofore. Beginning with the August settlement, 1917, said August settlement and all funds collected for school purposes thereafter in the above described district shall be paid to the board of education of the Cromer's rural school district, for school purposes.

"Item 4. Be it

"RESOLVED, that in accordance with sections 4692 and the General Code, O. L. 105-106, page 397, a certified copy of the resolution and a map

showing the boundaries of the district above created, be filed with the auditor of Seneca county, and notices of such transfer shall be posted in three conspicuous places in the district so transferred."

From the above, then, I gather that on and prior to March 24, 1917, there existed in the Seneca county school district certain township rural districts named as follows:

Hopewell, Liberty, Pleasant and Clinton rural districts; and from portions or parts of said four named rural districts the county board of education attempted to create a new rural school district, the same to be known as the "Cromer's rural school district."

That said new district was to contain approximately twenty-seven square miles of territory, that a petition bearing approximately 88 per cent. of the electors in the territory described in the resolution above quoted was presented to the county board of education, petitioning for the creation of said new district.

It will be understood at the out set that said petition had no legal effect, for the only section of our school laws which provides for a transfer to be made upon the filing of a petition is section 4696 G. C.; and that section applies only to territory which is to be transferred from one county school district to another county school district; and inasmuch as the school districts above mentioned, both the old and the new, are all located within the same county school district, said section could not, and does not apply, and said petition which contained the names of said electors would be simply an expression of sentiment to the county board of education, from the electors of said territory.

So that the first act of legal effect in your matter would be the act of passing the resolution by your county board of education, in which a new school district was created out of the parts of the four rural school districts above mentioned. The said new district was attempted to be created, and could be created only under and by authority of section 4736 G. C., which reads as follows:

"The county board of education shall arrange the school districts according to topography and population in order that schools may be most easily accessible to the pupils, and shall file with the boards of education in the territory affected, a written notice of such proposed arrangement; which said arrangement shall be carried into effect as proposed unless, within thirty days after the filing of such notice with the board or boards of education, a majority of the qualified electors of the territory affected by such order of the county board, file a written remonstrance with the county board against the arrangement of school districts so proposed. The county board of education is hereby authorized to create a school district from one or more school districts or parts thereof. The county board of education is authorized to appoint a board of education for such newly created school district, and direct an equitable division of the funds or indebtedness belonging to the newly created district. Members of the board of education of the newly created district shall thereafter be elected at the same time and in the same manner as the boards of education of the village and rural districts."

That is to say, your county board of education is authorized, acting under said section, to create a new school district from one or more school districts or parts thereof, in this case from parts of the four rural districts mentioned. In so doing, and after passing a resolution similar to the one above set forth, the county board of education shall file with each one of the rural boards of education of the districts mentioned, or from which territory is used in the creation of the new district, a written notice of

such proposed arrangement. After filing such written notices with said rural boards of education, a majority of the qualified electors of the entire new district then have thirty days' time in which to file a written remonstrance with the county board of education, remonstrating against the said arrangement so proposed in the formation of such new district. If such remonstrance is so filed by a majority of the qualified electors of the entire new district, and found to be such by the county board of education, and filed within thirty days from the date of such notices, then the proposed arrangement does not become effective; but if no such remonstrance is so filed by a majority of the qualified electors of such entire new district before thirty days from the date of the filing of such notices with the various rural boards of education, then said proposed arrangement or the creation of such new district does become effective. It is contemplated that the said notices so to be filed shall be filed at the same time that the resolution is passed which purports to create such new district; but the language of said section in relation to the filing of such notices is unquestionably only directory, and the notices can be filed within a reasonable time after the passing of such resolution, for instance, at this time.

It was held in Johann v. Board of Education, 26 Ohio circuit court, new series, 209, 212, that:

> "The statutory requirement is directory in so far as it fixes the time for such filing,"

keeping in mind, however, that the electors of such proposed district have thirty days from the filing of such notices in which to file their remonstrance. In the creation of a new district it is not necessary to file any map with the county auditor of the county in which the new district is created. The provision of the law for the filing of a map applies only when territory is transferred from one district of the county school district to an adjoining district or districts of the county school district.

Where a new district is created it is not such a transfer to an adjoining district, and hence in the creation of such new district the procedure outlined in section 4736 G. C. is followed, as above mentioned, and under the procedure as outlined in section 4692 G. C., which latter section applies only to transfers of territory. When your new school district is once created, it is necessary that a board of education be appointed, and therefore, while you do not inquire in relation to same, I deem it advisable to call your attention to a portion of opinion 368, rendered by this department June 16, 1917, in which opinion I held as follows:

> "The question as to whether the county board of education has a right to appoint a board of education for such new school district is not so easily determined. The language of section 4736, in relation thereto, seems clear and explicit. It provides that 'the county board of education is authorized to appoint a bord of education for such newly created school district,' but section 4736-1 G. C. provides:
>
> " 'In rural school districts hereafter created by a county board of education, a board of education shall be elected as provided in section 4712 of the General Code. When rural school districts hereafter so created, or which have been heretofore so created, fail or have failed to elect a board of education as provided in said section 4712, *or whenever there exists such school district which for any reason or cause is not provided with a board of education, the commissioners of the county to which such district belongs shall appoint such board of education* * * *.'
>
> "Said section 4736 was enacted May 20, 1915, and approved by the governor May 27, 1915, and filed in the office of the secretary of state May

28, 1915. Said section 4736-1 was enacted May 20, 1915, approved by the governor June 4, 1915, and filed in the office of the secretary of state June 5, 1915, being, therefore, the later of the two acts.

"It is somewhat difficult to ascertain whether or not the language of said acts is so contradictory that the latter will repeal the former by implication, or whether effect can be given to both. Effect must be given to both if the same can be done, and I am of the opinion that if at the time the county board of education creates a new district it appoints a board of education for such district, such board of education thereby becomes the legally constituted board for such district but if, for any reason or cause, the county board of education fails to appoint a board of education for such newly created district, then I am of the opinion that the board of county commissioners have the right to appoint such board, thus giving effect to both of the above mentioned sections."

From the above considerations you will plainly see that both petitions and the remonstrance which were mentioned by you, and especially the petition and remonstrance which were filed following the filing of said map with the county auditor, were of no effect in law.

Reaching this conclusion, then, the direct answer to your question is made unnecessary, but the procedure necessary is outlined above.

Yours very truly,
JOSEPH MCGHEE,
Attorney-General.

492.

APPROVAL— PROCEEDINGS FOR BOND ISSUE BY COUNTY COMMISSIONERS OF LOGAN COUNTY, OHIO.

COLUMBUS, OHIO, August 3 1917.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"IN RE —Bonds issued by the board of county commissioners of Logan county, Ohio, in the sum of $8,390.00 covering the shares to be paid by Liberty township and abutting property owners of the cost and expense of improving section 'D' of inter-county highway No. 189."

I have carefully examined the proceedings of the board of county commissioners of Logan county Ohio, of the board of township trustees of Liberty township, said county, and of other officers relating to the above bond issue and find the same to be in compliance with the sections of the General Code relating to bond issues of this kind, and I am of the opinion that properly prepared bonds covering said bond issue will, when signed by the proper officers, constitute valid and subsisting obligations of said county.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

493.

SALARY—OFFICER TAKING OFFICE DURING REFERENDUM PERIOD OF A BILL CHANGING SALARY OF SAID OFFICE—TAKES SUBJECT TO THE LAW EXISTING BEFORE THE CHANGE.

An officer assuming office within the referendum period of ninety days from the filing of an act with the secretary of state, which act changes the salary of said officer, takes the office at the salary as it existed before the change. And the change of salary becoming effective at the end of the ninety day period does not affect his salary for the term for which he was appointed.

COLUMBUS, OHIO, August 3, 1917.

The Public Utilities Commission of Ohio, Columbus, Ohio.

DEAR SIRS:—I have your communication of some days since in which you ask for my opinion in reference to a certain claim made by Hon. Lawrence K. Langdon for salary claimed due him as a member of your commission from June 8, 1915, to February 1, 1917. Your communication reads as follows:

> "On the 27th day of May, 1915, Mr. L. K. Langdon assumed office as a member of the public utilities commission of Ohio by virtue of an appointment by Governor Willis to fill the unexpired term of Charles C. Marshall, ending February 1st, 1917, at a salary of $6,000.00 per annum. Mr. Langdon received such salary until the 8th day of June, 1915, at which date the law reducing the salary to $4,500.00 per annum became effective. Thereafter he was paid at the rate of $4,500.00 per annum.
>
> "Mr. Langdon submitted a bill to this commission for the sum of $2,470.83, being the balance of salary claimed by him as commissioner from June 8th, 1915, to February 1, 1917, (the latter date being the expiration of his term of office), and representing the difference between the salary of $6,000, to which he claims he was entitled under article 2, section 20, of the constitution of Ohio, and the salary of $4,500 per annum which he received for said period.
>
> "Acting under authority of an opinion of Attorney-General Turner, rendered to this commission on the 22nd day of January, 1916, with respect to commissioner O. H. Hughes, the commission has approved and allowed the bill. (Copy of the attorney-generals opinion attached.)
>
> "Upon transmissal of same to auditor of state, it was returned and the attached communication addressed to Mr. Langdon.
>
> "The commission would be pleased to have your opinion as to the legality of the claim."

The section of the General Code which fixes the salary of members of the public utilities commission is 2250-2 G. C. The old section is found in 102 Ohio Laws, 549, and reads as follows:

> "Each member of the commission (then public service commission, now public utilities commission) shall receive an annual salary of six thousand dollars, * * *."

This section was amended in 106 Ohio Laws, 26, to read as follows:

> "Each of the members of the public utilities commission of Ohio shall receive an annual salary of four thousand five hundred dollars, * * *."

This latter act changing the salary from six thousand dollars to four thousand five hundred dollars was passed March 8, 1915, was approved by the governor on March 8, 1915, and filed by him in the office of the secretary of state March 9, 1915. Mr. Langdon was appointed a member of the commission on May 27, 1915, to fill the unexpired term of Hon. Charles C. Marshall, whose term would have expired on February 1, 1917.

The question now is as to whether Mr. Langdon would be entitled to six thousand dollars per year during the term for which he was appointed or not.

Under the principles of the referendum, no law becomes effective until ninety days after the same has been filed with the secretary of state. Hence this law changing the salary of the public utility commissioners from six thousand dollars to four thousand five hundred dollars became effective on June 8, 1915. We thus see that the law changing the salary became effective on June 8, 1915, while Mr. Langdon was appointed as a member of the commission on May 27, 1915.

The question now is as follows:

> "(1) Did Mr. Langdon draw a salary of four thousand five hundred dollars from the beginning of the term for which he was appointed to the end of the same; or
>
> "(2) Did he draw a salary of six thousand dollars from the beginning of the term for which he was appointed to the end of the same; or
>
> "(3) Did he draw a salary of six thousand dollars from the beginning of the term for which he was appointed up until June 8, 1915, the time at which the new law became effective, and then from that time on to the end of the term for which he was appointed draw a salary of four thousand five hundred dollars per year?"

These questions arise under and by virtue of the constitutional provision found in section 20 of article II of our constitution, which reads as follows:

> "The general assembly, in cases not provided for in this constitution, shall fix the term of office and the compensation of all officers; but no change therein shall affect the salary of any officer during his existing term, unless the office be abolished."

Before proceeding further in the consideration of the question I desire to note carefully this constitutional provision. There are several important phrases in the provision which apply to this question, namely: "The general assembly shall fix the compensation of all officers," "but no change therein," and "during his existing term." Let us first note that the phrase "no change therein" has reference to a change in compensation and not to a change in law. The word "law" is not used in the provision. "Therein" is a word with the attributes of a preposition and a pronoun, namely, "in which." The antecedent of "which" is compensation and not law. This is important to keep in mind for the reason that the phrases "no change therein" and "during his existing term" are vitally related to each other. They are related practically as follows:

> "During the term existing at the time the salary of an officer may be changed, his salary will not be affected."

Or, in other words, the said constitutional provision practically reads:

> "But no change in salary or compensation shall affect the salary of any officer during the term which an officer is serving at the time the change in salary is made."

So that we must carefully note in the further consideration of this question the time at which the change in salary took place as applied to the members of the public utilities commission. This for the reason that the change in salary, whenever it may take place, shall not affect the salary of any of the members of the public utilities commission during the terms they were serving at the time the change in salary took place.

With this in mind let us inquire when the change in salary from six thousand dollars to four thousand five hundred dollars was made. Did the change in salary take place on the ninth day of March, 1915, when the act was filed by the governor with the secretary of state; or was the change made on the eighth day of June, 1915, ninety days after the same was filed with the secretary of state; or was the change made at some intervening period between the ninth day of March, 1915, and the eighth day of June, 1915?

The change in salary was certainly not made on the ninth day of March, 1915. If the change in salary was made at that time, then Mr. Langdon would have drawn a salary of four thousand five hundred dollars from the day of his appointment. But this would not be possible for the reason that the law filed with the secretary of state on March 9, 1915, had no force or effect until ninety days after said date. Hence there was no change in salary effective on March 9, 1915, and, of course, there was no change in salary intermediate between that date and the eighth of June, 1915, but the change took place on said latter date, namely, June 8, 1915. If the change in salary took effect on June 8, 1915, and Mr. Langdon was appointed May 27, 1915, the term of Mr. Langdon was existing at the time the salary was changed and under the constitutional provision the change in salary would not affect his salary for the term he was serving at the time the salary was changed.

With this in mind let us go back to the three questions asked above in reference to the salary proposition As said before, he certainly could not be held to have started on his term at a salary of four thousand five hundred dollars per year. The new law was not effective on May 27, 1915. The old law was still in force and it was the only law in force. Hence Mr. Langdon entered upon his term at a salary of six thousand dollars and not at a salary of four thousand five hundred dollars. But if he entered upon his term at a salary of six thousand dollars "no change therein," that is in the salary, could affect him during the term upon which he had entered; that is, during the term existing at the time the salary was changed. It is true the salary was changed on June 8, 1915, from six thousand dollars to four thousand five hundred dollars; but this change could not affect his salary for the constitutional provision above quoted protects him in the salary which he was drawing at that time and would protect him in that salary during the term existing at the time the salary was changed.

This whole matter really involves the question as to whether the provisions of a law filed with the secretary of state ought to be anticipated and considered of some force and vitality during the ninety day referendum period; or whether we ought to rely entirely upon the old status of the law, until the ninety day period expires. It is my opinion that the provisions of a law filed with the secretary of state are not effective during the ninety day period, commonly known as the "referendum period." Its provisions during that period are held in abeyance. The law works no change or effect whatever upon the rights of persons until the ninety day period has expired. No rights can be predicated upon it; no remedies can be secured from it. The same principle must control whether the time being considered is but a few days before the referendum period expires or whether it be eighty or ninety days before the expiration thereof. The constitution provides that no law shall have any force or effect until ninety days after it has been filed with the secretary of state. Hence the repealing section of the new law has no force or effect until said ninety day period has

expired. Therefore, the old law has just as much force and just as much effect as if the new law had not been enacted to take its place, up until the time that the ninety day period expires.

It is needless to say that we can not have two laws upon which to base our rights and to secure our remedies. If we consider the new law at all as being effective, to what extent will we consider it? If there is a certain time within the referendum period at which we might begin to anticipate the new laws coming into effect, what is that time? The answer to these questions must develop the fact that there is just one safe course to pursue and that is to rely entirely upon the old law until the new one comes into force and effect, which is ninety days after it is filed with the secretary of state. We must treat the new law just as if it were not in existence until it becomes effective. Any other course would lead to endless confusion and uncertainty. If this construction is not adopted the people of our state will be entirely at sea as to their rights and their remedies during this ninety day period.

This was evidently the construction which the people and the convention itself meant to have placed upon the referendum provisions. This we gather from the language of the provisions themselves. Not only does section 1c of article II provide that "no law passed by the general assembly shall go into effect until ninety days after it shall have been filed by the governor in the office of the secretary of state," but it also provides that if a petition signed by a certain percentage of the electors shall be filed with the secretary of state within ninety days, then "the secretary of state shall submit to the electors of the state *for their approval or rejection* such law." From this it is quite evident that the framers of the constitution, as well as the people in adopting it, had in mind the idea that the people had the right not only to reject but they practically reserved the right to stamp their approval upon the same. This language is very similar to the language used in reference to the attitude of the governor of the state toward a bill. Section 16 of article II provides:

> "Every bill passed by the general assembly shall, before it becomes a law, be presented to the governor *for his approval.* And he may either approve the bill by signing it or he may reject the same by returning it to the general assembly unsigned."

It is my opinion that the poeple of the state were given practically the same authority in reference to acts passed by the legislature as that which is given to the governor of the state. Supposing the principle of the referendum did not exist, and supposing Mr. Langdon had been appointed just a few days before the law making the change in salary had been signed by the governor—would there be any question as to the application of the principle of the constitutional provision? None whatever, and this for the reason that the bill as passed by the legislature could not be effective until ten days after the same was presented to the governor or until at such time within said period of ten days as he might see fit to sign the same and file it with the secretary of state. It seems to me the same construction should be placed upon the one procedure as upon the other. In the one case the act is held in abeyance for ten days in order to ascertain what action the governor of the state will take in reference to it; while in the other the provisions of the act are held in abeyance for ninety days in order to ascertain what action, if any, the people of the state will take in reference to it; and I am of the opinion that we should not anticipate what action the governor will take in reference to the bill nor what action the people shall take in reference to the law filed with the secretary of state. In each case the provisions of the act can have no force or effect until the expiration of the respective periods of ten days in the one case and ninety days in the other.

I am aware that the word "bill" is used in speaking of an act in so far as the governor's attitude toward the same is concerned, while the word "law" is used in speaking of the act in so far as the people's attitude in reference to the same is concerned.

But I do not feel that this should make any material difference as to the construction to be placed upon the two circumstances. Whether we call the act a "bill" or whether we call it a "law," it is true that in the ten day interim in the one case and the ninety day interim in the other the provisions of the act are held in abeyance by the constitution itself and do not become effective until the end of the period.

Hence, answering your question specifically, it is my opinion that Mr. Langdon was entitled to a salary of six thousand dollars per year from the day upon which he was appointed, namely, May 27, 1915, up until the time that his term expired, namely, February 1, 1917.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

494.

DEPUTY STATE SUPERVISORS AND INSPECTORS OF ELECTIONS—NOT STATE OFFICERS—NOT EXEMPT FROM MILITARY SERVICE—UNDER FEDERAL CONSCRIPTION SERVICE ACT.

Under the ruling of Provost Marshal General Crowder, form 22, under date of July 24, 1917, governing the status of officers in contemplation of the regulations for local and district boards and which he orders to be followed in passing upon claims for exemption under section 18 of the rules and regulations, deputy state supervisors of elections and deputy state supervisors and inspectors of elections are not exempt and are not to be regarded as state officers within the purview of section 18, subsection (a) of the federal conscription service act which exempts from such service certain officers of the state and federal governments.

COLUMBUS, OHIO, August 3, 1917.

HON. JAMES M. COX, *Governor of Ohio, Columbus, Ohio.*
MY DEAR GOVERNOR:—I beg to acknowledge the receipt of your communication under date of July 26th, reading as follows:

> "Will you kindly furnish me with an opinion as to whether the position of deputy state supervisor of elections is to be regarded as a state office, within the purview of that section of the federal conscriptive service act which exempts from such service certain officers of the state and federal governments?"

In the rules and regulations prescribed by the President under the authority vested in him by the terms of the act of congress to authorize the President to increase temporarily the military establishment of the United States, approved May 18, 1917, section 18 provides for persons or classes of persons to be exempted by a local board. Subsection (a) of said section reads as follows:

> "Officers, legislative, executive, and judicial, of the United States, the several states, territories, and the District of Columbia. The word 'officers' shall be construed for the purpose of said act of congress and these rules and regulations to mean any person holding a legislative, executive, or judicial office created by the constitution or laws of the United States, or of any of the several states or territories."

The subsection itself defines the word "officer," and since, of course, the position

concerning which you inquire was not created by the constitution or the laws of the United States, we must look to the statutes of our state to ascertain what the position really is.

Section 4787 of the General Code provides:

> "By virtue of his office, the secretary of state shall be the state supervisor and inspector of elections and the state supervisor of elections, and, in addition to the duties now imposed upon him by law, he shall perform the duties of such offices as prescribed in this title."

Section 4788 of the General Code provides:

> "In each county of the state which contains a city wherein annual general registration of the electors is required by law, or which contains two or more cities in which registration is required by law, there shall be a board of deputy state supervisors and inspectors of elections, consisting of four members who shall be qualified electors of the county."

Section 4803 of the General Code provides:

> "Except in counties containing cities wherein annual general registration of electors is required by law, or which contains two or more cities in which registration is required by law, there shall be a board of deputy state supervisors of elections for each county consisting of four members who shall be qualified electors."

From the above sections it is apparent that the secretary of state is constituted by law the state supervisor and inspector of elections and the state supervisor of elections, and further provisions of the election laws give him general charge of the election machinery of the state. In the counties there are deputies under the state supervisor, and in the one instance they are called "deputy state supervisors and inspectors of elections," while in the other they are known as "deputy state supervisors of elections."

Section 4801 G. C. gives to the state supervisor and inspector of elections all the rights, powers and duties conferred and imposed by law upon the state supervisor of elections, and the board of deputy state supervisors and inspectors of elections are given all the rights, powers and duties conferred and imposed by law upon boards of deputy state supervisors of elections.

Various sections of the election laws impose duties and confer rights upon said boards of elections for the supervision and conduct of elections in their respective jurisdictions.

In the case of *State of Ohio ex rel* v. *Craig, Auditor, et al.*, 8 N. P. 148, the court held that the deputy state supervisors of elections are not officers within the legal definition of that term, and, though their jurisdiction may be coterminous with that of the county, they are not county officers and, therefore, section 2866-3 R. S. does not violate section 1 of article X of the constitution. In that case the contention was that deputy state supervisors of elections possessed many or most of the characteristics of a public officer, namely, that they are officers in an independent capacity, clothed with some part of the sovereignty of the state, appointed for definite terms, taking oath of office, are required to give bond, and are paid a compensation out of the county treasury, and that the territory in which they act, being coterminous with the county, they are, therefore, county officers, and being county officers should be

elected and not appointed. The court, holding that they were not county officers within the constitution, held the law constitutional. The act under which the deputy supervisors were appointed (Section 2966-1 R. S.) provided:

> "There is hereby created the office of state supervisor of elections, and of deputy state supervisors of elections, with the powers and duties hereafter prescribed."

The court concluded that since the secretary of state was the principal election officer, and the deputy state supervisors were subordinate officers for the carrying out the agencies of the state for the conduct of elections, "the legislature in designating *these officers* as deputy officers, intended to make them officers subordinate to the secretary of state, and, consequently, that while they were officers, they were not officers within the legal definition of that term under the constitution."

The above case was appealed to the circuit court, which held that *quo warranto* and not injunction was the proper procedure in trying title to office, thus inferentially holding that such positions were officers, State ex rel. Craig, 21 O. C. C. 175, which decision was affirmed without report in the supreme court, 61 O. S. 588.

Of course, it is readily apparent that deputy state supervisors are neither legislative nor judicial officers, and the sole question is whether or not a deputy state supervisor of elections is "a person holding an executive office created by the state of Ohio." Under our statutes I do not think that the question is even debatable. The legislature has specifically provided for their appointment (Sec. 4808 G. C.); provided for the form of oath to be taken (Sec. 4809); provided their general duties (Sec. 4819); required them to make investigations for violations of the election laws and report same to the state supervisor of elections, and authorized either the state supervisor or the deputy state supervisors to order the prosecution of all offenses against any law of the state relating to the conduct of elections (Sec. 4820). Such boards appoint all registrars, judges and clerks of elections (Sec. 4874), make and issue rules, regulations and instructions, not inconsistent with law, as they deem necessary for governing and guiding their appointees (Sec. 4875), perform all duties imposed by the primary laws of this state (Sec. 4967), pass upon objections or other questions arising in the course of nominations (Sec. 5006), and only in case of disagreement or where no decision can be arrived at is there any provision for submitting the matter to the state supervisor of elections (Sec. 5007).

The deputy state supervisors of elections possess all the indicia of officers. They are persons "holding a * * * executive * * * office created by" the laws of Ohio.

Your attention is called to the case of *United States* v. *Maurice*, 2 Brock. 103, in which it was held that an agent of fortifications was an officer of the United States. In that case Chief Justice Marshall, with that ability and learning which characterized all of his judicial utterances, said:

> "An office is defined to be a public charge or employment, and he who performs the duties of an office is an officer. Although an office is an employment, it does not follow that every employment is an office. A man may certainly be employed to do an act or perform a service without becoming an officer. But if that duty be a continuing one, which is defined by rules prescribed by the government, and not by contract, which an individual is appointed by government to perform, who enters upon the duties appertaining to his station without any contract defining them, if those duties continue,

though the person be changed, it seems very difficult to distinguish such a charge or employment from an office, or the person who performs the duties from an officer."

Considering the above definition of "office" and "officer," and also considering the statutory provisions creating the position of deputy state supervisor, the nature of the public service to be performed by those deputies, the duties imposed upon them by law within the territorial limits fixed, the fact that many could prescribe duties, are independent of their superior and supervising officer and partake to some extent of the sovereignity of the state, all leads to the inevitable conclusion that as far as the law of this state is concerned the positions thus created by law are offices and that the persons filling these positions are persons filling offices created by statute

While it would be my personal view, interpreting the language of subsection (a) of section 18 of the rules and regulations, that persons filling the position above referred to would be within the exemption, still any view of mine would be controlled absolutely by any different or limited interpretation of such section given by the federal authorities.

Since the preparation of this opinion, I am in receipt of "Compiled Rulings of Provost Marshal General No. 1" under date of July 24, 1917. Provost Marshal General E. H. Crowder on p. 4 of the pamphlet containing said rulings, subsection (s) under the heading "Officers and other persons in Federal or State service," uses the following language:

> "The following ruling governing the status of officers in contemplation of the regulations for local and district boards is to be followed in passing upon claims for exemption or for discharge under section 4 of the act of May 18, and sections 18 and 20 of the regulations for local and district boards."

The following ruling governing the status of officers in contemplation of the regulations for local and district boards is to be followed in passing upon claims for exemption or for discharge under section 4 of the act of May 18 and sections 18 and 20 of the regulations for local and district boards:

"I. Federal service.

* * * * * * * * *

"II. State, territorial, and District of Columbia service.

"Exemptions (regulations No. 18, p. 24). The exemptions extend to the following offices:

"Section 6. 1. Supreme offices. Governor, members of the supreme (i. e., highest) court, members of the appellate (i. e., intermediate revisory) court, members of both branches of the legislature.

"Section 7. 2. Superior offices. (1) All offices, other than the above, filled by popular election for the entire state, and (2) all offices filled by appointment by the governor or by the legislature or by the supreme and appellate courts, for the entire state; and having no intermediate superior between them and the appointing power.

"As an example of the kinds of positions which would fulfill ordinarily one or the other of these requirements, the following list will serve as a guide: attorney general, auditor, commissioner of health, commissioner of public utilities, commissioner of prisons, commissioner of insurance, commissioner of forestry, commissioner of labor, commissioner of railroads, commissioner of workmen's compensation, librarian, lieutenant governor, printer, superintendent of public instruction, treasurer.

"Further requirements. But positions in this class 2 must also fulfill

the following requirements: (a) They must form the principal occupation of the incumbent, requiring the substance of his daily work and time; and (b) they must be performed by regular attendance at a building or room furnished by the state, territory, or District of Columbia.

"Section 8. Discharge (regulations No. 20, p. 29). All persons holding in a state, territory, or District of Columbia, other positions than the above must apply for discharge under regulations, section 20, paragraph a, as 'county and municipal officers' if this description applies to them. If it does not apply, their positions are not within the class for whom either exemption or discharge is authorized."

In section 8, above quoted, reference is made to section 20, paragraph "a," as found at p. 30 of the rules and regulations, which reads as follows:

"(a) County and municipal officers. Any county or municipal officer, including therein officers of counties, townships, cities, boroughs, parishes, towns, and villages, who has been elected to his office by popular vote and whose office may not be filled by appointment for an unexpired term, upon presentation to such local board at any time within 10 days after the filing of a claim for discharge by or in respect of such person, of an affidavit made by the county clerk or like officer of the county, township, city, borough, parish, town, or village of which such person is an officer, stating the office held by such person and the date of his election, when his term of office expires, and that the unexpired term of such office may not be filled by appointment; and upon presentation by affidavits of such other evidence as may be required, in the opinion of the local board, to substantiate the claim."

So at this time the Provost Marshal General has laid down a rule which fixes the exemptions under section 18, subsection (a). It is evident from reading his ruling that deputy state supervisors of elections do not come within the exemption therein defined. They are neither 'supreme officers" nor "superior officers" under his ruling. Neither do they fulfill the further requirements that the performance of the duties of the position must form the principal occupation of the incumbent, requiring the substance of his daily work and time; nor that they must be performed by regular attendance at a building or room furnished by the state.

It is well known that with the exception of the larger cities, but very little time must be given by the deputy state supervisors of elections in the discharge of their duties, and even in the larger cities it does not take all their time. Again, the expenses of the building or room used by the election board, if any, is borne by the county and not by the state, and in the majority of instances the county and not the state furnishes the quarters for the election board within the court house. Neither can these election officers come within the definition of county and municipal officers, as found in subsection (a) of section 20 of the rules and regulations.

I am therefore constrained to advise you that under and by virtue of the ruling of Provost Marshal General Crowder, the positions of deputy state supervisors of elections and deputy state supervisors and inspectors of elections are not to be regarded as state offices within the purview of that section of the federal conscriptive service act which exempts from such service certain officers of the state and federal governments.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

495.

BOARD OF EDUCATION—ADJOURNED MEETING—DEFINED—FAILURE TO READ AND APPROVE MINUTES OF PREVIOUS MEETING—EFFECT THEREOF—COUNTY SUPERINTENDENT—BY WHAT BOARD ELECTED.

An adjourned or continued meeting is but a prolongation or continuation of the meeting from which such adjournment or continuation was had.

The provision of law in reference to reading and approving minutes of previous meeting are directory only and a failure to do so is not such a fatal defect as will justify a court of equity to interfere.

A county superintendent can only be elected by the board which is in power at the beginning of the term of such superintendent.

COLUMBUS, OHIO, August 3, 1917.

HON. E. A. SCOTT, *Prosecuting Attorney, West Union, Ohio.*

DEAR SIR:—Your several letters which have been previously acknowledged contain for my opinion the following:

"(1) From the minutes of the county board of education quoted herein, is Superintendent Dening legally employed as county superintendent of Adams county for three years, beginning August 1, 1917?

"(2) Are there two or four supervision districts in the Adams county school district?"

The minutes of the county board of education, which you submit and which are necessary for our consideration herein, are as follows:

"MINUTES OF ADAMS COUNTY SUPT. OF SCHOOLS, from January, 1917 to April, 1917.

"West Union, Ohio, January 2, 1917.

"The regular meeting of December 13, 1916, continued to January 2, 1917, at 10 A. M., was held in the office of the county superintendent.

"Members present: J. E. McNeil, J. A. McClanahan, C. H. Ryan.

"Members absent: L. J. Fenton, C. E. McHenry.

"Minutes of December 13th were read and approved.

* * * * * * * * * * *

"Motion by J. E. McNeil, seconded by C. H. Ryan, 'That the regular meeting of the board be continued to January 5, 1917, at 10 A. M.'

"On roll call, the vote was:

"J. E. McNeil, Aye.
"J. A. McClanahan, Aye.
"C. H. Ryan, Aye.

"J. A. McClanahan,
"President.

H. E. Dening,
County Superintendent.

"West Union, Ohio, January 5, 1917.

"The regular meeting of the county board of education continued from January 2, 1917, to January 5, 1917, at 10 A. M., was called to order by the president, J. A. McClanahan.

"Members present: J. E. McNeil, J. A. McClanahan, C. H. Ryan, O. E. McHenry.

"Members absent: L. J. Fenton.

"Minutes of January 2, 1917, were read and approved.

"Supt. Williamson reported that the Tiffin township board of education had made arrangements to transport pupils concerning which complaint had been made to the county board of education.

"The subject of redistricting the county was discussed by the members of the board.

"The county superintendent was requested to invite the county commissioners to be present January 12, 1917, and consult with the county board of education in regard to financial conditions.

"Motion by J. E. McNeil, seconded by O. E. McHenry: 'That H. E. Dening be employed or appointed as county superintendent for a term of three years, beginning August 1, 1917, at a salary of two thousand ($2000) dollars a year.'

"On roll call the vote was:

"J. A. McClanahan, Aye.
"J. E. McNeil, Aye.
"C. H. Ryan, Aye.
"O. E. McHenry, Aye.

* * * * * * * * * * *

"The minutes of this meeting (January 5, 1917) were read. Motion by J. E. McNeil, seconded by O. E. McHenry: 'That the minutes of this meeting (January 5, 1917) be approved.'

"On roll call the vote was:

"J. A. McClanahan, Aye.
"O. E. McHenry, Aye.
"J. E. McNeil, Aye.
"C. H. Ryan, Aye.

"Motion by J. E. McNeil, seconded by O. E. McHenry, 'That this regular meeting of the County Board of Education be continued to January 12, 1917, at 10 a. m.'

"On roll call the vote was:

"O. E. McHenry, Aye.
"J. A. McClanahan, Aye.
"J. E. McNeil, Aye.
"C. H. Ryan, Not voting.

"J. A. McClanahan, H. E. Dening,
"President. County Superintendent.

"West Union, Ohio, January 12, 1917.

"The regular meeting of the county board of education continued from January 5, 1917, was held in the office of the county superintendent.

"Members present: J. A. McClanahan, J. E. McNeil, O. E. McHenry, C. H. Ryan.

"Members absent: L. J. Fenton.

"The minutes of January 5, 1917, were approved as a whole.

* * * * * * * * * * *

"The board adjourned at 12 o'clock until 1 p. m.

"At the afternoon session the county commissioners met with the county board of education and a general discussion of the county's financial condition followed.

"Motion by O. E. McHenry, seconded by J. E. McNeil: 'That in accordance with section 4738 L. of O. Adams county be re-districted for school purposes as follows:

"Supervisory district No. 1 to be composed of the following named rural districts: Braton Twp., Franklin Twp., Lawshe, Locust, Grove, Meigs Twp., Jefferson Twp., Greene Twp., Rome, Sandy Springs.

"Supervisory district No. 2 to be composed of the following named rural districts: Winchester Twp., Scott Twp., Oliver Twp., Tiffin Twp., Wayne Twp., Liberty Twp., Sprigg Twp., Monroe Twp., Bentonville.

"That the following named rural and village districts be assigned to the county superintendent for supervision in accordance with section 4738 L. of O.: West Union, Winchester, Seaman, Cherry Fork.

"That in accordance with section 4740 L. of O. Manchester village and Peebles village school districts be continued as separate districts under the supervision of the county superintendent.

"On roll call the vote was:

"C. H. Ryan, Aye.
"O. E. McHenry, Aye.
"J. E. McNeil, Aye.
"J. A. McClanahan, Aye.

"The president declared the motion carried and stated that the same would go into effect September 1, 1917.

"The minutes of the meeting were then read. Motion by J. E. McNeil, seconded by O. E. McHenry: 'That the minutes of this meeting January 12, 1917, be approved.' On roll call the vote was:

"J. A. McClanahan, Aye.
"J. E. McNeil, Aye.
"O. E. McHenry, Aye.
"C. H. Ryan, Not voting.

"On motion the board adjourned.

"J. A. McClanahan,
"President.

H. E. Dening,
County Superintendent.

* * * * * * * * * * *

"West Union, Ohio, January 20, 1917.

"On this date a copy of the decision of the supreme court of Ohio in the case of state of Ohio ex rel. v. C. H. Ryan, was filed in this office. This decision was in favor of Mr. Scott, who succeeds Mr. C. H. Ryan, as a member of the county board of education. The copy was from the records of the court January 16, 1917.

"H. E. Dening,
"County Superintendent.

"West Union, Ohio, February 14, 1917.

"The Adams county board of education met in regular session in the office of the county superintendent at 10 A. M.

"Members present: J. A. McClanahan, C. E. Kirkpatrick, Dyas Scott, L. J. Fenton. Member absent: J. E. McNeil.

"Motion by C. E. Kirkpatrick, seconded by Dyas Scott: 'That this

board is not to be understood as approving the minutes, directly or by implication, of any continued, adjourned, or called meeting after December 13, 1916.' On roll call the vote was:

"Dyas Scott, Aye.
"C. E. Kirkpatrick, Aye.
"L. J. Fenton, Aye.
"J. A. McClanahan, No.

* * * * * * * * * *

"On motion the board adjourned.

"J. A. McClanahan, H. E. Dening,
"President. County Superintendent.

"West Union, Ohio, March 17, 1917.

"In accordance with section 4732 L. of O., the county board of education met in the office of the county superintendent at 10 a. m.

"Members present: C. E. Kirkpatrick, Dyas Scott, J. E. McNeil, L. J. Fenton, J. A. McClanahan.

"Minutes of the last meeting were read and approved.

"Mr. Scott nominated L. J. Fenton for president, seconded by Mr. Kirkpatrick. On roll call the vote for president was:

"Mr. Kirkpatrick for L. J. Fenton.
"Mr. Scott for L. J. Fenton,
"Mr. McClanahan for L. J. Fenton.
"Mr. McNeil for L. J. Fenton,
"Mr. Fenton, not voting.

"Mr. Fenton was declared elected president.

"Mr. Kirkpatrick nominated Dyas Scott for vice-president, seconded by Mr. McClanahan. On roll call the vote was:

"Mr. McClanahan for Dyas Scott.
"Mr. McNeil for Dyas Scott.
"Mr. Fenton for Dyas Scott.
"Mr. Scott, Not voting.

"Mr. Scott was declared elected vice-president.

"Mr. McClanahan nominated C. E. Kirkpatrick for secretary pro tem., seconded by Mr. McNeil. On roll call the vote was:

"Mr. McNeil for Mr. Kirkpatrick.
"Mr. Fenton for Mr. Kirkpatrick.
"Mr. Scott for Mr. Kirkpatrick.
"Mr. McClanahan for Mr. Kirkpatrick.
"Mr. Kirkpatrick, Not voting.

"Mr. Kirkpatrick was declared elected secretary pro tem.

"Motion by Mr. Kirkpatrick, seconded by Mr. McClanahan: 'That the regular meetings of the county board of education be held on the second Wednesday at 10 a. m. of April, June, August, October, December, 1917, and February, 1918.' The vote was:

"Mr. Fenton, Aye.
"Mr. McNeil, Aye.
"Mr. Scott, Aye,
"Mr. Kirkpatrick, Aye.
"Mr. McClanahan, Aye.

* * * * * * * * * *

"On motion the board adjourned.

"L. J. Fenton, H. E. Dening,
"President. County Superintendent.

"West Union, Ohio, April 11, 1917.

"The regular meeting of the Adams county board of education held in the office of the county superintendent April 11, 1917.

"The meeting was called to order by President L. J. Fenton.

"Members present: L. J. Fenton, J. E. McNeil, C. E. Kirkpatrick, J. A. McClanahan, Dyas Scott.

"Minutes of the last meeting were read and approved.

* * * * * * * * * *

"The following resolution was offered by Mr. Kirkpatrick, seconded by Mr. Scott: Whereas, at what was termed as a continued regular meeting of the board of education of Adams county, Ohio, alleged to have been held on the 12th day of January, 1917, at which said alleged meeting the following appears in the minutes thereof.

* * * * * * * * * *

"Motion by O. E. McHenry, seconded by J. E. McNeil: 'That in accordance with section 4738 L. of O., Adams county be redistricted for school purposes as follows: Supervisory district No. 1, to be composed of the following named rural districts: Bratton township, Franklin township, Lawshe, Locust, Grove, Meigs township, Jefferson township, Green township, Rome, Sandy Springs. Supervisory district No. 2 to be composed of the following named rural districts: Winchester township, Scott township, Oliver township, Tiffin township, Wayne township, Liberty township, Sprigg township, Monroe township, Bentonville. That the following named rural and village districts be assigned to the county superintendent for supervision in accordance with section 4738 L. of O.: West Union, Winchester, Seaman, Cherry Fork. 'That in accordance with section 4740 L. of O. Manchester village and Preble village school districts be continued as separate districts under the supervision of the county superintendent.'

* * * * * * * * * *

"Whereas, said attempted resolution, or motion was passed at a meeting of said school board not held in accordance with law, and

"Whereas, said attempted action of said board of education was never approved, nor the minutes thereof approved, by said board of education of Adams county, Ohio.

"Resolution by Mr. Scott, seconded by Mr. Kirkpatrick: Whereas, it is the wish and desire of the citizens of Adams county, as well as to the benefit of the schools of said Adams county, that said Adams county continue to be divided into four districts, the same as originally decided by this board, and

"Whereas, the supposed redistricting, as heretofore attempted by which said county was to be divided into two districts, is not for the best interests of said schools, and

"Whereas, the same would interfere with the unexpired terms of districts superintendents, and

"Whereas, the attempted redistricting of said county into two districts was unlawful and illegal and not in accordance with law, and

"Whereas, said attempted redistricting has not been approved by this board,

"Therefore, be it resolved that said attempted redistricting, as shown by the minutes on the 12th day of Januray, 1917, be and the same is hereby set aside as not in accordance with the law, and not to the best interests of the schools of said Adams county, and that the supervisors of districts as

they existed prior to the attempted redistricting, as above referred to, are and shall remain as the supervisors of said districts of said county, and said motion was carried upon roll call by the following votes:

"Mr. Scott, Aye.
"Mr. McNeil, Nay.
"Mr. Fenton, Aye.
"Mr. McClanahan, Nay.
"Mr. Kirkpatrick, Aye.

"On motion by Mr. Scott, seconded by Mr. Kirkpatrick the board adjourned until 1 p. m.

"The board reconvened at 1 p. m.

"Resolution by Mr. Scott, seconded by Mr. Kirkpatrick: Whereas, what was termed a continued regular meeting from January 2, 1917, of the board of education of Adams county, Ohio, was attempted to be held on the 5th day of January, 1917, at which said attempted meeting the records show:

" 'On motion of J. E. McNeil, seconded by O. E. McHenry, that H. E. Dening, be employed or appointed as county superintendent for a term of three years, beginning August 1, 1917, at a salary of two thousand ($2,000) dollars a year,' and

"Whereas, there was and is no authority in law for holding such meeting of said board of education on January 2, 1917, and

"Whereas, said alleged action of said board on said January 5th was never approved by this board of education nor authorized by law,

"Whereas, there was no authority in law for the alleged employment of said Dening at said time as such school superintendent, and

"Whereas, said one C. H. Ryan, who participated as a member of said board of education was not a member of said board and had no right or authority to participate therein, and

"Whereas, it is not to the best interests of the schools of said Adams county that said Dening should be employed as such superintendent, and

"Whereas, said meetings and each of them, on January 2, 1917, and January 5, 1917, as well as said alleged meeting of said board of education on January 12, 1917, and neither of them, were meetings held under or by virtue of any laws of the state of Ohio, and are illegal and void, and

"Whereas, the hiring of said Dening as such county superintendent under the circumstances and facts, was illegal and void under the laws of the state of Ohio, and

"Whereas, said Dening has never accepted said alleged employment as such superintendent.

"THEREFORE, be it resolved, by the board of education of Adams county, that said attempted action, attempting to employ or appoint the said H. E. Dening, as above referred to under date of January 5, 1917, be and the same are hereby rescinded, abrogated, revoked, annulled and vacated, and that the same is unlawful, null and void, and the president of the board of education of Adams county is ordered and directed to write across in red ink, said resolution or resolutions looking to the employment of said H. E. Dening, so passed on January 5, 1917, the following:

" 'This resolution is canceled, annulled, and expurged from the records in accordance with the resolution of said board of education of Adams county, Ohio, passed April, 1917.'

"Thereupon the same was put to a vote, and upon roll call the vote was as follows:

"Mr. McNeil, Nay.
"Mr. Fenton, Aye.
"Mr. McClanahan, Nay.
"Mr. Kirkpatrick, Aye.
"Mr. Scott, Aye.

"Motion by Mr. McNeil, seconded by Mr. McClanahan: 'That the motion by which Dyas Scott was allowed $17.30 for attending meetings of the county board of education when he was refused recognition, be reconsidered.'

"On roll call, the vote was:

"Mr. Fenton, Nay.
"Mr. McClanahan, Aye.
"Mr. Kirkpatrick, Nay.
"Mr. Scott, Nay.
"Mr. McNeil, Aye.

"Motion by Mr. Scott, seconded by Mr. Kirkpatrick: 'That the board proceed to elect a county superintendent to begin August 1, 1917.'

"On roll call, the vote was:

"Mr. McClanahan, Nay.
"Mr. Kirkpatrick, Aye.
"Mr. Scott, Aye.
"Mr. McNeil, Nay.
"Mr. Fenton, Aye.

"Motion by Mr. Kirkpatrick, seconded by Mr. Scott: 'That W. L. Hostetter be elected county superintendent for a term of three years beginning August 1, 1917, at a salary of $1,800 a year.'

"On roll call the vote was:

"Mr. Kirkpatrick, Aye.
"Mr. Scott, Aye.
"Mr. McNeil, Not voting.
"Mr. Fenton, Aye.
"Mr. McClanahan, Aye.

"On motion the board adjourned.

"H. E. Dening,
"County Superintendent."

The first question I shall determine is the following:

"Were the meetings of January 2, 1917, and January 5, 1917, legal meetings?"

The regular meetings of a county board of education are held under authority of section 4733 G. C., which reads as follows:

"The regular meeting of the county board of education shall be held at the office of the county superintendent. At the time of the first meeting the board shall fix the time for holding its regular meeting. Regular meetings shall be held at least every two months and at the call of the president or any two members. A majority of the board shall constitute a quorum at any regular or special meeting."

Section 4729 G. C. provides that the terms of members of county boards of education shall begin on the third Saturday of January and shall extend for the term of

five years. Section 4732 G. C. provides that each county board of education shall meet on the third Saturday of March of each year and the third Saturday of March each year is made the regular meeting at which the organization of the board is perfected. The county superintendent shall act as secretary of the board unless there be no county superintendent, then a temporary secretary shall be chosen, which temporary secretary shall act until a county superintendent has been elected and no longer. At the first meeting of the board provided for, as above mentioned, the board shall fix the time for holding its regular meetings, but it is provided that such regular meetings shall be held at least every two months,—that is, beginning on the 3d Saturday in March a county board of education must hold at least one regular meeting every two months and if the time set by the board for holding such regular meetings is such other time than the third Saturday in March, then said board is compelled by law to hold a regular meering on said day also, for the third Saturday in March, and someone day in each two months, which day is designated by the board, are all prescribed by law as the regular meeting days of the county board of education.

It is also provided that "other" meetings may be held at the call of the president or of any two members. Such "other" meetings are special meetings if they are held upon call and if they are not held as provided by a rule of the board, for if they are held as provided by a rule of the board then they are regular meetings and are not called meetings. The statute recognizes only two general classes of meetings, that is, regular meetings and special meetings, so that the meetings which are fixed by law or a rule of the board, as provided by law, are regular meetings, and those meetings which are upon call either of the president or of any two members of the board, are called or special meetings, but a regular meeting or a special meeting may be adjourned from one day to another.

1 Cyc., 793, says: "To adjourn is to put off until another time and place. It is not more than a continuance of a session from one day to another."

In Harris v. Gest, 4 O. S. 473, in speaking of an adjourned term of court, Thurman, C. J., says:

> "When this power is exercised, the sitting after the adjournment is a prolongation of the regular term, and, in contemplation of law, there is but one term."

An adjourned meeting would, following the above, be a continuation of the meeting from which the adjournment was taken, and it is held in Turpin v. Haggerty, 47 Bull. 809, in a case in which the circuit court was defining "regular sessions," that whenever a statute designates a particular regular session for certain business, as for instance the March, June, September and December regular sessions of the board of county commissioners, that business would have to be done at that particular session or *at an adjourned meeting thereof.*" That is to say, following the above reasoning, when the county superintendent is compelled by law to be elected at a regular session of the county board of education, such superintendent must be so elected at such regular session or meeting, or at an adjourned session or meeting of a regular session or meeting. In other words, a county superintendent could not be elected legally at a special or called meeting or a continuation or adjournment of such special or called meeting.

In Lenhart v. Board of Education, 5 O. N. P. (n. s.) 129, it is held that a second adjourned meeting of a called meeting is a continuation of the original called meeting; and in Bryant v. Goodwin, et al, 9 O. S. 472, an adjourned session of a regular session is a continuation of the regular session.

In Wiswell v. Church, 14 O. S. 31-40, it is held that it is perfectly settled that adjournments are the prolongations of the annual session.

Therefore, following all the above citations, I must conclude that the adjourned

or continued meetings of January 2nd and of January 5th were but continuations or prolongations of the regular meeting of December 13, 1916, and were valid regular meetings at which any business which could be transacted at any other regular meeting might be transacted at those regular meetings, except the organization of the board, which by statute is made to take place on the third Saturday in March of each year.

The next question is,

> Was it necessary for the board of education to approve the minutes of the meetings of January 2nd and of January 5th, and if so when could the same be done?

General Code section 4754, and which applies to boards of education generally, reads as follows:

> "The clerk of the board of education shall record the proceedings of each meeting in a book to be provided by the board for that purpoes, which shall be a public record. The record of proceedings at each meeting of the board shall be read at its next succeeding meeting, corrected if necessary, and approved, which approval shall be noted in the proceedings. After such approval the president shall sign the record and the clerk attest it."

The above question was considered in the case of Leathers v. Clouser, decided by the court of appeals of Wood county, May 19, 1915, in which the court held:

> "It is also claimed that the minutes of the meetings of the board of education were not read, nor approved, nor signed at the next succeeding meeting, in conformity to the provisions of law * * *. The requirements of law providing for the reading, approval and signing of the minutes of the board of education at the next succeeding meeting of the board are directory only and a failure to comply therewith is not such a fatal defect as justifies the interference of a court of equity by injunction."

The same being directory only such minutes would, therefore, not need the approval of the board at the next succeeding meeting to make the same valid, for approval or disapproval of minutes is simply to correct or cause such minutes to speak the truth of the business of the board of education which was lawfully transacted at such meeting.

The third question I shall determine is, did the county board of education have a right to hire superintendent Dening for a term of three years, the same to begin August 1, 1917, and could such hiring be done on the 5th day of January, 1917.

General Code section 4744 provides that the county board of education, at a regular meeting held not later than July 20th, shall appoint a county superintendent for a term of not longer than three years. Such term shall commence on the first day of August.

General Code section 7705, which section refers to village and rural schools provides that teachers shall begin their terms within four months from the time of their appointment.

General Code section 7702 provides that the superintendent of city schools shall begin his term within four months of the time of his appointment, but I find nothing in our school laws which provides that the county superintendent must begin his term within any particular time after he is appointed. The only provision is that his term shall begin on the first day of August, which necessarily must mean on the

first day of August next following the time of his appointment. The county board of education is a continuing body. One new member is elected each year for the term of five years and such term of office of such member so elected each year shall begin on the 3d Saturday of January so that each year on the third Saturday of January a new member is elected to the county board of education and such new board shall meet on the third Saturday of March of each year and shall organize by electing on of its members president and another vice president, both of whom shall serve but one year. There is in reality, then, while a continuing board, a new addition or a different member upon such board each year and a new organization is had for each separate year. Such county board of education, as noted above, at a regular meeting held not later than July 20th, shall appoint a county superintendent and it is a well recognized principle of law that no appointing power can make an appointment the term of which shall begin after the term of the appointing power. That is to say, the board of education, in exercising the authority under section 4744, and appointing a county superintendent, could not exercise same until the board was in power, which would be in power on August 1st, because August 1st is the day set for the beginning of the term of the county superintendent and the board which is in power on August 1st is the board which organizes on the third Saturday of March, but one member of which is elected on the third Saturday of January of each year.

It is held in State v. Sullivan, 81 O. S. 79-92, that:

> "It is admittedly the well-established general rule of law that an officer clothed with authority to appoint to a public office, cannot, in the absence of express statutory authority, make a valid appointment thereto for a term which is not to begin until after the expiration of the term of such appointing officer. Mechem in his work on public offices and officers, at section 133, states the general rule as follows: 'The appointing power cannot forestall the rights and prerogatives of their own successors by appointing successors to office expiring after their power to appoint has itself expired.' The author then quotes with approval the language of Buchanan, J., in Ivy v. Lusk., 11 La. n. 486, where he says: 'That an appointment thus made by anticipation has no other basis than expediency and convenience, and can only derive its binding force and effect from the supposition that there will be no change of person, and consequently of will, on the part of the appointing power, between the date of the exercise of that power by anticipation, and that of the necessity for the exercise of such power by the vacancy of the office.' Throop in his treatise on public officers, section 92, says: 'But it has been held that where an office is to be filled by appointment by the governor, with the advice and consent of the senate, the governor and senate cannot forestall their successors, by appointing a person to an office which is then filled by another, whose term will not expire until after the expiration of the terms of the governor and senators. And that an out-going board of freeholders of a county cannot lawfully appoint a person to an office which will not become vacant during their official terms.' The correctness and soundness of the rule and doctrine as above enumerated, so far as investigation has disclosed to us, is not opposed by any of the authorities, but is supported by many, among which are State ex rel. Bownes v. Meehan, 45 N. J. L. 189; The People ex rel. Sweet v. Ward, 107 Cal. 236; Ivy v. Lusk, 11 La. An. 486."

But it is urged that the board being a continuing body the above principle would not apply to it the same as to an appointing officer whose term would expire, or the same as it would to a board the term of which the full membership expires prior to the time such appointed person's term would begin. The above, however, is answered

in State ex rel. Attorney General v. Thomson, 6 O. C. D. 106-110, where the following language is used:

> "At the time of the attempted appointment of the defendent by the commissioners, it was known that when the office should become actually vacant the *personnel* of the board would be changed by the expiration of the term of Mr. Cassidy. For that reason, in addition to the others we have stated, the board had no power to make his appointment."

The appointment referred to above was one to be made by the board of three commissioners, the term of only one of which would expire, but it was considered a new board and one without authority to appoint a person whose term would begin after the term of any member upon the board.

> "In Commissioners v. Ramek, 9 O. C. C., 301, the board of county commissioners employed a janitor on the last day of the term of certain members of said board. On page 308 the court uses the following language.
>
> "We fully concur in what was said in State ex rel Attorney-General v. Thompson, 6 O. C. D., 106, and believe that in the absence of some necessity or special circumstances, showing that the public good required it, such a contract, as the one under consideration, made by an expiring board, and which has the effect to forestall the action of its successor for a year, is not only evidence of unseemly conduct on the part of the members of the board, but in its object, operation and tendency, is calculated to be prejudicial to the public interests, and is against public policy and void.
>
> "The maxim, *omnia praesumuntur rite esse acta* rests largely on the ground of public policy, so that in a case of this character, where the contract *prima facie* has a bad tendency, the maxim does not apply, and a court might well refuse to enforce the contract in the absence of a showing that it was made in good faith, and in the interests of the public, even though it might hold that the question of the necessity for the employment of a janitor was one of discretion and not of jurisdiction. This contract was made on Saturday, the last working day of the board. On the following Monday, the new board came into existence. No necessity of an employment for a year is shown. Indeed it is conceded by the pleadings that the employment was unnecessary, and a contract made under such circumstances and for such length of time, is strong evidence, to say the least, that the only object in making the contract was to forestall the action of the new board. We, therefore, hold that the contract is void, as against public policy."

I must therefore conclude that the county board of education has no authority to appoint a county superintendent whose term will begin after the term of any member of such board, or, in other words, that such appointment can only be made after such new board has organized on the third Saturday of March in each year in which a vacancy occurs in such position.

In the second question you inquire in reference to supervision districts of the county. Supervision districts are provided for by section 4738, which reads as follows:

> "The county board of education shall divide the county school district, any year, to take effect the first day of the following September, into supervision districts, each to contain one or more village or rural school districts. The territory of such supervision districts shall be contiguous and compact. In the formation of the supervision districts consideration shall be given to the number of teachers employed, the amount of consolidation and centralization,

the condition of the roads and general topography. The territory in the different districts shall be as nearly equal as practicable and the number of teachers employed in any one supervision district shall not be less than thirty. The county board of education shall, upon application of three-fourths of the presidents of the village and rural district boards of the county, redistrict the county into supervision districts. The county board of education may at their discretion require the county superintendent to personally supervise not to exceed forty teachers of the village or rural schools of the county. This shall supersede the necessity of the district supervision of these schools."

That is to say, the county board of education, when it determines that it is necessary to do so, shall divide the county school district into supervision districts *any year*, but that such division shall take effect on the first day of the following September. It is not necessary for the county board of education to await the application of three-fourths of the presidents of the village and rural district boards before such division is made. It may be made without any such application.

This department held in Opinion No. 94, rendered to Hon. Charles H. Jones, prosecuting attorney, Jackson, Ohio, under date of March 9, 1917, as follows:

> "The re-districting may be perfomed by the county board of education any year and upon application of three-fourths of the presidents of the village and rural boards of education the county board of education *must* redistrict the county into supervision districts."

During the school year beginning September 1, 1916, your county school district had four supervision districts and on January 12, 1917, under and by virtue of section 4738, above quoted, the county board of education divided the school district into two supervision districts, as set forth in the resolution of that date. On April 11, 1917, the county board of education passed a resolution rescinding the action of the board of January 12th and resolving "that said Adams county continues to be divided into four districts the same as originally divided by this board." That is to say, the board determined on April 11th that the action of the board on January 12th should not stand, and that the conditions warranted a division of the county school district into four supervision districts instead of only two. This, I am of the opinion, the board had a right to do, although there is some question as to whether or not the board has a right to act again upon this matter after it has once acted, and especially after certain other statutory acts intervene. Some of such other statutory acts are the meeting of the presidents of the boards of education within such supervision district, or in supervision districts, which contain three or less village or rural districts, the boards of education of such districts to elect a district superintendent, or, the certificate of the county auditor of the salary of the district superintendents employed, or the apportionment of the school funds by the county auditor. A decision of this question is not necessary to answer your inquiry and I am not determining same definitely.

So that, answering your second question, I advise you that the county board of education did have the right to divide the county into supervision districts on April 11, 1917, and that the original division into supervision districts will stand.

The direct answer to your several questions, then, is as follows:

First, from the minutes of the county board of education, quoted above, superintendent Hostetter is the legally employed superintendent and his term will begin August 1, 1917, and extend three years.

Second, there are four supervision districts in Adams county as shown by the minutes above mentioned.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

496.

CIVIL SERVICE LAW—WHAT SCHOOLS ARE INCLUDED THEREIN.

Paragraph 12 of section 8 of the civil service law includes the institutions and schools therein mentioned, whether the same be those of the state at large or whether they be under the control of political subdivisions thereof.

COLUMBUS, OHIO, August 4, 1917.

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

GENTLEMEN:—I am in receipt of a communication under date of July 16, 1917, from Hon. Charles A. Groom, city solicitor, Cincinnati, Ohio, and as the same concerns a matter of state-wide interest and importance, I am taking the liberty of expressing my views concerning this matter in an opinion addressed to you.

The communication is as follows:

> "May a municipal civil service commission exempt from the classified service teachers in city, penal or reformatory institutions, such as for instance the house of refuge, and student employes in a city university, such as the university of Cincinnati, when it finds it impracticable to include such employes in competitive classified service?
>
> "Paragraph 12 of section 486-8 General Code (106 Ohio laws 405) provides:
>
> "'12. Such teachers and employes in the agricultural experiment stations; such teachers in the benevolent, penal or reformatory institutions of the state; such student employes in normal schools, colleges and universities of the state; and such unskilled labor positions as the state commission or any municipal commission may find it impracticable to include in the competitive classified service; provided, that such exemptions shall be by order of the commission duly entered on the record of the commission with the reasons for each such exemption.'
>
> "You will note that the reference is to teachers in benevolent, penal or reformatory institutions of the state, and such student employes in normal schools, colleges and universities of the state, and such labor positions as the state commission or any municipal commission may find it impracticable to include in the competitive classified service; while subdivision '(b)' states that the classified service shall comprise all persons in the employ of the state and several counties, cities and city school districts thereof not specifically included in the unclassified service, to be designated as the competitive class and the unskilled labor class, and further specifies in paragraph 1, under subdivision (b) that the competitive class shall include employments in cities for which it is practicable to determine the merit and fitness of applicants by competitive examinations.
>
> "By the use of the words 'of the state' in connection with the mention of the municipal commission, the designation only of competitive and unskilled labor classes thereafter, and the further specification that the competitive class include those positions in cities for which it is practicable to determine the merit and fitness by competitive examinations, was it intended to use the term 'of the state' in the restricted sense of institutions maintained by the state in its separate governmental capacity, or was it intended to include such institutions maintained by the state through its local governmental agencies?
>
> "For the sake of uniformity in operating under paragraph 12 of section 485-8 I would appreciate your opinion."

In the section of the code copied in the above inquiry the phrase "of the state," used in reference to teachers and employes in the agricultural experiment stations, and in the benevolent, penal and reformatory institutions and students employed in normal schools, etc., has exactly the same meaning as if it read "in the state," and the section, therefore, includes all such teachers in this state in any such institution or school therein named, existing by virtue of the law of the state. The natural meaning of the words is just as susceptible to this general interpretation as would be the more restricted meaning suggested by you, and no reason is apparent for restricting its application to those institutions or schools under the control of the state at large as distinguished from political divisions thereof. Besides, if there were any doubt, the inclusion of a municipal commission would solve it, as a municipal commission has authority in municipal corporations and in the school district included in such municipal corporation, or which includes it, while the state service includes all other branches of the civil service, whether it be the service of the state at large or of other political divisions thereof than cities and city school districts. The extension of authority therefor to the municipal civil service commission necessarily means that employes under its control are within the provisions of the section. This meaning is not affected by the relative position of the phrase in question, as suggested in your inquiry. The phrase "as the state commission or any municipal commission may find it impracticable to include in the competitive classified service" applies to all the employes enumerated above it, as the section and each clause in the series begins with the word "such." The competitive classified service is the whole classified service and the whole civil service under the supervision of the commission. Section 486-1 contains the following:

> "(3) The term 'classified service' signifies the competitive classified civil service of the state, the several counties, cities and city school districts thereof."

This presents an apparent conflict with paragraphs 1 and 2 of subdivision (b) of section 486-8, where the competitive class seems to include the unskilled labor class, which labor is placed under the authority of the civil service commission. The conflict, however, is not important and only presents an additional particular to that mentioned in the definition and thereby supplements the latter, which to that extent is incomplete.

You are therefore advised that the municipal civil service commission may, by proper order upon their record, omit the appointees in question from the competitive classified service.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

497.

CONTRACTOR—WORKING FOR STATE HIGHWAY DEPARTMENT—MAY ASSIGN MONEY DUE HIM.

A person or firm contracting with the state highway commissioner for the construction of an inter-county highway, under the provisions of the Cass highway law, may assign money due or to become due under such contract with the state and the assignee thereby obtains an enforceable right to such payment.

COLUMBUS, OHIO, August 4, 1917.

HON. CHESTER E. BYYAN, *Treasurer of State, Columbus, Ohio.*

DEAR SIR:—Under date of June 26, 1917, you addressed a communication to

me in which you requested my opinion as to the necessity of having all future warrants drawn in favor of Philip Dieffenbacher & Sons, endorsed by the Southern Surety Company, which company, it appears, is surety on the bond of said Philip Dieffenbacher & Sons on their contract with the state for the construction of section "G" of I. C. H. No. 145, Holmes county, Ohio. From a communication addressed to you by the Southern Surety Company, under date of May 10, 1917, it appears that at the time of the execution of said bond said surety company, for its protection thereunder, took from Philip Dieffenbacher & Sons an assignmentof all payments to become due to them for the construction of said improvement. The terms of the contract executed by Philip Dieffenbacher & Sons, whereby said payments were assigned to said surety company, are in words as follows:

> "In consideration of the execution of said bond by The Southern Surety Company, we the undersigned hereby covenant with said company * * *.
>
> "That we, the undersigned, will at all times indemnify and keep indemnified said company and hold it safe and harmless from and against any and all liability, damages, loss, cost, charges and expense of whatsoever kind or nature * * * which the company shall or may at any time sustain or incur by reason or in consequence of having executed the bond herein applied for * * * and that we will pay over, reimburse and make good to said company all sums and the amounts of money which said company shall pay or cause to be paid *or become liable to pay on account of the execution* of said instrument * * * and for the better protection of said company, we, the undersigned, do as of the date hereof hereby convey and assign unto the said company any and all payments, funds, moneys or property due or to become due to the undersigned as provided in said contract (contract between Dieffenbacher & Sons and the state)."

The inquiry made by you depends upon the question whether by said assignment the Southern Surety Company took an enforceable right in the payment thereafter becoming due to Dieffenbacher & Sons from the state in the construction of said inter-county highway improvement. In this connection it may be observed that although said contract between Dieffenbacher & Sons and the state, for the construction of said inter-county highway, cannot have the effect of investing Deffenbacher & Sons, or any body through them, with an enforceable right of action against the state in its sovereign capacity, nevertheless, any person legally entitled to the payments coming due from the state in the performance of said contract would undoubtedly have a right to institute an action in mandamus against the proper state officer to secure payment of such claims. Though you do not so state, I assume that the contract for the construction of the inter-county highway improvement referred to in the correspondence attached to your communication was entered into under the provisions of chapter 8 of the Cass highway law relating to the construction and improvement of roads by the state highway department, which law went into effect September 6, 1915, and the provisions of which relating to the construction and improvement of roads by the state highway department have been carried into the General Code as sections 1178 to 1231-3 inclusive.

Section 1218 G. C. provides that each contract under the provisions of the chapter of which the section is a part shall, except as otherwise provided in the act, be made in the name of the state and executed on its behalf by the state highway commissioner and attested by the secretary of the department.

Section 1208 G. C. provides that before entering into a contract, the state highway commissioner shall require a bond with sufficient sureties, conditioned that the contractor will perform the work upon the terms proposed within the time prescribed and in accordance with the plans and specifications thereof, and that the contractor

will indemnify the said county or township against any damages that may result by reason of the negligence of the contractor in making said improvements. This section further provides that such bond shall also be conditioned for the payment of all material and labor for or used in the construction of roads for which such contract is made, and which is furnished to the original contractor or subcontractor, agent or superintendent of either engaged in said work. It is further provided that such bond may be enforced against the person, persons or company executing such bonds, by any claimant for labor and material, and suit may be brought against such bond in the name of the state of Ohio with relation to any claimant within one year from the date of delivery or furnishing such labor or material, and that such bond, or surety thereon, shall not be released by the execution of any additional security, note or other instrument on account of any such claim, or any reason whatsoever except the full payment of such claim for labor and material.

By section 1212 G. C. it is provided that the state's proportion of the cost and expense of construction, improvement, maintenance or repair of a highway, under the provisions of said chapter relating to the construction of highways by the state highway department shall be paid by the treasurer of state upon the warrant of the auditor of state, and that the proportion of the cost and expense of such construction or improvement to be borne by the county, township and property owners shall be paid by the treasurer of the county in which the highway is located, upon the warrant of the county auditor, issued upon the requisition of the state highway commissioner. There being no stipulation or statutory provision in the contract between the state and Dieffenbacher & Sons to the contrary, I know of no reason why Dieffenbacher & Sons could not legally assign to the surety company payments thereafter to become due them under their then existing contract with the state.

The rule of law here applicable is stated in Vol. 2 of Ruling Case Law, at page 602, as follows:

> "As to money due or to become due under a contract with a government, it is well settled that an assignment thereof is valid unless prohibited by statute or stipulated to the contrary."

Such assignment of payments thereafter becoming due on a contract between a contractor and a state, or a political subdivision thereof, cannot be made to the detriment of rights of those furnishing labor or material to such contractor, where the rights of those furnishing such labor and material have been secured by statutory provision applicable to the case.

> General Fireproofing v. Keepsdry Construction Company, 173 App. Div. (N. Y.) 528.

With respect to this question, however, it will be noted that there is nothing in the provisions of the Cass highway law, under which the contract between Dieffenbacher & Sons and the state was executed, which confers any right upon those furnishing labor and material to the contractor in the money due him from the state by lien or otherwise. On the contrary, express provision is made for the security of such persons by giving them a right to proceed on the bond which the contractor was required to furnish under the provisions of section 1208, above noted.

In the case of State of Washington ex rel vs. Cheetham, Auditor of State, 17 Wash., 131, it was held that under a statute providing for the construction of a state normal school building and making appropriation therefor, the contractor and his assigns, upon completion of the building, were entitled to warrants for the amount due upon the contract price, although the contract in that case provided that the contractor must first show that all debts due for labor and material had been paid. The court

held that in the absence of such requirement in the statute there was no privity between the state and such claimants on account of labor and material furnished to the contractor and that the fact that the contractor had assigned a portion of the sum due him for the erection of such building in the payment of his personal debts, while claims in connection with the construction of the building remained unpaid, did not justify the state auditor in refusing to issue warrants in payment of the orders issued by the contractor.

I am therefore of the opinion that by the assignment set out in the communication addressed to you by the Southern Surety Company, such surety company obtains an enforceable right to the payments thereafter coming due Dieffenbacher & Sons in the performance of their contract with the state for the construction of said inter-county highway improvement and that before paying any warrants in favor of Dieffenbacher & Sons on such contract you should have the consent of the surety company to such payments endorsed thereon.

Before closing this opinion I feel impelled to make a few observations which are not, perhaps, strictly necessary in the consideration of the precise question submitted by you. In the first place the conclusion here reached, that the contractors, Dieffenbacher & Sons, had a legal right to assign money due or to become due to them on their contract with the state, is predicated, of course, upon the facts here appearing that such assignment carried all the moneys due or to become due under said contract and the conclusion here reached as to Dieffenbacher & Sons' right to make the assignment in question would not hold good with reference to an assignment which carried to the assignee a part only of a claim which may be due and owing to the contractor, for it has been an established principle that an assignment of a part of a debt cannot be enforceable by law unless assented to by the debtor.

Mandeville v. Welsh, 5 Wheat., 277.
Railway Company v. Bolkert, 58 O. S., 362, 369.

In the second place I note from the correspondence attached to your communication that although you, in your official capacity as treasurer of state, received notice of this assignment by Dieffenbacher & Sons, as likewise did the state highway commissioner and certain county officials, no notice of the assignment appears to have been given to the auditor of state.

Under section 243 of the General Code the auditor of state is required to examine each claim presented for payment from the state treasury and if he finds it legally due and that there is money in the treasury duly appropriated to pay it, he shall issue to the person entitled to receive the money thereon a warrant on the treasurer of state for the amount found due.

By section 301 it is provided that no money shall be paid out of the state treasury except on the warrant of the auditor of state. A consideration of the provisions of the sections just noted makes it clear that the notice of such assignment should have been directed to the auditor of state rather than to yourself, but I am holding in this opinion that inasmuch as a matter of fact you did receive notice of this assignment, the proper thing for you to do, in order to avoid future complications with respect to moneys becoming due and payable on this particular contract, is to require the consent of the surety company to such payment before paying warrants drawn in favor of Dieffenbacher & Sons. Lastly, I may note that section 1208 General Code, above referred to, has been amended by the act of the legislature under date of March 20th, 1917, so as to provide that the state highway commissioner shall not draw his requisition for a warrant on account of any contract until it appears by the affidavit of such contractor, or its officer or agent in case the contractor is a corporation, that all such indebtedness of such contractor, on account of material incorporated into the work or delivered on

the site of the improvement, or labor performed thereon, has been paid. This section, as amended, further gives the persons furnishing such labor or material the right to protect and enforce a lien to the extent of their claims against the money due the contractor from the state.

It is obvious, from what has been said above with respect to the amendment of section 1208 G. C., that the conclusion reached by me with respect to the particular case mentioned in your communication would not apply to contracts with the state highway commissioner made and entered into on behalf of the state after the amendment of section 1208 went into effect. As to such contract, no assignment can be made which either you or the auditor of state is required to recognize, if there are any outstanding claims for labor or material furnished the contractor in the performance of his contract with the state; and if such recognition on the part of yourself or the auditor of state will have the effect of prejudicing the payment for such labor and material so furnished to the contractor.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

498.

APPROVAL—FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN AUGLAIZE, CLARK, CLINTON, CRAWFORD, ERIE, FRANKLIN, FULTON, GALLIA, GEAUGA, HOCKING, LAWRENCE, LORAIN, MAHONING, MEDINA, PUTNAM, ROSS, STARK, VINTON AND WILLIAMS COUNTIES. DISAPPROVAL—FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN PUTNAM, MAHONING, HOLMES AND GALLIA COUNTIES.

COLUMBUS, OHIO, Aug. 7, 1917.

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

DEAR SIR:—I have your communication of July 25, 1917, in which you enclose a number of final resolutions in reference to the improvement of certain highways and ask my approval of the same. They are as follows:

"Auglaize county—Section 'A-1' of the Wapakoneta-St. Marys road, I. C. H. No. 165. Types 'A,' 'B,' 'C,' 'D,' and 'E.'

"Clark county—Section 'A-1' of the Springfield-Jamestown road, I. C. H. No. 472, Type 'B.'

"Clinton county—Section 'A' of the Wilmington-Hillsboro road, I. C. H. No. 254.

"Crawford county—Section 'G' of the Bucyrus-Upper Sandusky road, I. C. H. No. 200.

"Erie county—Section 'O' of the Sandusky-Clyde road I. C. H. No. 276.

"Franklin county—Section 'r' of the Portsmouth-Columbus road, I. C. H. No. 5.

"Fulton county—Section 'K-1' of the Archbold-Fayette road, I. C. H. No. 301.

"Gallia county—Section 'A-1' of the Ohio river road, I. C. H. No. 7.

"Gallia county—Section 'F-1' of the Gallipolis-Jackson road, I. C. H. No. 399.

"Gallia county—Section 'F' of the Gallipolis-Jackson road, I. C. H. No. 399.

"Gallia county—Section 'E-1' of the Gallipolis-Ironton road, I. C. H. No. 405.

"Geauga county—Section 'K-1' of the Cleveland-Meadville road, I. C. H. No. 15.

"Hocking county—Section 'J' of the Logan-Chillicothe road, I. C. H. No. 363 (in duplicate).

"Holmes county—Section 'A' of the Navarre-Berlin road, I. C. H. No. 79.

"Lawrence county—Section 'E' of the Ironton-Miller road I. C. H. No. 404. Types 'A,' 'B,' and 'C.'

"Lawrence county—Section 'F' of the Jackson-Ironton road, I. C. H. No. 400.

"Lawrence county—Section 'K' of the Ohio river road, I. C. H. No. 7. Types 'A,' 'B,' 'C,' and 'D.'

"Lorain county—Section 'I' of the Ashland-Oberlin road, I. C. H. No. 144. Types 'A,' 'B,' and 'C.'

"Mahoning county—Section 'A-1' of the Niles-Canfield road, I. C. H. No. 328.

"Mahoning county—Section 'Y' of the Canfield-Poland road, I. C. H. No. 486.

"Mahoning county—Section 'P' of the Akron-Youngstown road, I. C. H. No. 18.

"Mahoning county—Section 'b' of the Youngstown-Lowellville road, I. C. H. No. 14.

"Mahoning county—Section 'R-1' of the Akron-Jamestown road, I. C. H. No. 18.

"Mahoning county—Section 'U-1' of the Akron-Canfield road, I. C. H. No. 87.

"Medina county—Section 'H2' of the Elyria-Medina road, I. C. H. No. 314.

"Putnam county—Section 'h' of the Kalida-Lima road, I. C. H. No. 134.

"Putnam county—Section 'g' of the Kalida-Lima road, I. C. H. No. 134.

"Ross county—Section 'N (n)' of the Chillicothe-Lancaster road, I. C. H. No. 361.

"Stark county—Section 'B-2' of the Canton-New Franklin road, I. C. H. No. 72.

"Vinton county—Section 'A' of the Gallipolis-McArthur road, I. C. H. No. 398.

"Williams county—Section 'L' of the Bryan-Pioneer road, I. C. H. No. 306. Types 'A,' 'B,' and 'C.'

I have carefully examined these final resolutions and, with the exception of those hereinafter specifically noted, find them correct in form and legal, and have therefore endorsed my approval thereon and return the same to you.

However, there are several of the final resolutions which are not regular in form and ought to be corrected before I approve the same.

1. In the final resolution having to do with I. C. H. No. 134, section 'h,' Greens burg township, Putnam county, the certificate of the clerk of the township shows that the final resolution was entered into on April 26, 1916, while the resolution itself shows the same to have been entered into on July 20, 1917.

2. The final resolution relative to I. C. H. No. 87, section 'U-1,' Mahoning county, sets forth that the preliminary application to the state highway department for state aid was made on the 28th day of December, 1917, which of course is not correct.

3. The certificate of the county auditor, in the final resolution relating to I. C. H. No. 18, section 'R-1,' Mahoning county, to the effect that the money was in the treasury to the credit of the appropriate fund, was made on July 20, 1917, while

the final resolution entered into by the county commissioners was dated December 28, 1914. This is not in harmony with the provisions of section 5660 G. C., which requires that the certificate of the proper officer shall first be filed before the entering into of any contract or resolution.

4. In regard to I. C. H. No. 79, section 'A,' Holmes county, the resolution itself shows that it was entered into on June 19, 1917, while the certificate of the county auditor states that the final resolution was entered into on July 19, 1917. The certificate of the county auditor, to the effect that the money was in the treasury to the credit of the proper fund, was also made on July 19, 1917, some time after the 19th day of June, 1917. Undoubtedly July 19, 1917 is the proper date, rather than June 19, 1917, but this should be corrected.

5. In I. C. H. No. 399, section 'F-1,' Gallia county, there was a mistake made in the amount of money appropriated by the chief clerk of the state highway department, in that he appropriated the sum of $9,845.00, instead of $9,485.00, the sum which the state highway department is to furnish toward the improvement of said highway. Inasmuch as this is a step that is not particularly required by law, I have endorsed my approval on said final resolution. It might be well, however, for your department to make these figures stand as they should, namely, $9,485.00.

You also call my attention to section 2288-1 G. C. (107 O. L. 457), and make inquiry as to whether the state auditor under the provisions of said section would have to make his certificate before the chief clerk could appropriate the different sums of money set out in the different final resolutions. You suggest that the first steps in the matter of these final resolutions were taken prior to the date upon which the act, of which section 2288-1 G. C. is a part, became effective, and therefore you inquire whether the provisions of the old law would apply, and not those of the new law.

It is my opinion that the provisions of the new law would apply, notwithstanding the fact that the first steps in the matter of these final resolutions were taken prior to the taking effect of the new act. This certificate of the state auditor has nothing whatever to do with any of the steps in the proceedings up until the time that the state highway commissioner shall enter into a contract, agreement or obligation involving the expenditure of money, or pass any resolution or order for the expenditure of money.

Hence it is my opinion that the provisions of section 2288-1 G. C. should be made to apply from the taking effect of the act in reference to all expenditures of money. But the question arises, when the provisions of this section would apply in reference to the procedure of your department. It is my opinion that the provisions of this section would apply to the entering into of the contract, agreement or obligation involving the expenditure of money, and not to the appropriation of money as set out in your final resolutions, for the reason that there is no provision of law requiring the formal appropriation by your department of money which is to enter into the payment of the improvement of a highway.

The first instance in which your department binds the state to pay out money is when it enters into the contract, agreement or obligation with a contractor, to improve a certain highway. Hence it is my opinion that the certificate of the auditor of state should be secured as provided in section 2288-1 G. C., before your department enters into such a contract, agreement or obligation, and not necessarily before the formal appropriation which your department makes.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

499.

MATRON—EMPLOYED TO CARE FOR SICK EMPLOYES IN FACTORY—IS WITHIN THE PROVISIONS OF SECTION 1008 G. C.—FIFTY HOUR LAW.

A matron employed in a factory to look after the needs of both male and female employes in case of sickness or accident is within the provisions of section 1008 *G. C. which prohibits the employment of females in certain establishments, irrespective of the character of work that they may be called upon to perform therein.*

COLUMBUS, OHIO, August 7, 1917.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—In your communication of July 12th you state

"We are in receipt of the following letter from the Diamond Match Company, Barberton, Ohio:

" 'We have a matron at our factory and I would very much like to know if she comes under the lately enacted fifty hour law for women.

" 'You understand a matron's duty is to look after all the needs of both male and female employes in case of sickness or accident, and inasmuch as departments employing men only work ten hours per day, it is absolutely necessary that our matron be on hand.

" 'Will you kindly give the interpretation of the law in this case and greatly oblige?'

"Section 1008 of the General Code reads as follows:

" 'Females over eighteen years of age shall not be employed or suffered to work in or in connection with any factory or workshop more than nine hours per day, etc.'

"In view of the fact that the law does not apply to this class of employment in hospitals, homes, etc., we should like to have your opinion as to whether it is applicable in this case."

Section 1008 of the General Code (107 O. L. 149), reads:

"* * * Females over eighteen years of age shall not be employed or permitted or suffered to work in or in connection with any factory, workshop, * * * more than nine hours in any one day, except Saturday, when the hours of labor in mercantile establishments may be ten hours, or more than six days, or more than fifty hours in any one week, * * *."

It is suggested that since the matron's duty is to look after all the needs of both male and female employes in case of sickness or accident, and since there is no inhibition against females performing this character of work in hospitals and homes, that possibly such a matron would not be included within the provisions of the section.

In the case submitted it is admitted that the matron is employed or permitted or suffered to work in or in connection with a factory. Plainly, then, she is within the letter of this enactment. The exception found in the act only applies to canneries and establishments engaged in preparing for use perishable goods, during the season they are engaged in canning their products.

It will be noted that the inhibition is against females over eighteen years of age

working in or in connection with certain named establishments. The exception also applies to certain establishments. The prohibition is not against the character of the work done or services performed; neither is the exception along that line.

In the case of *Miller v. Wilson*, 236 U. S., 373, (L. R. A. 1915 F, page 829), the second paragraph of the syllabus reads:

> "2. Including hotels among the specified establishments in which women must not be employed more than eight hours in one day, or forty-eight hours in one week, does not render the statute invalid as discriminatory, although the classification may, to some extent, be based upon the nature of the employer's business rather than the character of the employe's work."

In this case, at page 834, Justice Hughes refers to the fact that the case of Hawley v. Walker, 232 U. S. 718, which arose under the Ohio act prohibiting the employment of "females over eighteen years of age" to work in "any factory, workshop, etc." was held constitutional, and, following that case, the court held that the California statute which was under discussion was likewise constitutional. It had been urged, among other things, that the California statute was invalid because the classification was based on the nature of the employer's business and not upon the character of the employe's work. The court, referring to the objection urged as stated above, uses this language: (page 834).

> "With respect to the last of these objections, it is sufficient to say that the character of the work may largely depend upon the nature and incidents of the business in connection with which the work is done. The legislature is not debarred from classifying according to general considerations and with regard to prevailing conditions; otherwise, there could be no legislative power to classify. For it is always possible by analysis to discover inequalities as to some persons or things embraced within any specified class. A classification based simply on a general description of work would almost certainly bring within the class a host of individual instances exhibiting very wide differences; it is impossible to deny to the legislature the authority to take account of these differences, and to do this according to practical groupings in which, while certain individual distinctions may still exist, the group selected will, as a whole, fairly present a class in itself. Frequently such groupings may be made with respect to the general nature of the business in which the work is performed; and, where a distinction based on the nature of the business is not an unreasonable one, considered in its general application, the classification is not to be condemned."

It would seem, then, that the legislature has prohibited the employment of females in certain establishments, irrespective of the character of work that they may be called upon to perform therein. In the instant case the duties of the matron would have no bearing upon the matter. The law forbids the employment of females over eighteen years of age in or in connection with a factory. It is plainly evident that the matron in question is employed in and in connection with the match factory, and it is my opinion that she is clearly within the provisions of said section 1008 of the General Code.

Very truly yours,
JOSEPH McGHEE,
Attorney-General.

500.

CONSTITUTIONALITY OF SECTION 2411 AUTHORIZING THE EMPLOYMENT OF CIVIL ENGINEERS BY COUNTY COMMISSIONERS.

The provisions of section 2411 General Code are not in contravention of section 2 of Article X of the Constitution. The said engineer and assistants are not officers in the constitutional sense, but are mere employes of the board of county commissioners.

COLUMBUS, OHIO, August 7, 1917.

HON. ROBERT P. DUNCAN, *Prosecuting Attorney, Columbus, Ohio.*

DEAR SIR:—I have your communication of July 30, 1917, in which you ask my opinion upon the following statement of facts:

> "The commissioners of Franklin county, in January, 1917, employed a civil engineer who was neither the surveyor of said county, nor an assistant to said surveyor, to prepare plans for two county bridges, under the provisions of section 2411, General Code, * * *
>
> "1. What effect does section 2, article X, Ohio Constitution, have on the appointment made by the commissioners of Franklin county under the provisions of section 2411 General Code, in the light of section 2792 General Code, which latter section requires a county official, to wit: the county surveyor to perform all duties for the county now or hereafter authorized or declared by law to be done by a civil engineer or surveyor, and which further says that he shall prepare all plans, specifications, etc., for the construction of bridges, etc., constructed under the authority of any board within and for the county?
>
> "2. Can a contract of the nature mentioned in section 2343, General Code, be entered into by the county commissioners, based upon the plans and specifications prepared by the engineer appointed under the provisions of section 2411 General Code?"

The question submitted in your communication has to do with the constitutionality of section 2411 General Code. That is, you raise the question as to whether the provisions of section 2411 General Code are constitutional when taken in connection with the provisions of section 2792 General Code. The particular section of the constitution which is called into question is section 2 of artilce X, which reads:

> "County officers shall be elected on the first Tuesday after the first Monday in November, by the electors of each county in such manner, and for such term, not exceeding three years, as may be provided by law."

If the engineer provided for in section 2411 General Code is a county officer, then in that event the provisions of the section would not be constitutional, and this from the fact that all county officers must be elected under the provisions of section 2 of article X of the constitution, and not appointed as provided for in said section 2411.

In order to get a correct understanding not only of a number of the sections of the General Code which I shall consider hereafter, but also an understanding of the holding of our supreme court in reference to the matter under consideration, it will be necessary for me to note the provisions of section 845 Revised Statutes. This section included within its provisions a number of different and distinct matters. Among others it included provision giving power to the county commissioners to employ an engineer, assistant engineers, rod men, and inspectors, which part of the section reads as follows:

"Whenever in any county the services of an engineer are required with respect to roads, turnpikes, ditches, or bridges or to their improvement or construction, or with respect to any other matter, requiring the services of an engineer, and whenever said board, on account of the amount of work to be performed, shall deem it necessary, said board, upon the written request of the county surveyor, may employ a competent engineer and as many assistant engineers, rodmen, and inspectors, as may be needed, and shall furnish said engineer and assistants with suitable offices and with the necessary books, stationery, instruments and implements for the proper performance of the duties required of such persons. Said engineer, assistants, rodmen, and inspectors shall perform such duties as may be imposed upon them by such board."

It also includes provisions giving power to the county commissioners to employ legal counsel, which part of the section reads as follows:

"Whenever the board of county commissioners of any county deems it advisable, it may employ legal counsel and the necessary assistants upon such terms as it may deem for the best interests of the county, for the performance of the duties herein enumerated. Such counsel shall be the legal adviser of the board of county commissioners and the board of control, where there is such board, and of all other county officers, of the annual county board of equalization, the decennial county board of equalization, the decennial county board of revision, and the board of review; and any of said boards and officers may require of him written opinions or instructions in any matters connected with their official duties. He shall prosecute and defend all suits and actions, which any of the boards above named may direct, or, to which it or any of said officers may be a party, and shall also perform such duties and services as are now required to be performed by prosecuting attorneys under sections 799, 1277, 1278-a and 3977 of the Revised Statutes, and as may at any time be required by said board of county commissioners."

Section 845 Revised Statutes was divided into a number of sections when it was carried over into the General Code, the above quoted sections becoming sections 2411 and 2412 of the General Code. Section 2411 General Code reads practically as it did in the Revised Statutes as follows:

"When the services of an engineer are required with respect to roads, turnpikes, ditches or bridges, or with respect to any other matter, and when, on account of the amount of work to be performed, the board deems it necessary, upon the written request of the county surveyor, the board may employ a competent engineer and as many assistant engineers, rodmen and inspectors as may be needed, and shall furnish suitable offices, necessary books, stationery, instruments and implements for the proper performance of the duties imposed on them by such board."

Section 2412 General Code reads entirely differently from what it read in the Revised Statutes, and is as follows:

"If it deems it for the best interests of the county, upon the written request of the prosecuting attorney, the board of county commissioners may employ legal counsel to assist the prosecuting attorney in the prosecution or defense of any suit or action brought by or against the county commissioners or other county officers and boards, in their official capacity."

In State ex rel. v. Cannon et al., 12 C. C. N. S. 103, the court held that part of section 845 Revised Statutes which gave the commissioners power to employ legal counsel unconstitutional, on the ground that it contravened section 2 of article X of the constitution. The judgment of the circuit court was affirmed without report by the Supreme Court in 80 Ohio Statutes 756.

The question now is as to whether section 2411 General Code, originally a part of section 845 Revised Statutes, is not unconstitutional on the same ground and for the same reasons as set forth by the court holding that part of section 845 Revised Statutes unconstitutional which had to do with the selection of legal counsel. In order to answer this question let us note the argument of the circuit court which led it to the conclusion that said part of section 845 Revised Statutes is unconstitutional. In the opinion of the court on page 105 the court laid down the following basic proposition:

> "If the positions which the several defendants occupy and the duties required of them are such as to constitute them officers, it is clear that the statute authorizing their appointment by the board of county commissioners is in contravention of this constitutional provision."

The court then points out the numerous and varied duties which the legal counsel so selected had to perform, in part, as follows:

> "Such counsel shall be the legal adviser of the board of county commissioners, and of all other county officers, of the annual county board of equalization, the decennial county board of revision, and the board of review; and any of said boards and officers may require of him written opinions or instructions in any matters connected with their official duties. He shall prosecute and defend all suits and actions, which any of the boards above named may direct, or to which it or any of said officers may be a party; * * *"

He shall also perform such duties and services as may at any time be required by said board of county commissioners; he shall determine and certify that contracts named in section 799 Revised Statutes are in accordance with law; shall be the legal adviser of the county commissioners and all other county officers; shall have the power in the name of the state to apply to a court of competent jurisdiction to restrain the mis-application of funds, the completion of illegal contracts and the recovery back for the county of moneys illegally paid out.

The court after setting out the above duties which were to be performed by legal counsel so selected by the county commissioners under favor of section 845 Revised Statutes concludes as follows:

> "That most of these duties, if not all of them, are official duties, duties which can only be performed by a public officer, would seem to be beyond question, under any definition of what constitutes an officer with which we are acquainted."

From the duties imposed upon said legal counsel, it would hardly seem that the court would have arrived at any other conclusion than that to which it came—that a legal counsel selected by the county commissioners was clothed with almost as broad and ample powers as was the prosecuting attorney.

We now come to the question as to whether section 2411 is open to the same criticism as was that part of section 845 of the Revised Statutes upon which the court passed in the above case.

I am of the opinion that it is not.

When said section 2411 is studied carefully, we find its scope to be entirely different

from the matter upon which the court passed above. The engineer is employed for some specific matter or duty in reference to roads, turnpikes, ditches or bridges. He is employed for some particular work on account of the inability of the county surveyor to perform the same due to the amount of work which he already has on hand to perform. Further, the county surveyor must make a written request for assistants. The engineer so selected upon the request of the county surveyor has certain duties imposed upon him, as is evidenced by the latter part of the section, which provides that he shall be furnished with suitable offices, necessary books, stationery, instruments and implements for the proper performance of the *duties imposed on him by such board of county commissioners.*

In other words, he is the employe of the county commissioners at the request of the county surveyor to perform some certain specific duties. He is a sort of assistant to the county surveyor, selected not by the county surveyor but by the county commissioners. He is in no sense an officer; he is not given general, continuous and official duties to perform.

The main requirements necessary to constitute an officer are generally given as follows: "The person must occupy a permanent position and not a mere occasional or temporary one. He must be invested with some portion of the sovereignty of the state. He usually is required to take an official oath, and generally is required to give bond. He is invested with the right to discharge the duties of some particular office provided by law or by the constitution. Mere employment has none of these distinguishing features. A person employed acts only on behalf of his principal. In the case under consideration he merely performs the duties which are placed upon him by the county commissioners who are the employers. So that, I am of the opinion that the engineer provided for in section 2411 General Code is not in any sense an officer, but a mere employe.

In arriving at the above conclusion I am not unmindful of section 2792 General Code, which reads as follows:

> "The county surveyor shall perform all duties for the county now or hereafter authorized or declared by law to be done by a civil engineer or surveyor. He shall prepare all plans, specifications, details, estimates of cost, and submit forms of contracts for the construction or repair of all bridges, culverts, roads, drains, ditches and other public improvements, except buildings, constructed under the authority of any board within and for the county. When required by the county commissioners, he shall inspect all bridges and culverts, and on or before the first day of June of each year report their condition to the commissioners. Such report shall be made oftener if the commissioners so require."

But notwithstanding the fact that this section provides for the county surveyor's performing all the work set out in the section, we know that the county surveyor cannot personally do all of the said work, and therefore provision is made for assistants in section 2788 General Code, which provides:

> "The county surveyor shall appoint such assistants, deputies, draughtsmen, inspectors, clerks or employes as he deems necessary for the proper performance of the duties of his office * * *."

In my opinion section 2411 General Code was enacted for the purpose merely of taking care of an emergency. For all the ordinary help which the county surveyor needs he himself appoints assistants and deputies, but when an emergency arises for which his ordinary office help is not sufficient, the county commissioners may,

upon the request of the county surveyor, appoint assistants to take care of the emergency. Hence the engineer and the assistants provided for in section 2411 Genral Code are practically assistants to the county surveyor selected not by himself under section 2788 General Code, but by the county commissioners.

I desire to call attention to two opinions rendered by my predecessor, Honorable Timothy S. Hogan. One is found in the report of the attorney-general for 1913, Vol. II, page 1144, in which he was asked the question: "Can commissioners for the purposes of the above (preparing plans and specifications for a bridge) employ engineer or architect under section 2411?" Mr. Hogan, in the second branch of the syllabus, held as follows:

> "Under section 2792, General Code, it is the duty of the county surveyor to prepare all plans and specifications necessary for bridge improvements, and assistants for such work may not be employed except upon the request of the county surveyor in accordance with section 2411 General Code."

And in the opinion, at page 1146, he makes the following statement:

> "The commissioners, however, cannot employ such engineer and assistants, under section 2411, unless a request therefor is first made in writing, by the county surveyor; nor can they employ an engineer or architect to prepare plans and specifications for bridges, under section 2343, without the requisition of the county surveyor."

In Vol. II, Report of the Attorney-General for the year 1914, at page 1262, in passing upon the question of the employment of legal counsel to assist the prosecuting attorney of a county, Mr. Hogan uses the following language: (p. 1264.)

> "* * * it is clear that it is primarily the duty of the prosecuting attorney of your county to defend the county auditor and county treasurer in the suits referred to, but if he deems it for the best interest of the county, he may request the county commissioners to appoint counsel to assist him in these cases, and the commissioners may employ such counsel by virtue of section 2412."

It must be remembered, however, that Mr. Hogan used this language in reference to section 2412 General Code, which was entirely modified from the way in which it stood as a part of section 845 Revised Statutes. So that, answering your question specifically, I am of the opinion that the provisions of section 2411 General Code do not contravene the provisions of section 2, article X of the constitution, and that the county commissioners of Franklin county had authority to employ an engineer and assistants under said section to make plans and specifications for the erection of bridges in said county. The answer to your second question naturally follows from the answer to the first and that is, the county commissioners may use the plans and specifications prepared by the engineer appointed under the provisions of section 2411 General Code as a basis for a contract under the provisions of section 2343 General Code.

I am assuming, in rendering the above opinion, that the county surveyor notified the county commissioners that on account of the amount of work to be performed the services of an engineer would be required in the matter of making the plans and specifications for the bridges mentioned in said request. I have learned this to be the fact both from the prosecuting attorney's office and from the county surveyor's office.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

501.

STATE CIVIL SERVICE COMMISSION—POWER TO LIMIT COMPETITION FOR CERTAIN POSITION. SUPPLEMENTAL TO OPINION NO. 358.

1. *The state civil service commission, acting under section* 486-10 *is required to limit competition on any of the grounds therein mentioned, when and to the extent that the same are laid down as qualifications for office by the constitution or statutes, or as limitations on the employing power by statutes which are consistent with the civil service amendment to the constitution. The limitation in the law relating to the appointment of district mine inspectors, requiring such inspectors to have been residents of the district for which appointed, for a specified time prior appointment, is of this character.*

2. *Said commission, under said section is also authorized to limit competition on any of said grounds, when the same are not expressly laid down in the statutes as such qualifications or limitations on the appointing power, but when the nature of the duties of a given position, as established by law or the rules or practice of the head of a department, are such that lack of the qualification of the kind mentioned in section* 486-10 *is sufficient to make any person unfit to discharge them at a minimum degree of efficiency. The commission is the judge of the facts necessary to establish this conclusion, but its determinations are subject to court review when its jurisdiction is exceeded or its powers abused. Mere expediency, convenience, or the wishes of the head of a department are not sufficient reasons to support a limitation of competition.*

Whether non-residence in a prescribed area is ever sufficient in law to make an applicant for a state district position unfit to discharge its duties, quaere.

COLUMBUS, OHIO, Aug. 7, 1917.

The State Civil Service Commission, Columbus, Ohio.

GENTLEMEN:—I have your communication of June 16, 1917, in which you ask my opinion as follows:

> "After careful consideration of your opinion under date of June 8, relating to districting of the state for the purpose of examination and certification, the commission is still in some doubt as to its proper interpretation.
>
> "In the case of district mine inspectors under the Industrial Commission, mentioned in this opinion, there is a specific provision of law requiring that the chief inspector of mines shall establish certain districts, and that inspectors appointed therein shall have been residents of their respective districts for two years preceding appointment. The commission understands that in making certification to these positions, the names certified must be confined to residents of the particular district to which certification is made, and that, therefore, separate eligible lists must be created for each district established by the chief inspector of mines.
>
> "While the laws relating to the inspection of workshops and factories, examination of steam engineers, and the inspection of boilers, under the industrial commission of Ohio, provide for districting of the state and the appointment of district deputies, there is no specific provision of law requiring residence in a district as one of the qualifications necessary for appointment to service therein; and the commission understands that in holding examinations to create eligible lists, either for a specified district or for all of these districts, they must be open to competition by persons throughout the state, regardless of residence, and that certification for appointment to any such district cannot, under the civil service law, be limited to residents of that district but must

include the names of the three persons standing highest on the eligible list composed of all persons throughout the state who have competed in the examination for that particular branch of the service.

"This would apply also to inspectional forces and field workers of other departments assigned to districts for the purpose of administration and facilitating field work where there is no specific provision of law requiring residence in a district.

"Will you kindly inform the commission, at the earliest possible date, whether this interpretation is correct?"

I think your question requires me to consider the meaning of certain provisions of sections 486-10 and 486-11 of the General Code. It is true that these provisions which I am about to quote must be interpreted in the light of other provisions of the same act, the constitutional requirements respecting civil service and other laws of the state as well as other constitutional provisions; nevertheless, in the main the complete answer to your question depends upon the two sections refererd to. They are in part, as follows:

"Section 486-10. All applicants for positions and places in the classified service shall be subject to examination which shall be public, competitive and free for all, *within certain limitations, to be determined by the commission,* as to citizenship, *residence,* age, sex, experience, health, habits and moral character; * * * .

"Written or printed notices of every examination for the state classified service shall be sent by the commission to the county clerk of each county in the state, etc. * * * . In case of examinations limited *by the commission* to a *district,* county or city, the commission shall provide in its rules for adequate publicity of such examinations in the *district,* county or city, *within which competition is permitted.*

"Section 486-11. * * * The commission may refuse to examine an applicant, or after an examination to certify an eligible, who is found to lack any of the *established preliminary requirements* for the examination or who is physically so disabled as to be rendered unfit for the performance of the duties of the position which he seeks, * * * ."

The use of the word "residence" in the context in which it is found in the above quotation raises the question which must be answered in connection with your specific inquiry; but that question is not limited to the meaning of the meaning of the word itself but rather extends to the interpretation and application of the whole clause, and more especially to the phrase "to be determined by the commission" and other similar phrases found in the cognate clauses.

In a word, it is palpable that some power, authority, or it may be duty, is vested in or imposed upon the civil service commission to determine limitations upon the absolute freedom and openness of competition in its examinations for positions in the state service which would otherwise be required by the first part of the first sentence which has been quoted, and that such limitations may or must, in appropriate cases be residential in character. So much must be taken for granted, for to hold otherwise would be to ignore the clear statement of the law that the commission is to make the determinations, that the determinations are to relate to limitations upon competition, and that such limitations may be made dependent upon residence. The problem is to determine the rules of law which must guide and restrain the commission in the general exercise of its power or duty to prescribe limitations, or, as section 486-11 has it, "preliminary requirements," and more particularly what those rules of law are as applied to the determination of limitations based upon residence.

I start with the principle that the commission is not given any arbitrary power by

section 486-10. This is plain enough for the broad reason that no administrative power will be regarded as arbitrary; for so to regard it would be to make the law unconstitutional in such respect. Authorities might be multiplied on this point. *Harmon v. State*, 66 O. S. 249, is an extreme case on the one hand, and *State Board of Health v. Greenville*, 86 O. S. 1, on the other; but both of them yield deference to the idea that legislative power may not be delegated to an executive tribunal. The general assembly must make the law, though it may permit to the executive branch of the government what is known, despite the dictum to the contrary in the first case cited, as the administrative power to apply the general principles of the law to specific cases, and to make orders, rules and regulations to that end.

As between two possible interpretations of a statute that one which will avoid conflict with constitutional limitations, express or implied, (regarding the principle against delegation of legislative power as a species if implied constitutional limitation) must be chosen. I do not think that section 486-10, read in connection with all the other sections of the civil service law, could be fairly regarded as an attempt to vest arbitrary power in the civil service commission; but even if it could be so regarded, it would have to be interpreted otherwise in accordance with the principle just stated.

For these general reasons, then, it becomes clear that the whole law relative to the powers or duties of the civil service commission in the respect under consideration is not stated in the unvarnished language of section 486-10, to the effect that the commission may prescribe limitations based on residence respecting the scope of competition for positions for which examinations are to be held. There must be added such rules of law as will define what limitations the commission is at liberty to impose on this ground within the scope of its purely administrative power; or, putting it negatively, what attempted limitations on the part of the commission would transcend the exercise of its administrative power and amount to unauthorized legislation.

At the outset, the scope of the power which is herein granted is rather broadly indicated by the enumeration of grounds upon which limitations on competition may be imposed. Those grounds, repeating them, are "citizenship, residence, age, sex, experience, health, habits and moral character."

But without pausing to attempt to extract from this catalogue some attribute common to all these enumerated things which might serve to show the purpose and the co-ordinate limitations of the grant of power, I think we may add to the express provisions to be considered the all-controlling declaration of article XV, section 10 of the constitution, as follows:

> "Appointments and promotions in the civil service of the state, the several counties, and cities, shall be made according to merit and fitness, to be ascertained, as far as practicable, by competitive examinations. Laws shall be passed providing for the enforcement of this provision."

Looking now to the language of section 486-10 and reading it in the light of the constitutional provision just quoted, we discover that only to the extent that the various things enumerated in section 486-10 may so operate as to determine the merit and fitness of a particular person for a given position may they be constitutionally considered by the commission or any one else, as requirements for admission to a civil service examination.

In this connection, however, one consideration deserves special mention. The legislature has the undoubted power as a general proposition to prescribe qualifications for public offices. The "civil service of the state" mentioned in article XV, section 10 of the constitution is not therein defined, but in the law which has been passed "for the enforcement of this provision" it is so defined as to include some offices as well as a great many mere public employments. (Section 486-1 G. C.). Some

nice questions are raised here, but I do not feel called upon to discuss them minutely. It is sufficient to say that where a position is an office, as distinguished from a public employment, and the legislature has prescribed qualifications for that office, those qualifications should by all concerned, and unless and until the courts hold otherwise because of some possible application of article XV, section 10, be deemed controlling. That is to say, at the present time all administrative officers should agree to follow implicitly the laws relating to qualifications for particular public offices, either on the ground that such qualifications will be conclusively presumed to have been set up because of their bearing upon the question of merit and fitness, or because in the constitutional sense (as distinguished from the legislative sense) the civil service of the state does not include offices at all.

Now the law relating to appointments to positions which are offices may prescribe the qualification of citizenship. This, of course, is universally true, for article XV, section 4 of the constitution, which is in force and must be read in connection with the civil service amendment thereto provides that:

> "No person shall be elected or appointed to any office in this state, unless he possesses the qualifications of an elector."

To possess the qualifications of an elector a person must be a "male citizen of the United States, of the age of twenty-one years, who shall have been a resident of the state one year next preceding the election, and of the county, township, or ward, in which he resides, such time as may be provided by law." (Article V, section 1).

Here are qualifications both of citizenship and residence, as well as of age and sex, which the commission and the legislature itself must observe. In this respect, therefore, it follows that the civil service commission, acting under section 486-10 in prescribing the preliminary requirements for admission to an examination for an *office* in the classified service, not only may, but must, impose such limitations as the constitution of the state itself imposes in the foregoing respects.

However, these reasons are not applicable to positions which are not offices. The other considerations hereinafter to be discussed must come into play as to them.

Again, particular statutes may, as stated, impose particular qualifications. The incumbent of a position which is an office may be required by the legislature to have certain definite qualifications of experience, such as that he shall be a civil engineer of two years' experience, or the like. In my opinion, the commission not only may but must impose such preliminary qualifications under section 486-10 if the statutes so require; and here, in my opinion, the rule applies alike to offices and employments, for though I have been discussing the legislative power to determine the qualifications for an office, yet I am also of the opinion that when the legislature has imposed qualifications of this kind for an employment, as distinguished from an office, the presumption is that it has been imposed for reasons bearing upon merit and fitness.

However, there may conceivably be qualifications for employments imposed by the legislature which, obviously, have no relation to merit and fitness. I recall the case of a statute at one time in force in this state limiting the employments of attendants and other persons in the various benevolent institutions of the state which might be made from the county in which the institution is located. I am unable to appreciate by any stretch of the imagination any relation between such a requirement and that of merit and fitness. In such case the legislative rule is not on which prescribes the qualifications for office, but merely is a limitation upon the power of employment otherwise to be exercised by the head of the department or institution. In such case the conflict between the legislation and the civil service amendment to the constitution would appear to be clear. Without going through the statutes to find whether there are any at present apparently in force which palpably so violate the constitution, I content myself with pointing out the possbility of such legislation

and advising the commission that should such legislation be enacted the commission would be justified in raising the question as to its power or duty to follow the mandate of the legislature under such circumstances.

There are, however, some tests enumerated in section 486-10 which, so far as I am advised, have never customarily been made standards of qualification for office or even legislative standards of fitness for employment. I refer particularly to the words "health" and "habits" as used in the section. I think it is safe to say that it has never been the legislative policy of this or any other state to set up any standard of health or habits as statutory qualifications for office or limitations on the employing power. If this is true, it would seem to follow that although with respect to qualifications for office imposed by the constitution and the laws, the function of the commission acting under section 486-10 is merely to follow and enforce such qualifications by excluding those not qualified from the examination, and although with respect to such limitations on the employing power for particular positions as the legislature may have seen fit to impose and which have some appreciable relation to merit and fitness, it may be the commission's duty to give effect to them without question under section 486-10, the legislature did not intend that the commission's functions under this section should be limited merely to giving effect to express legislation or constitutional provisions. In other words, the fact just noted leads me to conclude that in prescribing limitations on competition on the grounds enumerated in section 486-10 the civil service commission is not limited merely to following the qualifications for office imposed by the constitution or laws and proper limitations of employing powers made by express legislation, but may—still, of course, in the exercise of purely administrative power—prescribe limitations without the sanction of express legislation.

This conclusion is supported, of course, by the phrase "to be determined by the commission;" for if the legislature had intended merely to direct the commission to exclude from examination for offices those disqualified by law to hold such offices or to exclude from examinations for employments those which the legislature in other laws had prohibited the head of the department from employing, I do not think it would have used the phrase "to be determined by the commission."

I am of the opinion, therefore, that the commission does have the power within limits hereinafter to be pointed out, to prescribe preliminary requirements or limitations upon competition other than those which the constitution or the statutes may have expressly prescribed for given positions.

Before discussing those limitations and defining the scope of the power which I have just held to exist, let me pause to point out that some of the specific questions which you have in mind have already been answered. Where a law like that relating to the district mine inspectors specifically provides that the chief inspector of mines shall establish certain districts, and that inspectors appointed therein shall have been residents of their respective districts for two years preceding appointment, we have a situation which may be looked at in two different lights and, so regarded, produces the same result in either case. The position of district inspector of mines may be regarded as an office. If so regarded, the qualifications laid down are those which the legislature on principles above stated should be held, at least until the contrary is declared by a court, to have the power to prescribe, and the law so enacted by the legislature is binding upon the commission, so that the commission not only may but must, acting under section 486-10, follow the law in prescribing the limitation based on residence which the statute itself requires. Or, the position of district inspector may be regarded as a mere employment (although I presume it is an office), in which event we would have a legislative declaration that two years' residence in the district is requisite to the efficient discharge of the duties of the position. Inasmuch as such declaration has an appreciable relation to the matters of merit and fitness, the first duty of the commission would be to follow it as a criterion of such

merit and fitness. Therefore, on either of the grounds suggested I would advise with respect to the district mine inspectors that it is not only the right but the duty of the commission to create separate eligible lists for each district established by the chief inspector of mines and to limit competition for the position of a given district inspectorship to those who have the preliminary requirements established by the law itself.

Where a law provides that districts may be established for the ordering of an inspection or other similar service within a state department, but is itself silent as to the qualifications of the incumbents of such district positions, the case must stand upon a different footing and be decided by different rules. For in such case the position in its nature is a state position. The legislature has not expressly made it a district position so far as qualifications therefor are concerned; and has not limited the authority of the employing power—if the position be regarded as a mere employment —to persons residing within the district. It is very questionable whether even express legislative authority to divide the state into districts for such a purpose would carry with it as a necessary implication the power to determine that each district inspector should have resided in the district for a given time prior to his appointment or employment, or should continue to reside therein while discharging his duties. As an example of this kind of legislation I refer you to the former law on the subject of inspection of workshops and factories (sections 984 et seq. of the General Code, many of which have been repealed). It was therein provided that the chief inspector of workshops and factories should divide the state into districts, should appoint twenty-five district inspectors, and should make such assignments of district inspectors in the several districts and prescribe such rules and regulations for their government as the service might require. It will be observed that these statutes go as far as it could be possible to go without expressly authorizing the head of the department to prescribe as a rule that district inspectors shall be appointed from and reside in their districts. Of course, as a matter of practice the appointing power under such a section might, in the absence of civil service laws, so limit his appointments; and as a matter of law I believe he would have the right under his power to prescribe rules and regulations to assign residential headquarters to his various inspectors for the purpose of determining such matters as the payment of traveling expenses, the transmission of orders from the main departmental office, and the like. But I incline to the view that in the absence of civil service laws the power to prescribe rules of the kind just referred to would not arise until an inspector was appointed. That is to say, the head of the department is to prescribe rules for the government of the inspectors, not for his own government in appointing inspectors.

What has been said respecting a statute as explicit as the old law relating to the district inspectors of workshops and factories would apply *a fortiori* to a statute under which the head of a department might successfully assert the implied power to divide the state into districts for the government of an inspection service, or the like, and an implied power to prescribe rules for the government of subordinates in performing such service. I believe it may safely be assumed that where a service of this character naturally lends itself to a scheme of districting, the head of the department by virtue of his position as such, and simply because those who work under him are his subordinates, has the power to order them to confine their operations to particular districts, and to prescribe for them places in such districts which shall be regarded as their headquarters and at which they shall live, for official purposes at any rate. Nevertheless, a power of this sort does not go far enough to authorize the head of a department possessing it to require, as a matter of law binding upon others who might be governed thereby, that appointment shall be made from residents of such district.

In a word, then, except as to a law like the mine inspection act, the commission is neither compelled to lay down residential qualifications as in that case because the head of a department may deem it advisable that such qualifications should be laid

down, nor even authorized to do so for any such reason; for a limitation of this kind is a limitation upon the appointing power or the employing power. Because a stream can rise no higher than its source, it follows that the appointing power or the employing power can not impose limitations upon itself.

Stating it in another way: it is within the power of the head of the department, like the former chief inspector of workshops and factories, to appoint whomever he chooses to a district inspectorship, whether the diatrict is established by him under the express authority of law or by reason of his implied power; he may choose to appoint residents of the several districts, but his choice in this particular lacks the force of law and is neither perfectly binding upon him nor upon any one else.

What I have been saying respecting cases of the type now under discussion has been based upon the state of the law as it would be without the civil service law. That law, as we have seen, enacts that competition for all positions in the state service shall be open to all in the first instance. The whole civil service law is a limitation upon the appointing or the employing power. It takes away from the heads of the various departments the uncontrolled power which they formerly had. So that it is clear that with the civil service law in force the appointing power is less than it formerly was from the viewpoint of the heads of the departments. From all that has been said, then, it must follow that any attempt on the part of the head of a department to make a rule, to the effect that subordinates performing services in districts established under the express or implied authority of law by the head of the department shall have resided before appointment in the district in which they are to work, or for that matter outside of the district in which they are to work, can have no binding force upon the civil service commission, and in and of itself is not even sufficient as authority to the civil service commission to exercise any power which it may have under section 486-10 of the General Code.

But this discussion does not fully dispose of all the questions which are involved in your inquiry. I have already stated that the power and duty of the civil service commission, acting under section 486-10, to prescribe preliminary requirements of various sorts which constitute limitations upon free competition in the examinations for positions in the classified service is not limited to the mere enforcement of qualifications for office or limitations on the power of employment expressly prescribed by constitution or statute. I have also said, however, that where such qualifications are prescribed by the constitution as to offices they are binding upon the civil service commission and it must observe them in formulating its rules under section 486-10; and where such qualifications are prescribed by statute the commission must also observe them except in such cases, more particularly regarding statutory limitations on the power of employment as distinguished from that of appointment to office, which bear no perceptible relation to the question of merit and fitness. What I have just been saying is merely that the administrative regulations of the head of a department, as such, do not have the force and effect of constitutional provisions or statutes in this particular, so that such administrative regulations are not a part of the law that is to guide the civil service commission in determining whether or not it may or should impose a given preliminary requirement under section 486-10.

A question now arises which may be stated as follows:

If no statute creates a given qualification or imposes a given limitation upon the appointing or employing power such as is referred to in section 486-10 of the General Code, and if the administrative rules of the head of the appointing or employing department are not efficacious to create such qualifications, what standards are to determine whether or not such limitations may lawfully be imposed or determined by the civil service commission? For we have seen that the power of the commission under section 486-10, though it extends beyond mere compliance with statutes and the like, is not arbitrary; so that the jurisdiction of the commission is circumscribed by some rules of law.

The abstract answer to this question is not difficult to state, however hard it may be to apply it as a principle to the solution of particular questions. The one great and controlling law which the civil service commission by its administrative activities is to enforce and apply to specific cases as they arise is that appointment to and promotions in the civil service of the state shall be made only according to merit and fitness, to be ascertained as far as practicable by competitive examination. This is the keynote of every question that arises in the administration of the civil service law. Here, then, is one test by which the power of the commission under section 486-10 may be at least partially defined. No limitation upon competitive examination for a position in the state service otherwise open to all can be made which is not based on the factor, the existence or non-existence of which in a given case will conclusively determine the merit and fitness of any person who may apply for examination for any particular position in the classified service In short, the civil service commission must be guided only by the question of merit and fitness, where the statutes themselves are silent; the wishes or practices of a head of a department in themselves afford no criterion.

I feel that I ought to explain what I mean by the statement just made. How, it may be asked, can any of the things mentioned in section 486-10 so conclusively determine merit and fitness? In the first place, the two words used in the constitution and in the civil service law ought to be defined.

"*Merit*" is defined in the Standard Dictionary as follows:

> "1. The state or fact of deserving, either in a favorable or unfavorable sense; desert; as used absolutely, the state or fact of deserving well; excellence; worth; * * *. 2. Ground or basis of consideration or judgment; * * *."

"*Fitness*" is defined as follows:

> "1. The state or quality of being fit; suitableness; adaptability; congruity, or aptitude of any means to accomplish an end: * * *.
> "2. The state of being fitted or prepared; readiness; preparedness; qualification; as, *fitness* for an office."

Though these lexicographic definitions do not make the distinction entirely clear, I feel that the framers of the constitution and the legislature with them did not intend to employ the mere vain repetition of synonymous terms in the use of these words and that they denote radically different ideas. It seems to me that the word "merit" carries with it the implication of a comparison of an individual with other individuals who are in competition with him; while the word "fitness" imports the idea that a single individual is to be considered with respect to the duties of a given position.

To put it in another way: The constitution requires that two standards be set up—one by which each applicant for a position in the civil service may be tested with respect to his adaptability to that position as an individual and wholly apart from the qualifications of other individuals. This is what is implied in the word "fitness": the other standard is that by which one applicant is compared as regards his adaptability to the duties of the position, i. e., his "fitness", with other applicants for the same position. "Fitness" relates the man to the job; "merit" compares him with other applicants for the same position.

There is another shade of meaning by which certain distinctions may be drawn which should be here noted. While the very double standard which has been referred to implies that there may be degrees of fitness, yet it is conceivable and indeed demonstrable that the required comparison of the attributes of the man with the duties of the position may show not only a low degree of fitness but also an absolute unfitness.

The same thing is not true, as I see it, of merit. Merit is the relation among those who are fit. It has no such absolute significance as is involved in the term fitness. In other words, it is possible for an applicant to prove to be not merely little fit, but absolutely unfit to discharge the duties of a given place. When that appears he is thereby eliminated from consideration and the criterion of merit need not even be applied to him, but where several have shown that they are fit in one degree or another they must then be classified according to their respective merit.

I have entered upon this somewhat academic discussion with a view to showing what I mean by the way in which the controlling law which is embodied in the phrase "only according to merit and fitness" is to govern the action of the commission under section 486-10. To get at all that I have in mind here it is necessary now to show what use is to be made of the determinations made under that section. This is disclosed by section 486-11, which provides, in part, as follows:

> "The commission may refuse to examine an applicant, or after an examination to certify an eligible, who is found to lack any of the established preliminary requirements for the examination or who is physically so disabled as to be rendered unfit for the performance of the duties of the position which he seeks, * * *."

It will be seen that the preliminary requirements referred to in section 486-11 or, what is the same thing, the limitations on competition referred to in section 486-10 have for their purpose the elimination of the unfit. They constitute a convenient means of avoiding the idle ceremony of admitting to an examination one of whom unfitness could be predicated by the ascertainment of some outstanding fact. Just because fitness is an absolute term as well as a relative one it is necessarily true, in the nature of things, that it may be possible to determine unfitness without competition, and thereby to narrow competition to those of whom the facts upon which unfitness may be predicated do not foreclose the question.

Coming down to specific cases, there may be positions in the classified civil service of the state for which it could be held conclusively as a matter of fact, and for our present purposes, of course, as a matter of law—the law resulting from the constitutional requirement and from the controlling general provisions of the civil service act—that for example a woman would be unfit simply because of her sex to discharge the duties of a given position. This might be just as true where the legislature had not taken the trouble expressly to limit the appointing or employing power by this qualification as where the legislature had limited employments to men, as in the case of qualifications for a public office. The mere fact that the legislature did not act would not change the law requiring fitness.

The same thing would be true of other facts mentioned in section 486-10. A man over sixty might be on that account alone in a conceivable case—though I do not undertake to imagine any—absolutely unfit to discharge the duties of some public employment. It is not necessary to carry the illustrations further. The commission has, I think, by this time come to an understanding of the controlling principle.

In a word then, there is a principle of law which emerges here; it is that no unfit person shall be appointed to a position in the civil service of the state. The constitution makes this law, and the civil service law, among other things, is intended to provide machinery for applying it as a principle to specific cases. The civil service commission is the administrative agency selected to discharge this function. (See Green v. Civil Service Commission, 90 O. S. 252.) One of the ways in which it is to discharge it is by determining limitations under section 466-10 of the General Code. Where the legislature has itself created qualifications the civil service commission, subject to the principles above laid down, must look to such legislation as a part of the law governing it; but where the legislature does not prescribe qualifications or limitations

upon the employing power, the civil service commission is to prescribe such specific qualifications or limitations as, on the grounds enumerated in the section, may be necessary to enforce the law that the unfit shall not be appointed.

How is this to be done? I need not go into an elaborate discussion of this question. It is obvious that the problem in each case is to determine the criteria of fitness with relation to the duties of the position. Those duties exist as objective facts beyond the control of the civil service commission under the law as it now stands—at least I am not aware of any provision which gives any power to the commission to specify what duties shall be assigned to particular positions. The commission will find that duties have been assigned to each position in the classified service of the state "by law or by practice," as one of the sections of the law has it. That is to say, as to some positions, including practically all the offices in the classified service, the statutory law itself is to be looked to to determine what the duties are; as to others, including even some whose duties are partially prescribed by law, the commission by such investigations as it is authorized by law to make must ascertain from the head of the department what duties have been assigned to particular positions by the departmental regulations, colored, of course, by the nature of the work of the department as a whole. The appropriation acts passed by the general assembly are to be consulted wherever they may have a bearing upon these questions. In short, the duties of the position may be prescribed in three ways:

"1. Directly by statute or appropriation.

"2. By the head of a department under the express authority of statute.

"3. By the head of a department under such implied power as such an officer must necessarily have in order to organize and administer the work of the department."

The civil service commission, having ascertained by consulting the sources of information suggested what the duties of a given position are at the time it is required to hold examinations therefor, must, if it is to discharge its duty to eliminate the unfit, determine what there is about such duties that may render it impossible, in the sense which I am about to describe, for persons of a given class to discharge such duties. I have used the word "impossible" for lack of a better term. What I mean to say is, that the commission is authorized by section 486-10 and section 486-11, and indeed is required by the controlling principle of law which I have developed, to devise appropriate means for eliminating from the possibility of appointment to positions in the classified service of the state such persons as to whom some of the easily ascertained characteristics mentioned in section 486-10 may make it apparent that they could not meet the minimum requirements of the duties of the position. Such persons are really disqualified by law—not the edict of the commission, for the law is that the unfit shall not be appointed, and the commission's duty is merely to determine what facts respecting a given position would make certain classes of persons unfit. To cite another example which I take from my own experience: The duties of the position of stenographer in the office of the attorney-general are of such character that a person lacking experience in the taking and transcribing of language couched in legal phraseology would not be competent to discharge them. In other words, such stenographers require what may be called a "legal vocabulary." I do not mean to say that this is true as a matter of law, for that is for the commission to decide; but I am pointing out an instance wherein one of the things referred to in section 486-10, viz.: "experience" or, rather, the lack of it, might well be held to furnish a conclusive test of fitness.

Now if it is true as a matter of fact that only such persons as may have the requisite preliminary experience are qualified for such a position—that is, competent to discharge its duties according to the minimum requirements of efficiency—then it is the law that they shall not be appointed to that particular position; and the duty

of the commission is merely to ascertain whether or not the fact exists. The order or determination authorized to be made under section 486-10 merely applies the law to the facts thus ascertained.

It is apparent from what I have said, I think, that the civil service commission, acting under section 486-1C, can not go further than to find that as a matter of law a given fact concerning possible applicants for a position has such relation to the duties of that position be established by law or in practice as that it can be said of it that it unfits an applicant to discharge those ditues—that is, conclusively establishes his incompetency therefor. Mere considerations of convenience are not enough. The head of a department may desire the establishment of standards of efficiency which are unreasonably high and have no necessary relation to the duties of the position; but such desire on the part of the head of the department lacks legal sanction and can not be given such sanction by an order of the commission. The department head merely establishes the duties. The minimum standard of efficiency or qualification results by operation of law upon facts to be ascertained by the civil service commission.

There is no delegation of legislative power involved here, (Green v. Civil Service Commission, supra), even though one might claim that the working out of these principles would practically amount to vesting in the civil service commission the power to determine qualifications for office which the legislature had not prescribed. I say this because the civil service commission does not determine what the qualifications shall be, as the legislature does when it makes the law, but merely determines as a matter of fact what those qualifications are. In other words, the mere silence of the legislature on the point of qualification for office or limitation on the appointing power, coupled with the declaration of the first part of section 486-10 that competition shall be open to all, does not result in a principle that presumably all persons are qualified for all positions except those dealt with by the legislature. The contrary is true because of the constitutional and statutory provisions requiring the elimination of the unqualified or unfit.

Since leaving the case of the mine inspectors I have discussed in this opinion other criteria of fitness mentioned in Section 486-10, but have not dealt with that of "residence" as therein mentioned. This is because I was seeking to get at the meaning and application of the clause as a whole by working it out through the consideration of such other requirements as age, sex, experience, etc. The word "residence" is used in the same context and, so far as the abstract principles are concerned, I believe that the action of the commission in determining limitations based upon residence is to be governed by the same rules as those which have been discussed in connection with the other facts mentioned in the same section. It must be apparent, however, that though the abstract principles are the same, the working out of those principles in specific cases may be vastly different with respect to one fact from what they are with respect to another. Thus, I can not at this moment think of any position in the civil service of the state, other than an office, of which it might be said as a matter of law—and it must finally be as a matter of law—that its duties are such that a person not a citizen of the United States would be unfit to discharge them. This does not read the word "citizenship" out of the section, for we have seen that if a position is an office the commission must in deference to the Constitution of the state limit competition to citizens of the United States. The question now arises as to whether "residence" is like "citizenship" in this respect, or whether it is possible to imagine cases in which it might be used like "age" or "sex" have been used in the ways suggested in the previous discussion.

I will not undertake to answer this question explicitly. However, it may be that there are some positions in the service of the state which a resident of a particular territory would be incompetent to fill, regardless of his other qualifications. The case of the superintendent of a free employment bureau comes into my mind. I will not say that it is true that a non-resident of the area to be served by the particular free

employment agency would not be fit to take charge of such an office and discharge its duties. I will only say that without investigating the matter thoroughly, and merely as a case of first impression, I can see some reasons at least for so holding. On the contrary, however, a mere stenographer in a given free employment office, whose duties are limited to those of ordinary stenographic service, would clearly not be unfitted for her work by reason of lack of previous residence in the area to be served by the office in which she is employed.

You inquire specifically about district inspectors of workshops and factories. The present law applicable to the organization of this branch of the work of the industrial commission undoubtedly authorizes the industrial commission to divide the state into districts and to assign different inspectors to different districts. In all likelihood the industrial commission may go so far in the establishment of rules and regulations for the government of its employes as to require actual residence in the district to which assignment is made during the period of service. but the fact that such power had been exercised would not, in my opinion, be enough to establish the legal conclusion of unfitness. I say this without detracting at all from what I have previously said to the effect that it is for the commission to determine the facts. What I mean is, that the facts which I have mentioned, put together, would not in law justify the commission in holding that a limitation as to competition should be made on the ground of residence and that eligible lists should be made up exclusively of residents of the different districts established by the industrial commission. More would have to appear, as that the inspection of factories and public buildings is a work requiring for its competent discharge at a minimum standard of efficiency such acquaintance and knowledge of and information respecting local conditions as could be possessed *only* by a person residing in the district at the time of his appointment. From a very general understanding of the nature of these duties I do not think that this is the case, but I will not say so as a matter of law—merely advising the commission that these additional facts must be examined into and that the regulations of the industrial commission creating districts and assigning inspectors thereto, and requiring inspectors so assigned to have their headquarters in the districts in which they are to work, are not enough.

And so one might go through the whole catalogue of state positions. Very few, if any, of them, I am sure, are characterized by duties of such a nature as that a person not a resident of a given locality would be plainly and palpably unfit to discharge them. Of course, the commission has discretion in making its findings, but it must act within the scope of its jurisdiction and that scope is circumscribed by the principle that absolute unfitness must be found to exist before exclusion from competition can be predicated upon any of the facts enumerated in section 486-10. A mere determination by the commission to limit competition, without stating the grounds therefor, would be open to general review as to its reasonableness. Whereas, if the commission should specifically state in its order limiting competition by any of the standards enumerated in section 486-10 a reason therefor, based upon some such mere consideration as desirability or the wishes of the appointing power or expediency, or the like, the commission's order would be void because it was plainly and palpably in excess of its jurisdiction. The commission is not required to state the reasons for its orders as a jurisdictional step, but if it does so and the reasons are not sufficient the orders would not stand when called in question in court.

But if the commission should actually find as to a given position that its duties are such that unfitness to discharge them in the legal sense which I have been trying to describe could be predicated of one residing in a given district or not residing in a prescribed area, as the case might be, or if, without stating its reasons, the commission should make the determination to limit competition on such grounds, then the courts, acting upon familiar principles, would not set aside the orders of the commission merely because they might disagree with them, but would only do so if able to find

that the discretion of the commission had been palpably abused. This very fact—the breadth of discretion entrusted to the commission by the law—leads me to admonish the commission as to its high moral duty to use the power granted to it sparingly, and of its plain legal duty, to be satisfied by its own independent investigation in each case, that the absolute standards of unfitness which I have been describing require a given exclusion to be made upon a particular ground mentioned in section 486-10 before taking action thereunder.

I advise the commission, therefore, respecting the particular positions inquired about in your letter, excepting that of district mine inspectors which have been perviously dealt with, that I incline to the view that none of them mentioned are such as with respect to examinations for which competition may be limited to the residents of a particular district. Because the commission has some discretion under this section I can not go so far as to make my negative advice unequivocal and positive; but the mere wishes of the head of a department like the industrial commission are no justification to your commission to divide the state into districts; nor is the fact that the industrial commission, acting under express or implied power, has itself divided the state into districts for the purpose of administration. The further facts mentioned in the opinion must appear, and appear clearly and conclusively, before the commission is empowered to limit competition in accordance with such districts so established.

Of course, I think it is apparent from the discussion in this opinion that in a case if any, where the commission may find it to be true that a non-resident of a given district would be unfit on account of his non-residence alone to discharge the duties of a particular district position, the district within which competition may be limited by the commission must be the district established by the appointing authority. This point was fully covered in the previous opinion referred to in your letter, in which it was pointed out that the commission's power to establish civil service districts has nothing whatever to do with questions like those which have been under discussion. There may be some inconsistency of expression between the prior opinion referred to and this one, and to the extent of this inconsistency I desire that you regard the later expression of my views as the controlling one.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

502.

COUNTY OFFICER—PERSON ACTING AS SUCH WITHOUT COMMISSION —NOT ENTITLED TO COMPENSATION.

No one can be a county officer without receiving a commission for the office in question, and one acting as a county officer, never having received a commission for such office is not entitled to receive the compensation provided by law therefor.

COLUMBUS, OHIO, Aug. 7, 1917.

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

GENTLEMEN: I am in receipt of your letter of July 20, 1917, requesting my opinion on the following matter:

> "Some time during the year 1915, A was appointed coroner of M—— county to fill the unexpired term of B, resigned. A gave bond for the term of his appointment but failed to make application for a commission from

the governor. While A was paid the fees for services rendered by him during that part of 1915 that he served, he has presented bills for his fees claimed by him during the year 1916, which the county commissioners have not yet allowed, and the commissioners and the auditor of said county wish to know whether he may be legally paid the fees he now claims, in view of the fact that he was never commissioned as required by section 138 General Code."

From the above statement the person assuming to exercise the office of coroner never was commissioned as such. The "commission" seems to be the one thing needful to constitute a man a county officer. The section of the General Code governing is section 138, and is as follows:

"A judge of a court of record, state officer, county officer, militia officer and justice of the peace, shall be ineligible to perform any duty pertaining to his office, until he presents to the proper officer or authority a legal certificate of his election or appointment, and receives from the governor a commission to fill such office."

This is a very old statute, and is so plain in its terms that it has not been necessary that it receive much attention from the courts. It was, however, passed upon at a very early date (in 1832) by the supreme court in the case of State ex rel. v. Moffitt, 5 Ohio 358. In that case Moffitt claimed to have been elected associate judge of Ashtabula county, but by reason of an informality in his election he failed to get a certificate thereof, and consequently failed to get a commission from the governor, but the court of common pleas admitted him to take the oath of office and sit as an associate judge. The supreme court held that this was illegal under the above statute and that he could prove his title to the office only by the commission therefor. The same statute at that time contained the provision now found in section 7 in reference to the failure to give bond, and the office then also being deemed vacant for failure to secure the commission. It was not simply held that the commission was evidence of his title to the office but that the obtaining thereof signified his acceptance, so that the commission instead of simply being evidence of his right to the office was one of the steps necessary to entitle him to it. Hitchcock, J., in his opinion, at page 365, says:

"By taking the oath he signifies his acceptance, but he is expressly prohibited from discharging the duty until the '*indorsement*' is made. This may be considered as a mere trifle, as usless formality. But shall a man who assumes the character of a judge treat any part of the law as insignificant and trivial? It would rather become him to be scrupulously exact in his compliance with every *scintilla* of law. Let others, if they will, complain of the unnecessary provision of any statute or of any other principle of law, but such language does not become a judge. Let me be not misunderstood; it is not the commission issued in pursuance of these statutes which confers the right upon the officer. The right is derived from the election or appointment, of which the commission is only evidence. But it is evidence without which the officer cannot proceed to act officially."

This language would seem to indicate that the commission is evidence alone of his title to the office, but immediately before that it is stated:

"* * * every man before he presumes to exercise the office of a judge

must have a commission, must signify his acceptance of the appointment and must take an oath of office, and have the same *'indorsed on his commission.'* "

The whole opinion relates to the proposition that the commission in addition to being a title to office is a requisite to his exercising the same. Of course county officers being provided for in the same section are governed by the same principles. The same section is incidentally considered in a recent opinion in the case of Bushnell v. Koon, et al., 8 C. C. N. S. 163, in which it is distinguished and held that the date of the term of a justice of the peace, also provided for in said section, is the date of his *commission*, and where a justice was re-elected before the expiration of his first term but there was an interim between the expiration of that term and the ensuing commission for the second term, that any judgments rendered by him during that interim were absolutely void and their enforcement might be prevented by injunction, there being no provision that he should hold until his successor was elected, etc.

The term of office begins with the receipt of the commission and expires at the end of a period of the term after the date of the commission. He was no officer until he received the commission, and he ceases to be one as soon as it expires. The commission and the office go together. The commission is the evidence that the man is an officer. It is more than that,—it is his muniment of title to the office. It is not the foundation of his right, for that is his election or appointment, but it is a necessary accompaniment of the existence of his right, which neither preceeds it nor survives it.

It follows from the above statute and the authorities and principles established and recognized by them that the appointee in the instant case never became coroner; never had any right whatever to exercise the duties of the office, not even an imperfect right; that he simply assumed to be such officer and performed such duties without right, and with nothing more than "color" of office, even if he had that.

It would seem plain upon principle that one cannot become entitled to the emoluments of office by interfering therein and performing the duties thereof without any right to do so. Having no express legal right to the emoluments of the office, because not being an officer, he would only be entitled to such compensation upon the principle of *quantum meruit*, which plainly can have no application to such case for such numerous and strong reasons that it is unnecessary to enter upon them.

The question asked of you by the county commissioners and county auditor is therefore answered in the negative.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

503.

APPROVAL—LEASE OF CANAL LANDS IN ROSS COUNTY.

COLUMBUS, OHIO, August 7, 1917.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your communication of August 7, 1917, in which you enclose two leases of canal lands and ask me to endorse my approval thereon. The leases are as follows:

"1. To James P. Fuller and Martha Baus, of Columbus, Ohio, of certain lands located in the city of Chillicothe, Ross county, Ohio, valuation $4,166.66⅔, at an annual rental of $250.00.

"2. To R. E. Wagner, of Akron, Ohio, of certain lands located in Chillicothe, Ross county, Ohio, valuation $4,166.66⅔, at an annual rental of $250.00."

I have examined these two leases carefully and find the same to be regular in form and legal. I further find that the rights of the state are fully protected in the terms and conditions of said lease. I am therefore endorsing my approval on the same, and have forwarded them to Hon. James M. Cox for his approval.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

504.

CLERK—APPOINTED BY COMMISSIONERS—NOT AUTHORIZED TO PERFORM DUTIES OF AUDITOR UNDER SECTION 2342 G. C.—BUILDING COMMISSION—COMPENSATION—NOT ENTITLED TO PERCENTAGE RECEIVED FROM INSURANCE.

(1) *A clerk appointed by the county commissioners, under the provisions of section 2409 G. C., is not authorized to perform the duties provided for in section 2342 G. C.*

(2) *Under section 2334 G. C. the members of the building commission are entitled to receive only two and one-half per cent. of the amount received by the county from taxes raised for the purpose of constructing the building or from the amount received by the county from the sale of bonds for the purpose of constructing the building. The commissioners are not entitled to any percentage of money received from an insurance company to cover loss of an old building by fire, even though this money is expended by the building commission in the construction of the new building.*

COLUMBUS, OHIO, August 8, 1917.

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

DEAR SIR:—I have your letter of July 17, 1917, which reads as follows:

"Under the provisions of the statutes, a building commission was duly appointed for the erection of a new infirmary building for Warren county, Ohio.

"The attorney-general, in an opinion rendered February 5, 1916, which is found at 216-17 of the 1916 Reports of the Attorney-General's Opinions, held among other things the following: 'I am of the opinion, in answer to your third question, that a clerk of the board of county commissioners, appointed under the provisions of section 2409 G. C. may perform for the building commission the duties imposed by section 2343 G. C. upon the county auditor.'

"I desire to inquire whether or not the building commission may pay to the clerk who has performed such duties any compensation therefor out of the funds to be expended by the building commission.

"It is not the desire of the commission in this county to pay a large amount of money to the clerk, but they do desire to make some compensation to the clerk of the county commissioners for the services rendered to the building commission.

"$19,000.00 of the amount of money which has been and will be expended on this building is money which came into the fund from insurance on the building which was destroyed by fire. The balance of the fund, to wit,

$65,000.00, came from the sale of bonds. I desire to inquire whether or not in fixing the compensation of the commission who were appointed under section 2334 G. C., the aggregate compensation of 2½ per cent. of the money, in that section, should be calculated on $65,000.00 of the funds or whether it would be based on $84,000.00 which is the amount of the bond and the insurance money which was placed in the building. It would seem that the intention of the legislature in section 2334 G. C. was to fix a per cent. on the amount of money which the commission would have a right to expend, but owing to the language of the section, I am in a little doubt as to whether the legislature may not have limited the compensation to 2½ per cent. of the amount of bonds actually sold.

"While the insurance money did not come from taxation directly, at the same time the premiums on the policies under which it was paid were paid by funds arising from taxation.

"The building commission in this county is anxious to complete its work and finally dissolve as soon as possible."

Answering your first question:
Sections 2409 and 2342 General Code read:

"Section 2409. If such board finds it necessary for the clerk to devote his entire time to the discharge of the duties of such position, it may appoint a clerk in place of the county auditor and such necessary assistants to such clerk as the board deems necessary. Such clerk shall perform the duties required by law and by the board.

"Section 2342. Full and accurate records of all proceedings of the commission shall be kept by the county auditor upon the journal of the county commissioners. He shall carefully preserve in his office all plans, drawings, representations, bills of material, specifications of work and estimates of costs in detail and in the aggregate pertaining to the building."

I have read the opinion of former Attorney-General Turner, to which you refer, which is dated February 5, 1916, and found in Opinions of the Attorney-General for 1916, vol. 1, page 216, in which request the following question was asked:

"Is the auditor their (building commission's) clerk or is he relieved from that duty by reason of the fact that the commissioners have heretofore appointed a commissioner's clerk?"

Mr. Turner answered this question as follows:

"I am of the opinion, in answer to your third question, that a clerk of the board of county commissioners, appointed under the provisions of said section 2409 G. C., may perform for the building commission the duties imposed by section 2342 G. C. upon the county auditor."

The above is the full extent of the opinion of Mr. Turner as to the right of the clerk of the board of county commissioners to perform the duties for the building commission imposed by section 2342 upon the county auditor. In the opinion there is no citation of authorities or any argument to show how Mr. Turner reached said opinion.

In the case of State vs. Edmonson, 12 N. P. (n. s.) 577, the first branch of the syllabus is as follows:

"1. A distinct legislative intent appears in the provisions of section 2342,

P. & A. Anno. G. C., that the county auditor shall act as the recording officer of a commission to build a new court house, and a writ of mandamus will issue requiring him so to act, notwithstanding the earlier and in some measure conflicting provision for the appointment of a clerk of the board of county commissioners in place of the auditor."

On page 586 of the opinion, Hunt, J., holds as follows:

"The commissioners of Hamilton county have availed themselves of section 2409 and have appointed a clerk to take the place of the auditor as their secretary, and it is argued by reason thereof that said clerk should perform duties specifically enjoined upon the auditor under sections 2341 and 2342. In addition to the fact that the building commission act is a later act and charges such duties upon the auditor specifically and not upon the secretary or clerk of the board of county commissioners, and the further fact that section 2409 is by its terms and context applicable only to the duties of the auditor in connection with the proceedings of the county commissioners, section 2409 also contemplates that such duties of the clerk shall be such as to require him to 'devote his entire time' to such duties, leaving no time for him to act for the building commission. The legislature therefore provided that the auditor should act as recording officer of the building commission. For these additional duties he can adequately provide by the appointment, if necessary, of a deputy under section 2563.

"The recording officer of the building commission is therefore the county auditor, or a deputy appointed by him for such purpose."

It seems to me that the holding of the court, as above set out, is the better reasoning and I therefore adopt the same and hold that the clerk appointed by the county commissioners, under the provisions of section 2409 of the General Code, is not authorized to perform the duties imposed upon the county auditor by virtue of section 2342 of the General Code, and that therefore the building commission is unauthorized to pay to the clerk of the board of county commissioners any compensation for duties performed under section 2342 of the General Code.

Referring to your second question, sections 2333 and 2334 of the General Code read:

"Section 2333. When county commissioners have determined to erect a court house or other county building at a cost to exceed twenty-five thousand dollars, they shall submit the question of issuing bonds of the county therefor to vote of the electors thereof. If determined in the affirmative, within thirty days thereafter, the county commissioners shall apply to the judge of a court of common pleas of the county who shall appoint four suitable and competent freehold electors of the county, who shall in connection with the county commissioners constitute a building commission and serve until its completion. Not more than two of such appointees shall be of the same political party.

"Section 2334. The persons so appointed shall receive a reasonable compensation for the time actually employed, to be fixed by the court of common pleas and on its approval paid from the county treasury. Their compensation in the aggregate shall not exceed two and one-half per cent of the amount received by the county from taxes raised, or from the sale of bonds for the purpose of constructing the building."

These sections were originally section 1 of the act found in 98 O. L., page 53, which reads:

> "Section 1. That when the county commissioners of any county have determined under and by the authority of the statutes of the state of Ohio to erect a court house which shall cost to exceed twenty-five thousand dollars and after the question of issuing the bonds of said county for the construction of said court house or other county building has been submitted to a vote of the electors of the county, and said question has been determined by said electors in the affirmative, said county commissioners shall, within thirty days after said election has been held and the results thereof determined, apply to the judge of the court of common pleas for said county, who shall appoint four suitable and competent freehold electors of said county, not more than two of whom shall be of the same political party, who shall, in connection with the county commissioners, constitute a building commission and who shall serve until the completion of said court house as contemplated herein. Said persons so appointed shall receive a reasonable compensation for the time actually employed by them; said compensation to be fixed by the court of common pleas and paid out of the county treasury, on the approval of the common pleas court. Said compensation shall not in the aggregate, for said four persons, and their successors, exceed two and one-half (2½) per cent. of the amount received, by said county, from taxes raised for or from the sale of bonds issued for the purpose of building said court house, or other county building; said limitation on said compensation shall apply to persons now or hereafter appointed. * * * "

It will be noted that the original act provided:

> "Said compensation shall not in the aggregate, for said four persons, and their successors, exceed two and one-half per cent of the amount received by said county, *from taxes raised for or from the sale of bonds issued for the purpose of building said court house, or other county building.*"

In section 2334 General Code the words "for the purpose of constructing a building" qualify the words "from taxes raised" and therefore the compensation to be paid the building commissioners under this section is limited to two and one-half per cent. of the amount received by the county from taxes raised for the purpose of constructing the building and from money received by the county from the sale of bonds for the purpose of constructing the building.

It is clear that the $19,000 received from the insurance company in the case you submit, even though it should be paid into the general county fund and then transferred to the infirmary building fund by authority of popular vote, is not and cannot be held to be money "from taxes raised * * * for the purpose of constructing the building." This being so I am forced to the conclusion that the maximum amount of compensation to be allowed the building commission referred to is two and one-half per cent. of the $65,000 raised from the sale of bonds and that said commission is not entitled to receive as his compensation any percentage of the $19,000 which was received from the insurance company to cover the loss sustained in the destruction by fire of the old building.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

505.

SMITH ONE PER CENT. LAW—WHEN BOARD OF EDUCATION MAY MAKE LEVY OUTSIDE OF THE LIMITATION OF SAID LAW.

Although under the provisions of section 7630-1 *and section* 5649-4 *G. C., a board of education is not authoized to levy taxes outside of the limitations of the Smith one per cent law for the purpose of paying the principal and interest on bonds issued on a vote of the electors for the purpose of constructing a school building, the construction of which is made necessary by the emergency mentioned in section* 7630-1 *G. C., unless it is not practicable to secure the funds necessary for the construction of such building under the provisions of sections* 7625 *to* 7630, *inclusive, G. C., the right of the board of education to make such levy outside of the limitations of the Smith one per cent. law should not be denied where the legislation of the board of education with respect to such bond issue shows a bona fide attempt on the part of the board of education to bring the proceedings within the authority of said sections* 7630-1 *and* 5649-4; *and it further appears as a matter of fact that said board of education cannot meet such bonds and the interest thereon by levies within the limitations of the Smith one per cent. law.*

COLUMBUS, OHIO, Aug. 8, 1917.

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

DEAR SIR:—I have your communication under date of June 27, 1917, enclosing a couple of resolutions relating to a certain bond issue in the sum of $20,000, issued by the board of education of South Lebanon village school district on a vote of the electors of such school district.

The first resolution is one under date of June 9, 1914, providing for the submission of said bond issue to the electors. This resolution recites the fact that the chief inspector of the department of workshops and factories and public buildings has by order condemned the then school building of the district and ordered its further use discontinued. This resolution further determines that for the proper accomodation of the pupils in the school of the said school district it is necessary to build and furnish a new school building, and that the board estimates that the amount of money required will be the sum of $20,000.00. This resolution further recites that the school funds at the disposal of the board of education, or that can be raised under section 7629 and 7630 of the General Code of Ohio, are not sufficient to accomplish the purpose of constructing said school building, and

> "it is not practicable to raise such funds in any other way, and that it is necessary that bonds of said district be issued in the amount of $20,000.00 for the purpose of paying the expense thereof."

Following these recitals the resolution provides for the submission of the question of such bond issue to the electors of the school district at an election to be held on July 21, 1914.

This resolution does not contain the finding that it was not practicable to secure such funds for the purpose under any of the six sections of the General Code preceding section 7630-1 General Code, because of the limits of taxation applicable to such school district.

The resolution of the board of education providing for the issue of said bonds subsequent to the election authorizing the same, in directing the manner in which said bonds should be advertised for sale, among other things provides that the notice of such bond sale should state

"that said bonds are issued under the authority of sections 7625, 7626, 7627, 7628, 7630-1 and 5649-4 of the General Code of Ohio and a vote of the electors of said district and of this resolution."

The question submitted by you is whether or not tax levies made by the board of education to meet and pay the principal and interest on these bonds are required to be within the fifteen mill limitation of the Smith one per cent law, or whether, on the other hand, such levies may be made without respect to the limitations of said law.

The question made by you resolves itself into the further question of whether the bonds above noted are bonds legally issued under the provisions of section 7630-1 General Code or not. If these bonds were legally authorized under section 7630-1 of the General Code then, by reason of the provisions of section 5649-4 of the General Code, tax levies to meet such indebtedness are not subject to the limitations of the Smith one per cent. law so-called.

A consideration of the question here presented requires me to note briefly the different statutory provisions relating to the issue of bonds of a school district for the purpose of obtaining, constructing or improving school property.

Under section 7629 General Code the board of education of a school district is authorized to issue bonds on its own initiative and without a vote of the electors of the school district for the purpose of obtaining or improving public school property. With respect to such bonds, however, this section contains the limitation that the board of education shall issue no greater amount of bonds in a year than would equal the aggregate of a tax at the rate of two mills for the next year preceding such issue.

Section 7625 General Code authorizes a board of education to submit to a vote of the electors of a school district the question of issuing bonds for the purpose of purchasing a site for constructing or repairing a school building. This section, however, as a condition to the right of the board of education to submit such question to the vote of the electors requires, among other things, that the board of education shall *determine* that the funds at its disposal or that can be raised under the provisions of section 7629 are not sufficient to accomplish the purpose. Section 7630-1 General Code provides as follows:

"If a school house is wholly or partly destroyed by fire or other casualty, or if the use of any school house for its intended purpose is prohibited by any order of the chief inspector of workshops and factories, and the board of education of the school district is without sufficient funds applicable to the purpose, with which to rebuild or repair such school house or to construct a new school house for the proper accommodation of the schools of the district, and it is not practicable to secure such funds under any of the six preceding sections because of the limits of taxation applicable to such school district, such board of education may, subject to the provisions of sections seventy-six hundred and twenty-six and seventy-six hundred and twenty-seven, and upon the approval of the electors in the manner provided by sections seventy-six hundred and twenty-five and seventy-six hundred and twenty-six issue bonds for the amount required for such purposes. For the payment of the principal and interest on such bonds and on bonds heretofore issued for the purpose herein mentioned and to provide a sinking fund for their final redemption at maturity, such board of education shall annually levy a tax as provided by law."

An examination of the resolution of July 9, 1914, providing for the submission to the electors of South Lebanon village school district of the question of said bond issue clearly indicates that the same contains all that is necessary for the submission

of the question of a bond issue under section 7625 General Code. If the bonds in question are to be considered as having been issued by the board of education pursuant to a vote of the electors under this section, it follows from the provisions of sections 5649-2 and 5649-5b that tax levies made by the board of education for the purpose of meeting the principal and interest on said bonds are subject to the combined limitations of fifteen mills for all purposes. The fact, however, that the question of said bond issue was submitted to the electors of South Lebanon village school district in conformity to the provisions of section 7625 General Code does not necessarily imply that the question of said bond issue was not also submitted to the electors in conformity to the provisions of section 7630-1 of the General Code, and this for the reason that section 7630-1 among other things provides that bonds issued thereunder shall be subject to the approval of the electors of the school district in the manner provided for in section 7625 General Code.

The question whether or not the bonds in question were legally issued under section 7630-1 arises from the fact that the resolution providing for the submission of the question of this bond issue contained no finding to the effect that it was not practicable for the board of education to procure the funds needed for the purpose under the provisions of sections 7625 to 7630, inclusive, because of the limitations of taxation applicable to such school district.

The resolutions above referred to clearly states the emergency which confronted the board of education and which made necessary the construction of a new school building in this school district, and the only question is whether or not the board of education in failing to recite in said resolutions the fact that by reason of the limitations of taxation applicable to such school district it could not secure the necessary funds by an issue of bonds under sections 7625 to 7630 General Code, inclusive, put itself in the position of issuing these bonds under sections 7625 et seq. and not otherwise.

I am inclined to the view that although the *fact* that the board of education could not provide a levy sufficient for the purpose under the authority of sections 7625 to 7630, inclusive, was jurisdictional to the authority of the board to issue bonds under the authority of section 7630-1 General Code, it was not necessary for the board to make a specific finding of such fact on its record as a condition of its right to issue bonds under the latter section.

In this connection it will be noted that before a board of education can issue bonds under section 7625 and 7626 General Code it must in its resolution submitting the question of the bond issue to the electors under section 7625 *determine* the fact that the funds at its disposal, or that can be raised by a bond issue under section 7629, are not sufficient for the purpose. There is nothing in the provisions of section 7630-1 which require the board of education to determine that it cannot raise sufficient funds by proceeding under section 7629 or section 7625 et seq. as a condition to its right to issue bonds under section 7630-1. In one case it is the determination of a fact which gives the board of education the right to proceed. In the other case it is the existence of the fact.

The case of Lima v. McBride, 34 O. S. 338, is, I believe, in point on this question. In that case the question was whether a certain tax levy made by the county commissioners of Allen county, Ohio, for road purposes, which was carried into the record in general terms, was a levy under a statute providing for a special tax levy for certain emergency road repairs, or whether the levy was one made under a more general statute authorizing the county commissioners to levy taxes for road purposes. The syllabus in this case reads as follows:

> "2. Where the county commissioners, intending to make a levy of taxes for road purposes, under the act of April 30, 1869 (66 O. L. 60), cause such levy to be entered on the record, in general terms, the tax will not be

regarded as invalid, or made under the act of 1877 (74 O. L. 92), on the mere ground that the record does not show the existence of facts which warranted the levy under the former act."

In an opinion to Hon. Fred. W. McCoy, prosecuting attorney, Carrollton, Ohio, under date of July 19, 1915, my predecessor, Hon. Edward C. Turner, addressing himself to a concrete question similar to that here presented, said:

"It will be observed that under the provisions of section 7630-1 G. C., the authority conferred by said section on said board of education may not be invoked by said board unless it finds that it is unable to provide a levy sufficient for the aforesaid purpose, under authority of sections 7625 to 7630, inclusive, of the General Code, because of the limits on tax levies applicable to said district. In other words, if the aggregate levy for said district for the year 1915, and thereafter, including said sinking fund levy, will not exceed the 15 mill limitation above referred to, the authority conferred on said board of education by section 7630-1 G. C., and section 5649-4 G. C., as amended, may not be invoked.

Inasmuch, however, as the aforesaid bonds were issued by said board of education for the purpose of constructing a new school building, in compliance with the order of the state inspector of workshops and factories, I am of the opinion that, if the said board of education finds that said sinking fund levy cannot be made without exceeding said fifteen mill limitation, said board may make said levy under authority of said sections 7630-1 G. C., and 5649-1 G. C., as amended, irrespective of the limits provided by sections 5649-2 to 5649-5b, inclusive, of the General Code, and referred to in said section 5649-4, G. C., as amended."

(Opinions of the Attorney-General, 1915, Vol. II, 1263.)

As above noted, the resolution of the board of education providing for the issue of bonds in question after the vote of the electors of the school district authorizing the same, recites among other things that said bonds are issued under the authority of sections 7630-1 and 5649-4, General Code.

I do not feel called upon to determine in this opinion just how far, if at all, with respect to school bonds issued on a vote of the electors one resolution of the board of education pertaining thereto can be helped out with respect to the matter of essential averments by recitals in another resolution pertaining to the said issue. Neither do I feel it necessary to here determine the question whether under the provisions of section 7630-1 the finding that it is not practicable for the board of education to procure funds under any of the six sections immediately preceding said section because of the limits of taxation applicable to such school district should properly be incorporated in the resolution submitting the question of the bond issue to a vote of the electors or in the resolution providing for the issue of bonds after such vote is taken. In other words, I do not find it necessary to determine here whether section 7630-1 is essentially a bond-issuing statute or a statute providing for the levy of taxes. I do hold that the record relating to this particular bond issue, taken as a whole, shows a bona fide attempt upon the part of the board of education to issue these bonds under the authority of section 7630-1 General Code, and applying in this case to the record of the proceedings of the board of education the rule adopted in the case of Lima v. McBride, supra, with respect to the construction of the record of proceedings of inferior tribunals, I am constrained to the opinion that this bond issue can be sustained as one under the authority of section 7630-1 General Code, and that under the express terms of section 5649-4 General Code the board of education of said school district, if it finds that it cannot make a sufficient levy to pay the interest on said bonds and to create a sinking

fund to redeem such bonds as they mature within the fifteen-mill limitation of the Smith one percent law, may make said levy without respect to the limitations of said law.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

506.

SECRETARY OF STATE BOARD OF EMBALMING EXAMINERS—WHEN TERM EXPIRES—COMPENSATION.

The old secretary of the state board of embalming examiners should turn over the affairs of the office at the end of his term and such old secretary can receive no compensation for services performed after the old board has ceased to exist.

COLUMBUS, OHIO, August 9, 1917.

HON. B. G. JONES, *President Ohio State Board of Embalming Examiners, 277 East Broad St., Columbus, Ohio.*

DEAR SIR:—In your communication you submit for my opinion the following:

> "At what time will the secretary of the old board turn over the affairs of his office to his successor and if it can be done after the annual meeting of the board can he, the old secretary, draw any compensation for intervening time?"

General Code section 1335, as amended in 107 O. L., 655, provides that there shall be a state board of embalming examiners which shall consist of five members; that the president and secretary of the state board of health shall be *ex officio* advisory members of the board; and that the other three members of the board shall be residents of Ohio who have had at least five consecutive years of experience in the practice of embalming and the preparation and disposition of the dead.

General Code section 1336 G. C., as amended in 107 O. L., 655, provides that the members of the present state board of embalming examiners, with the exception of the president and secretary of the state board of health, shall continue in office until the terms for which they were appointed shall expire. Said section before it was amended, as above mentioned, provided that the board should consist of three members, each of whom was appointed by the governor for the term of three years from the first day of July following his appointment. The present section further provides that the governor may appoint a member to serve for three years from the first day of July of the year of his appointment, so that the board, as it is now constituted, consists of the three members who composed the old board, one of which having been re-appointed by the governor. Inasmuch as the laws providing for the state board of health have been repealed, and there being now no president and secretary of the state board of health, no other members except the three above mentioned have qualified to serve on the present board of state embalming examiners, but those who have qualified are a quorum for the transaction of all necessary business.

Section 1338 G. C. provides that:

> "On the second Tuesday of July of each year the state board of embalming examiners shall organize and elect from their number, a president and secretary-treasurer. The president shall serve for a term of one year and until his

successor is elected and qualified. The secretary-treasurer shall serve during the pleasure of the board and shall keep a complete record of the transactions of the board, collect all moneys and perform any other duties required by the board. * * * The board shall from time to time make and adopt rules, regulations and by-laws, for its government not inconsistent with the laws of this state and the United States. Two members shall constitute a quorum at all meetings of said board."

The board thus created is a new board. The board as it formerly stood has been abolished and with the abolition of the old board also is terminated the terms of the officers of the old board. That is to say, when the board ceased to exist which had employed the secretary, the secretary's term then ceased and he should turn over to the new secretary-treasurer whatever books or affairs of his office there was in his possession. He can receive no compensation for any services performed after the end of his term. A new secretary, having been elected at the annual meeting, is in charge of the affairs of the office and is the only person who can draw compensation as such secretary.

Answering your question, then, I advise you that the old secretary should turn over the affairs of the office at the end of his term and that he can receive no compensation for services rendered since that time.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

507.

COUNTY SURVEYOR—APPOINTED TO FILL VACANCY—HOLDS OFFICE UNTIL SUCCESSOR ELECTED AND QUALIFIED.

A county surveyor appointed to fill a vacancy caused by the death of the one elected to said office will hold the office until his successor is elected and until he qualifies for the position according to law, and he holds as a de jure officer and not as a de facto officer. His acts are legal and he is entitled to the salary provided for said office.

COLUMBUS, OHIO, Aug. 9, 1917.

HON. CHARLES M. GORDON, *Member House of Representatives, Georgetown, Ohio.*

DEAR SIR:—I have your communication of July 10, 1917, which reads as follows:

"Mr. Carl Thomas who is at present acting as county surveyor for this county was appointed by the county commissioners to fill a vacancy in the county surveyor's office caused last summer by the death of county surveyor John R. Moore. The appointment was until his successor was elected and qualified. Mr. Thomas was elected last fall (in November) to fill the vacancy which will expire on the first of September, 1917. Mr. Thomas since his election to fill this vacancy has continued to fill the office of county surveyor but has never given bond nor been sworn into office to fill the vacancy from the time of his election until the present time. Will the work he has performed on disputed farm lines be legal and will the work he has performed as county engineer be legal? Can he legally draw his salary under such circumstances? If his acts are not legal will he be compelled to pay back what money he has drawn from the county treasury as county surveyor?"

And not being quite certain as to whether Mr. Thomas gave a bond and took

the oath of office at the time he was appointed to fill the vacancy of John R. Moore, deceased, upon my request you wrote me further under date of July 31, 1917, stating that Mr. Thomas did take oath and give bond when he was appointed to take the place of John R. Moore, deceased. The facts in the matter submitted to me for consideration, then, are about as follows:

John R. Moore, county surveyor of Brown county, whose term would have expired in September, 1917, died some time during the summer of 1916. Carl Thomas was appointed as county surveyor to fill the vacancy and qualified according to law. Then at the November election 1917 the said Carl Thomas was elected to complete the unexpired term of Mr. Moore, but since said election he has taken no oath or given no bond and therefore has not qualified according to law. Your question upon these facts is as to what the status of matters is in your county due to the above facts.

Section 10 General Code provides, in part, as follows:

> "* * * Unless otherwise provided by law, such successor shall be elected for the unexpired term at the first general election for the office which is vacant that occurs more than thirty days after the vacancy shall have occurred. * * *"

From this provision it is readily seen that the correct procedure was followed in electing some one to fill the unexpired term of Mr. Moore; that is, the appointment lasts no longer than up until the time of the next general election for the office which is vacant, when some one to fill the vacancy must be elected.

Section 10 also provides as follows:

> "When an elective office becomes vacant, and is filled by appointment, such appointee shall hold the office until his successor is elected and qualified."

From this provision it is noted that the person appointed to fill a vacancy shall hold the office until his successor, that is, the successor of the one appointed, is elected and qualified. That is, Mr. Thomas would, in the first instance, hold his appointment up until the election in November, 1917; but further, under the provision above quoted, Mr. Thomas would hold his appointment up until his successor is elected and qualified. Notice the provision is not only until his successor is elected, but until his successor is elected and qualified. Hence, Mr. Thomas would hold the office under and by virtue of his appointment so long as a person is not elected and does not qualify to succeed him.

In the case submitted by you Mr. Thomas was elected to succeed himself, but it is my opinion that the same principle of law would apply in the case submitted by you as if some other person were elected at the November election in 1917 to succeed Mr. Thomas. If this assumption is correct, then Mr. Thomas, the appointee, would hold the office under and by virtue of his appointment up until the time that Mr. Thomas, the person elected, shall qualify; and as Mr. Thomas, the one elected to succeed Mr. Thomas, the appointee, has not yet qualified, Carl Thomas is still performing the duties of county surveyor under and by virtue of his appointment made in the summer of 1916.

Further, Mr. Thomas is an officer *de jure* and not merely an officer *de facto*. That is, he is performing the duties of his office as a matter of right just the same as any other legally elected or appointed officer would perform the duties of his office. To substantiate this legal proposition I will merely call attention to the case of State ex rel. v. Howe, 25 O. S. 588.

With the above conclusion in mind the answers to your questions are readily given. All the work that Mr. Thomas has performed up to the present time is legal

and indisputable, and he is entitled to draw the salary provided by law for his services so rendered as county surveyor. It follows from this, of course, that the county can not recover the money which it has paid to him for services rendered.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

508.

TEXT BOOKS—WHAT BOARD HAS POWER TO ADOPT SAME.

General Code section 7706-2, which provides that county and district superintendents shall recommend text books to county boards of education, does not repeal by implication the provisions of section 7713 which gives the power to adopt text books to district boards of education.

A county board of education has no power to adopt a text book and therefore any recommendations to it of text books should in turn be referred to the various district boards of education of the county school district.

COLUMBUS, OHIO, August 9, 1917.

HON. MELL G. UNDERWOOD, *Prosecuting Attorney, New Lexington, Ohio.*

DEAR SIR:—Your request for my opinion contains the following language:

> "Does section 7706-2 repeal section 7713 by implication? Under this new section where does the power of selecting text books lie? If not given to the county board of education, what powers does this new section of the law give to the county board in reference to the selection of text books?"

Section 7706-2 of the General Code, as amended in 107 O. L. 624, reads as follows:

> "It shall be the duty of the county superintendent, district superintendents to recommend to the county board of education such text books and courses of study as are most suitable for adoption."

No where in our school laws is the county board of education given authority to adopt or purchase text books and it cannot be inferred that authority to so adopt or purchase same is given to the county board from the mere fact that the county and district superintendents are directed to recommend same to such board as most suitable for adoption.

Said section, prior to its amendment, above noted, and found in 104 O. L. 133, read as follows:

> "It shall be the duty of the district superintendent to recommend to the village and rural boards of education within such district, such text books and courses as are most suitable for adoption."

It is noted that as distinquished from the section as it now reads, the section formerly provided that the district superintendents should recommend text books to the village and rural boards of education. This for the reason that the village and rural boards of education were the boards of education authorized by law to adopt text books and the district superintendents having the general supervision of the schools of the district, which include the districts controlled by the various boards

of education, gave such superintendents special knowledge of the particular needs of such schools, which knowledge should be valuable to the various boards of education when the question of the adoption of text books was under consideration.

Section 7713 of the General Code provides:

> "At a regular meeting, held between the first Monday in February and the first Monday in August, each board of education shall determine by a majority vote of all members elected the studies to be pursued and which of such text books so filed shall be used in the schools under its control. But no text books now in use or hereafter adopted shall be changed, nor any part thereof altered or revised, nor any other text book be substituted therefor for five years after the date of the selection and adoption thereof, as shown by the official records of such boards, except by the consent at a regular meeting, of five-sixths of all members elected thereto. Books so submitted shall be adopted for the full term of five years."

Each board of education mentioned in the above section means the board of education having control of the schools of the various districts, but does not include the county board of education and, as noted above, the county board of education has no power to adopt text books.

In opinion No. 1838, found in Opinions of the Attorney-General for 1916, Vol. 2, page 1357, section 7706-2, as found in 104 O. L. 133, was under consideration, and it was held that while the district superintendent had a right to recommend text books he had no power or authority to adopt or cause to be adopted any particular text book or books. I agree with the reasoning and the holding in said opinion and believe that the same has a bearing upon the questions presented by you, for under the language of section 7706-2, as now found in 107 O. L. page 624, all that the county and district superintendents are authorized to do with reference to text books and courses of study is to recommend same. Just why the legislature provided that the recommendation should be made to the county board of education is not clear. Only an inference as to said intention can be drawn and that is that inasmuch as the county board of education occupies a sort of supervisory capacity over the school districts of the county, and inasmuch as the county board of education elects the county superintendent, who has general supervision of the schools of the county, it must be inferred that the legislature intended the county board of education to in turn recommend to the various boards of education for adoption such text books and courses of study as is recommended to it by the county and district superintendents. No other conclusion can be drawn, but the fact that it is provided that such recommendation shall be made does not authorize the county board of education to adopt text books, and the same cannot be taken as a repeal of any part of the language of section 7713.

So that, answering your questions specifically, I advise you:

> (1) That section 7706-2 does not repeal by implication section 7713 of the General Code.
>
> (2) That the power of selecting text books lies with the various district boards of education and not the county board of education.
>
> (3) That the only power the county board of education can have is to recommend text books to the varoius district boards.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

509.

TAX COMMISSION—"ROAD BED" AND "MAIN TRACK" AS USED IN SECTION 5430 DEFINED—OPINION No. 388 MODIFIED.

1. *The established practice of the tax commission by which the term "roadbed" as used in section* 5430 *General Code is limited in application to improvements placed on real estate for the purpose of supporting tracks is correct and should be followed in the future so far as the general features of it are concerned.*

2. *There is grave doubt as to the power of the commission to single out one track and call it the "main track" for the purposes of section* 5430 *General Code; but in the absence of complaint that practice may also be followed, though primarily the phrase "main track" means all tracks which are in point of fact "main tracks" as distinguished from side tracks, switches, turnouts, etc.*

3. *The practice of the commission which in effect localizes the roadbed underlying all tracks, excepting the single or first main track, and apportions only the latter on the mileage basis cannot be supported under section* 5430 *General Code; and in the future the commission should apportion the value of all the roadbeds on the mileage basis, whether such roadbed underlies the main track or side tracks, turnouts, etc.*

4. *Opinion No.* 388 *is modified in so far as it is inconsistent with this opinion, and particularly in so far as it purports to frame a definition of the term "roadbed."*

COLUMBUS, OHIO, August 9, 1917.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your letter of July 7, 1917, requesting a reconsideration of a certain part of my opinion No. 388 given to the tax commission under date of June 8, 1917, and relating in the main to the apportionment of property of railroad companies to counties and taxing districts therein. In that opinion the word "road-bed" was defined as including the land itself and as referring to a strip of land sufficient to accommodate the necessary tracks of the railroad—in other words as substantially synonymous with the term "right of way."

You submit in your last letter a brief summary of the requirements of the tax commission of Ohio made in the form prescribed by it for the return of real estate and personal property by railroads. From this it is apparent that the commission has not exactly placed a definition on the term "road-bed," but has used the term "roadway" so as to include the following:

> "roadbed, embankments, cuts, slopes, and fills and devices for the protection of the road, such as walls, breakwaters, levees, canals and dams; tunnels, bridges, trestles and culverts; ties, rails, frogs and switches; track fastenings and appurtenances; fences crossings, cattleguards, and signs; but not the value of the land. * * * "

The definition which was given in the former opinion was based exclusively upon an interpretation of the decision in the case of Railway Company v. Hynicka, 4 N. P. N. S., 345, affirmed without report in Hynicka v. Railway Co., 77 O. S., 628. Hoffheimer, J., in his opinion in this case did hold rather clearly that not only "road-bed," whatever meaning be attached to that term, but all real estate necessary to the "daily running operations of the road" was to be averaged and apportioned on the mileage basis. (See page 353.) In other words, the learned judge evidently supposed that all real estate necessary to the daily running operation of the road was to be apportioned.

Of course this view involved a manifest error as old section 2774, which the court

was then applying, did not authorize the apportionment of all property necessary to the daily running operation, but was in terms exactly the same in this particular as present section 5430.

In justification for Judge Hoffheimer's error, at this point it is to be observed that he was following the dictum of Bradbury, J., in Railroad Company v. Commissioners, 48 O. S., 249, wherein, speaking of section 2774—which was then in exactly the same language as is now found in section 5430 General Code—he said:

> * * * "This section provides that such proportion of the entire property of a railroad, (except realty not necessary to its daily running operations) shall be taxed in each district through which it runs, as the length of the road in such district bears to its whole length."

It will be seen that Judge Bradbury also supposed that all real estate necessary to the daily running operations of a railroad would be apportioned on the mileage basis.

This discrepancy was observed when the other opinion was prepared and the thought in my mind was to reconcile these dicta with the statutes as they actually appeared by putting on the word "road-bed" such interpretation as would include practically the entire right of way.

This feature of the former opinion was not essential to the main inquiry then considered and answered.

The practice of the commission is not consistent with the former opinion nor with the dicta upon which it was based. In reconsidering the present question it is obvious that I must first determine whether and to what extent the decisions referred to are binding and should be followed.

I have already said they seem to rest on a misapprehension of what the statute provides. In addition to this fact, however, an examination of both decisions show that the propositions laid down by the two courts in their respective decisions were in neither case essential to the points to be decided therein.

In Railway Company v. Commissioners the only question was as to whether or not the one mile assessment pike tax was properly levied upon the assessed value of the property of a railroad within the bounds of the road. No question as to what should actually have been done under the railroad tax statutes was raised in the case, though the alleged inequality and unfairness of the statutes were referred to in the argument thus evoking the remarks of Judge Bradbury.

In Railway Company v. Hynicka the question was as to whether the value of a bridge across the Ohio river had entered into the valuation made by the county auditor under the railroad property tax sections, i. e., whether it was property used in the daily running operations or was separate and distinct property like the bridge in the case of Cowen v. Aldridge, 114 Fed. Rep., 44. The latter bridge was a toll bridge and as such was held not properly included within the property to be assessed by the local auditor or the board of auditors.

In Railway Company v. Hynicka the county auditor had attempted to place so much of the value of the bridge as was represented by that part of it which lay within the territorial limits of Ohio upon the duplicate as omitted property for the reasons above stated. All that it was necessary for the court to conclude was that it was property used in the daily running operations of the railroad, and therefore had been already assessed for the year in controversy.

The gratuitous remarks of the court to the effect that all property used in the daily running operations was apportioned on the mileage basis was not essential to the decision.

I conclude, therefore, that the cases referred to do not answer the question now under discussion and that I may with propriety consider the question on its merits.

As I have intimated in this opinion and held in the former opinion, no real estate as such, whether used in the daily running operations or not, is to be apportioned on the mileage basis unless it constitutes either "main track, road-bed or power house."

The commission's interpretation of the word "road-bed" appears to be that which limits the application of the term to improvements on the real estate. This is the natural and primary meaning of the term. A mere strip of land secured for the purpose of building a roadbed is not in this sense a roadbed. The latter comes into existence only when the railroad company has put ballast consisting of gravel or stone, or culverts and bridges, and the like upon the land for the purpose of supporting the track at the proper grade. Of course, in one sense, such material when in place naturally becomes a part of the real estate, but it is not so considered for the purpose under discussion.

Is this the meaning of the term "roadbed" as used in section 5430 General Code? On the face of section 5430 itself, there is support for this meaning in the immediate context which is:

> "rolling stock, main track, roadbed, power houses, poles, wires, supplies, etc."

All the other things mentioned in this category have in common the attribute of being, or of having been in the first instance, personal property. Those most nearly like roadbed, i. e., "main track" and "power houses" have in common the additional attribute of being improvements on real estate.

If I were to base my opinion on section 5430 alone then I would come to the conclusion without further thought that the commission's interpretation is right.

It is only when other considerations are evoked that any doubt is raised. In the first place the term "roadbed" as used in similar statutes in other states has not been uniformly interpreted. Consistent with the commission's interpretation and that which I would place on the section standing by itself are the following cases:

> Cass County v. C. B. & Q. R. R. Co., 25 Neb. 348;
> Railroad Company v. Board of Equalization 60 Cal. 12;
> City of Shreveport v. Shreveport Belt R. R. Co., 107 La. 785;
> Attorney-General v. Detroit, 148 Mich. 71;
> RE: New York Bay R. R. Co., 75 N. J. Law 389;
> Railroad Co. v. Stockton, 149 Cal. 83;
> Skiles v. Railway Co., 130 Mo. App. 162;

Opposed to it and consistent with the idea that the term "roadbed" includes the real estate itself are the following:

> Hayes v. Railroad Co., 135 Mo. 618;
> Meadows v. Pac. Life Ins. Co. of California, 129 Mo. 76;
> Railroad Co. v. Railway Co., 87 Ala. 520;
> Osgood v. U. S. Health & Ac. Ins. Co., 76 N. H. 475;
> McClure v. Great West. Ac. Association, 133 Iowa 224;
> Railway Co. v. Patterson, 122 Tenn. 1;
> Railway Co. v. Grayson, 72 Ark. 119.

Not all of these cases are in point. Possibly all of the cases on the other side are to be distinguished. However, it is fair to say that whatever be the weight of authority the term "roadbed" has not been universally regarded as having any such definite and fixed meaning as to preclude either definition.

Again, I find the term "roadbed" in another law relating to railroads wherein

it clearly refers to land. I refer to the sections relating to the appropriation of private property by railroads and particularly to those under favor of which a railroad company may appropriate an unfinished roadbed owned or claimed by another railroad company or companies and not used for a period of five years. (Sections 11076 et seq. General Code.) Section 11083 General Code defines roadbed as used in these sections as including "rights of way, depot grounds, and other easements connected therewith."

It is manifest, however, that this statutory use of the term is a conventional one.

I do not deem it necessary to go into an extended discussion of the decisions which have been or may be cited. It is sufficient to observe that the better reasoning supports the commission's interpretation; but even if there were some doubt about this that interpretation has, as you have informed me, been followed and applied by the commission ever since it came into existence. An established executive interpretation of even a doubtful statute ought not to be disturbed by the courts unless it is based in a manifestly erroneous conception thereof. In this case I not only do not think the commission's interpretation is not warranted by statute, but believe that it is, at the very least, the better interpretation thereof; in point of fact I think it is rather clearly true that it is the only true and correct interpretation of the section.

For the reason then that section 5430 General Code on its face indicates that the word "road bed" is used in the sense of something put upon the land; because that is the natural meaning of the term; because the apparent weight of judicial opinion under similar statutes support this definition; because the two cases containing dicta, which it is difficult to reconcile with this view, are not authoritative; and because, finally, even if it were possible to raise a doubt as to the interpretation of the section by the consideration of extraneous circumstances, such doubt should be resolved in favor of that interpretation of the section which has been adopted and followed for years by the tax commission.

I conclude that the blank forms in use by the commission as reflecting upon the practical application to be given to the section in this particular are proper.

Your letter, though not specifically requesting my opinion thereon, also raises the question as to the propriety of the commission's treatment of the term "main track" as used in section 5430. The commission has divided all tracks into the following classes:

> "Main track, second main track, branches, yard tracks, sidings, switches and turnouts."

The statement of the commission is that according to its practice.

> "A valuation per mile is placed upon the second, third, fourth and fifth tracks if so many are operated, and also upon the sidings, yard tracks and switches, and the valuation of these tracks is assigned to the county and taxing district in which they are located or through which said tracks run.
>
> "The value of the single first main track is treated as 'Other Property' and distributed in accordance with the method outlined thereunder.
>
> "In the apportionment of the valuation of railroad companies 'Other Property' includes the value of main track (single), roadbed, power houses, telegraph and telephone lines, moneys, credits and investments and other intangible capital. 'Other Property,' which consists of the two items just named, is distributed over the entire mileage (single main track) to each taxing district in the proportion the miles of main track therein bears to the entire length of the road in the state."

The question which is now raised in my mind is in part suggested by section

8745 General Code, an old section which has been in force side by side with the railroad taxation sections for a number of years, and which provides as follows:

> "Any railroad company may maintain and operate, or construct, maintain and operate a railroad, with such *main tracks, not exceeding six* and such side tracks, turnouts, offices, depots, round-houses * * * and other necessary appliances, as it deems necessary, between the points named in its articles of incorporation * * *."

In short, the commission has assumed that but one track is a main track consistently with the use of the term in section 5430 in the singular number, whereas section 8745 assumes and provides that there may be more than one main track, distinguishing such tracks from such other tracks as are comprised in the classification of "sidings, turnouts, switches," etc., all of which are tracks of another character.

Members of the commission have verbally pointed out to a representative of this department that it would seem to be unfair to distribute on the basis of mileage the value of more than one main track, because on that basis a county through which a division of a railroad having but one main track might run, would share the value of an additional main track located in another county. That is to say, assuming, which is perhaps the case, that the Pittsburgh, Chicago, Cincinnati & St. Louis Railroad Company operates four main tracks east of Columbus and only two on any of its divisions west of Columbus, the commission practically would leave the additional value arising from the extra main tracks in the counties where such tracks are located; whereas the contrary application of the statute would bring into the western counties a part of the value represented by the tracks lying in the eastern counties.

This question is much more troublesome than that relating to the term "roadbed." I do not think that the natural meaning of the phrase "main track" can be limited to a single track; so that, in this instance, the commission's interpretation lacks at least one of the sanctions which support its interpretation of the word "roadbed." I do not know how it is possible to determine which of two or more tracks on which traffic is continually moving in one direction or another is the "*first* main track." Where, for example, one track carries all the eastern-bound traffic and the other the western-bound traffic one is as much a "main track" as the other. It is obvious that the commission's selection of one track under these circumstances is made upon a more or less arbitrary basis for the purpose of avoiding the supposed inequality of applying the statute in the other way.

I am not so sure that the commission has not power, and that it is its duty, to obviate the injustice, which the commission fears, in another way. Section 5431 provides that if the line of a railroad company is divided into separate divisions or branches.

> "* * * so much of the rolling stock thereof as belongs to or is used solely upon such divisions or branches shall be apportioned in like manner to the county, or counties, and to each taxing district therein, through which such branch or division runs. * * *"

While this section in terms relates only to the apportionment of rolling stock, in my opinion it establishes a principle that the commission may adhere to for the apportionment of other things.

I agree with the commission that the statute as a whole was not intended to give to the counties through which one separate division or relatively unimportant branch runs the benefit of the great value inhering in the tracks on the main trunk line. For example, the New York Central Lines between Cleveland and Toledo are operated over two divisions. The main division, which is a four-track line, runs via Sandusky,

What is locally known as the "Southern Division," which is a single-track line, runs via Norwalk and Fremont. I agree that Huron county, for example, in which no part of the trunk line lies, ought not to reap any advantage from the fact that what may be termed a "part of the main line" is located within its borders and the fact that one of the main lines has four tracks.

It would seem, however, that if section 5431 be liberally interpretated the commission might regard the "Southern Division" as a separate unit for the purpose of apportioning the value of the single main track thereof, and apportion the main track on the trunk line to those counties in which that line is located on the mileage basis.

Of course the commission's method of handling this problem comes to precisely the same result as would be the case if different terminology were used, for, as I understand it, the commission gets a value per mile for all tracks, which is applied uniformly in all counties and taxing districts. Where the same number of main tracks exists throughout a division this would come to the same thing as apportioning the value of the main track on the mileage basis; but it is true that if the same number of main tracks does not exist throughout a division there would be a substantial difference between the commission's method of apportioning track values and that suggested by the opposite interpretation of the statute.

The commission's interpretation, however, as observed, has the support of the fact that the phrase in the statute is in the singular number.

On the whole, I see no objection to the commission's going through, for the present at least, with its established scheme of using a single track as a "main track" so long as no question is raised by any railroad or county auditor. This is because the established practice ought not to be upset except for sufficient reason. I must say, however, that if the question were a new one I should be inclined strongly to advise the commission that the phrase "main track" includes all main tracks, and is not limited to a "*first* main track."

I have not referred to the question respecting main tracks solely because it is raised by the statement transmitted to me by the commission respecting its method of operation in the past, but also because another application of the phrase "roadbed" as used in the section is here involved. I have heretofore approved the commission's definition of roadbed in general; however, I find myself unable to approve it without qualification, for it is apparent from the information furnished me by the commission that you have been apportioning as "roadbed" only the sub-structure of the "first track." This appears from the following:

"TRACKS AND ROADWAY:

"Under this heading a return is required of the number of miles and the true and actual value per mile of all tracks owned or leased by the company, located in each county and taxing district through which the road runs in the state of Ohio. For the purpose of this return railway tracks are defined as follows: Main track, second main track, branches, yard tracks, sidings, and switches and turnouts.

"The valuation per mile of track is to include the value of roadbed, embankments, cuts, slopes and fills and devices for the protection of the road, such as walls, breakwaters, levees, canals and dams; tunnels, bridges, trestles and culverts; ties, rails, frogs and switches; track fastenings and appurtenances; fences, crossings cattle guards and signs; but not the value of the land. * *

"A valuation per mile is placed upon the second, third, fourth and fifth tracks if so many are operated, and also upon the sidings, yard tracks and switches, and the valuation of these tracks is assigned to the county and taxing district in which they are located or through which said tracks run. * * *."

These statements in connection with others which have previously been quoted raise some question in my mind as to the commission's method of procedure, but it would seem to be as follows:

The commission does not separate in the form of return prepared by it the value of the tracks as such from the value of the roadbed, but all are lumped together as "tracks and roadway" and the valuation per mile is put upom them as main, second, third, fourth and fifth tracks, and as sidings, yard tracks and switches. In other words, it appears that what is properly comprised within the meaning of "roadbed" is treated by the commission for convenience as part of the value of an entire thing called "tracks and roadway," and that this value is divided into first, track, second track, etc.; and that only the value of the "*first* track" is apportioned.

If this is true, then it would follow as a practical result that the value of the roadbed underlying the second track and other additional main tracks, and the value of the roadbed underlying switches, yard tracks, turnouts, and the like, would be localized instead of distributed and proportioned to the length of the road. I cannot find any justification for this in section 5430, unless it be in the mere fact that the word "roadbed" follows the phrase "main track" and is influenced in its meaning thereby. That is to say, the commission's interpretation of the section would read as follows:

> "* * * and so that the rolling stock, main track, *and the roadbed thereunder*, power houses, poles, wires, supplies, * * * shall be apportioned in like proportion that the length of the road in such county bears to the entire length thereof, * * * etc."

It seems to me that if the legislature had meant this result it would have used different language. It is not some of the roadbed that is to be apportioned, but all of the roadbed, whether under the main track or under other tracks. I regret very much to come to any conclusion that would not be in harmony with the established practice of the commission, but I cannot bring myself to support the commission's practice in this respect.

In my opinion, all roadbeds of the company, by which I mean all structures and improvements designed to accommodate any and all tracks of the company, whether main tracks or otherwise, are apportionable. It will be objected that this has the unequal result referred to above in the discussion of the phrase "main track." Any principle that might be derived from such supposed injustice cannot, however, be carried too far. For example, power houses, poles, wires and supplies must be apportioned on the basis of the length of the road, so that the value of the property of an interurban railroad, like the Columbus, Delaware and Marion Railway, for instance, having one power house located in Delaware county, must be so apportioned that Franklin and Marion counties will share in the value of that power house. So also with the poles and wires; the telegraph lines of a railroad company may be much more valuable in one county than in others on account of the large number of wires carried, etc., yet the value of the whole as ascertained must be apportioned on the mileage basis.

It is my opinion that the plain language of section 5430 requires the commision to apportion all roadbed on the mileage basis and prevents the commission from separating roadbed into different classes as it has separated tracks.

My conclusions then are as follows:

1. The established practice of the tax commission by which the term "roadbed" as used in section 5430 General Code is limited in application to improvements placed on real estate for the purpose of supporting tracks is correct and should be followed in the future so far as the general features of it are concerned.

2. There is grave doubt as to the power of the commission to single out one track and call it the "main track" for the purposes of section 5430 General Code; but

in the absence of complaint that practice may also be followed, though primarily the phrase "main track" means all tracks which are in point of fact "main tracks" as distinguished from side tracks, switches, turnouts, etc.

3. The practice of the commission which in effect localizes the roadbeds underlying all tracks, excepting the single or first main track, and apportions only the latter on the mileage basis cannot be supported under section 5430 General Code; and in the future the commission should apportion the value of all the roadbeds on the mileage basis, whether such roadbed underlies the main track or side tracks, turnouts, etc.

4. Opinion No. 388 is modified in so far as it is inconsistent with this opinion, and particulerly in so far as it purports to frame a definition of the term "roadbed."

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

510.

BOARD OF EDUCATION—HOW TUITION FOR HIGH SCHOOL PUPIL FROM ANOTHER DISTRICT RECOVERED.

A board of education cannot recover tuition for high school pupils from the district of the residence of such pupils, un'ess WRITTEN NOTICE *is given as provided by section* 7750.

COLUMBUS, OHIO, August 9, 1917.

HON. C. A. STUBBS, *Prosecuting Attorney, Celina, Ohio.*

DEAR SIR:—In your letter of July 11, 1917, you inquire as to the following statement of facts:

> "In Re: Opinion 1653, 1916.
>
> "The above opinion was given to B. A. Myers, prosecuting attorney, on June 3, 1916.
>
> "In this case, no written notice was given to the school board, of the attendance of pupils from Montezuma special school district to the Celina High school. Members of the board, however, had knowledge of the fact that such pupils were attending.
>
> "The people concerned were instructed by Mr. Myers that such knowledge would be sufficient notice and that written notice would not be necessary in this case. The board now refuses to pay the tuition.
>
> "I will thank you to reply, stating whether written notice is necessary as designated in the statute, where the board has knowledge as in this case."

The opinion of the Attorney-General, to which you refer, is found in Opinions of the Attorney-General for 1916 Vol. 1, page 976, the syllabus of which reads as follows:

> "A rural school district which maintains no high school and has no agreement with another district maintaining a high school for the schooling of its high school pupils, is required to pay the tuition of such high school pupils by section 7747 G. C., 104 O. L., 125, when the notice of the attendance of such pupils is given as required by section 7750, G. C."

Your inquiry now is whether actual notice on the part of the members of the

board is a sufficient substitute for the written notice which is required by section 7750. The matter of giving notice is in relation to the payment of tuition for pupils who are eligible for admission to high school.

General Code section 7747 provides that the tuition of pupils who are eligible for admission to a high school and who reside in rural districts in which no high school is maintained shall be paid by the board of the district in which such pupils have a legal residence.

General Code section 7750 provides that a board of education which has no high school, may enter into an agreement with one or more boards of education where high schools are maintained, for the schooling o all its high school pupils, and then provides:

> "In case no such agreement is entered into, the school to be attended can be selected by the pupil holding a diploma, *if due notice in writing* is given to the clerk of the board of education of the name of the school to be attended and the date the attendance is to begin, *such notice to be filed not less than five days previous to the beginning of attendance.*"

Notice is defined as the information given of some act done or the interpellation of which some act is required to be done and is usually divided into two classes, viz., actual and constructive.

Actual notice may again be divided into express and implied and one of the classes of express notice is written notice or notice in writing.

It was held in Jones vs. Van Zandt, 13 Fed. cases, 1047-1049, that where notice is required, any knowledge is equivalent to notice except where it is required to be in writing.

In Annual Reports of the Attorney-General for 1913, Vol. 2, page 1207, section 7750 was being considered and the following language was used:

> "Section 7750 of the General Code, in so far as giving notice *in writing* of the school to be attended by the pupil, provides in substance that if the board of education, not having a high school, does not provide a high school for its Patterson graduates, a school which said graduates may attend can be selected by the pupils holding the diplomas *provided due notice in writing* is given to the clerk of the board of the name of the school to be attended, and the date the attendance is to begin, such notice to be filed not less than five days previous to the beginning of the attendance."

In School District v. Harrison Twp., 14 O. Dec. 62, the court had under consideration the same section and in its conclusion, on page 64, lays down the following proposition:

> "Where no high school is maintained by the township board of education and no agreement has been made by such township board, with one or more boards of educa ion of the same or adjoining townships for the schooling of high school pupils of such township, the high school pupils resident in such township may attend any high school in the state, and tuition in such case shall be chargeable to such township board of education, *providing written notice thereof is given to the clerk of the board of education before the attendance begins.*"

That the legislature has a right to provide for written notices cannot be doubted. A board of education is a creature of statute and where the statute prescribes certain forms or rules to be followed, the board in the transaction of its business must follow same. It was provided in this case that notice in writing should be given at least five days prior to the time the attendance of the pupil began and that such notice should

be given to the clerk of the board of education. The notice must also contain the name of the school to be attended and the date the attendance is to begin. I am satisfied if the board of education of the district in which the pupil resides should refuse to make payment and an action were brought by the board of education of the school attended, demurrer would lie to the petition on the ground that notice in writing was not alleged.

In MacMillen v. Middletown, 11 L. R. A. (n. s.) 391, it was held that the legislature may make the giving of written notice to the municipal authorities, of the defective condition of a street, prior to the happening of an accident, a condition precedent to holding the municipality liable for injuries caused by such defect, and Gray, J., in delivering the opinion of the court, says:

> "It is not alleged in the complaint that this written notice had been given, and, as such a notice was made a condition precedent to the maintenance of such an action, the absence of such an allegation would be fatal to the complaint upon demurrer."

Speaking further of the right of the legislature to provide for written notice on page 393, the same court uses the following language:

> "The cases are numerous which involve the right of a municipality to defeat the claims of a plaintiff because of a failure to show notice or knowledge on its part of the conditions complained of and because of the failure to comply with statutory requirements of notice to municipal officers before the commencement of an action. The novelty of the case, in the feature of the statutory requirement *that a written notice shall have been given*, is explained in the legislative purpose to make that certain which before was often uncertain. The fact of knowledge should no longer be dependent upon inferences from the evidence of circumstances, nor the liability of the municipality be left to a determination reached upon an indulgent construction of the legal rules as to actual notice.'

What applies to a municipal corporation would also apply to a board of education and I must therefore conclude that inasmuch as the statute provides for written notice to be given, other knowledge or notice will not be sufficient.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

511.

SUPERINTENDENT OF BANKS—EXPENSE INCURRED IN LIQUIDATION OF BANK DISALLOWED BY COURT—PERSONAL LIABILITY.

Where the superintendent of banks incurred expenses in the liquidation of a bank in 1914 *and* 1915, *which expenses he paid, and upon presenting the same to the court of common pleas of the county in which such bank was located, under section* 742-4 *G. C., the same were partially disallowed, and thereupon before payment of dividends, the superintendent resigned, a cause of action exists against him for the amount of such expenses so paid out of the assets of such bank which was disallowed by the court.*

COLUMBUS, OHIO, Aug. 9, 1917.

HON. PHILIP C. BERG, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—On July 21, 1917, you addressed the following request for advice to this office:

> "We submit herewith the following statement of facts:
>
> "A private bank was closed by this department May 16, 1914. The superintendent immediately proceeded to liquidate its assets in the performance of which he incurred expenses, including salaries of liquidating agents, bookkeepers, clerks, attorney fees, etc., which were paid for as rendered.
>
> "On or about December 26, 1914, he (the superintendent) made application to the court of common pleas of the county in which the bank was closed, for the approval of the expenses thus incurred and which had been paid out of the assets of the bank, to which application objections were filed by a committee representing the creditors of the bank; before a hearing was had thereon the superintendent resigned. Later, viz. March 16, 1915, the matter was heard and the court made an order therein, a copy of which is hereto attached disallowing, or not approving, a part of the moneys paid out; this disallowance amounts to approximately $2,300.00. No proceedings have ever been instituted by either of my two predecessors in office. The matter is substantially the same as when the order was made by the common pleas court in March, 1915, reference to which is made herein.
>
> "Please favor us with your opinion advising what, if any, duties we should perform in this matter."

Since submitting the above you have forwarded two copies of bonds given by the former superintendent, one executed by the American Surety Co. of New York, the other by the National Surety Co., each for the sum of twenty-five thousand dollars

The law governing the payment of expenses by you incurred in the liquidation of an insolvent bank is G. C. section 742-4, which, as it read at the time of the transactions you mention, was as follows:

> "The expenses incurred by the superintendent of banks in the liquidation of any bank in accordance with the provisions of this act, shall include the expenses of deputy or assistants, clerks and examiners employed in such liquidation, together with reasonable attorney fees for counsel employed by said superintendent of banks in the course of such liquidation. Such compensation of counsel, of deputies or assistants, clerks and examiners in the liquidation of any corporation, company, society or association, and all expenses of supervision and liquidation shall be fixed by the superin-

tendent of banks, subject to the approval of the common pleas court of the county in which the office of such corporation, company, society or association was located, on notice to such corporation ,company, society or association. The expense of such liquidation shall be paid out of the property of such corporation, company, society or association in the hands of said superintendent of banks, and such expenses shall be a valid charge against the property in the hands of said superintendent of banks and shall be paid first, in the order of priority."

This section has since been amended by adding thereto a proviso to the effect that such expenses should not be paid until after the approval of an account thereof by the court, and also providing for notice by publication of the filing thereof. But as it stood at the time it required the superintendent in making payments of such expenses, to do so at his peril, and in case of disapproval by the court he would be required to account for and make good any amount which the court so refused to approve. If he continued in office until a dividend were payable under section 742-7, he could be required by order of the court to take such excess payment into account in fixing the amount of the dividend, and if all claims against the bank were paid in full and there were surplus assets to be disposed of for the benefit of stockholders under section 742-11 et seq., this sum would still remain assets in his hands to be disposed of under the provisions of those sections.

This consequence is defeated by his resignation before paying a dividend, and as his successor in office never received the amount in question, he is, of course, not responsible for it.

There is, therefore, a cause of action against the former superintendent for the amount.

The two bonds are similar in form. The condition in both is identical, and is as follows:

"The condition of the above obligation is such that whereas the said Emory Lattaner has been duly and in accordance with the law appointed superintendent of the department of banks and banking of the state of Ohio, to serve from the sixth day of June 1913 and until his successor shall have been appointed and qualified.

"Now if the said Emory Lattanner shall during his term of office faithfully discharge the duties imposed upon him by law to the best of his knowledge and ability, then this obligation shall be void, otherwise it shall remain in full force and effect."

Nothing is here stated in reference to the payment of money, but only that he shall faithfully discharge the duties imposed upon him by law to the best of his knowledge and ability, and it might be argued upon his behalf that he has done so, that in making the payments above discussed he was discharging his duty to the best of his knowledge and ability; that the payments were made in good faith and on the belief on his part that the expenses were necessary and the amounts reasonable. This defense, however, would fall short by reason of the following consideration. His duty did not end with making a payment, but continued until he had complied with the decision of the court upon that subject. He might have protected himself by contracting for repayment or taking security thereof, or withholding actual payment until the court had passed upon it, but it was his official duty, upon the finding of the above deficiency by the court, to return the amount in money to the assets of the bank. The general clause that he will faithfully discharge the duties imposed upon him is to be taken to its full extent.

The statutory provision on the subject is G. C. section 6, which is as follows:

> "A bond payable to the state of Ohio, or other payee as may be directed by law, reciting the election or appointment of a person to an office or public trust under or in pursuance of the constitution or laws, and conditioned for the faithful performance, by such person, of the duties of the office or trust, shall be sufficient, notwithstanding any special provision made by law for the condition of such bond."

The statement is that the bond in this general form shall be sufficient. This has been held by the courts to mean sufficient to accomplish the purpose of the bond; that is, sufficient to secure the faithful performance of all his duties of whatever nature.

King et al. v. Nichols, et al. 16 O. S. 80.
Kelly v. State, 25 O. S. 567.
Dawson v. State, 38 O. S. 1.

In the latter case the court says:

> "A faithful discharge of the duties of the office of county treasurer, within the condition of his official bond, required the payment over 'according to law' of all moneys which came into the hands of the treasurer, during his term, belonging to the city or school district."

In Kelly v. State, supra, the bond provided for the payment of moneys due the state, county and township and omitted school boards, and the moneys of these latter were held included under the general terms, so that the bonds given in the case under consideration seem sufficient, and as those companies probably have representatives in the state so that they may be sued here, although the principal on the bond is absent and said to be a resident of the state of Texas, it would seem to be your duty to proceed to enforce the payment of the above obligation.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

512.

COUNTY BOARD OF EDUCATION—WHEN BOARD MAY REDISTRICT COUNTY SCHOOL DISTRICT—PETITION OF PRESIDENTS OF VILLAGE AND RURAL BOARDS—UNNECESSARY.

The county board of education may, any year, upon its own motion, redistrict the county school district into supervision districts the same to take effect the first of the following September.

It is not necessary for a petition of three-fourths of the presidents of the village and rural district boards of education to be filed in order that the county board of education may act in redistricting the county school district, although the county board must act when such petition is filed.

COLUMBUS, OHIO, August 9, 1917.

HON. EUGENE WRIGHT, *Prosecuting Attorney, Logan, Ohio.*

DEAR SIR:—In your letter of July 2, 1917, you submit for my opinion the following:

> "I would like to have an opinion as soon as convenient from your office concerning section 4738 of the new school code. The question which pre-

sents itself is, can the county board of education, upon their own initiative, redistrict the county into supervision districts, any year, to take effect the first day of following September, or must they wait and act only when three-fourths of the presidents of the village and rural districts apply or petition for a redistricting of the county?"

General Code section 4738, to which you refer, provides as follows:

"The county board of education shall divide the county school district, any year, to take effect the first day of the following September, into supervision districts, each to contain one or more village or rural school districts The territory of such supervision districts shall be contiguous and compact. In the formation of the supervision districts consideration shall be given to the number of teachers employed, the amount of consolidation and centralization, the condition of the roads and general topography. The territory in the different districts shall be as nearly equal as practicable and the number of teachers employed in any one supervision district shall not be less than thirty. The county board of education shall, upon application of three-fourths of the presidents of the village and rural district boards of the county, redistrict the county into supervision districts. The county board of education may at their discretion require the county superintendent to personally supervise not to exceed forty teachers of the village or rural schools of the county. This shall supersede the necessity of the district supervision of these schools."

That part of the above quoted section which provides that the county board shall divide the county school district any year is clear and explicit. That is to say, if in any year certain conditions warrant action upon the part of the county board of education in dividing county school districts into supervision districts, section 4738, above quoted, is sufficient authority for the county board of education to act.

It is well in the consideration of this question for us to note the legislative history of said section in order that we may determine the full effect of that part of the section which provides for a redistricting upon application of three-fourths of the presidents of the village and rural district boards of a county. Said section was enacted February 5, 1914, and, as found in 104 O. L. 140, reads as follows:

"The county board of education shall within thirty days after organizing divide the county school district into supervision districts, each to contain one or more village or rural school districts. The territory of such supervision districts shall be contiguous and compact. In the formation of the supervision districts consideration shall be given to the number of teachers employed, the amount of consolidation and centralization, the condition of the roads and general topography. The territory in the different districts shall be as nearly equal as practicable and the number of teachers employed in any one supervision district shall not be less than twenty nor more than sixty.

"The county board of education shall, upon application of three-fourths of the presidents of the village and rural district boards of the county, redistrict the county into supervision districts."

Prior to the enactment of said section there was no provision made in our school laws for county supervision, or for the dividing of the county school district into supervision districts. So that it was under the provisions of the above quoted section that the county was originally divided into supervision districts. Under the above sec-

tion when the county was once divided into supervision districts, within thirty days after the original organization of a county board of education, such supervision districts would continue to remain as so originally formed, until an application was made by three-fourths of the presidents of the village and rural boards of education of a county, asking the county board of education to *redistrict* the county into supervision districts. There was no authority in the county board to redistrict after it had once divided the county into supervision districts unless said application was filed by the presidents above mentioned, but in 106 O. L. 396, said section was amended as follows:

> "The county board of education shall divide the county school district, any year, to take effect the first day of the following September. into supervision districts, each to contain one or more village or rural school districts. The territory of such supervision districts shall be contiguous and compact. In the formation of the supervision districts consideration shall be given to the number of teachers employed, the amount of consolidation and centralization, the condition of the roads and general topography. The territory in the different districts shall be as nearly equal as practicable and the number of teachers employed in any one supervision district shall not be less than thirty. The county board of education shall, upon application of three-fourths of the presidents of the village and rural districts boards of the county, redistrict the county into supervision districts. The county board of education may at their discretion require the county superintendent to personally supervise not to exceed forty teachers of the village or rural schools of the county. This shall supersede the necessity of the district supervision of these schools."

The material change by said amendment is that the county board of education is given authority to divide the county school district into supervision districts "any year," the same to take effect the first day of the following September. The provision with reference to the application of three-fourths of the presidents of the village and rural district boards remains the same as in the original enactment. A question is raised as to the difference in the language used between a division by the county board and a re-districting upon application of the presidents of the village and rural boards. That is to say, the section provides that the county board may, in any year, "divide" the county school district into supervision districts and also provides that upon application of three-fourths of the presidents of the rural and village boards, the county board shall "redistrict" and it is suggested that this means that after the county board of education has once divided the county school district in any year into supervision districts that then the right of three-fourths of the presidents of the rural and district boards attaches and that they may then file their application to have the county school district redistricted. In other words, the county board must either act and divide the county school district into supervision districts, not only in any year, but in every year, or accept the old division as a new division, if no new division is made before three-fourths of the presidents of the rural and village boards are permitted to make said application to so redistrict. I do not think that construction is the proper one. Under the original section, as found in 104 O. L. 140, the county board after it had once acted, could not act again until such application was filed. That is to say, the filing of the application was made a jurisdictional fact which must exist before the county board could act, but since the amendment in 106 O. L., such act on the part of three-fourths of the presidents of the rural and district boards is not necessary in order to permit the county board to act. The county board may, on its own initiative, divide in any year, whenever it determines that a necessity for such division exists.

This department held in Opinion No. 94, rendered March 7, 1917, that the re-

districting may be performed by the county board of education any year and upon application of three-fourths of the presidents of the village and rural boards of the county, the county board of education must re-district the county into supervision districts.

I believe the construction given to said section in the above mentioned opinion is the proper construction and that it is not necessary for the county board to act in order that the presidents of the rural and village boards may have a right to act, and on the other hand, that the county board may act without any action whatever on the part of the rural and village board presidents, and that the village and rural board presidents may petition if the county board has acted or not.

This department held in Opinion No. 495 that:

> "There is some question as to whether or not the board has a right to act again upon this matter after it has once acted (in any year) and especially after certain other statutory acts intervene. Some of such other statutory acts are the meeting of the presidents of the boards of education within such supervision districts which contain three or less village or rural districts, the boards of education of such districts to elect a district superintendent, or, the certificate of the county board of education to the county auditor of the salary of the district superintendents employed, or, the apportionment of the school fund by the county auditor."

> Answering your question specifically, then, I advise you that the county board of education has authority, upon its own initiative, to re-district the county into supervision districts in any year and that the same shall take effect the first of the following September and that it is not necessary for such county board of education to wait until application is made by three-fourths of the presidents of the village and rural district boards of education and act only upon such application.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

513.

TOWNSHIP TRUSTEES—NOT AUTHORIZED TO TRANSFER CEMETERY —OR MONEY FROM LOT OWNERS TO INCORPORATED CEMETERY ASSOCIATION.

1. *Township trustees are not authorized by section* 4199 *G. C. to transfer a cemetery under their control to an incorporated cemetery association. This section only applies to union cemeteries.*

2. *Township trustees are not authorized to turn over to an incorporated cemetery association moneys collected from lot owners, even if such trustees retained ownership and control of the cemetery and such incorporated cemetery was to keep the lots and graves clean.*

COLUMBUS, OHIO, August 9, 1917.

HON. BENTON G. HAY, *Prosecuting Attorney, Wooster, Ohio.*

DEAR SIR:—I am in receipt of your communication wherein you ask for an opinion upon the following:

> "The township trustees in a certain township of this county desire to

transfer, to an incorporated cemetery association, a township cemetery. Can such transfer be made by authority of section 4199 of the General Code, or must it be a union cemetery before a transfer can be made under said section?

"This particular cemetery with other township cemeteries, have been in the control of the township trustees for many years, and this is the only cemetery from which any money has been derived from the sale of lots and other sources, which money has been placed in the township cemetery fund, and all the cemeteries kept up out of this fund. There is now in the township cemetery fund about $700.00 all of which has been obtained from this particular cemetery, and at least $1800.00 during the last thirty years has been expended for the keeping up of different township cemeteries in the township, all of which money has been obtained from this cemetery proposed to be transferred.

"In making a transfer of this cemetery to the cemetery association, have the trustees a right to turn over to the cemetery association this $700.00 in the cemetery fund, and can the trustees make a levy equal to the amount that has been obtained from this cemetery and used on other cemeteries, and at the time of such transfer of the cemetery turn over to the cemetery association the funds obtained from such levy?

"Again, if the trustees do not make a transfer of the cemetery to the cemetery association, could the trustees retain the ownership and control of the cemetry, collect from the lot owners money as an endowment of lots and turn over to the cemetery association this money obtained as an endowment and allow this cemetery association to keep the lots and grave clean?"

1. You inquire whether township trustees, having the control and management of a township cemetery, are authorized to transfer such cemetery to an incorporated cemetry association under section 4199 G. C.

Said section 4199 reads as follows:

"The council of a municipality, and the trustees of a township, may transfer to an incorporated cemetery association, the lands, lots and improvements of a cemetery, owned and controlled by the municipality or township for cemetery purposes. The cemetery association shall assume all legal debts on the cemeteries so transferred."

This section was 2545a R. S. and was enacted in April, 1904, as found in 97 O. L. 165, supplementing section 2545 R. S. Section 2545 R. S. is now section 4198 G. C. and is found in Ch. 9, Div. 4, Tit. XII, part I, under the heading "Cemeteries" and the subheading "Union Cemeteries.' The language of the section is:

"The council of a municipality, *and* the trustees of a township may transfer, etc."

As the subchapter on union cemeteries, in which the above is found, deals with the authority of the council and the trustees acting as a joint body, I am inclined to view that the sole authority granted by the legislature in section 4199 G. C. is to such joint body to make such transfer. This view is strengthened by the fact that in title XI, under the heading "Townships," division 3, chapter 6, the legislature treats of the subject of township cemeteries (Secs. 3441 et seq. G. C.). Nowhere in this chapter do we find any authority given the township trustees as given the joint board under section 4199 G. C.

Back in 1902 it was no doubt the desire to make a transfer of a township cemetery to a cemetery association, and the legislature, as evidenced in 95 O. L. 939,

passed a statute which in terms authorized the transfer of any public burying ground located in any township in any county containing a city of the third grade of the first class and not under the control of any municipal corporation and the title of which is vested in the township trustees, to convey such cemetery to the trustees of any cemetery association organized under the laws of the state of Ohio. This section is now numbered 14686 G. C., and even if assumed to be constitutional, would only apply to Lucas county.

I think the principle is well settled that without legislative authority township trustees, being a board of limited authority and deriving all their power from legislative enactment, would have no right to make the transfer spoken of, unless the grant of power was expressly given them.

As above stated, section 4199 G. C. was section 2545a R. S., as passed, 97 O. L. 165. It was:

> "An act to supplement section 2545 of the Revised Statutes, relating to transfers of cemeteries.
> * * * * * * * * * *
> "Section 2545a. The city council of any city or village, and the trustees of any township, may transfer to any cemetery association incorporated under existing laws, the lands, lots, and improvements of *such* cemetery, now owned and controlled by said city, village or township, for cemetery purposes; said cemetery association shall assume all legal debts on said cemeteries so transferred."

The codifying commission saw fit to insert "a" in place of "such," as found in original enactment. The punctuation of this section, found between the words "village" and "and" and the use of the word "and" between the word "village" and the words "the trustees," in the first part of the section, coupled with the words found later in the section, "owned and controlled by said city, village *or* township,' render the section somewhat ambiguous, and under familiar rules of construction we can refer to the original act in seeking light as to what the legislative intent was in the passage of the supplemental section, as also any other history pertaining to the legislation in question.

Attention may be called to the fact that most of the sections now found in the subtitle "Union Cemeteries" will be found in the municipal code passed in 1869, 66 O. L. 149 et seq.

Section 4183 G. C. was section 377 of the municipal code of 1869, and the succeeding sections of the municipal code, like the succeeding sections of section 4183 G. C., pertain to union cemeteries.

Section 4198 G. C., formerly section 2545 R. S., was section 388 of the municipal code of 1869. This section provides that the council and the trustees may purchase of an incorporated cemetery association the lands, lots and improvements of such association.

Section 4197 G. C. provided what a municipality and a township may make use of in the establishment of a union cemetery.

Section 4199 G. C., as passed in 97 O. L. 165, was a supplemental section to present section 4198 G. C. and originally provided that the council of a municipality and the trustees of a township may transfer the lands, lots and improvements of *such* cemetery owned and controlled by the municipali y or township for cemetery purposes. "Such cemetery" refers to some kind of cemetery theretofore spoken of. An examination of the preceding sections evidences that a union cemetery was the only cemetery under consideration in such preceding sections. The necessary inference is that "such cemetery" refers to the particular kind of cemetery spoken of in the

preceding section to which section 4199 was supplementary, or to that kind of cemetery that was contemplated in the immediately preceding sections to which reference must necessarily be had to determine what "such cemetery" really meant

In view of all the foregoing, it is my opinion that your township trustees are not authorized to make such transfer under section 4199 G. C., and since there is no statute that empowers them to make such transfer, they are without any authority to do so.

2. Since it is my view that a transfer of this cemetery to the cemetery association can not be made, there is no necessity of answering your further question as to the right of the trustees to turn over to the cemetery association the seven hundred dollars in the cemetery fund, or to make a levy equal to the amount heretofore obtained from this cemetery and used on other cemeteries, and turn the proceeds of this levy over to the cemetery association.

3. You further inquire, could the trustees retain the ownership and control of the cemetery, collect from the lot-owners money as an endowment of lots and turn over to the cemetery association this money obtained as an endowment and allow this cemetery association to keep the lots and graves clean?

Section 3441 G. C. and other sections found in chapter 6, above referred to, contain the legislative enactments regarding township cemeteries. Without setting out the sections in full, they give the authority to the trustees to acquire lands for cemetery purposes, to levy taxes for the purpose of obtaining the lands, and a further levy not to exceed two thousand dollars in any one year, for the needful care, supervision, repair and improvement of such cemeteries. They are authorized to sell lots and section 3449 G. C. provides:

> "Section 3449. The proceeds arising from the sale of such lots shall be used in improving and embellishing such grounds, and the trustees shall build and maintain proper and secure fences around all such cemeteries, to be paid for from the township funds."

Section 3457 G. C. authorizes them to receive by gift, devise, bequest or otherwise, any money, securities or other property in trust as a permanent fund to be held and invested by them and their successors in office, the income therefrom to be used and expended under their direction, in the care, improvement and beautifying of any burial lot designated and named by the person making such gift, devise or bequest, in any township cemetery over which such trustees have jurisdiction.

This seems to be the only provision for a special fund and it seems limited to the care of special burial lots. This fund must be properly invested and section 3459 G. C. compels the township treasurer to keep an accurate and separate account of such investments.

Under section 3464 G. C. the township trustees may appoint three directors to take charge of any cemetery in the township, the control of which is vested in such rustees. When so appointed, such directors shall be governed in the discharge of their duties by the laws so far as applicable relating to township trustees in the control of cemeteries in the township.

Sections 3465 and 3466 G. C. refer to abandoned burial grounds, and it is only when the burial ground has been abandoned and the bodies have been removed, that there is authority to the trustees to sell at public sale such cemetery property.

In the absence of any legislative authority, it seems to me that your trustees have no right to turn over the money collected from lot owners to this cemetery association. Their powers and duties are set forth in the statute. They have no authority beyond

that found in the legislative enactment. While they may empower persons necessary to keep the lots and graves in proper shape, they would be acting entirely beyond their authority in turning over any fund to a private association, upon an agreement to look after the cemetery or upon any other agreement.

Trusting this answers your inquiry, I am,

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

514.

APPROVAL—FIVE LEASES AT BUCKEYE LAKE AND LAKE LORAMIE.

COLUMBUS, OHIO, August 10, 1917.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your communication of August 8, 1917, in which you enclose for my consideration five leases in triplicate, as follows:

"To George Herman, small island in Buckeye Lake for cottage site, valuation $1,666.66.

"To Bernard Vogelsang, cottage site at Lake Loramie, valuation $300.00.

"To Josephine Vogelsang, cottage site at Lake Loramie, valuation $300.00.

"To George Kirner, cottage site at Lake Loramie, valuation $300.00.

"To Ralph Rulmann, cottage site at Lake Loramie, valuation $300.00."

I have examined these leases carefully and find them correct in form and legal in every respect. I have, therefore, endorsed my approval upon the same and forwarded them to Hon. James M. Cox, governor, for his consideration.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

515.

COUNTY COMMISSIONERS—UNDER WHAT CONDITIONS THEY MAY PAY MONEY TO HOSPITAL—INDIGENT DEFINED—AUTHORITY TO PROVIDE MEDICAL ATTENTION FOR WARDS AND THE INDIGENT SICK AND DISABLED OF THE COUNTY.

1. *Under the provisions of section 2502 G. C. two conditions must obtain before the county commissioners can pay a hospital any sum of money, namely.* (1) *The hospital must have been organized or incorporated for purely charitable purposes and* (2) *the hospital must receive, free of charge, the indigent poor of the county for needed medical and surgical treatment. If these two conditions obtain, the hospital may be located either within or without the county.*

2. *The county commissioners do not pay the money on condition that the hospital receives the indigent poor of the county for treatment, but because the hospital receives the indigent poor of the county for treatment.*

3. *The word "indigent" in said section is not limited to the wards of a county, but includes all those persons who are destitute of property or means sufficient to enable them to pay for medical and surgical treatment.*

4. *In so far as the wards of the county are concerned, the county commissioners have authority to enter into a contract with a hospital for the medical care and attention which said county wards may require, which would be payable out of the county poor fund.*

5. *Sections* 3138-1 *and* 3138-2 *G. C. provide a method by which the county commissioners may enter into an agreement with a corporation or association organized for charitable purpose, or if there is no such corporation, then with any corporation or association organized for maintaining a hospital, for the care of the indigent sick and disabled of the county, for which a special levy is provided.*

COLUMBUS, OHIO, August 10, 1917.

HON. HARRY D. SMITH, *Prosecuting Attorney, Xenia, Ohio.*

DEAR SIR:—As heretofore acknowledged, I have your communication in which you ask my opinion as follows:

> "Mr. C. E Brotten, state examiner, has called to the attention of our board of county commissioners a matter concerning which we desire your opinion.
>
> "Section 2502 General Code provides in substance that in a county where there is no hospital supported by public funds the county commissioners may pay to 'a hospital organized or incorporated for purely charitable purposes, in which the indigent poor of the county may receive free of charge needed medical and surgical treatment, a sum not exceeding twenty-five hundred dollars each year.' The amount so paid is to be paid from the county poor fund on the first day of January and July, 'and shall be for the maintenance and support of such indigent poor and the reimbursement of such hospital for treatment thereof.' Payment of 'public funds to a sectarian institution' is not authorized by this statute as specifically provided therein.
>
> "This statute was first enacted 95 Ohio Laws 644, and was section 922-4 of the Revised Statutes. When the statute was incorporated in the General Code, there was some change in phraseology, which extended the scope of the statute, but which does not affect the solution of the questions raised.
>
> "Subsequent to the incorporation of this statute in the General Code, and prior to the time of statutory changes making infirmary directors of county commissioners, our board of county commissioners as county commissioners and not as infirmary directors, began making semi-annual pay-

ments to the Miami hospital of Dayton, Ohio (Montgomery county adjoining our county of Greene), the payments being made at the times and not in excess of the amount as provided by the statute.

"There was not at that time, there is not now and never has been in Greene county, any hospital 'supported by public funds.'

"No stated sum or allowance was paid to the Miami Valley hospital. On the first of January and July each year representatives of the hospital met with the commissioners and gave the board of commissioners a detailed statement of the number of indigent patients (residents of Greene county) who had been cared for by the hospital during the preceding six months. Thereupon the commissioners allowed to the hospital a sum of money which was determined by allowing $5.00 for the use of the operating table for each operation, and $1.85 per day for each day each Greene county patient had been cared for in the hospital.

"This continued to be the practice in this county until two or three years ago, when by arrangement with one (and later a second) private hospital in Xenia, the indigent poor of Greene county have been receiving operations, treatments and care in these private hospitals.

"These local hospitals are the private property of local physicians, and it can not be contended that either of them was 'organized or incorporated for purely charitable purposes,' although both of these hospitals have undoubtedly done a considerable amount of charity work for which they have received no compensation whatever.

"The local hospitals receive from the county semi-annually, on the allowance of the commissioners, sums of money at the times and all within the limits of the statute, in practically the same manner as allowances were formerly made to the Miami Valley hospital at Dayton. However, there is this difference in determining the amount of the allowance. The Xenia hospitals receive an allowance at the rate of $1.50 per day for each patient, instead of the $1.85 allowed the Dayton hospital, which I am informed by the commissioners accounts for the change from support of the Dayton hospital to patronage of the local Xenia hospitals

* * * * * * * * * *

"The commissioners have always allowed these sums, as a board of county commissioners and not as infirmary directors. The benefits of treatment in the hospitals have not been limited to the inmates of the county infirmary or to those who were county or township charges, but have been extended in all cases where the patients were in such financial circumstances as to prohibit necessary hospital or surgical care, except for this assistance from the county.

The questions presented are:

"1st. What constitutes 'a hospital organized or incorporated for purely charitable purposes?' One from which no owner or stockholder derives any profit, and the income of which is entirely devoted to the payment of the expenses of operation?

"2nd. If there is no such hospital in Greene county, what is to prevent the county commissioners from making such payments to some 'purely charitable' hospital outside of Greene county?

"3rd. Who are the 'indigent poor of the county?' Only the inmates of the county infirmary, and other township and county charges, or does it not include all persons whose financial circumstances are such that they can not obtain necessary medical or surgical treatment?

"4th. Should not the allowance if made at all, be made by the commissioners as commissioners, and not as infirmary directors?

"5th. In so much as the Xenia hospitals are the property of local physicians, and if the payments made to them in the past are not within the provisions of section 2502, can such payments be made under section 2546 of the General Code, provided bids are taken, contracts made, quarterly reports made by the physicians, and if one of the physicians is given all the white patients of the county needing hospital care, and the other is given the colored patients?

"Would hospital care be medical relief under section 2546, and might one physician contract to give such medical relief to persons living outside of his respective township?"

The answers to your questions depend mainly upon the construction to be placed upon section 2502 G. C., but I believe it will assist us, in placing a proper construction upon this statute, to consider the act as it was originally passed. Said act was passed in 1902 and is found in 95 O. L. 644. It is entitled:

"An act to provide for the relief of benevolent and charitable hospitals in the state of Ohio."

The act as originally passed reads as follows:

"That in any county in the state of Ohio, except in counties containing hospitals supported by public funds in which is operated, by any corporation or association of persons, a hospital organized or incorporated for purely charitable purposes, in which all the indigent poor of the county requiring the same shall receive medical and surgical treatment free of charge, the county commissioners of such counties may in their discretion pay to such hospital association out of the county poor fund a sum not to exceed twenty-five hundred ($2,500) dollars per year, payable on the first day of January and July, in equal payments, for the maintenance and support of such indigent poor so requiring such treatment, and the reimbursement of such organization so operating such hospital. Provided that nothing in this act shall be held to authorize the payment of public funds to any sectarian institution."

This act became section 922-4 of the Revised Statutes and afterwards became section 2502 of the General Code. Section 2502 G. C. reads as follows:

"Except in counties containing hospitals supported by public funds, the commissioners of any county, in their discretion, may pay to a hospital organized or incorporated for purely charitable purposes, in which the indigent poor of the county may receive free of charge needed medical and surgical treatment, a sum not to exceed twenty five hundred dollars each year. Such amount shall be paid from the county poor fund in equal payments on the first day of January and July, and shall be for the maintenance and support of such indigent poor and the reimbursement of such hospital for treatment thereof. Nothing herein shall authorize the payment of public funds to a sectarian institution."

Let us first analyze the provisions of section 2502 G. C., with a view of ascertaining the conditions under which county commissioners may pay money to a hospital, and, secondly why they pay money to such a hospital. In the first place, if a county contains a hospital or hospitals supported by public funds, the commissioners can in no

case pay money to other hospitals. If a county contains no hospital or hospitals supported by public funds, two conditions must obtain before the county commissioners can pay money to a hospital:

1. The hospital must be incorporated or organized for purely charitable purposes.
2. The indigent poor of the county must be entitled to receive needed medical and surgical treatment therein, free of charge.

If these two conditions obtain, then the county commissioners may pay to such hospital, not to exceed twenty-five hundred dollars each year for the following purposes:

1. For the maintenance and support of such indigent poor.
2. For the reimbursement of such hospital for treatment thereof.

It will help us to understand the true construction to be placed upon this statute if we remember that there is no provision in the same suggesting that there may be contractual arrangements had between the county commissioners and the hospital. There is nothing whatever suggested in reference to a contractual relation existing between the county commissioners and the hospital. The county commissioners do not pay the hospital a certain amount each year, on condition that the hospital receives for treatment the needy poor of the county; but the county commissioners pay the hospital a certain amount each year because the hospital receives the indigent poor of the county free of charge for needed medical and surgical treatment.

Whatever the county commissioners do is purely discretionary on their part. The hospital may receive aid from the county and it may not receive aid. It may receive aid this year and not receive it next year. What the county commissioners pay to the hospital is with a view of helping and relieving the hospital in its charitable work, and not primarily with the object of paying the hospital for rendering services free of charge to the indigent poor of the county. This is plainly evidenced in the title of the act, which is, as suggested above, "to provide for the *relief* of benevolent and charitable hospitals."

If a hospital is organized or incorporated for purely charitable purposes, and if it receives the indigent poor of the county for needed medical and surgical treatment free of charge, then the county commissioners may in their discretion pay the hospital some amount each year, but not exceeding twenty-five hundred dollars. But what they do pay is in the nature of an aid or relief to a worthy cause, and not in the nature of an obligation which they owe as a matter of right. It is a case in which the county manifests its good will in a substantial way, and not one in which it is meeting an obligation for support rendered the indigent poor of the county. This is fairly evident from the fact that the county commissioners are not authorized to pay a hospital any sum of money unless it be organized or incorporated for purely charitable purposes.

So let us note again the logical order of the provisions of this statute:

1. A hospital must be organized or incorporated for purely charitable purposes.
2. It must render, free of charge, needed medical and surgical treatment to the indigent poor of the county.

Then, these two precedent and necessary conditions obtaining, the county commissioners may, if they think best, allow said hospital a sum each year, said sum, however, not exceeding twenty-five hundred dollars per year.

If the above construction placed upon the said statute is correct, your county commissioners have no authority, under the provisions of section 2502 G. C., to pay any hospital any sum of money whatever, unless (1) the hospital is organized or incorporated for purely charitable purposes and (2) unless it is open to the indigent poor of the county, where they may receive, free of charge, needed medical and surgical treatment.

If these two precedent conditions obtain, then your county commissioners may in their discretion pay to said hospital a certain sum each year, not exceeding twenty-five hundred dollars.

It is to be noted that under the law as it was originally passed, the hospital must

have been located in the county before the county commissioners could pay it any amount. But under the law as it now is, I am of the opinion that your county commissioners could pay a sum each year to a hospital located outside the county, provided the two above conditions obtain in reference to the hospital.

I will now take up your questions in their order:

1. You have possibly answered your first question about as well as it can be answered. "Organized or incorporated for purely charitable purposes" implies that the organizers had in mind the public at large and not themselves. They are desirous of enriching the public, and not themselves being enriched at the expense of the public. They are in the business not for the profits they make but for the good they may do their fellow men. In other words, they organized not for profit and conduct the hospitals not for profit.

2. As said above, your county commissioners may make payments to some "purely charitable" hospital outside of Greene county, provided said hospital is giving the indigent poor of the county of Greene needed medical and surgical treatment free of charge.

3. As to the scope and meaning of the word "indigent:" There seems to be nothing in the statute which would limit the scope of this word to the poor who are wards of the county. In fact the terms of the statute seem to indicate the opposite.

Webster says indigent persons are those—

"destitute of property or means of comfortable subsistence; needy; poor."

It is to such persons that the word refers, in my opinion, and not merely to those who are inmates of the county infirmary or children's home, or who are county or township charges.

4. The board of infirmary directors is abolished. The duties which were formerly performed by the infirmfiry directors are now performed by the county commissioners. The allowance provided for in said section would be made, if at all, by the county commissioners in their capacity as county commissioners.

5. You ask whether your county commissioners would be authorized to pay the Xenia hospitals, which are maintained by local physicians, under and by virtue of the provisions of section 2546 G. C. If you mean to inquire whether the provisions of section 2546 G. C. could be taken in connection with the provisions of section 2502 G. C., and thus enable your county commissioners to pay the physicians who are conducting the Xenia hospitals, in the manner provided for in section 2502 G. C., it is my opinion that this can not be done. There could be no objection to any one of the physicians conducting the hospitals in Xenia submitting bids to the county commissioners to give relief to the poor and entering into a contract with the county commissioners for this purpose.

Section 2544 G. C. provides:

> "In any county having an infirmary, when the trustees of a township, after making the inquiry provided by law, are of the opinion that the person complained of is entitled to admission to the county infirmary, they shall forthwith transmit a statement of the facts to the superintendent of the infirmary, and if it appears that such person is legally settled in the township or has no legal settlement in this state, or that such settlement is unknown, and that the superintendent of the infirmary is satisfied that he should become a county charge, they shall forthwith receive and provide for him in such institution, or otherwise * * *."

That is to say, if after the trustees of a township are notified that there lives a person in such township who is destitute of means or needs public relief, the trustees,

or one of them, shall forthwith make an investigation and ascertain certain facts, among which is the settlement of such person, and if the trustees are then of the opinion that such person is entitiled to admission to the county infirmary, they shall transmit a statement of the facts in relation thereto to the superintendent of the infirmary, and if the superintendent of the infirmary is satisfied that such person should become a county charge, he shall be received either in the county infirmary or provided for otherwise. If such person is entitled to hospital care and the same cannot be furnished at the infirmary, I am of the opinion that under the above provisions such care and attention may be had outside of the infirmary, that is, in a hospital located other than at the infirmary. I am of the opinion also that the board of county commissioners have a right to enter into a contract with the owner or keeper of a hospital that if any such persons so accepted by them shall be received during the year into such hospital, the costs and expenses thereof shall be at particular rates, that is, a certain amount for the operating table, and a certain amount per day while such indigent persons are in such hospital, but under the above sections the costs and expenses thereof must be paid from the poor funds of the county.

I might call your attention to the provisions of sections 3138-1 and 3138-2 G. C. The act containing these sections is found in 101 O. L. 166, and is styled:

> "An act to authorize the board of commissioners of any county to render assistance to a corporation or association maintaining a hospital for charitable purposes."

Section 3138-1 G. C. reads as follows:

> "That the board of county commissioners of any county may enter into an agreement with a corporation or association, organized for charitable purposes, or if there is no such corporation or association, then with any corporation or association organized for the purpose of maintaining and operating a hospital in any county where a hospital has been established, or may hereafter be established, for the care of the indigent sick and disabled, excepting persons afflicted with pulmonary tuberculosis, upon such terms and conditions as may be agreed upon between said commissioners, and such corporation or association, and said commissioners shall provide for the payment of the amount agreed upon, either in one payment, or installments, or so much from year to year as the parties stipulate."

It will be noted that under the provisions of this section the county commissioners may enter into an agreement with a corporation or association organized for charitable purposes. In this respect the provisions of this section differ from those of section 2502 G. C. Further, the provisions of this section are broad enough to authorize the county commissioners to enter into an agreement with any corporation or association organized for the purpose of maintaining and operating a hospital, provided there is no corporation or association within the county organized for charitable purposes. It is possible that your county commissioners can avail themselves of the provisions of this section, but I desire to call your attention to the fact that the section reads:

> "any corporation or association organized for the purpose of maintaining and operating a hospital."

This might be, and possibly would be, so construed as to prevent the county commissioners from entering into a contract with a mere individual maintaining and operating a hospital. It seems as if the provisions of section 3138-1 G. C. contemplate a corporation or association organized for such purpose.

In passing I desire to call attention to an opinion rendered by my predecessor, Hon. Edward C. Turner, and found in Vol. I of the Opinions of the Attorney General for 1916, p. 237, under date of February 9, 1916. In discussing the provisions of section 2502 G. C., Mr. Turner argued that the county commissioners might contract with a hospital under said provisions. With this language and line of argument I do not concur, for the reason that there are no provisions in said section warranting such a conclusion.

I might also call attention to section 8 of Article VI of the constitution of Ohio. There might be some question raised as to whether section 2502 G. C. is constitutional, in view of section 8 of Article VI of the Ohio constitution, but in reference to this matter you do not inquire and I am not passing upon it.

Very truly yours,
JOSEPH McGHEE,
Attorney-General.

516.

JUSTICE OF THE PEACE—WHEN PORTION OF TOWNSHIP OF HIS RESIDENCE IS ANNEXED TO CITY THAT HAS ABOLISHED OFFICE OF JUSTICE OF THE PEACE—HAS NO AUTHORITY TO CONTINUE TO ACT AS JUSTICE—MAY HOLD HIS OFFICE BY MOVING INTO PORTION OF TOWNSHIP NOT ANNEXED.

1. *Where a justice of the peace resides in a portion of a township adjoining a township whose township lines are coterminous with the city, and such portion of the township is annexed to said city and township, and by statute the office of justice of the peace has been abolished in said city, provision being made for a municipal court by an act of legislature, such justice of the peace residing in the portion of a township so annexed can not serve out his term and is without authority of law to continue as justice of the peace in the city.*

2. *If said justice of the peace, now living in the portion of an adjoining township to a city and township wherein the office of justice of the peace has been abolished by statute, desires to retain his commission and serve out his term, it will be necessary for him, within a reasonable time, to move into a portion of his township which is not contained in the territory annexed to said city and township.*

COLUMBUS, OHIO, August 10, 1917.

HON. JARED P. HUXLEY, *Prosecuting Attorney, Youngstown, Ohio.*

Attention Mr. H. H. Hull, Asst. Prosecuting Attorney.

DEAR SIR:—I have your communication of July 25, 1917, in which you ask for an opinion upon the following state of facts:

> "There is a situation growing out of the annexation of a portion of a township adjoining Youngstown township which I would like to submit to you for your opinion.
>
> "The question I desire to present is:
>
> " 'What effect will such an annexation have upon the commission of an acting Justice of the Peace who now lives, and who will be living, in that part of the adjoining township which will be annexed to the city of Youngstown?'
>
> "As you know, the act of legislature abolished justice courts in the city of Youngstown and provided us instead with a municipal court. I might

add that the justice who is now living in said portion of said adjoining township desires to retain his commission and if necessary he can move into a portion of the township which is not annexed, but this will entail great inconvenience for him."

As you state, section 56 of the act providing for a municipal court in Youngstown, section 1579-182 G. C., abolished the office of justice and justices of the peace in and for Youngstown township, Mahoning county, Ohio, and no provision was made, as in similar acts, creating municipal courts, for the justice continuing until the end of his term of office.

Section 1713 G. C. provides among other things:

" * * * No justice may be deprived of his commission until the expiration of the term for which he was elected."

So the justice who is now living in the township adjoining Youngstown township a portion of which is to be annexed to the city of Youngstown, still holds his commission and has jurisdiction in said township. However, when the annexation of that portion of the township in which the justice of the peace now resides is completed, he will then be in the territory in which the statute has abolished the office of justice of the peace.

If there were such office as a justice of the peace in Youngstown, then under the decision of our supreme court, in State ex rel. v. Morse, 94 O. S. 435, the justice would be authorized to act as justice in said city.

Section 1716 G. C. provides:

"If a part of a township is attached to another township, justices of the peace residing within the limits of that part so attached shall execute the duties of their office in the township to which such part is attached in the same manner as if elected for such township, and may hold court therein."

If the office of justice of the peace had not been abolished in Youngstown township, even if by special act the number of justices were limited, still it is decided in Pfeiffer v. Green, 3 O N. P. 156, that a justice brought into the limits of a city would be permitted to complete his unexpired term. But it is my opinion that the provision of the municipal court act abolishing the office of justice of the peace is effectual in preventing any justice from exercising his jurisdiction in that territory.

As stated before, the justice still has a commission in the township, adjoining Youngstown township, in which he resides, prior to the proposed annexation, and it is my view that while he is not bound to move either in or out of the territory that has been attached, if he sees fit to remain in that part of the township which is annexed, he will in effect surrender his office and resign his commission; or, by moving out of that portion of the territory which is annexed, into the portion of his old township which is not affected by the annexation, he can still continue out his term.

The Constitution of 1802 provided that certain judges should be residents of their respective districts. In State ex rel. v. Choate, 11 Ohio Rep. 511, the court held that where the lines of the district had been changed so that a judge living in one district was by the change of the territorial lines thrown over into another district, his failure to change his residence into some portion of his own district forfeited his office.

So it is my opinion that if the justice of the peace, of whom you speak, desires to retain his commission and serve out his term, it will be necessary for him to move into a portion of his township which is not annexed to the city of Youngstown.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

517.

COUNTY RECORDER—RETAINS OFFICE UNTIL SUCCESSOR IS ELECTED AND QUALIFIES—WHEN RECORDER ELECT DIES BEFORE QUALIFYING.

1. *When a county recorder elect dies before qualifying, the encumbent of the office under section 8 G. C. continues in said office until a successor is elected and qualifies.*

2. *Where F. B. D. was elected county recorder in November, 1916, to succeed C. M., whose regular term expires the first Monday of September, 1917, but dies without qualifying, C. M. continues in his office until a successor, elected at the election in November, 1918, qualifies and enters upon his term of office on the first Monday of September, 1919.*

COLUMBUS, OHIO, August 10, 1917.

HON. CHARLES L. FLORY, *Prosecuting Attorney, Newark, Ohio.*

DEAR SIR:—I am in receipt of your inquiry regarding a question relative to your county recorder and enclosing your opinion upon same. I desire to thank you for the assistance rendered me by the able opinion and brief submitted by you. The request for opinion as stated by you was upon the following state of facts:

> "Frank B. Dudgeon was elected November 7, 1916, to succeed the present county recorder, Carl Martin, whose term would ordinarily expire on the first Monday in September, 1917. On April 23, 1917, and before he had taken any step whatever towards qualifying as recorder, Frank B. Dudgeon died.
>
> "You inquire:
>
> "1st. Will there be a vacancy in the office of recorder on the first Monday in September, 1917, to be filled by the county commissioners, or will the present recorder hold over until his successor is elected and qualified?
>
> "2nd. Whether a vacancy will exist to be filled by appointment by the commissioners, or whether the present recorder will hold over, when will be held the first election to which a recorder will be elected? And when will such person so elected qualify and take office as recorder?"

As you have covered the question as well as it could be covered, I am adopting the following portion of the opinion you have submitted for my consideration:

> 'There are certain provisions of the constitution and General Code pertinent to your question as to whether there will be a vacancy in the office of recorder on the first Monday of September, 1917, or whether the present recorder will hold over.
>
> "Article 10, section 2 of the constitution of Ohio provides:
>
> " 'County officers shall be elected on the first Tuesday after the first Monday in November, by the electors of each county in such manner, and for such term, not exceeding three years, as may be provided by law.'
>
> "Section 2750 G. C. provides:
>
> " 'There shall be elected biennially, in each county, a county recorder, who shall hold his office for two years, beginning on the first Monday in September next after his election.'
>
> 'Section 2755 G. C. provides:
>
> " 'If a *vacancy* occurs in the office of recorder, the commissioners shall

appoint a suitable person to fill it, who shall give bond, take the oath of office, as provided by law for county recorders, and shall hold his office until his successor is elected and qualified.'

"Section 8 G. C. provides:

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

"As to a county recorder, it is not 'otherwise provided in the constitution or laws,' so that a county recorder holds his office until his successor is elected or appointed and also qualified.

"There are several supreme court decisions touching, more or less directly, upon the question as to whether the death of Mr. Dudgeon, prior to taking any steps to qualify, will result in a vacancy on the first Monday in September, 1917, to be filled by the commissioners.

"In State ex rel. v. Metcalfe, 80 O. S. 244, the second paragraph of the syllabus reads:

" 'The death of a person elected to an office, before he qualifies, does not create a vacancy where the constitution provides that an incumbent in an office shall hold for his term and until the election and qualification of a successor.'

"While the constitution of Ohio does not specifically provide that a recorder shall hold his office until his successor is elected and qualified, section 8 G. C. does so provide * * *.

"In State ex rel. v. Metcalfe, supra, Elias E.Roberts was elected at the November election, 1908, to the office of circuit judge; his term of office to commence February 9, 1909. But, without having qualified, Judge Roberts died on November 22, 1908. On p. 265 the court says:

" 'We should not allow ourselves to become confused by the use of forms of expression. It seems to be assumed that a vacancy must necessarily have been created by the decease of Judge Roberts, taking effect February 9, 1909, because the successor to be elected will be chosen for an unexpired term and there cannot be an unexpired term without a vacancy in the term of which it is a part; hence there was a vacancy in Judge Robert's term. With due respect we wish to urge that Judge Roberts had no term. His untimely death prevented such result. On the other hand his decease, as hereinbefore indicated, was the incident on which the constitution, supplemented by the appointment of the respondent, acted in a way to prevent a vacancy. An unexpired term is not synonymous with a vacancy. The former is the remainder of a period prescribed by law after a portion of such time has passed; a vacancy exists where there is no person lawfully authorized to assume and exercise at present the duties of the office. And if provision, either by constitution *or statute*, has been made for preventing a vacancy, it is a misuse of terms to assume that a vacancy has occurred. If, therefore, at the expiration of the six years for which Judge Burrows was elected, a person qualified to hold it was in possession of the office, no vacancy existed. It is held distinctly in Kimberlain v. The State, supra, that: "The death of a person elected to an office before he qualifies does not create a vacancy where the constitution provides that the incumbent shall hold office for his term and until the election and qualification of his successor." '

"On page 266 the court proceeds:

" 'It is held in Commonwealth ex rel. v. Hanley, 9 Pa. St. 513, that:

" 'The death of the person elected to fill the office of clerk of the orphan's

court, before he has qualified himself according to law, does not create a vacancy, but the incumbent who is authorized to hold the office until his successor shall be qualified, holds over.' And Rogers, J., in the opinion observes: 'It will be observed that the terms on which alone the governor can appoint are a vacancy in the office, and that there can be a vacancy in an office when there is a person in possession whom all acknowledge to be rightfully in possession, having a perfect right to exercise all the powers and duties of the office, and to receive and enjoy all its emoluments, is a difficult position to comprehend. It is an abuse of terms to say that at the time the governor issued his commission to the relator the office was vacant, for no person can plausibly deny that the respondent was the rightful possessor of the office at the time.' So here, it is conceded that the defendant was rightfully in the office at the time of the appointment of the relator unless his powers ceased with the expiration of the six year portion of the term of Judge Burrows. To sustain the claim that they did so cease would, we think, be to fly in the face of the weight of authority; and the manifest purpose of our constitution and statutes, which purpose, as heretofore pointed out, is to secure continuity and steadiness of service and to discourage the creation of vacancies.'

"In State ex rel. McCracken, 51 O. S. 129, the court says:

" 'The recognized policy of the state is to avoid, if practicable, the creation of a vacancy in an elective office, and where the right to hold over is given in language that is not limited, and the same is not otherwise qualified, a court would hardly be justified in seeking for an unnatural construction by which a limit would be placed upon the right. Here the words are: "And until his successor is elected and qualified," and nothing is found in the context to restrict the natural import of the text as given in the section quoted.

"In contemplation of law there can be no vacancy in an office so long as there is a person in possession of the office legally qualified to perform the duties. This conclusion is distinctly supported by the holding in the State ex rel. v. Howe, 25 O. S. 588: 'That the framers of the constitution, in providing for filling vacancies in office, did not regard an office as vacant, when an incumbent might lawfully hold over his definite term until a successor was elected or appointed and qualified, is manifest from other provisions in the instrument. By section 4 of article 10, the duration of the term of township officers is fixed at one year from the Monday next succeeding their election, and until their successors are qualified. It would hardly be contended that, under this provision, a township office becomes vacant at the end of the year, from the mere fact that no successor to the incumbent has qualified.'

" 'We think there is no vacancy in the office of clerk of the court of common pleas, but that the persons duly elected, and holding on February 8, 1894, are entitled to perform the duties until their successors, respectively, elected at the November election, 1893, are qualified.'

"In State ex rel. v. Wright, 56 O. S. 553, the court says:

" 'His right to serve after the expiration of the designated period, until the qualification of his successor, being conferred by statute at the time of his election, is no less a part of his statutory term of office, than is the fixed period itself; and while he is so serving, *there can be no vacancy in the office, in any proper sense of the term, for there is an actual incumbent of the office legally*

entitled to hold the same. As was said by McIlvain, J., in State v. Howe, 25 Ohio St. 588, 596, "the incumbent continues in office, not as a mere *de facto* officer or *locum tenens*, but as its rightful possessor until such successor" is duly chosen and qualified. And by a successor, is not meant a mere temporary appointee, but one regularly chosen in succession to the office, to take the place of the predecessor on account of the cessation of his right of occupancy.'

"From the foregoing authorities, I conclude that the death of Frank B. Dudgeon, after his election, but before his qualification, will not create a vacancy in the office of recorder on the first Monday in September, 1917. And since the commissioners are authorized by section 2755 G. C. to appoint a recorder only when a *vacancy* occurs in that office, the county commissioners will have no authority to make such an appointment in the present instance.

"The cases above cited are also authority for holding that the present recorder, Carl Martin, holds over until his successor is elected and qualified; that the right of the present recorder to hold over is as much a part of his term as the definite two years for which he was elected. Speaking on this subject the court says, in State ex rel. v. Metcalfe on p. 264:

" 'We are of opinion that he resigned the entire authority which as a judge he possessed. That embraced as well the authority to hold over until a successor should be elected and qualified as the remaining portion of the six years, the extent of his term as originally conferred. Using the language of Williams, J., in The State ex rel. v. Wright, 56 Ohio St. 540, speaking of the office of mayor: "His right to serve after the expiration of the designated period, until the qualification of his successor, being conferred by statute at the time of his election, is no less a part of his statutory term of office than is the fixed period itself; and while he is so serving there can be no vacancy in the office in any proper sense of the term, for there is an actual incumbent of the office legally entitled to hold the same," citing The State v. Howe, supra. In Kimberlain v. The State, 14 L. R. A. (Ind.) 858, it is held that: "The period between the expiration of his term and the qualification of his successor is as much a part of the incumbent's term of office as the fixed statutory period, where the law provides that he shall hold over until his successor qualifies." See also Mechem on pubic offices, here and there.'

"Since the present recorder has the right of holding over, the question arises, for what length of time does he hold?"

As hereinbefore stated, Art. X, section 2 of the constitution provides:

"County officers shall be elected * * * in such manner, and for such term, not exceeding three years, as may be provided by law."

Art. XVII, section 2 of the constitution, as adopted November 7, 1905, reads:

"* * * and the term of office of all elective county, township, municipal and school officers shall be such even numbers of years not exceeding four (4) years as may be so prescribed. * * *."

It is my view that section 2 of article X of the constitution, in so far as there is any conflict, is impliedly repealed by the later provisions of section 2 of article XVII.

State ex rel. v. Creamer, 83 O. S. 412.
State ex rel. v. Cox, 90 O. S. 219-225.

The provision of section 2750 G. C. is that the term of the county recorder shall be for two years.

Under article XVII, section 2, the legislature could have made the term of county recorder four years, but four years would be the constitutional limitation, and the legislature could not provide for a term exceeding four years.

Bearing in mind these two provisions of the constitution, I conclude that Mr. Martin's present two-year term will expire on the first Monday in September, 1917, and since section 8 G. C. continues his term until his successor is elected or appointed and qualified, he would continue in office for not exceeding two additional years, unless otherwise provided.

Section 2750 G. C. provides that a county recorder shall be elected biennially, and since the regular time for the election of recorder will occur in November, 1918, it will be necessary to make provision for same. But the recorder elected at the election in November, 1918, will not take office until the first Monday in September, 1919, and as the provisions of section 10 G. C. for an election for the unexpired term only applies in cases of "vacancy," and since there has been no vacancy in the office of recorder, Mr. Martin merely holding over, consequently Mr. Martin will continue in the office of county recorder until his successor, elected at the November election, qualifies and enters upon his term on the first Monday of September, 1919.

I am not unmindful of the holding of our supreme court in State v. Brewster, 44 O. S. 589, wherein it was held that the limitation in article X, section 2 of the constitution, prohibited a county recorder from holding beyond three years. As hereinbefore stated, I am of the opinion that this provision has been impliedly repeal d by the enactment of that part of article XVII, section 2 of the constitution, which provides there can be a four-year term for a county officer.

It is my opinion, therefore, that under the state of facts presented, Carl Martin, will continue to serve as county recorder until his successor, elected at the regular November election in 1918, qualifies and takes his office the first Monday in September, 1919.

Very truly yours,
JOSEPH McGHEE,
Attorney-General.

518.

OHIO BOARD OF ADMINISTRATION—CONVICT LABOR—ERECTION OF BUILDINGS—WHEN PLANS, ETC., MUST BE PREPARED—NOT NECESSARY TO EMPLOY ARCHITECT—COMPETITIVE BIDDING—WHEN NECESSARY.

The amendments to the state building code, sections 2314 *et seq. G. C., found in* 107 *O. L.* 453, *in connection with the statutes under which the Ohio board of administration is authorized to conduct industries at the various state institutions and to direct and employ the labor of convicts and inmates of such institutions, require that when a state building is to be erected under the supervision of the board of administration, at an aggregate cost in excess of* $3,000.00, *including the cost of such labor and materials as are to be furnished by the state, plans, specifications, estimates, etc., covering the entire improvement, shall be prepared; but the contract to be let by competitive bidding under the building code, if any, is to include only such portions of the work as are not done by the board of administration itself.*

It is not necessary, under section 2314 *G. C. as amended* (107 *O. L.* 453) *to employ an architect, if the "owner," as referred to in said section, can avail himself or itself of the services of a person competent to prepare the papers therein specified, without such independent employment.*

Where all the labor and a part of the materials of a state improvement are to be furnished by the state, and the aggregate cost of the entire improvement exceeds $3,000.00, *the balance must be let by competitive bidding, as provided in the "state building code," and such materials may not be furnished through the activities of a purchasing department conducted under the authority of the state department supervising the improvement.*

COLUMBUS, OHIO, August 10, 1917.

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

DEAR SIR:—I have your letter of July 28, 1917, in which, speaking for yourself and the board of administration, you request my opinion upon the following question:

> "On page 218 of the indexed appropriations of the last general assembly, H. B. No. 584, under the caption of 'Ohio Board of Administration,' appropriations are made for the erection of cottages for numerous institutions under this board.
>
> "The former appropriation bill that expired June 30, 1917, carried a clause exempting the board of administration from the provisions of section 2314 of the General Code of Ohio. This provision has appeared in the last two or three appropriation bills. The last general assembly failed to include this provision in the appropriation bill and a new building code was enacted which provides that all structures, improvements, equipment, etc., in excess of $3,000.00, shall be advertised as the law provides.
>
> "The board of administration is willing to comply with the building code of Ohio in part, but they believe that there are certain structures, for which appropriations have been made to them, that should be constructed in conformity with the building code, while on the other hand they feel that numerous cottages can be constructed by the use of their own labor and materials so far as they may have the same, and any other materials necessary to complete these buildings they desire to purchase by competitive bids through their purchasing department. Their claim is that they can save the fees that would go to an architect and the percentage of profit that would

go to a contractor, and can provide labor of inmates of their institutions, and in fact procure a much cheaper and more satisfactory structure. * * *

"* * * In fact, they are only asking to have waived the advertising for competitive bids as a whole on certain improvements.

"The board of administration claims that the fact that the appropriation bill this year did not carry the voiding of section 2314 was an oversight, and you can probably get further information by taking the matter up with the budget commissioner.

"This opinion is at the joint request of the board of administration and the auditor of state in order that thay may speedily determine the policy that must be construed. We desire you to render an opinion stating whether or not the board of administration can proceed along the lines above suggested."

I have omitted from your statement of facts certain procedure that the board of administration is willing to follow.

I find that my predecessor, Hon. Edward C. Turner, considered the very question which you have asked of me. You submitted it to him on June 22, 1915, under the apparent erroneous impression that the budget appropriation bill of 1915 omitted the exemption clause, which it had been customary theretofore to insert in appropriation bills. As a matter of fact, the exemption clause was in the 1915 bill, as you have probably since discovered, but it is found in a general section in 106 O. L. 827, instead of in connection with the specific appropriations, as had been the custom theretofore.

It is true, as you state, that the present appropriation bill does not contain the exemption clause. The question, however, is similar to that considered by Mr. Turner though neither he nor you at that time were aware that the question did not then exist.

The opinion which Mr. Turner prepared will be found in Vol. II of Opinions of the Attorney-General for 1915, p. 1142. The conclusions which he reached were arrived at under the general laws of the state and particularly sections 2228 to 2230, both inclusive, sections 1845 to 1848, both inclusive, and section 1858 of the General Code. Section 1869 G. C. was also referred to.

The general purport of these sections, a part of which relate to the employment of convicts in the penitentiary and Ohio state reformatory, and part to the development of industries at the benevolent institutions of the state, is expressly to authorize, and indeed to direct, the board of administration to find productive employment in state work for the wards of the state under its custody and control.

Both Mr. Turner and his immediate predecessor, Mr. Hogan, who passed upon the effect of the customary exemption clause, in an opinion addressed to the board of administration under date of July 21, 1914, Vol. I, Annual Report of the Attorney-General for 1914, p. 1031, agreed that the state building code, so called, and particularly section 2314 of the General Code, was in effect modified by the then subsequent enactment of these sections which could not be reconciled with it. So that without the exemption clause in the appropriation, section 2314 G. C. Did not necessarily apply, unmodified, the procedure of the Ohio board of administration in the construction of a structural improvement under the supervision of that board, when it was practicable to employ laborers under the control of the board as wards of the state or to use materials produced at the state institutions.

Mr. Turner's specific conclusions were as follows: (Vol. II, Opinions of Attorney-General for 1915, p. 1145).

"Any building material which may be produced at any state institu-

tion under the control and management of the Ohio board of administration may be excepted from the contract required to be entered into under section 2314 G. C., and furnished directly by one institution to the other.

"Any labor of convicts, or otherwise, which the state board of administration may lawfully employ upon construction work is likewise to be eliminated from the contract which is required to be entered into by section 2314 G. C.

"In case the labor to be so furnished by the board of administration embraces that on all branches of the work, then the only contract to be let should be for the materials, and not for the doing of the work, unless some of the materials are to be likewise purchased from another institution.

"In case the labor is to be furnished on certain branches of the work only, the general contract to be let should exclude these branches of the work, and the branches upon which the labor of inmates is to be employed should be provided for by separate contracts for the purchase of materials.

"In cases in which materials are to be furnished by one institution to another for construction work, the contract should be for the performance of the labor only, except to the extent, as already pointed out, to which the labor of inmates may be employed.

"No improvements at the penitentiary are to be governed at all by section 2314 G. C., such improvements being expressly excepted by that section itself from its remaining terms.

"The aggregate cost of an improvement within the meaning of section 2314 G. C., in the event of the use of materials or labor furnished by a state institution, is the estimated cost of the labor and materials not so furnished."

I may say that I entirely agree with Mr. Turner in his interpretation of the law as he then found it. It does not follow, however, that this is the law at the present time, for section 2314 G. C. has since been amended and now has whatever force must be accorded to a later enactment. The amendment is found in 107 O. L. 453. The act amends several sections of the so-called state building code, but it will be necessary to quote only sections 2314 and 2317 G. C. They provide as follows:

"Section 2314. Whenever any building or structure for the use of the state or any institution supported in whole or in part by the state or in or upon the public works of the state that are administered by the superintendent of public works, is to be erected or constructed, or whenever additions or alterations, structural or other improvements are to be made, or heating, cooling or ventilating plants or other equipment to be installed for the use of the state, or in or upon such public works or in or for an institution supported in whole or in part by the state, or for the supply of material therefor, the aggregate cost of which exceeds three thouands dollars, each officer, board or other authority, upon whom devolves the duty of constructing, erecting, altering, or installing the same, hereinafter called the owner, shall make or cause to be made, by an architect or engineer whose contract of employment shall be prepared and approved by the attorney-general and filed with the auditor of state, the following: full and accurate plans, suitable for the use of mechanics and other builders in such construction, improvement, addition, alteration, or installation; and details to scale and full sized, so drawn and represented as to be easily understood; accurate bills showing the exact quantity of different kinds of material necessary to the construction; definite and complete specifications of the work to be performed, together with such directions as will enable a competent mechanic or other builder to carry them out and afford bidders all needful information; a full and accurate estimate of each item of

expense and of the aggregate cost thereof, and such further data as may be required by the governor, secretary of state and auditor of state acting as and being the state building commission. In the absence of the governor, the secretary to the governor, in the absence of the secretary of state, the assistant secretary of state, and in the absence of the auditor of state, the deputy auditor of state, shall act as members of such commission."

"Section 2317. After the proceedings required by sections 2314 and 2315 have been complied with, such owner shall give public notice of the time and place when and where proposals will be received for performing the labor and furnishing the materials of such construction, improvement, alteration, addition or installation, and a contract or contracts therefor awarded, *except for materials manufactured by the state or labor supplied by the Ohio board of administration that may enter into the same.* The form of proposal approved by the state building commission shall be used, and a proposal shall be invalid and not considered unless such form is used without change, alteration or addition. Bidders may be permitted to bid upon all the branches of work and materials to be furnished and supplied, or upon any thereof, or alternately upon all or any thereof."

The purport of these sections is plain. Under them what was left to implication in the state of the law as it was when Mr. Turner considered it, is covered by expression. Mr. Turner's first conclusion is of course exactly correct and section 2317 supra expressly provides therefor. So also with his second, third, fourth and fifth conclusions. His sixth conclusion is changed, as I shall hereinafter point out. His seventh conclusion is reversed by the amendment. No longer is the aggregate cost of an improvement within the meaning of section 2314 to be determined by the estimated cost of labor and materials not furnished by the state. But it is rather clear, from the consideration of sections 2314 and 2317 supra, together, that the estimated cost of the improvement is to be determined without regard to the fact that a part of the labor or materials, or both, is to be furnished by the state. So that if the board of administration contemplates the erection of a structural improvement and the furnishing of such proportion of the labor and materials thereon as will leave the remainder not so furnished of a less aggregate estimated cost than $3,000.00, that fact alone will not suffice to take the whole proceeding out of the operation of section 2314 and the related statutes. On the contrary, the total aggregate cost, including that of the labor and materials to be furnished by the state, must be considered in determining whether it will be necessary to comply with section 2314 G. C. But when it comes to the letting of the contract, then the labor and materials furnished by the state are to be excepted from the work to be so let.

In short, section 2317 G. C. embodies a recognition of the powers of the board of administration under the other sections referred to by my predecessors.

Section 2314 G. C. then must be complied with if the aggregate cost, including that of the labor and materials to be furnished by the state, exceeds $3,000.00. I point out, however, that section 2314 G. C. merely requires that plans, specifications, details, bills of material, etc., covering the entire work, be prepared and filed.

There is no absolute necessity under this section for the employment of an architect. If the "owner" has in his or its employ a person who is competent to prepare papers necessary to be prepared under section 2314 G. C., such papers may be prepared by such person. It is only when it is necessary to go outside the general service of the state and employ an independent architect or engineer, that contract of employment, to be prepared and approved by the attorney-general, must be entered into.

Therefore, the suggestion of the board of administration, that it is in a position to save architects' fees, can be acted upon and yet section 2314 G. C. may be com

plied with. Also, the suggestion of the board of administration that it is willing to furnish the details, plans, specifications, etc., may be followed, with the remark, however, that the board is not only permitted but required to do this, under section 2314 G. C., if the total cost of an improvement, as hereinbefore interpreted, exceeds $3,000.00.

If, as you say, the only thing the board is asking to have "waived" is the advertising for competitive bids as a whole, you are advised that the statute itself does not require that competitive bids be invited on the whole of the work, but only on that part which remains after the labor and material to be furnished by the state is excluded from the whole.

If, however, the board of administration is desirous of waiving the entire requirement as to the inviting of competitive bids under the building code so called, and obtaining the additional materials through its purchasing department, you are advised that this can not be done. The only thing to be excepted from the contract is materials manufactured or labor supplied by the state. The fact that the board of administration has a purchasing department is of no legal significance in this connection.

In so far as compliance with sections 2314 et seq. G. C. is rendered difficult or burdensome on account of prevailing fluctuations in prices, or made seemingly wasteful because of the elements of expenditure involved in the architect's fee and the contractor's profit, it is of course obvious that these considerations are not admissible. If the board of administration were permitted to evade the law in so far as it applies to that board, on these grounds and on the plea that it is in a position, because of its administrative organization, to furnish adequate substitutes for the things contemplated by the statutes, similar arguments might be advanced by other state departments, as reasons why the law ought to be ignored as to them. But this point needs no discussion. Such considerations are for the legislature and not for the courts or for administrative officers. The law, except as modified as above stated, applies to the board of administration and to the extent that it so applies that board must follow it, even though all concerned might rest under the conviction that economies might be effected by ignoring it.

In this connection let me point out that section 2314, supra, no longer exempts improvements at the penitentiary from its provisions, and that the statutes in their present form do not authorize any different procedure in emergency cases from that required in other cases, except in the rejection of the lowest and best bid and in the making of changes in the plans and specifications which are governed by sections 2320 and 2321 G. C. respectively.

Very truly yours,
JOSEPH McGHEE,
Attorney-General.

519.

APPROVAL—FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN ADAMS, CRAWFORD, FAIRFIELD, HIGHLAND, KNOX, MEDINA, PREBLE, SANDUSKY AND SCIOTO COUNTIES.

COLUMBUS, OHIO, August 11, 1917.

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

DEAR SIR:—I have your communication of August 6, 1917, enclosing the following final resolutions, on which you ask my approval:

"Adams county—Section 'C-2' of the West Union-Sinking Spring road, I. C. H. No. 124.

"Crawford county—Section 'J' of the Columbus-Sandusky road, I. C. H. No. 4.

"Fairfield county—Section 'A-1' of the Baltimore-Reynoldsburg road, I. C. H. No. 461.

"Highland county—Section 'H' of the Allensburg-Lynchburg road, I. C. H. No. 459.

"Knox county—Section 'K' of the Columbus-Wooster road, I. C. H. No. 24.

"Medina county—Section 'P-1' of the Cleveland-Wooster road, I. C. H. No. 25.

"Preble county—Section 'C-2' of the Hamilton-Eaton road, I. C. H. No. 180.

"Sandusky county—Section 'O' of the Fremont-Castalia road, I. C. H. No. 281.

"Scioto county—Section 'A-1' of the Portsmouth-Lucasville road, I. C. H. No. 406. Types 'A,' 'B,' 'C' and 'D.' "

I have carefully examined said final resolutions, find same correct in form and legal and am therefore returning them to you with my approval endorsed thereon.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

520.

APPROVAL—TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE BY THE BOARD OF EDUCATION OF HIGGINSPORT VILLAGE SCHOOL DISTRICT.

COLUMBUS, OHIO, Aug. 11, 1917.

Industrial Commission of Ohio, Columbus, Ohio.
GENTLEMEN:

"RE:—Bonds in the sum of $1,200.00 issued by the board of education of Higginsport village school district for the purpose of repairing school building therein, being six bonds of two hundred dollars each."

I have examined the transcript of proceedings of the board of education of Higginsport village school district in connection with the above bond issue, and I find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds drawn in accordance with the form required and signed by the proper officers will, upon delivery, constitute valid and binding obligations of said village school district.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

521.

APPROVAL—FINAL RESOLUTION FOR ROAD IMPROVEMENT IN MUSKINGUM COUNTY.

COLUMBUS, OHIO, Aug. 11, 1917.

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

DEAR SIR:—I have your communication of August 7, 1917, enclosing the following final resolution, on which you ask my approval:

"Muskingum county—Section 'M-1' of the Zanesville-Dresden road I. C. H. No. 344."

I have carefully examined said final resolution and find same is correct in form and legal, and am therefore returning it to you with my approval endorsed thereon.

Very truly yours,
JOSEPH McGHEE,
Attorney-General.

522.

APPROVAL—FINAL RESOLUTIONS FOR ROAD IMPROVEMENTS IN HOLMES, LAWRENCE, MAHONING AND PUTNAM COUNTIES.

COLUMBUS, OHIO, Aug. 11, 1917.

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

DEAR SIR:—I have your communication of August 7, 1917, enclosing the following final resolutions, on which you ask my approval.

"Holmes county—Section 'A' of the Navarre-Berlin road, I. C. H. No. 79.

"Lawrence county—Section 'K' of the Ohio river road, I. C. H. No. 7.

"Mahoning county—Section 'U-1' of the Akron-Canfield road, I. C. H. No. 87.

"Mahoning county—Section 'R-1' of the Akron-Jamestown road, I. C. H. No. 18.

"Putnam county—Section 'h' of the Kalida-Lima road, I. C. H. No. 134.

I have carefully examined said final resolutions, find same correct in form and legal, and am therefore returning them to you with my approval endorsed thereon.

Very truly yours
JOSEPH McGHEE,
Attorney-General.

523.

TRACTORS—USE OF SAME UPON PUBLIC ROAD—FARMER TRAVELING FROM ONE FIELD TO ANOTHER.

The provisions of section 7246 and section 13421-12 General Code are broad enough to include within the same a farmer passing over the highways of the state from one part of his farm to another with tractors such as are therein set out.

COLUMBUS, OHIO, Aug. 11, 1917.

HON. DAVID A. WEBSTER, *Prosecuting Attorney, Bryan, Ohio.*

DEAR SIR:—I have your communication of July 23, 1917, in which you ask me to place a construction upon our statutes in reference to certain matters mentioned in your communication. The communication reads as follows:

> "I have been asked by one of our progressive farmers, in this community, for a construction of the statute relating to improved highways, and the moving of tractors, over and along said roads, when going to and from their work.
>
> "This farmer's land is divided by an improved highway, and he is the owner of a large tractor equipped with lugs, and it is necessary for him to cross the improved road, but in doing so, he informs me, that he exercises every caution, possible, to not injure the road more than absolutely necessary. At times it is necessary for him to travel upon this public road a distance of twenty or thirty rods. * * *."

The sections of our statute upon which you ask me to place a construction are sections 7246 (107 O. L., 139), and 13421-12 General Code. Section 7246 G. C., reads as follows:

> "No traction engine, trailer, wagon, truck, steam roller, automobile truck or other power vehicle, whether propelled by muscular or motor power, weighing in excess of twelve tons, including weight of vehicle, object or contrivance and load, shall be operated over and upon the improved public streets, highways, bridges or culverts within the state, except as hereinafter provided. This provision shall not apply to vehicles run upon rails or tracks or to fire engines, fire trucks, or other vehicles or apparatus belonging to any municipal or volunteer fire department or used by such department in the discharge of its functions. No object shall be moved over or upon such streets, highways, bridges or culverts upon wheels, rollers or otherwise, except as hereinafter provided, in excess of a total weight of twelve tons including weight of vehicle, object or contrivance and load."

It will be noted that the terms of this section are very broad and comprehensive It is further to be noted that this section does not refer at all to the person using the thing forbidden, but the section refers to the thing itself. Further, this section sets out certain exceptions to which the provisions of the same shall not apply, but in these exceptions there is nothing which would seem to indicate that a farmer who uses a tractor for the purpose of conducting his farm work is to be exempted from the application of this section when it comes to his use of the public highway. The latter part of the said section reads:

> "No object shall be moved over or upon such streets, highways, bridges

or culverts upon wheels, rollers or otherwise, except as hereinafter provided, in excess of a total weight of twelve tons including weight of vehicle, object or contrivance and load."

It will be noted that this section has to do with the weight of the tractor or whatever object it is that is being moved across or along the highway. In connection with this section I would like to call attention to the provisions of section 7251 General Code (107 O. L., 141), which provides in part as follows:

"Any person violating any of the provisions of section 7246 to 7249 inclusive of the General Code shall be liable for all damages resulting to any street, highway, bridge or culvert by reason of such violation. In the case of any injury to a state road such damages shall be collected by civil action brought in the name of the state on the relation of the state highway commissioner and it shall be the duty of the attorney-general or prosecuting attorney of any county to institute such action when so requested by the state highway commissioner and to prosecute the same to final judgment. In the case of an injury to an improved public road, bridge, or culvert of a county such damages shall be recovered by a civil action prosecuted by the county commissioners and in the case of an injury to an improved public street, highway, bridge or culvert of a municipal corporation it shall be the duty of the proper authorities of such municipal corporation to institute an action for the recovery of such damages. All damages collected under the provisions of this section shall be paid into the treasury of the state or proper political subdivisions thereof and credited to any fund for the repair of streets, roads or bridges."

This section throws some light upon the comprehensive scope of section 7246 General Code. The language is "*any person.*" This term "any" is possibly as broad, comprehensive and all-inclusive as any word we have in the English language, and when it is made to apply to any class or group of subjects it is difficult in placing a construction upon the same to make any exception of anything that comes within the class or group. For the present let us turn to section 13421-12 General Code, which reads as follows:

"Whoever drives over the improved highways of the state, or any political subdivision thereof, a traction engine or tractor with tires or wheels equipped with ice picks, spuds, spikes, chains or other protections of any kind extending beyond the cleats shall be fined for each offense not less than ten dollars nor more than one hundred dollars. The terms 'traction' engine or 'tractor' as used in this act, shall apply to all self-propelling engines equipped with metal tired wheels operated or propelled by any form of engine, motor or mechanical power, used for agricultural purposes. No city, county, village or township shall adopt, enforce or maintain any ordinance, rule or regulation contrary to or inconsistent with the terms of this act; or require of any person any license tax upon or registration fee for any traction engine, tractor, or trailer, or any permit or license to operate. Operators of traction engines the drivers of any other vehicle unless some other safe and convenient way is provided, and no public road open to traffic shall be closed to traction engines or tractors."

Here we again find another term similar to the term "any" in so far as its application is concerned—the term "*whoever*" is as broad and comprehensive as any word can be, and in this section we find no exceptions noted. While section 7246 General Code has particular reference to the weight, section 13421-12 has particular reference

to the destructive qualities of the engines used, and provides that "if the engine or tractor has wheels equipped with ice picks, spuds, spikes, chains or other projections,' then he shall be liable to punishment.

It will be noticed that the above section is a radical amendment by the last legislature and is found in 107 O. L., 652. I would like to call your attention especially to the part of the section which reads:

> "* * * The terms 'traction engine' or 'tractor' as used in this act, shall apply to all self-propelling engines equipped with metal-tired wheels operated or propelled by any form of engine, motor, or mechanical power, *used for agricultural purposes.*"

Hence, so far as this section is concerned, it is quite evident that the legislature intended this provision to apply to tractors used in the manner suggested in your communication.

While I am aware that the farmers use these tractors in the legitimate running of their farms and are to be complimented upon their progressive spirit and tendencies, yet, on account of the nature of the terms used in these two sections, it is my opinion that no exception in law could be made which would exempt them from the provisions of the same.

Hence, answering your question specifically, it is my opinion that a farmer who would use a tractor weighing in excess of twelve tons when loaded, or would use a tractor, the rims of which are set with lugs or spikes, on improved highways of the state, would come within the provisions of section 7246 and section 13421-12, respectively, of the General Code.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

524.

ELECTORS OF TOWNSHIP—MAY NOT VOTE IN CITY UNTIL TOWNSHIP ACTUALLY ANNEXED—ALTHOUGH PROCEEDING STARTED—MAY VOTE IN TOWNSHIP.

1. *Where it is proposed by proper proceeding that part of a township shall be annexed to a city, but the proposed annexation can not take effect until after the date of the primary election, such electors are not qualified to vote in the city.*

2. *Such electors, being qualified voters of the township on the date of said primary election, would be entitled to vote at the township primary if such primary were held, the same as if no annexation proceedings were pending.*

COLUMBUS, OHIO, August 11, 1917.

HON. JARED P. HUXLEY, *Prosecuting Attorney, Youngstown, Ohio.*

DEAR SIR:—In your communication of August 4, 1917, you ask for an official opinion upon the following:

> "Part of Boardman township has, by ordinance duly passed but not effective for thirty days, been annexed to the city of Youngstown. On account

of the ordinance not taking effect for thirty days, this part of the township will not be a part of the city when the primary elections are held, but will be a part of the city on the date of the election.

"The question is: Are the people of this annexed district entitled to vote at the primary election?"

Section 4980 G. C. provides who may vote at primary elections and reads in part as follows:

"At such election only legally qualified electors or such as will be legally qualified electors at the next ensuing general election may vote and all such electors may vote only in the election precinct where they reside, * * *"

Section 4967 G. C. makes all statutory provisions relating to general elections applicable, as far as possible, to primary elections.

It is my opinion that section 4980 gives the right to a person who, on primary election day, is legally qualified to vote in the election precinct where he at that time resides. Under the general election statutes, 4863, 4864 and 4865, residents in the state, county, township and municipality, with an exception as to the head of a family, are duly provided for, and section 4866 lays down the rules that should govern judges of elections in determining the residence of a person offering to vote. Now since in your inquiry you advise me that the ordinance annexing the territory to the city of Youngstown will not take effect until thirty days, and also that the primary election will be held before the date of the going into effect of the said ordinance of said annexation, that part of the township which will subsequently be annexed to the city is now, and will be on primary election day, a part of the township and the mere fact that this annexed territory will be a part of the city on the day of the regular election makes no difference. These statutes prescribe the qualifications for electors at the regular election and if at that time the electors who are now residents of the township become qualified electors in a city, they, of course, will be entitled to vote at the November election.

This produces the anomolous situation of these electors voting at the primary for candidates for whom, if they are annexed to the city, they will not have a right to vote, and voting for candidates at a general election in whose nomination they did not take part, owing to their annexation. But this is nothing strange. Persons move from place to place and frequently might make their change of residence at such a time that while they might assist in nominating, they would be voting for candidates in whose nomination they had taken no part.

Since the annexation ordinance is suspended and will not become effective until after the primary, it is just the same as if it had not been passed at all. The situation of the annexed territory is nothing different from any other portion of the township.

If the township, either by reason of population or petition, as provided by section 4951, where the population is less than 2,000, will hold a primary on the regular primary election day, the qualified electors in that portion of the township which subsequently will be annexed to the city will vote at the township primary. See Bach v. Goff, 24 C. C. (n. s.) 561.

In answer to your specific question, then, my opinion is that the people of the annexed district referred to are not entitled to vote at the primary election for the city, but if a township primary is held then they would be entitled, if otherwise qualified, to vote at the township primary in the same manner as if no annexation proceedings were pending.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

525.

BOARD OF EMBALMING EXAMINERS—FEE MUST ACCOMPANY EACH APPLICATION FOR EXAMINATION—CANNOT DELEGATE AUTHORITY TO PASS UPON APPLICATION—SECRETARY-TREASURER MUST PAY PREMIUM ON HIS BOND—THREE YEARS PRACTICAL EXPERIENCE—HOW TIME COMPUTED.

The state board of embalming examiners has no authority to allow an appli ant who has failed at an examination to take a second or subsequent examination without paying a fee therefor. A fee of $10.00 must accompany each application for examination.

The state board of embalming examiners must pass upon all applications; it has no authority to delegate this duty to the secretary-treasurer.

The secretary-treasurer is required to pay the premium upon a surety bond, if such bond is offered by him.

The three years' practical experience required of a person who practiced embalming prior to January 1, 1913, can be computed from any such experience had by such person prior to the date of the filing of his application which must be filed prior to December 31, 1917.

COLUMBUS, OHIO, Aug. 11, 1917.

HON. B. G. JONES, *Secretary The State Board of Embalming Examiners, Columbus, Ohio.*

DEAR SIR:—You submit for my opinion the following:

> "As secretary of the Ohio state board of embalming examiners I have been instructed by the board to secure your opinion upon the following questions to wit:
>
> "1. Has this board the authority under the law or by rules adopted by them to allow an applicant who has failed at one examination the privilege of taking a second examination without the payment of an additional fee or the filing of a new application?
>
> "2. Will it be the duty of the board as a whole to pass upon all applications for registration, or will the filing of the same with the secretary-treasurer be sufficient, (assuming that the applicant fills them out according to law) to allow him (the secretary-treasurer) to issue a certificate of registration?
>
> "3. Who pays for the bond of the secretary-treasurer as required under section 1340 General Code?
>
> "4. As provided under section 1343 G. C. can the board construe the three years of practical experience prior to January 1, 1903, to be continuous experience to date or to the passage of the present law (March 21, 1917)? In other words, how much actual experience must the applicant have?"

Pertinent to your questions is General Code section 1342 which reads as follows:

> "Every person desiring to engage in the practice of embalming or the preparation of the dead for burial, cremation or transportation, in the state of Ohio, shall make a written application to the state board of embalming examiners for registration, giving such information as the said board may, by regulation, require for such registration. Each application must be accompanied by a fee of one dollar with the certificates of three reputable citizens, (one of whom shall be a licensed embalmer) that the proposed applicant is of good moral character and stating his age and general education which shall be such as to entitle him or her to admittance to high school. If the said

board shall find the facts set forth in the application to be true, the said board shall issue to said applicant a certificate of registration. Before a registered applicant can apply for and take an examination in the practice of embalming or preparing for burial, cremation or transportation, the body of any dead person in the state of Ohio, said applicant shall have completed to the satisfaction and approval of the said board, a course consisting of at least twenty-six weeks of studies in the science of embalming, disinfection and sanitation in a regular school of embalming, recognized by said board or shall have had at least two years of practical experience under a licensed embalmer in this state, during which time he or she shall have embalmed (arterially) at least twenty-five dead adult human bodies. All applications for a license to practice embalming and the preparation of the dead for burial, cremation or transportation in this state, must be made to the state board of embalming examiners in writing and contain the name, age, residence and the person or persons with whom employed, the name of the school attended together with a certificate from two reputable citizens that the applicant is of legal age and of good moral character, also a certificate under oath when required by the said board from the president or dean of the embalming school or college he or she has attended, that the applicant has complied with the requirements of said school or college or a certificate under oath, when required by said board, from the licensed embalmer under whom he or she has worked as an apprentice, that he or she has complied with the requirements of apprenticeship as set forth in this section. Each application must be accompanied by a fee of ten dollars and the certificate of registration. If after the state board of embalming examiners are satisfied that the applicant has qualified as set forth in this section, the said board shall cause the said applicant to appear before them and be examined in the subjects as set forth in the preceding section and he must pass said examination with an average grade of not less than seventy-five per cent."

That is to say, before a person who desires to engage in the practice of embalming or the preparation of the dead for burial or cremation or transportation in the state of Ohio is permitted to do so, he must pass an examination before the state board of embalming examiners. Before he is permitted to take the examination he must file an application under the terms and conditions set forth in the above quoted section. Said section provides that *"each application must be accompanied by a fee of* $10.00." So that in case the applicant fails to pass the examination he may apply for and be permitted to take another examination before such board. Said section further provides that "before a registered applicant can apply for and take an examination" he must file his application with the board of examiners. No applicant is permitted to take an examination unless the application is on file. All that would probably be necessary would be to refile the former application because there is no provision of statute which requires any new or additional matter to be set forth on a second or subsequent application for examination than that which is set forth in the original application. But a refiling of the original application for a new examination would be the same as filing a new application and therefore would require another fee of $10.00 to accompany such application.

Answering your first question, then, I advise you that the board has no authority to allow an applicant who has failed at one examina ion the privilege of taking a second examination without the payment of an additional fee or the filing of a new application.

Coming now to your second question: In the application referred to, in answer to your first question, and as required by said section above quoted, the applicant must state such information as the board requires by its regulations and the appli-

cation must be accompanied by certificates of three reputable citizens (one of whom shall be a licensed embalmer) that the applicant has a good moral character and also his age and general education, which education, however, shall be such as will entitle the applicant to admittance to a high school, as provided by law. The above application is in the nature of a condition precedent, that is, without such application having been made the person cannot take the examination required of all those persons who desire to be registered for the purpose of practicing embalming in this state. The application is provided by law and must contain certain matters which are prescribed by the statute and certain other matters which are prescribed by the regulation of the board. No place in the statute is the board empowered to authorize its secretary-treasurer to perform any of its acts, except in section 1338 "the secretary-treasurer shall serve during the pleasure of the board and keep a record of the transactions of the board, collecting all money and performing any other duties required by the board." Any other duties required by the board would be considered to be such other duties of a clerical nature which would ordinarily fall to the lot of a secretary of a board and not a duty requiring the judgment or the exercise of the discretion of the members of the board.

So that, in answer to your second question, I advise you that it will be the duty of the board to pass upon the applications for registration and that a certificate of registration cannot be issued by the secretary without the authority of the board therefor.

In your third question you inquire who shall pay for the bond of the secretary treasurer.

General Code section 1340 provides:

> "The secretary-treasurer of the state board of embalming examiners shall give bond to the state in such sum as the board shall direct with two or more sureties, or a reliable surety company, approved by said board conditioned for the faithful discharge of the duties of his office. Such bond, with the oath of office and approval of the board endorsed thereon, shall be deposited with the state treasurer."

If the bond is given with two or more sureties who are not a surety company, there would be no cost required therefor and it is only in case a premium is paid for a surety bond that any cost would attach thereto. There is no provision of law for the board to pay for any such surety bond and it would therefore manifestly follow that if the board is not authorized to pay for same, and the secretary desires to give a surety company as his bondsman, he, the secretary-treasurer, must pay the premium upon such surety bond.

Answering your third question, therefore, I advise you that if a surety bond is given by the secretary-treasurer, he must pay the premium therefor himself.

Coming now to your fourth question:

General Code section 1343 provides in part:

> "If the state board of embalming examiners finds that the applicant possesses all of the necessary qualifications as prescribed in the preceding section and has passed a satisfactory examination in the subjects prescribed in section 1341, it shall register the applicant as a duly licensed embalmer, provided, however, that this section and the preceding sections shall not * * * apply to any person engaged in the practice of embalming or the preparation of the dead for burial, cremation or transportation prior to January 1, 1903, provided that he or she has had at least three years' practical experience, if such person prior to January 1, 1918, makes application to the state board of embalming examiners for a license, accompanied by a fee of

$25.00, and an affidavit certifying that he or she was in such practice before January 1, 1903, and thereupon the state board of embalming examiners shall issue a license to such applicant."

As I read the above quotation it means that the provisions of law which relate to the registration of those persons who desire to practice embalming by causing such persons to pass an examination in certain prescribed branches, shall not apply to a person who was engaged in the practice of embalming or the preparation of the dead for burial, cremation or transportation prior to January 1, 1903. If such person at the time he files his application for a license, which must be before January 1, 1918, has had at least three years practical experience in embalming or the preparation of the dead for burial, cremation or transportation, I do not understand that it is necessary that the same be had since that time nor that the same be had at one continuous time, but what the statute does say is that such person must have been engaged in the practice of embalming, etc., prior to January 1, 1903, and that he has had at least three years practical experience.

So that, answering your fourth question, I advise you that the three years practical experience can be calculated by the board at any time such experience has been had, which must be prior to the time of the filing of the application, the last day of which filing is December 31, 1917.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

526.

SHERIFF—REQUISITION MATTERS—NOT ENTITLED TO FEES—PROSECUTING ATTORNEY CANNOT PAY FROM FUND UNDER SECTION 3004 G. C.

A sheriff is not entitled to per diem fees for services rendered in requisition matters.

The prosecuting attorney can not use the fund provided by section 3004 *G. C. to pay a sheriff for services or expenses in requisition matters.*

COLUMBUS, OHIO, August 13, 1917.

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

DEAR SIR:—You submit for my opinion the following statement of facts:

"For some time I have been paying the sheriff of this county out of the fund provided for by the provisions of section 3004 of the General Code the sum of $5.00 per day for services rendered outside of this state in cases of of extradition of criminals.

"I desire to have your opinion as to whether I can legally make these payments from the fund provided by section 3004 of the General Code."

Your inquiry calls for a consideration and construction of those sections of the General Code which apply to the collection of costs and expenses incurred in returning from a foreign state a fugitive from justice.

General Code section 109 provides how fugitives from justice may be demanded and reads as follows:

"On demand, the governor, when authorized by the constitution of the United States, may deliver to the executive authority of another state or territory a person charged therein with treason, felony or other crime com-

mitted therein. On application, the governor may appoint an agent to demand of the executive authority of another state or territory a person charged with felony who has fled from justice in this state."

After the application or demand is made of the governor for a person charged with treason, felony, or other crime, and the governor has appointed some one as an agent to demand of the executive authority of the other state or territory such person so charged, the expense which must necessarily follow such demand of such an agent and the return of the fugitive is then payable from the county treasury upon allowance by the county commissioners under the following sections, to wit:

"Section 2491. When any person charged with a felony has fled to any other state, territory or country, and the governor has issued a requisition for such person, or has requested the president of the United States to issue extradition papers, the commissioners may pay from the county treasury to the agent designated in such requisition or request to execute them, all necessary expenses of pursuing and returning such person, so charged, or so much thereof as to them seems just.

"Section 3015. The county commissioners may allow and pay the necessary expense incurred by an officer in the pursuit of a person charged with felony, who has fled the country."

That is to say, the county commissioners may pay from the county treasury to the agent designated in such requisition or request to execute them all necessary expenses of pursuing and returning such person, so charged, or so much thereof as the county commissioners deem should be paid.

In opinion No. 323—Opinions of Attorney General, 1915, volume 1, page 632, it was held that the expenses of an officer in returning from another state without requisition a person under indictment are payable under above quoted section 3015 and not under section 3004 G. C. Said last mentioned section reads, in part, as follows:

"There shall be allowed annually to the prosecuting attorney in addition to his salary, and to the allowance provided by section 2914, an amount equal to one-half the official salary *to provide for expenses which may be incurred by him in the performance of his official duties and in the furtherance of justice not otherwise provided for.* * * *"

That is to say if expenses are incurred either by the prosecuting attorney in the performance of his official duties and in the furtherance of justice or by any one for him, and provision of law is made covering said expenses, then the same can not be paid from the fund provided for under section 3004 G. C., but must be paid from the funds otherwise provided by law.

In your case, when the sheriff of your county incurs expenses in the pursuit of a person charged with felony who has fled the country or incurs expenses in relation to the return of a prisoner in requisition matters, such expenses are otherwise provided for by law and can not be paid by the prosecuting attorney from the fund provided for in section 3004 G. C.

Answering your question specifically, then, I advise you that it is not proper for you to pay the sheriff the sum of five dollars per day for services rendered outside of the state in cases of requisition of criminals from the fund provided for in section 3004 of the General Code. The sheriff is not entitled to per diem fees in requisition matters.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

527.

APPROVAL—FINAL RESOLUTIONS FOR ROAD IMPROVEMENTS IN HARDIN, KNOX, LICKING, MORGAN, SUMMIT AND WARREN COUNTIES.

COLUMBUS, OHIO, August 14, 1917.

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

DEAR SIR:—I have your communication of August 8, 1917, in which you enclose a number of final resolutions having to do with the improvement of certain highways which you submitted to me for my approval. The final resolutions are as follows:

"Hardin county—Section 'A' of the Kenton-Upper Sandusky road, I. C. H. No. 229. Types 'A,' 'B' and 'C.'

"Knox county—Section 'A' of the Mt. Gilead-Mt. Vernon road, I. C. H. No. 333.

"Licking county—Section 'F' of the Newark-Fallsburg road, I. C. H. No. 479.

"Morgan county—Section 'H' of the McConnelsville-Athens road, I. C. H. No. 162.

"Summit county—Section 'N-1' of the Cleveland-Massillon road, I. C. H. No. 17.

* * * * * * * * * *

"Warren county—Section 'B' of the Dayton-Lebanon road, I. C. H. No. 64."

I have examined all of these final resolutions with care and find them correct in form and legal, and I am therefore endorsing my approval thereon.

With the final resolutions returned to you you also included a final resolution having to do with section "C" of the Warren-Meadville road, I. C. H. No. 330, Trumbull county, Ohio. I am withholding this final resolution for further consideration as I am in doubt as to whether the same is legal. I will forward this final resolution to you with my opinion thereon in the very near future.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

528.

PRACTICE OF MEDICINE—GIVING DRUGS TO PRODUCE ANESTHESIA.

The giving of drugs to produce anesthesia is a practice of medicine under our laws which defines what shall constitute the practice of medicine in Ohio.

COLUMBUS, OHIO, August 14, 1917.

HON. HOWELL WRIGHT, *Member Twenty-Fifth Senatorial District of Ohio, Cleveland, O.*

DEAR SIR—You request my opinion as follows:

"As a member of the legislature, I desire an opinion as to whether the mere giving of the various drugs used in surgical anesthesia, given only under the personal direction and in the presence of the responsible operating surgeon, himself a licensed medical practitioner, by a person not a licensed prac-

titioner of medicine, but who has prepared himself or herself, by satisfactory study and preparation, constitutes in itself the practice of medicine under the provisions of the Ohio Medical Practice Act."

Your inquiry involves a consideration of our laws which relate to the practice of medicine in Ohio.

General Code section 1286 provides in part:

"A person shall be regarded as practicing medicine * * * within the meaning of this chapter who uses the words or letters 'Dr.,' 'Doctor,' 'Professor,' 'M. D.,' 'M. B.,' or any other title in connection with his name which in any way represents him as engaged in the practice of medicine * * * in any of its branches or who * * * *administers* or dispenses *for* a fee or *compensation* of any kind, direct or indirect, *a drug* or medicine, * * * of whatever nature for the cure or relief of a wound, fracture or bodily injury, infirmity or disease * * *."

That is to say, the practice of medicine as defined by our laws applies to any person who uses the words and letters above mentioned or who administers for a fee or compensation a drug or medicine. A surgical operation is strictly within the statute covering the practice of medicine and when it is determined by the surgeon that in order to properly perform an operation, it is necessary that an anesthetic be used in order that the person upon whom the operation is being performed may be placed in the condition that the performance of such operation is possible, then the administering of such anesthetic becomes as much a part of the operation as does the performance of any other act in relation thereto.

The loss of feeling caused by the administration of a drug is called anesthesia. A surgeon would, under no circumstances, attempt to perform a complicated or prolonged operation without anesthesia being first produced. In order to increase the safety of operation it is necessary to note the effect the anesthetic has on the patient at the time anesthesia is being produced and following. The anesthetist studies his patient, the respiration and circulation as carefully as does the surgeon watch his operating knife while the operation is being made. After the operation is over the anesthetist studies the effect of the surgical shock, the effects of the anesthetic on the resistance of the tissues to disease and the process of recovery from the effects of the anesthetic.

It was held in Opinion No. E222, Annual Report of the Attorney-General, 1911-1912, Vol. 1, p. 876, that:

"The question whether the act of administering an anesthetic is an act requiring technical skill or an act of administering a drug for the cure or relief of a wound, disease, etc., or whether such act is a mere ministerial act, is a question of fact. If it is true, as herein assumed, that the first alternative is correct, then such act may not be performed by any other person than a licensed physician, neither under the direction of a licensed physician nor by way of assistance to such nor otherwise."

and,

"It is perfectly clear that a person need not be qualified as a physician in order to be permitted under the law to perform some necessary services in connection with an operation under the direction of a physician or surgeon. Thus any person may, under the surgeon's direction, arrange the instrument for him, or hand him such appliances as he needs. I do not, however

regard the administration of an anesthetic as such an act as those described unless I have a wrong impression of the nature of the act. It is the act of administering itself the doing of which requires technical knowledge and professional skill. That would be such an act as could not be, under the law, delegated to another by a qualified physician, even though the person to whom it is delegated acts under the personal direction of the physician."

In other words, if the administering of the anesthetic might be delegated to a person other than one who is licensed to perform such act under our law, then any other act which is required to be performed in the practice of medicine can likewise be delegated to a person other than one who is licensed to practice under our law. That is to say, a physician could delegate to one person the authority to diagnose and to another to prescribe and to another to perform operations, and all that would be necessary would be to simply show that the persons who were performing such acts were doing so under the proper delegated authority of a licensed physician. This cannot be understood to be the law in Ohio. After defining what the term practice of medicine means, the legislature then determined to whom such statutes should not apply, and it is provided in General Code section 1287:

"Nothing in this chapter shall prohibit services in case of emergency, or domestic administration of family remedies. This chapter shall not apply to a commissioned medical officer of the United States army, navy or marine hospital service, in the discharge of his professional duties, or to a regularly qualified dentist when engaged exclusively in the practice of dentistry, *or when administering anesthetics*, or to a physician or surgeon residing in another state or territory who is a legal practitioner of medicine or surgery therein, when in consultation with a regular practitioner of this state nor shall this chapter apply to a physician or surgeon residing on the border of a neighboring state and duly authorized under the laws thereof to practice medicine or surgery therein, whose practice extends within the limits of this state; provided that equal rights and privileges are accorded by such neighboring states to the physicians and surgeons of Ohio residing on the border of this state, contiguous to such neighboring state. Such practitioner shall not open an office or appoint a place to see patients or receive calls within the limits of this state."

I have quoted the entire above section that the complete extent of the exemptions might be noted. Such exemptions are emergency cases, family remedies, United States army, navy or marine service, a dentist in his profession, physicians or surgeons of another state when called in consultation in this state, and physicians or surgeons on the border if reciprocity is enjoyed, but no where in said section are nurses, interns or hospital employes exempted.

The chapter which applies to the registration of nurses in Ohio, and as found contained in sections 1295-1 to 1295-20 G. C., both inclusive, provides for such examination and registration and section 1295-20 reads as follows:

"Nothing in this act shall in any way be construed to be in conflict with the laws of this state relating to the practice of medicine and surgery."

It cannot be disputed that the anesthetist administers a drug and that said administration is for a fee or compensation no matter whether such fee or compensation is paid by the patient or by the hospital, and that the administration is for the relief of bodily injury, infirmity or disease.

My attention is called to the case of Louis Frank et al. vs. John G. Smith et al., decided May 4, 1917, in the court of appeals of Jefferson county, Ky., in which the

court held that a nurse who administered anesthetics for operations in a hospital was not engaged, under the statutes of Kentucky, in the practice of medicine. But it will be remembered that sub-section 5 of section 2615 (Ky. statutes) provides that the law relating to the regulation of the practice of medicine in Kentucky "shall not include trained or other nurses or persons selling proprietary medicines when not traveling as a troupe or troupes composed of two or more persons" and that the act shall not apply to the practice of Christian Science.

If the above exemption had been made in our law as a part of 1287, or otherwise I would have no hesitancy in making application of the decision above named. But no such exemptions being made, I must hold that such decision cannot be given the same application to the laws of this state that it would necessarily have if our laws did contain such exemption.

From the above, then, I advise you that the giving of the various drugs to produce anesthesia, when surgical operations are being performed, constitutes the practice of medicine under the provisions of the medical laws of this state.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

529

EXPENSES—INCURRED BY STATE EMPLOYE—VISITING AT HIS HOME —CANNOT BE ALLOWED AS NECESSARY TRAVELING EXPENSES UNDER SECTION 275 G. C.

Where a deputy supervisor of the bureau of inspection and supervision of public offices, whose duties necessitate his being at the office of the department at Columbus continuously, makes trips to his place of residence at Dayton, Ohio, on Saturday afternoon, returning to Columbus, Sunday night, such trips having nothing to do with the duties of his office, his railroad fare expended on such trips cannot legally be allowed as necessary traveling expenses within the provisions of section 275 G. C.

COLUMBUS, OHIO, August 14, 1917.

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

Attention Mr. Blau.

GENTLEMEN:—I have your communication of August 2, 1917, in which you submit for opinion the following:

> "A deputy supervisor of the bureau of inspection and supervision of public offices resides at Dayton, Ohio. The requirements of the office necessitate his being at the office of the department continuously. He goes to his place of residence Saturday afternoon and returns to Columbus Sunday night.
>
> "*Question.* Can the railroad fare expended on such trips to Dayton and return be legally construed as 'necessary traveling expenses' within the provisions of section 275 G. C., 107 O. L. 504, and may same be paid from the state treasury?"

Section 275 General Code, to which you refer, as found in 107 O. L., page 504, reads:

"All necessary traveling and hotel expenses of the deputy inspectors and supervisors shall be paid from the state treasury."

Section 274 G. C. provides for a bureau of inspection and supervision of public offices and prescribes their powers and duties.

Section 275 G. C. must be read in connection with the other sections referring to the bureau of inspection and supervision of public offices and the provision that all necessary traveling and hotel expenses shall be paid means all necessary traveling and hotel expenses of the deputy inspectors and supervisors when traveling on the business pertaining to the bureau of inspection and supervision of public offices. Your question assumes that the requirements of the duties of this particular deputy supervisor necessitates his being at the office of the department continually and I take it that his superior, the auditor of state, who is by the act made chief inspector and supervisor of public offices, has designated the office at Columbus the headquarters and that the office of the bureau is his assigned station to which he must report for service without expense to the state. It would only be in case the business of the bureau called him from the office to some other point within this state that he would be entitled to his necessary traveling and hotel expenses.

You state that this deputy goes to his place of residence at Dayton, Ohio, on Saturday afternoon and returns to Columbus Sunday night. Surely it cannot be seriously contended that this would be such expense as would be covered by section 274. This is purely personal, it is in no way way connected with the business of the bureau and I cannot conceive how any claim could be made for the railroad fare or other expenses attendant upon such trips home.

It is therefore my opinion, in answer to your inquiry, that railroad fare expended by a deputy supervisor on trips made to his place of residence and back to Columbus cannot legally be allowed as necessary traveling expenses within the provisions of section 275 G. C.

Very truly yours,
JOSEPH MCGHEE,
Attorney General.

530

APPROVAL—FINAL RESOLUTION FOR ROAD IMPROVEMENT IN COSHOCTON COUNTY.

COLUMBUS, OHIO, August 14, 1917.

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

DEAR SIR:—I have your communication of August 9, 1917, in which you enclose for my approval the following final resolution:

"Coshocton county—Section 'A' of the Mt. Vernon-Coshocton road, I. C. H. No. 339. Types 'A' and 'B.' "

I have examined this final resolution carefully and find the same correct in form and legal, and I am therefore returning the same to you with my approval endorsed thereon.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

531.

BLIND RELIEF—NOT NECESSARY TO BE TOTALLY BLIND TO RECEIVE.

It is not necessary that one be totally blind to render him eligible to receive relief under the provisions of section 2965 if his loss of eyesight makes him unable to provide himself with the necessities of life.

COLUMBUS, OHIO, August 15, 1917.

HON. T. R. ROBINSON, *Prosecuting Attorney, Mansfield, Ohio.*

DEAR SIR:—Under recent date you requested my opinion relative to blind relief in which you state as follows:

> "Section 2965 General Code reads as follows:
>
> " 'Any person of either sex, who, by reason of loss of eyesight is unable to provide himself with the necessities of life, who has not sufficient means of his own to maintain himself, and who, unless relieved as authorized by these provisions would become a charge upon the public or upon those not required by law to support him, shall be deemed a needy blind person.'
>
> "This section and all others relating to blind relief commission was repealed, as found in 103 Ohio Laws 833. An emergency act was enacted by the general assembly, 104 Ohio Laws 200, which authorizes the transfer of funds, as provided in section 2967 of the General Code.
>
> "Question: Must a person be totally blind to be entitled to relief?
>
> "I have been unable to find any court decision or opinions of the Attorney-General on this question."

You call my attention to the fact that section 2965 was repealed by an act found in 103 O. L., 833, which act undertook to create an institution for the relief of the needy blind.

The sections of the new act to which you refer were codified by the Attorney-General as sections 1369-1 to 1369-9 inclusive.

In the case of State ex rel. v. Edmondson, 89 O. S., 351, sections 1369-1 to 1369-9, foregoing mentioned, were held to violate article XII, section 5, of the constitution of Ohio and therefore held to be unconstitutional and void. Said act having been declared unconstitutional and void, sections 2965, repealed by said act, was reinstated. Said section 2965 is set out in full in your inquiry.

In an opinion rendered by my predecessor, Hon. Edward C. Turner, on March 21, 1916, being opinion No. 1402 and found in the Opinions of the Attorney-General for that year, at page 521, Mr. Turner held:

> "It is therefore my opinion that it is not necessary that one be totally blind in order to entitle him to receive relief as a needy blind person. If he is so blind as to make it impossible for him to maintain himself from becoming a public charge he would be entitled to relief under the statute, all the other conditions being present."

I am in full accord with the opinion as rendered by Mr. Turner and hereby approve the same.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

532.

EMBALMING BOARD—FORMS RECOMMENDED.

COLUMBUS, OHIO, August 15, 1917.

HON. B. G. JONES, *Secretary-Treasurer, The Ohio State Board of Embalming Exnminers, Columbus, Ohio.*

DEAR SIR:—Accompanying your letter of August 2, 1917, you submit certain forms which you say will be necessary under the new law regulating the practice of embalming and you ask my opinion as to their legality. I shall take the same up severally and in the order in which you have them numbered.

General Code section 1342 provides in part as follows:

> "Every person desiring to engage in the practice of embalming or the preparation of the dead for burial, cremation or transportation, in the state of Ohio, shall make a written application to the state board of embalming examiners for registration, giving such information as the said board may, by regulation, require for such registration. Each application must be accompanied by a fee of one dollar with the certificates of three reputable citizens, (one of whom shall be a licensed embalmer) that the proposed applicant is of good moral character and stating his age and general education which shall be such as to entitle him or her to admittance to high school. * * *"

Covering the above proposition is your blank form No. 1, which I recommend as follows:

> NOTE.—This application must be filled out in ink and in applicant's own hand writing and name must be written in full. WRITE PLAINLY.
>
> APPLICATION FOR
>
> REGISTRATION
>
> FOR EMBALMER'S LICENSE
> (Under provision G. C. 1342.)
>
> I, the undersigned, hereby make application to the State Board of Embalming Examiners or an examination and license to practice embalming in the State of Ohio.
>
> I have been a resident of (State) _____ for _____ years, and of the town or city of _____, County of _____ for _____ years. I am _____ married; my age is _____ years.
>
> I have completed the entire course of first grade elementary school work and am entitled to admission to a high school in this state. (As provided in section 7655-7 General Code of Ohio.)
>
> Name of school _____
> of _____
> (City, Town or Village.)
> County of _____ State of _____

It is understood by me that should a license be granted me that the same must be regularly renewed as provided by law, and may be revoked at any time for cause.

Fee enclosed $1.00. Signature_____.

Subscribed and sworn to before me this day ____of _____, 19__.

_____

Notary Public.

NOTE.—This application, aceording to a rule of the board, must be on file with the Secretary of the State Board of Embalming Examiners at least thirty days previous to the examination.

* * * * * *

CERTIFICATE

This is to certify that we are personally acquainted with _____ _____, the applicant named herein and know _____ o be of good moral character and of good repute in the community in which _____ lives and (believes) that the above statements made by _____ are true.

Name_____ Address_____

Licensed Embalmer No._____ _____

Address_____

Name_____ _____

Address_____

Name_____ _____

Form No 1 is backed as follows

REGISTRATION
APPLICATION FOR

EMBALMER'S LICENSE.

No._____

Name_____
Street No._____
Residence_____
County_____
State_____
Fee paid_____19____

Registration Certificate issued_____
_____19____
Declined_____19____

The applicant must not write in the above blank spaces.

General Code se tion 1342 provides further in part:

"* * * If the said board shall find the facts set forth in the application to be true, the said board shall issue to said applicant a certificate of registration * * *."

Covering the above quotation you submit Form 2, which I recommend to be in the following form:

CERTIFICATE OF REGISTRATION

(Under provision of General Code section 1342.

This is to certify that _____ _____
of _____ County of _____
State of _____ has duly regis ered with this Board and is entitled to file an application for an examination to obtain a license to practice embalming in this tate.

STATE BOARD OF EMBALMING EXAMINERS
_____ _____ Secy. Treas.

Fee of one dollar paid.
Registra ion No. _____
Date.. _____19...

General Code section 1342 provides further in part:

"* * * Before a registered applicant can apply for and take an examination in the practice of embalming or preparing for burial. c emation or transportation, the body of any dead person in the state of Ohio said applicant shall have completed to the satisfaction and approval of the said board, a course consisting of at least twenty-six weeks of studies in the science of embalming, disinfection and sanitation in a regular school of embalming, recognized by said board * * *. Also a certificate under oath when required by the said board from the president or dean of the embalming school or college he or she has attended, that the applicant has complied with the requirements of said school or college. * * *"

Covering the above quotation I recommend Form No. 3, submitted by you to be as follows:

"To the State Board of Embalming Examiners.

"Certificate of required course of study as prescribed under the provision of section 1342 G. C.

"I hereby certify that _____of the city or town of _____, in the county of _____, in the state of _____ was enrolled in this school _____month, _____day _____year and has completed a course of at least 26 weeks in the science of embalming, disinfection and sanitation, as required by section 1342 General Code of Ohio

Signature _____
President or Dean.
of the _____
City or town.
State of _____

"Subscribed to and sworn before me, this _____day of _____, 19_____

_____ _____Notary Public.

General Code section 1341 provides:

"For use in the examination of persons who desire to engage in the practice of embalming and the preparation and disposal of the dead in this state, the state board of embalming examiners shall prepare a list of questions on the following subjects:

"(a) Visceral anatomy and vascular system of the human body.

"(b) The methods of embalming and of preparing bodies for transportation.

"(c) The meaning of 'contagion,' 'infection,' the dangers they beget and the best methods of their restriction and arrest, and bacteriology in relation to contagion and infection.

"(d) The signs of death and the manner in which they are determined.

"(e) Practical demonstrations on a cadaver."

Your blanks Nos. 4 and 5, covering the matters contained in said section, may be in the following forms, although the same contain matters not referred to in said section, but which I am informed are covered by resolutions of your board and which are not objectionable:

THE STATE BOARD OF EMBALMING EXAMINERS.—INFORMATION FOR EMBALMING COLLEGES AND SCHOOLS:

Before the state board of embalming examiners will recognize embalming colleges or schools they must comply with the following rules, to wit:

The college or school must adopt a standard of at least 26 weeks embracing a total minimum number of seven hundred and sixty hours (760).

Their curriculum must embrace the following subjects:

Visceral anatomy and vascular system of the human body.

The action and comparative value of germicides. The method of embalming and preparing bodies for transportation.

The meaning of "contagion" and "infection," the dangers they beget, and the best methods of their restriction and arrest. Also bacteriology in relation to contagion and infection.

The signs of death and the manner in which they are determined.

Practical demonstrations on the cadaver.

Each student must embalm (arterially) at least 25 bodies.

A copy of the college or school's curriculum must be on file with the board.

The college or school must maintain a complete record of attendance of each student, using for that purpose a standard roll book which shall be open at all times for inspection by this board.

They must maintain a complete record of the result of all school examinations, and those records should be open at all times for inspection by the board.

They shall be required to stand an inspection by a designated member of the board, whenever the board deems it necessary.

A certificate of completion of the course must not be granted by any school unless the student has a record of attendance of not less than 90% of the scheduled class work, as shown by the roll book.

A certificate of completion of the course must not be granted by any school unless the student has a record of a general average of not less than 75% from all examinations.

They must, when required, report to the secretary of the board, on a blank furnished by the board, the names and all other essential information regarding those who matriculate, and this information should be certified to by the president or head or the school or college.

The State Board of Embalming Examiners.

INFORMATION FOR APPLICANTS FOR A LICENSE TO PRACTICE EMBALMING IN OHIO.

(a) Applicants must be of legal age and of good moral character and have had such general education which shall be such as to entitle him or her to admittance to a high school of this state.

The following are the requirements for a one-year's actual training in practical embalming in a school or college prescribing a special course in the science of embalming.

(b) The school course shall consist of at least twenty-six weeks' work.

(c) The General Code of this state (Sec. 1341) prescribes the following subjects for examination:

Visceral anatomy and vascular system of the human body.

The action and comparative value of germicides.

The methods of embalming and preparing bodies for transportation.

The meaning of "contagion" and "infection," the dangers they beget, and the best methods of their restriction and arrest. Also bacteriology in relation to contagion and infection.

The signs of death and the manner in which they are determined.

Practical demonstrations on the cadaver.

which may for convenience be sudbivided as follows:

Anatomy, physiology, chemistry, the principles of embalming, applied embalming, applied anatomy, bacteriology, public health and sanitation, embracing a total minimum number of seven hundred and sixty hours (760).

(d) The applicant for a license to practice embalming in Ohio basing his eligibility for such license on a course "of at least 26 weeks in a school or college prescribing a special course in the science of embalming approved by the board," and shall make affidavit that he has completed the above course as prescribed; also, the president or head of such school or college shall, upon the completion of course, certify that the statements of said applicant are true.

The following are the requirements for an Ohio embalmer's license by reason of practical experience as required by the General Code of Ohio (Section ------)

In addition to paragraphs (a) and (c) of this circular, the applicant shall have had at least two (2) years of practical experience under a licensed embalmer of this state, during which time he or she shall have embalmed (arterially) at least twenty-five (25) dead adult human bodies."

Section 1342 G. C., after providing for a course of at least twenty-six weeks, at a recognized school of embalming, further provides:

"* * * or shall have had at least two years of practical experience

under a licensed embalmer in this state during which time he or she shall have embalmed (arterially) at least twenty-five dead adult human bodies * * *. Also a certificate under oath when required by the said board from * * * the licensed embalmer under whom he or she worked as an apprentice, that he or she has complied with the requirements of apprenticeship as set forth in this section."

Your form No. 6, covering the same, may be in the following form:

CERTIFICATE OF EXPERIENCE.

To The State Board of Embalming Examiners:

I do hereby certify that I am personally acquainted with_____, who is making application to the state board of embalming examiners for a license entitling h____ to practice embalming in Ohio.

I further certify that I am a licensed embalmer of the _____, License No_____, and
(State name of licensing board.)
that Mr._____served as an embalmer's
(Give name of applicant.)
apprentice under me while located at_____
(Give location of business.)
from the_____day of_____, 19____, to the_____day of_____, 19____, and that during this period of time he has assisted me in embalming_____ dead bodies; that I believe h_____ to be_____years of age, of good moral character and reliable as an embalmer.

_____ _____ _____191___.

_____
(Name.)

_____
(City or town.)

_____
(County.) (State.)

State_____ }
County of_____ } ss:

_____, whose signature appears
(Name of endorser.)
on the certificate of recommendation above, being duly sworn, deposes and says that the facts set forth in said certificate are true to the best of his knowledge and belief.

Dated this_____day of_____, 19____.

_____
Notary Public.

General Code section 1342 further provides:

"All applications for a license to practice embalming and the preparation of the dead for burial, cremation or transportation in this state must be made to the state board of embalming examiners *in writing* and contain the

name, age, residence and the *person or persons with whom employed,* the *name of the school attended* together with a *certificate from two reputable citizens* that the applicant is of legal age and of good moral character, also a certificate under oath when required by the said board from the president or dean of the embalming school or college he or she has attended, that the applicant has complied with the requirements of said school or college or a certificate under oath, when required by said board, from the licensed embalmer under whom he or she has worked as an apprentice, that he or she has complied with the requirements of apprenticeship as set forth in this section.Each application must be accompanied by a fee of ten dollars and the certificate of registration."

Your form No. 7, covering the above quotation, I recommend to be as follows:

NOTE—This application should be made out and signed by the applicant only.

APPLICATION
to the
STATE BOARD OF EMBALMING EXAMINERS
for
EMBALMING LICENSE.
(Under provision of G. C. section 1342.)

I hereby make application to the state board of embalming examiners for an examination and license to practice embalming in the state of Ohio.

I was born on the_____day of_____18____. My age is_____years. My place of residence is_____, No_____, City of_____, (Street.) County of_____, State of_____

I have attended the_____school of embalming for a period of_____weeks.

I have had_____years of practical experience (State No. of years.) as an embalmer under_____ (Give names licensed embalmers and address.)

_____

_____

as evidenced by_____certificate__ accompanying this (His or her) application and which certificate_____to be made and considered (Is or are.) a part hereof.

*I have been engaged in business as an embalmer and funeral director for_____successive years, at_____, county of_____, state of_____

It is understood by me that should a license be granted me, the same must be regularly renewed as provided by law, and may be revoked at any time for cause.

(Fee enclosed, $10.00.)

Date_____, 19____

Signature:_____
(Sign name in full.)

State of_____} ss:
County of_____}

Subscribed and sworn to before me by_____
(Applicant's name.)

this_____day of_____, 19____

My commission expires_____, 19____

Notary Public_____County, Ohio.

*To be filled by persons previously licensed in some state or in business for themselves.

CERTIFICATE OF RECOMMENDATION.

This is to certify that we are personally acquainted with Mr._____ the applicant named herein and know_____to be of legal age, of good moral character and of good repute in the community in which_____ lives, and (believe) that the statements in this application made by_____ are true.

Name_____ Address_____

Name_____ Address_____

Name_____ Address_____

Form 6 is backed as follows:

EMBALMER'S LICENSE.

License No_____

Name_____
Residence_____
County of_____
(State)

Fee $_____
Examined_____
Percentage_____
Written prac. Av.
License issued_____
Re-examined_____
Percentage_____
Written prac. Av.
Remarks_____

The applicant must not write in the above blank spaces.

General Code section 1343 provides in part:

"If the state board of embalming examiners finds that the applicant possesses all the necessary qualifications, as prescribed in the preceding section, and has passed a satisfactory examination in the subjects prescribed in section 1341, it shall register the applicant as a duly licensed embalmer * * *. The license shall be signed by the president and secretary-treasurer of the board and attested by its seal. The person to whom the license is issued shall register such license with the state board of health, either by mail or in person * * *. Every person to whom an embalmer's license is granted by the state board of embalming examiners of Ohio shall display the same in a conspicuous place in his office * * *."

Covering the above provision of law you submit form No. 8, which is approved as follows:

No.....

THE STATE BOARD OF EMBALMING EXAMINERS
OF OHIO.

This certifies that The State Board of Embalming Examiners of the State of Ohio, having examined.....
of the County of....., State of Ohio, in the science of embalming, and having obtained satifactory evidence of.....proficiency in the same, hereby grants to.....this license as an

EMBALMER.

and authorizes.....to practice the science of embalming in the State of Ohio, as required by the General Code of this state. (Sec.....)

In Witness Whereof the signatures of the President and Secretary-Treasurer and the official seal of the Ohio State
(SEAL) Board of Embalming Examiners are hereto affixed.

Given at Columbus Ohio, this.....day of....., A. D.....

.....
President.

.....
Secretary-Treasurer.

On the back of Form No. 8 is the following:

This is to certify that this license has been registered according to law.

STATE DEPARTMENT OF HEALTH

By.....

Section 1343 G. C. further provides:

"Annually, on or before the first day of January, every license holder shall pay to the secretary-treasurer of the state board of embalming examiners the fee of one dollar for the renewal of his or her license for the incoming year, whereupon the secretary treasurer shall issue a renewal card acknowledging the receipt of the fee therefor. * * * Each icense renewal card shall be registered in like manner as the license originally issued."

Your form No. 9 is recommended as follows:

RENEWAL CERTIFICATE

The State Board of Embalming Examiners.

This certifiies that_____

_____

paid one dollar for the renewal of _____Embalmer's License for the year ending December 31, 1918, and said renewal is hereby granted as provided by General Code section 1343.

Attest

_____

Secretary-Treasurer.

This is to certify that this renewal license has been registered according to law.

STATE DEPARTMENT OF HEALTH.

By_____

General Code section 1343-1 provides:

"The state board of embalming examiners may grant without examination an embalmer's license to a duly licensed embalmer of another state, who shall have been examined by a regular board of embalming examiners on substantially the same subjects and requirements demanded by the board of this state, and shall have obtained an average grade of not less than seventy-five per cent. in such examination. Such license shall be known as a reciprocal license, applications for which shall be made on a form containing a certified statement from the board which granted the original license in the other state, stating the grade and result of examination. Each applicant for a reciprocal license shall pay a license fee of twenty-five dollars, which shall accompany the application for such license. Such reciprocal license shall be renewed annually upon payment of a renewal fee of one dollar as provided above."

Your form No. 10 covering the above, is approved in the following form:

APPLICATION FOR A LICENSE
BY RECIPROCITY
from
THE STATE BOARD OF EMBALMING EXAMINERS.

On the basis of a certificate or license issued by the_____

---

on the_____day of_____19____and renewed on the_____day of_____19_____

I hereby make application for a license from the State Board of Embalming Examiners to practice emba'ming in the State of Ohio.

Residence the last two years_____

My age is_____years. Present residence_____

Intended Residence_____City of_____

County of_____State of_____

I have been engaged in the business as an Embalmer and Funeral Director for_____successive years.

EMBALMER'S EXAMINATION.

Was examined by the____(Give name of licensing board)_____ in the following subjects:

Visceral anatomy and vascular system of the human body.

The action and comparative value of germicides.

The methods of embalming and preparation of bodies for transportation.

The meaning of "contagion" and "infection," the dangers they beget, and the best methods of their restriction and arrest. Also bacteriology in relation to contagion and infection.

The signs of death and the manner in which they are determined.

Practical demonstrations on the cadaver.

which may for convenience be subdivided as follows:

Anatomy, physiology, chemistry, the principles of embalming, applied anatomy, bacteriology, public health and sanitation embracing a total minimum number of seven hundred and sixty hours (760).

And demonstrated my proficiency as an embalmer by operation on a cadaver.

It is understood by me that should a license be granted me the same must be regularly renewed as provided by law and the same may be revoked at any time for non-compliance with the rules of the Ohio state board of embalming examiners. It is further understood by me that the license granted me may be revoked at any time if I should sign a certificate attesting to the preparation of a dead body which has not been prepared either by myself or by a licensed embalmer under my direction.

Have you ever made application for Ohio license before?_____

When?_____

Date_____19____

(Fee $25.00). Signature_____

Sign name in full.

State of_____}ss.
County of_____}

The applicant whose signature appears above being sworn, deposes and says, that the facts regarding his age, place of residence and number of years

engaged as an embalmer and funeral director, as stated above, are true to the best of his knowledge and belief.

Dated this_____day of_____, 19____.

_____

Notary Public.

(Following to be printed on back of reciprocity application):

CERTIFICATE OF SECRETARY OF STATE EXAMINING BOARD.

I, _____ Secretary_____ _____(name of board)_____hereby certify that the records of this board show that_____ is a graduate of_____ under date of_____ and that the said _____(name of applicant)_____ has passed a written examination (including_____questions) *before this board,* in the following named branches, to wit:

Visceral anatomy and vascular system of the human body.

The action and comparative value of germicides.

The methods of embalming and preparing bodies for transportation.

The meaning of "contagion" and "infection," the dangers they beget, and the best methods of their restriction and arrest. Also bacteriology in relation to contagion and infection.

The signs of death and the manner in which they are determined.

Practical demonstrations on the cadaver.

and attained an average of_____per cent. By practical operation on a cadaver_____per cent., and was given a passing grade of_____ per cent.

I further certify that the original of the license or certificate (No.____) was issued to the said_____(name of applicant)_____ on the _____ day of_____, upon passing of the written and practical examination noted above, and that the said license or certificate has not been revoked and has been renewed for the year ending the_____day of_____, 19____.

I still further certify that to the best of my knowledge the said_____ _____(name of applicant)_____is an embalmer of good moral character, and worthy of professional recognition.

_____

(Seal of Board.) Secretary-Treasurer.

CERTIFICATE OF RECOMMENDATION.

We, the undersigned_____ hereby certify that we are personally acquainted with Mr_____ the applicant named herein, and that we know him to be of good moral character and reliable in his profession as an embalmer and funeral director.

_____

_____19____ _____

Licensed embalmer or registered physician.

_____Address.

_____

_____

_____

_____

(To be printed on back of this document).

RECIPROCITY.

State of_____

Ohio License No_____
Issued_____

Ohio State Board of Embalming Examiners.
Application for Licensed Embalmer.

RECORD.

Name_____
Residence_____
Fee received_____
License issued_____
License declined_____
Remarks_____

Fee for Reciprocal Registration—$25.00.

Section 1343 G. C., after providing for registering a person who has passed the required examination, further reads:

"* * * provided, however, that this section and the preceding sections shall not apply to any person * * * engaged in the practice of embalming or the preparation of the dead for burial, cremation or transportation prior to January 1, 1903, provided, that he or she has had at least three years' practical experience, if such person prior to January 1, 1918, makes application to the state board of embalming examiners for a license accompanied by a fee of $25.00, and an affidavit certifying that he or she was in such practice before January 1, 1903, and thereupon the state board of embalming examiners shall issue a license to such applicant."

I recommend your form No. 11 to be as follows:

LICENSE BY AFFIDAVIT

(Under provision of G. C. 1343).

I, the undersigned, hereby make application to the state board of embalming examiners to be registered as a duly licensed embalmer and hereby certify that I was engaged in the practice of embalming or the preparation of the dead for burial, cremation or transportation prior to January 1, 1903, at_____(city)_____County of_____ State of_____ and that I have had more than three years practical experience in the following named cities:

_____(City)_____County of_____
State of_____, _____(number)_____years, _____months.
_____(City)_____County of_____
State of_____, _____(number)_____years, _____months.

I herewith enclose a fee of $25.00. It is also my understanding that should a license be granted me, the same must be regularly renewed as provided by law and may be revoked at any time by the Board for non-compliance

with the laws of Ohio and the rules and regulations formulated by the State Board of Embalming Examiners; or, if I have made any misstatement in my application and certificate.

Signature _____
(Name in full.)

Dated_____19___. _____
(Address.)

State of_____ }
County of_____ } ss:

Personally appeared before me a notary public within and for the above named county, _____,
(Name of Applicant.)
who is known to me to be the same person whose name is subscribed to the above application and who being by me first duly sworn says that the facts set forth in the foregoing application and statement are true.

Sworn to before me and subscribed in my presence this _____ day of _____, 19____.

_____
Notary Public.
_____County, Ohio.

(To be printed on back of Form 11.)

CERTIFICATE

This is to certify that we are personally acquainted with Mr. _____, the applicant named herein, and have personal knowledge that _____ was engaged in the active practice of embalming, the preparation of the dead for burial, cremation or transportation three (3) years prior to January 1, 1903, and continuously to July 2, 1917.

Name_____ Address St._____
City or town_____
Age_____ County of_____
State_____

Name_____ Address St._____
City or town_____
Age_____ County of_____
State_____

APPLICATION BY AFFIDAVIT
FOR EMBALMING LICENSE.

Name_____
Residence_____
City or town_____
County_____
Fee ($25.00) paid_____
License issued_____
Remarks_____
_____

Your form No. 12 is approved as follows:

No.----------

THE STATE BOARD OF EMBALMING EXAMINERS.

The State Board of Embalming Examiners created under an act of the General Assembly to regulate the practice of embalming herewith certify that ----------
having satisfied the board that ------ has practiced embalming prior to January 1, 1903, and has had at least three years' practical experience, as required by law, is entitled to and hereby granted this license as an

EMBALMER

and authorized ------ to practice the science of Embalming in the state of Ohio, as required by the General Code of this state. (Sec. 1343.)

In witness whereof the signatures of the President and Secretary-Treasurer and the official seal of the Ohio State Board of Embalming Examiners are hereto affixed.

Given at Columbus, Ohio, this -------- day of ----------, A. D.----------.

----------President.
----------Secretary-Treasurer.

The statute does not provide for forms Nos. 13, 14 and 15, submitted by you, but I see no reason why the same should not be approved as follows:

(13.)

THE STATE BOARD OF EMBALMING EXAMINERS.

(Notice of having passed.)

You are hereby notified that at the last examination you received the necessary grade entitling you to practice embalming in the state of Ohio. You will be duly registered and your license will be forwarded to you in due course of time.

"You are given permission to practice in this state until December 31st of this year, when your license must be renewed according to law.

Dated ---------- 19----.

Secretary-Treasurer.

(14.)

THE STATE BOARD OF EMBALMING EXAMINERS.

(Notice of having failed.)

You are hereby notified that at the last examination for Embalmers, you did not receive the necessary grade of 75% as required by law.

Dated ---------- 19---.

Secretary-Treasurer.

(15.)

THE STATE BOARD OF EMBALMING EXAMINERS.

NOTICE OF EXAMINATION.

An examination for a license to practice Embalming in Ohio will be conducted by the State Board of Embalming Examiners_____19__ at_____; _____ _____Ohio.
You are hereby notified to be present.

Secretary-Treasurer.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

533.

DETENTION HOME—COMMISSIONERS SHOULD PROVIDE SAME—IN COUNTIES OF LESS THAN FORTY THOUSAND MAY PROVIDE NECESSARY ATTENDANTS.

Under sections 1670 *and* 1671 *G. C., upon the advice and recommendation of the juvenile judge, the commissioners should provide, by purchase or lease, a detention home. and in counties having a population less than forty thousand the commissioners are authorized to provide the necessary persons to care for said home and for the children therein.*

COLUMBUS, OHIO, August 15, 1917.

HON. J. CARL MARSHALL, *Probate Judge, Xenia, Ohio.*
DEAR SIR:—Under date of July 31, 1917, you submit the following:

"I would like to ask your opinion as to whether or not, under sections 1670 and 1671 G. C., the county commissioners have authority to provide, by lease or by rent, a detention home and provide also, from time to time, as necessity warrants, the necessary persons to care for the same and to care for the children in same."

Section 1670 G. C. reads as follows:

"Upon the advice and recommendation of the judge exercising the jurisdiction provided herein, the county commissioners shall provide by purchase or lease, a place to be known as a 'detention home' within a convenient distance of the court house, not used for the confinement of adult persons charged with criminal offenses, where delinquent, dependent or neglected minors under the age of eighteen years may be detained until final disposition, which place shall be maintained by the county as in other like cases. In counties having a population in excess of forty thousand, the judge may appoint a superintendent and matron who shall have charge of said home, and of the delinquent, dependent and neglected minors detained therein. Such super-

intendent and matron shall be suitable and discreet persons, qualified as teachers of children. Such home shall be furnished in a comfortable manner as nearly as may be as a family home. So far as possible delinquent children shall be kept separate from dependent children in such home. The compensation of the superintendent and matron shall be fixed by the county commissioners. Such compensation and the expense of maintaining the home shall be paid from the county treasury upon the warrant of the county auditor, which shall be issued upon the itemized voucher, sworn to by the superintendent and certified by the judge. In all such homes the sexes shall be kept separate, so far as practicable."

Section 1671 G. C. reads as follows:

"When such detention home is provided by the county commissioners, and upon such home being recommended by the judge, the commissioners shall enter an order on their journal transferring to the proper fund from any other fund or funds of the county, in their discretion, such sums as may be necessary to purchase or lease such home and properly furnish and conduct it and pay the compensation of the superintendent and matron. The commissioners shall likewise upon the appointment of probation officers, transfer to the proper fund from any other fund or funds of the county, in their discretion, such sums as may be necessary to pay them, and such transfers shall be made upon the authority of this chapter. At the next tax levying period, provisions shall be made for the expenses of the court."

In 99 O. L. 199, these sections were section 30 of an act. The codifying commissioners split section 30 into two sections, and the legislature, in 103 O. L. 864, amended section 1670 G. C. which in the original act provided that the commissioners "*may* provide by purchase or lease," etc., so as to make the section read: The commissioners *shall* provide by purchase or lease.

The age in the original section was raised from seventeen to eighteen years and in the last amendment the following sentence was interlined:

"So far as possible delinquent children shall be kept separate from dependent children in such home."

Under the provisions of section 1670 G. C. as it now stands, it is mandatory, upon the advice or recommendation of the judge exercising juvenile jurisdiction, that the county commissioners provide, by purchase or lease, a place to be known as a "detention home," and it is my view that if the juvenile judge so advises and recommends, then it is the duty of the commissioners to provide the detention home. I think the language of the section is plain and needs no construction or interpretation.

Said section 1670 further provides that in counties having a population in excess of forty thousand, the judge may appoint a superintendent and matron, who shall have charge of such home and of the delinquent, dependent and neglected minors detained therein.

Your county having, as shown by the last federal census, a population of 29,733, and not possessing a population of 40,000, that part of section 1670 G. C. would not authorize your juvenile judge to make this appointment.

I think that the general powers given commissioners under section 2410 G. C., which provides:

"The board may employ a superintendent, and such watchman, jan-

itors and other employes as it deems necessary for the care and custody of the court house, jail, and other county buildings, and of bridges, and other property under its jurisdiction and control,"

would be authority for the appointment of such employes as would be necessary to properly attend to and look after such detention home.

Hon. U. G. Denman, in an opinion rendered under date of November 29, 1910, found in the Annual Report of the Attorney-General for 1910-11, page 701, had under consideration sections 1670 and 1671 G. C., prior to the last amendment. In speaking of the distinction made by the law between "counties having a population in excess of forty thousand" and other counties, Mr. Denman said that such distinction consists in the provision that:

> "In counties having a population in excess of forty thousand, the judge may appoint a superintendent and matron."

Continuing Mr. Denman says:

> "This specific provision for the appointment of a superintendent and matron in such counties negatives the right to appoint a superintendent or matron in counties containing a population of forty thousand or less. It appears to me that in making this classification according to population, the general assembly felt that in counties containing over forty thousand population, it might be advisable to have regular persons, such as a superintendent and matron, permanently in charge of such a home throughout the year, whereas in the smaller counties, the general assembly felt that owing to the small number of children who would probably be involved, it was inadvisable to have persons permanently employed throughout the year. There is nothing, however, in the law which indicates that a county containing a population of forty thousand. or less, may not 'purchase or lease such home and properly furnish and conduct it.' This would include providing the necessary persons to care for this home and for the children from time to time.
>
> "I am, therefore, of the opinion that your county may proceed to establish a detention home and provide from time to time, as necessity warrants, the necessary persons to care for the same and to care for the children in said home, but I am also of the opinion that you are without power to provide a superintendent or matron for such home."

In an opinion found in Vol. II of the Opinions of the Attorney General for 1916, p. 1623, under date of September 29, 1916, former Attorney-General Edward C. Turner, as shown by the last paragraph of the syllabus, held:

> "In counties having a population of less than forty thousand the county commissioners shall employ or appoint persons necessary to take care of the children therein and the maintenance of the detention home."

He calls attention to the opinion of Hon. U. G. Denman, referred to above and concurs in same. He also calls attention (p. 1629) to the fact that section 1670 G. C. provides that a detention home established thereunder "shall be maintained by the county as in other like cases," and further says: "It is difficult to point to a very like case." Continuing, he says:

> "Both the infirmary and children's home have some similarity to a

detention home and the county jail in some respects as well. No two of these are exactly similarly maintained. I am, however, of opinion, in consideration of the duty of maintenance being imposed upon the county commissioners, and in the absence of specific authority being conferred upon the judge of the juvenile court by statute, to appoint the persons necessary to the care of the children and the maintenance of the home, that the authority to do so in counties having a population of less than forty thousand rests in the county commissioners."

In view of all the foregoing and in answer to your specific question, it is my opinion that under sections 1670 and 1671 G. C. the county commissioners, upon the advice and recommendation of the judge exercising the jurisdiction provided therein, shall provide, by either purchase or lease, a detention home, and that in counties having less than forty thousand population, the county commissioners are authorized to appoint the necessary persons to care for the same and for the children therein.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

534.

MAILING ARGUMENTS AGAINST PROHIBITION—NOT A VIOLATION OF SECTION 13223 G. C. FORBIDDING THE SOLICITING OF ORDERS FOR INTOXICATING LIQUORS.

Publication and mailing of circulars and advertisements containing arguments against the proposed prohibition amendment to be voted for at the November election, which do not contain advertisements for intoxicating liquors, but do contain statements regarding the liquor industry, can not be construed to be soliciting orders for intoxicating liquors under section 13223 *G. C.*

COLUMBUS, OHIO, Aug. 15, 1917.

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

DEAR SIR:—Under date of August 2, 1917, you submit the following:

"Enclosed herewith you will find copies of arguments which were used in the election on a proposed amendment to the constitution submitted at the election in November, 1915, which are similar, perhaps, to arguments which may be used in the coming fall campaign.

"Referring to section 13223 of the General Code, and the first paragraph of section 5 of the act of congress approved March 3, 1917, effective July 1, 1917, and known as the 'Reed Bone-Dry Amendment,' I have been asked to give an opinion as to whether or not such arguments, when published as circulars or in newspapers or pamphlets and deposited in the United States mails, would constitute a violation or infringement of section 13223 G. C.

"I am quite clearly of the opinion that the publication and mailing of such arguments do not violate this act but the matter is so far reaching that, in my judgment, it should have your interpretation in order that there may be some uniform ruling throughout our state. I therefore respectfully request that you give me your opinion as to whether or not the publication of these articles, or any of them, constitutes a violation of this section."

You enclose with your communication certain advertisements, one from the

Ottawa County Herald, which is an advertisement The Ohio Home Rule Association, containing arguments against the proposed amendment to the constitution, prohibiting the sale and manufacture for sale of intoxicating liquors as a beverage. The advertisement calls attention to the amount of taxes paid by the liquor industry to state and nation, and to the further fact that at the elections in 1913 and 1914 the electors of the state by majorities nearing one hundred thousand voted against the propositions submitted by the prohibition advocates. The entire trend of the argument is for a vote against prohibition. There is nothing in the advertising concerning any particular intoxicating liquor.

Another advertisement you enclose is one taken from the Zanesville, Ohio, Labor Journal. This too is an advertisement of The Ohio Home Rule Association, calling attention to the millions in wages and the thousands of jobs that would be sacrificed if prohibition obtained. It also calls attention to the extent of the liquor industry, the amount of wages paid in 1914, and argues it would be violative of personal right for prohibition to obtain; but nowhere does it seek to advertise any particular intoxicating liquor.

The other enclosure is a circular signed by The Ohio Home Rule Association, containing, like the two preceding advertisements, copy of a sample ballot to be voted on the prohibition amendment, and contains arguments and statements seeking to induce the readers thereof to vote "No" on the prohibition amendment. Like the preceding advertisements, this circular does not seek to advertise any intoxicating liquors or any particular kind thereof.

Section 13223 G. C. provides:

> "Whoever, directly or indirectly, solicits orders for intoxicating liquor in a county or territory where the sale of such liquor as a beverage is prohibited shall be fined not less than one hundred and fifty dollars nor more than four hundred dollars, and ,for each subsequent offense, shall be fined not less than four hundred dollars nor more than eight hundred dollars."

This section was section 4 of the act passed March 12, 1909 (100 O. L. 89) making it an offense to solicit orders for intoxicating liquors in "a county or territory where the sale of such liquor as a beverage is prohibited." This section was under consideration by our supreme court in the case of Hayner v. State, 83 O. S. 178. The facts in this case were as follows:

A liquor dealer addressed to parties in Knox county, Ohio, a certain letter, circular and post-card, which were received by the addressee in due course of mail in said county. The circular, in addition to setting forth the advantages of the "lock-stopper" decantor mentioned in the letter and depicting the quality of certain brands of whiskey manufactured at the defendant's distillery, commended the goods to the consumer as "absolutely pure," "distilled from the choicest grain," "of the most distinguished quality," and "guaranteed under the United States pure food and drugs act."

The post-card was as follows:

"Post card. "Stamp.)

"This side for address only.

"W. S. KIDDER, *Dayton, Ohio.*

"DEAR SIR:—You may send me by prepaid express the package as per your recent proposition. It is understood that if, after trying your product,

I find that it is not as represented, I am privileged to return balance by express at your expense. If the goods are as represented and I keep them I agree to remit $3.70. Remember, I bind myself only as above.

"Name_____Post office_____
Express office_____State_____ If member of firm, give firm name."

Davis, J., at p. 190 of the opinion, says:

"We assume that the act of soliciting may be done by letter as well as in person. The dictionary term 'solicit' implies 'an application to another for obtaining something.' It is the every-day experience of all of us that in other matters it is so done, and as there is no reason to presume that the general assembly used the word in any sense other than the ordinary sense, we give that construction to the term. We suppose, also, that the letter was intended to take effect in the county of Knox. If it was so intended then we see no reason why the prosecution was not properly commenced in that county. We call attention to the following authorities, and pass this matter without further comment.

"In re Palliser, 136 U. S. 257;
"The King v. Girdwood, 1 Leach 142;
"The King v. Johnson, 7 East 65;
"Commonwealth v. Blanding, 3 Pick 304;
"The People v. Rathbun, 21 Wend 509;
"Same v. Adams, 3 Denio 190;
"Foute v. The State, 15 Tenn. 712;
"United States v. Thayer, 209 U. S. 39;
"Benson v. Henkel, 198 U. S. 1;
"Burton v. United States, 202 U. S. 344;
"Rose v. The State, 4 Ga. App. 588, 62 S. E. 117."

Further, at p. 195, the court uses the following language:

"Attention is called to two Arkansas cases, which deserve notice. Carter v. The State, 81 Ark. 37, decided December 3, 1906, holds that, within the meaning of section 5133, Kirby's Digest, making it unlawful for any person, firm, partnership, or corporation engaged in the sale of liquors to solicit orders for the sale of liquors in any place where the same is prohibited by law, an advertisement in a newspaper published in a prohibition district that liquor may be obtained from a licensed liquor dealer doing business elsewhere, is not a solicitation. The validity of the act itself forbidding soliciting is not questioned."

The Hayner case, however, as suggested by the court, was a case directly on a charge of soliciting an order for the sale of intoxicating liquors as a beverage in a dry county, and did nor relate to the matter of advertising; so that phase of the subject was not considered.

Ohio, unlike some of the states, has not passed any act prohibiting liquor advertisements. The only law upon the question of soliciting is the section heretofore quoted, which makes it a violation to solicit orders.

One of my predecessors, Hon. U. G. Denman, in an opinion under date of May 3, 1909, found in Annual Report of the Attorney General for 1909 at p. 548, was called upon to construe section 4 of the so called Dean act, which now is section 13223 supra.

He held that the term "solicit," as used in said section, did not include advertisements for intoxicating liquors in dry territory. The following is quoted from his opinion (pp. 549-551):

"The definition of 'solicit,' which appears to fit the case in question, as given by the Century Dictionary, is as follows:

" 'To seek to obtain, strive after, especially by pleading; ask (a thing) with some degree of earnestness or persistency, as, to solicit an office or a favor; to solicit orders.'

"And 'advertisement' is thus defined by the same authority:

" 'To make public announcement of anything of which it is desired to inform the public; announce one's wants, wishes or intentions by advertisement; as to advertise for something that is wanted.'

"See also Anderson's Dictionary of Law, 'solicit,' and Bouvier's Law Dictionary, 'advertisement.'

"The act in question is penal and should, therefore, under the well known principle of statutory construction be strictly construed, and

" '* * * those who contend that a penalty may be inflicted, must show that the words of the act distinctly express that under the circumstances it has been incurred. They must fail if the words are merely equally capable of a construction that would, and one that would not, inflict a penalty.'

"2 Lewis' Sutherland Statutory Construction, section 523.

By a strained construction, the term 'solicit' might possibly be held to include 'advertisement' under the above definitions of those terms, but it must always be remembered that the intention of the legislature to forbid 'advertising' for orders for intoxicating liquors in 'dry' territory, must clearly appear from the express words used in the prohibitory act, and such intention cannot be reasoned into it.

" 'It is a principle in the construction of statutes that the legislature does not intend the infliction of punishment * * * by doubtful language. * * *. Although a case may be within the mischief intended to be remedied by a penal act, that fact affords no sufficient reason for construing it so as to extend it to cases not within the correct and ordinary meaning of its language.'

"2 Lewis' Sutherland Statutory Construction, section 521.

"The question here involved might perhaps 'be held to be within the mischief intended to be remedied' by the 4th section of the Dean act, but, we must ascertain the intention of the legislature from the actual words which they have embodied in the act, and must give to those words their common and ordinarily accepted meaning, and it is my opinion that, under the accepted definitions of these two terms, as above given, 'solicit' implies a more personal and individual application, or request, for orders by liquor dealers to inhabitants of 'dry' territory, than is implied in the word 'advertise,' and the further use of the words 'directly or indirectly' does not so enlarge the meaning of the term as to include 'advertising' such as you have referred to in your question. The apparent intention of the legislature in

using the words 'directly or indirectly' was to reach offending agents of anv such liquor dealers. The meaning of the word 'advertise' is well known, and had the legislature intended the act to apply to such cases as the one stated in your question, it should, and undoubtedly would have used that particular term. It is also well to consider in construing this act, that an interpretation of it which would include 'advertisements' such as you have spoken of, inserted in newspapers published in 'wet' counties, would so broaden its scope as to include and indirectly regulate the traffic in intoxicating liquors in 'wet' counties, for it is a well known fact that any newspaper published in 'wet' territory, which is of any value as a general advertising medium, would undoubtedly have a greater or less circulation throughout the 'dry' territory of the state. In my opinion, such an interpretation would give to this act a scope which it was not intended by the legislature to have when passed.

"The only case I have been able to find in the reports which is exactly in point on the question here involved is that of Carter v. The State, 98 Southwestern Reporter, 704, decided by the supreme court of Arkansas, in December, 1906. The question involved in that case was, whether an advertisement in the following terms—

" 'J. M. Strange, in Texarkana, will be glad to have your order for Joel B. Fraser whiskey. * * * Please send your order to J. A. Wilson, of Texarkana, for Bonny Rye.'

—inserted in a newspaper published in 'dry' territory, was unlawful under the terms of section 5133 Kirby's Dig., which read as follows:

" 'It shall be unlawful for any person, firm, partnership or corporation, engaged in the sale of alcohol, or any spirituous, ardent, vinous, malt, or fermented liquors, where the same may be lawful, to *solicit orders, either by agent or otherwise*, for the sale of alcohol or any spirituous, ardent, vinous, malt or fermented, liquors, in any place or places, in this state where the same is prohibited by law.'

"As can be seen, the above provision is in all essentials, and to all intents and purposes, identical with section 4 of the so-called Dean Act, and it is my opinion that the terms, 'either by agent or otherwise,' appearing in the Arkansas statute, and 'directly or indirectly,' appearing in the Dean act, are to all intents and purposes the same, and were intended to cover the same thing.

"Hill, C. J., for the court rendered the following opinion in the Arkansas case:

" 'The facts of this case, which will be found stated by the Reporter, called for a decision as to whether an advertisement is within the meaning of the solicitation denounced by section 5133 Kirby's Dig., * * * The many uses of the term "advertise," in its various forms may be found in the Century dictionary, from which this definition, the one most nearly reaching to the facts here, is taken:

" ' "The act or practice of bringing anything, as one's wants, or one's business, into public notice, as by paid announcement in periodicals, or by hand bills, placards, etc., as to secure customers by advertising."

" 'To "solicit" is thus defined:

" 'To importune, entreat, implore, ask, attempt, try to obtain.' Anderson's Law Dictionary. See also, Century dictionary, "solicit."

"None of the uses of this term embrace 'advertising,' although 'advertising' is a method, in a broad sense, of soliciting the public to purchase the wares advertised. But 'soliciting' is a well-known and defined action, and 'advertising' is an equally well-known and defined action, and they are not identical. It is true that they are intended to reach the same result, the sale

of wares, but different routes are traveled in reaching that end. One is legislated against, and the other is not. *If the legislature intended to make criminal the advertisement in prohibited district of liquor, it would have said so and not left such an important matter to be implied from the use of a general term. It would be a strained and unnatural use of the term 'solicit' to include in it advertisements in newspapers.*"

I concur in the opinion of my predecessor, Hon. U. G. Denman, in his holding that the word "solicit" in section 13223 G. C. does not include the newspaper advertisements, but in answering your question it is not necessary to go even that far, for the reason that the circulars and newspaper advertisements submitted, which contain arguments against prohibition and reasons claimed to induce one to vote "No" on the prohibition amendment, can in no sense be construed even to be advertisements for intoxicating liquors.

It is quite significant that while during all the years since the passage of the act, the penal section of which is now section 13223 G. C., the newspapers in this state published freely both advertisements for liquors and advertisements giving the prices of said liquors and the persons to whom orders should be sent, and these newspaper were mailed throughout the state, into dry as well as wet territory, no question was ever raised that such advertisements constituted a violation of the provision of section 13223 G. C.

The Hayner case, supra, does not assist us much, because the facts in that case show that the post-card was a direct solicitation for an order for liquors to the addressee and that the person was asked to send in his order, have the goods shipped to him, sample the goods, if satisfied remit the price, and if not satisfied the privilege was extended to return the goods. In fact the defense in this case practically admitted that a solicitation had been made in dry territory through the mails, but defended that act on the grounds which the supreme court found were not valid. The court in this case also decided that the solicitation of the order might be made by letter as well as in person.

But taking the plain words of the statute, I am constrained to hold that the mailing of newspapers or circulars, containing such or similar arguments as are found in the circulars and advertisements submitted to me, addressed to persons in so-called dry territory, is not an offense against section 13223 G. C., because nowhere therein is there any solicitation, directly or indirectly, for an order or orders for intoxicating liquors.

In your communication, in addition to referring to section 13223 G. C., you also make reference to section 5 of the act of Congress approved March 3, 1917, effective July 1, 1917. While I can not see how a consideration of the federal act will in any way reflect upon whether or not a particular advertisement offends against section 13223 G. C., still, since there seems to be an impression that the passage of this federal act in some way made advertisements different from what they were theretofore, I have considered same. You understand, of course, I have only considered it as far as it might in any way reflect upon the proper interpretation of our state statute. It would be beyond my jurisdiction to attempt to anticipate what construction the federal authorities might finally give same.

Section 5 of the act of Congress approved March 3, 1917, effective July 1, 1917, (40 Stats. at L. 1069) is as follows:

"That no letter, postal card, circular, newspaper, pamphlet, or publication of any kind, containing any advertisement of spirituous, vinous, malted, fermented, or other intoxicating liquors of any kind, or containing a solicitation of an order or orders for said liquors, or any of them, shall be deposited in or carried by the mails of the United States, or be delivered by any postmaster or

letter carrier, when addressed or directed to any person, firm, corporation, association, or other addressee, at any place or point in any state or territory of the United States at which it is by the law in force in the state or territory at that time unlawful to advertise or solicit orders for such liquors, or any of them respectively.

"If the publisher of any newspaper or other publication or the agent of such publisher, or if any dealer in such liquors or his agent, shall knowingly deposit or cause to be deposited, or shall knowingly send or cause to be sent, anything to be conveyed or delivered by mail in violation of the provisions of this section, or shall knowingly deliver or cause to be delivered by mail anything herein forbidden to be carried by mail shall be fined not more than $1,000 or imprisoned not more than six months, or both; and for any subsequent offense shall be imprisoned not more than one year. Any person violating any provision of this section may be tried and punished, either in the district in which the unlawful matter or publication was mailed or to which it was carried by mail for delivery, according to direction thereon, or in which it was caused to be delivered by mail to the person to whom it was addressed. Whoever shall order, purchase, or cause intoxicating liquors to be transported in interstate commerce, except for scientific, sacramental, medicinal and mechanical purposes, into any state or territory the laws of which state or territory prohibit the manufacture or sale therein of intoxicating liquors for beverage purposes shall be punished as aforesaid *Prov ded*, That nothing herein shall authorize the shipment of liquor into any state contrary to the laws of such state: *Provided further*, That the postmaster general is hereby authorized and directed to make public from time to time in suitable bulletins or public notices the names of states in which it is unlawful to advertise or solicit orders for such liquors."

In "Liquor Bulletin No. 2" of the post office department, which is the most recent bulletin that has come to hand, will be found the following, on p. 2:

"Since the passage of the act the department has received many requests from manufacturers, dealers, publishers, and editors for specific rulings as to whether or not certain liquids are 'intoxicating liquors' within the meaning of the act.

"The inquiries have been answered in each case by the statement that what is or what is not 'intoxicating liquor' within the meaning of the act is a question of fact to be determined from all available evidence.

'The department regards ethyl alcohol as an intoxicating liquor within the meaning of the act, and matter containing either advertisements or solicitations for orders for such alcohol will be unmailable on and after July 1, when addressed to territory affected by the act.

'Methyl alcohol, wood alcohol and denatured alcohol are not regarded by the department as intoxicating liquors within the meaning of the act.

"The contention has been made before the department that inasmuch as the second paragraph of th section permits the interstate shipment of liquor for 'scientific, sacramental, medicinal and mechanical purposes,' matter containing advertisements or solicitations for orders for intoxicating liquor for these purposes is not affected by the act.

"The two paragraphs of the act are entirely separate, the first relating to the mailability of matter, and the second relating to the physical transportation of the liquors themselves—a matter over which this department has no jurisdiction. Inasmuch as the first paragraph contains no exception as to the purposes for which the liquors are intended or the person addressed

the department after July 1 will regard as unmailable all matter containing advertisements or solicitations for orders for intoxicating liquor even though such liquors be intended for 'scientific, sacramental, medicinal, or mechanical purposes.'

'The act is construed to bar from the mails matter of the character described when addressed to states or portions thereof in which it is by state or local law forbidden either to advertise such liquors or to solicit, personally or otherwise, orders therefor.

"This bulletin is subject to change, being based upon the best information available at this time."

From the above it is evident that the post office department has construed the act as to bar from the mails the matter of such character as described in the act, when addressed to states or portions thereof in which it is by state or local law forbidden *either to advertise* such liquors or to solicit, personally or otherwise, orders therefor.

So that while in Ohio we have no law prohibiting liquor advertisements as such, we have, as has been seen, a law which prohibits soliciting orders for intoxicating liquors in any county or territory where the sale of such liquor as a beverage is prohibited, and we have quite a good deal of territory in Ohio, portions of said state, in which it is prohibited to sell such liquors.

But while the construction placed upon the federal act by the federal authorities makes it a federal offense to do the things inhibited in section 5 thereof, in the dry portions of this state, I can not see how that fact in any way has any bearing upon whether a liquor advertisement in the one instance would be violative of section 13223 G. C., or whether arguments against the proposed amendment prohibiting the sale and manufacture for sale of intoxicating liquors as a beverage could or could not be mailed into such dry territory.

So it is my view that irrespective of what facts might constitute an offense under the federal law, section 5, above quoted (having particular reference to the first part of said amendment which by reason of the fact that it covers liquor advertisements and soliciting orders for intoxicating liquors, is the only part of said section which has been given consideration herein), neither produces or limits the provisions of section 13223 G. C., and therefore any facts which might be held to constitute a violation of the last named statute would not be changed or have any different bearing by reason of the provisions of the federal act.

It might be well, even at the risk of lengthening this opinion, to call attention to part of section 1g of article 2 of the Ohio constitution, as adopted September 3, 1912:

"Section 1g. * * * A true copy of all laws or proposed laws or proposed amendments to the constitution, together with an argument or explanation, or both, for, and also an argument or explanation, or both, against same, shall be prepared. The person or persons who prepare the argument or explanation, or both, against any law, section or item, submitted to the electors by referendum petition, may be named in such petition and the persons who prepare the argument or explanation, or both, for any proposed law or proposed amendment to the constitution may be named in the petition proposing the same. The person or persons who prepare the argument or explanation, or both, for the law, section or item, submitted to the electors by referendum petition, or against any proposed law submitted by supplementary petition, shall be named by the general assembly, if in session, and if not in session then by the governor. The secretary of state shall cause to be printed the law, or proposed law, or proposed amendment to the constitution, together with the arguments and explanations, not exceeding a total of

three hundred words for each, and also the arguments and explanations, not exceeding a total of three hundred words against each, and *shall mail*, or otherwise distribute, a copy of such law, or proposed law, or proposed amendment to the constitution, together with such arguments and explanations for and against the same to each of the electors of the state, as far as may be reasonably possible. * * *"

It is apparent from the above that when an argument or explanation is prepared for or against the proposed amendment to the constitution on a prohibition proposition, it will be the mandatory duty of the secretary of state to mail or otherwise distribute with the copy of the proposed amendment the arguments and explanations to each of the electors of the state, as far as may be reasonably possible. Since the character of arguments and explanations against the prohibition amendment must necessarily be along the lines indicated in the advertisement you have submitted to me and which applied to former prohibition amendments, and since in performing the duty of mailing such arguments it would be uncumbent upon the secretary of state to send same into dry as well as wet territory, it is obvious that the electors in adopting section 1g, supra, contemp'ated the doing of the very thing concerning which you inquire; that is, having mailed to the electors in dry territory arguments for and against the prohibition amendment, when such amendment was being submitted.

In view of the foregoing, it is my opinion that circulars and advertisements sent into dry territory by mail or otherwise, merely containing arguments against prohibition and nowhere containing solicitations for orders for intoxicating liquors, are not prohibited by the provisions of section 13223, G. C.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

535.

COUNTY COMMISSIONERS—HAD NO AUTHORITY TO IMPROVE ROAD WITHIN MUNICIPALITY—UNDER CASS LAW—PETITION TO ALTER —LOCATE OR ESTABLISH ROADS—BOND AND COSTS—COMMISSIONERS MAY ISSUE BONDS TO PAY COST OF CRIB TO PROTECT PIER OF BRIDGE—ALTHOUGH BRIDGE BUILT PRIOR THERETO—HEDGE FENCE—ACTION IN DAMAGES PROPER REMEDY—WHEN OWNER FAILS TO KEEP WITHIN DIMENSIONS REQUIRED BY LAW.

1. *There was no provision in the Cass highway law authorizing the county commissioners to improve a road lying entirely within a muncipality and steps taken in reference to the improvement of such a road, before said act was amended, are of no force or effect in law.*

2. *Sections* 6887 *to* 6889, *both inc., G. C., providing for the location, establishing, altering, etc., of roads, seem to make no provision for a bond to be furnished by the petitioners; neither do they make any provision in the matter of costs.*

3. *In a case where a bridge was washed out during the flood of* 1913 *and has been reconstructed, with the exception of a crib in the river to protect the middle pier of the same, the county commissioners may issue bonds to pay for the cost and expense of said crib and levy taxes to redeem the bonds, outside the fifteen mill limitation provided by law, provided they can bring themselves within the provisions of section* 3 *of the emergency act* (103 *O. L.* 143).

4. *In cases where the owner of a hedge fence fails to keep it within the dimensions provided by law, the only remedy open to the public or to a private individual is that found in sections* 5935 *et seq., G. C., namely, an action for damages.*

COLUMBUS, OHIO, August 15, 1917.

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

DEAR SIR:—I have your communication of July 25, 1917, in which you ask my opinion on certain matters therein set out, as follows:

> "I have before me your opinion of recent date to the auditor of the county, in which you advise against the county commissioners constructing a road improvement through the village of Stockport under the provisions of Sec. 6949, and in which opinion you refer to opinion formerly rendered to prosecuting attorney of Medina county. Sec. 6949 was amended by last legislature and my question is 'Does Sec. 6949 as amended, give to the commissioners authority to continue a road through a municipality to the east line thereof, said road having been heretofore constructed by said commissioners to the west line of said village; the village and the commissioners agreeing on the portion each is to pay?'
>
> "Acting under Sec. 6949 the village of Stockport and the commissioners entered into the usual agreement; the village held an election on May 7, 1917, for the purpose of issuing bonds to pay for its share of the improvement; the vote was practically unanimous in favor of the bond issue. Under Sec. 6949 as it then stood are the proceedings as between the commissioners and the council void? Is the election to issue

bonds void? If, under Sec. 6949 as now amended the commissioners have authority to make such improvement, must the entire proceedings, including the election be again consummated?

"Second: Where petition is filed under Sec. 6887 for private road should a bond be required from the petitioner? In case the commissioners upon hearing dismiss the petition and adjudge costs against the petitioner, no bond having been required, how may the commissioners proceed, if at all, to collect?

"As a result of the flood of March, 1913, the bridge here was destroyed, and after a time was rebuilt. Considerable correspondence was had with the federal government about rebuilding and about a crib to protect the first pier, or draw bridge pier, of the bridge; the bridge was constructed either with or without government approval, and later a plan for constructing a crib up stream from the pivot pier, about 100 feet, at cost of about $8,000.00 was submitted to the government authorities. Approval was not given until recently; this pier having apparently been weakened by the action of the flood, may the commissioners at this time issue bonds for such improvement under flood emergency section, that is, outside the 15 mill limitation?

"When the owner of a hedge fence along a public road refuses to cut or trim same, are the trustees limited to the provisions of section 5935 et seq.?"

1. Your first question has to do with section 6949 G. C. Said section, before it was amended by the White-Mulcahy law, read as follows:

"Sec. 6949. The board of county commissioners may extend a proposed road improvement into or through a municipality when the consent of the council of said municipality has been first obtained, and such consent shall be evidenced by the proper legislation of the council of said municipality entered upon its records, and said council may assume and pay such proportion of the cost and expense of that part of the proposed improvement within said municipality as may be agreed upon between said board of county commissioners and said council."

As you suggested in your communication, I rendered an opinion to the effect that under the provisions of said section the board of county commissioners had no authority to assume jurisdiction over the improvement of a road which was entirely within the limits of the municipalty.

Said section 6949 G. C. has been amended by the White-Mulcahy law (107 O. L. 107) and now reads in part as follows:

"Sec. 6949. The board of county commissioners may construct a proposed road improvement into, *within* or through a municipality, when the consent of the council of said municipality has been first obtained * *."

It will be noticed that the word "within" is placed in the section, which was not in the section before its amendment. It was placed there to accomplish the very object which the law as it stood before did not accomplish, namely, to permit the county commissioners to improve a road which is entirely within the limits of a municipality.

Your question is as to whether the steps which the county commissioners

and the village council took upder the old law are of no effect, due to the fact that the old law made no provision for the improvement in reference to which the different steps were taken.

A number of jurisdictional steps have been taken by the county commissioners and the village council, among them the following: The consent of the council was given to the construction of the public highway in the village. The surveys, plans, etc., for the improvement have been made. These surveys and plans have been approved by the village council. The agreement as to the part of the cost and expense of the improvement each is to bear has been entered into. The county commissioners have taken all the necessary steps leading up to the advertising for bids.

For all of these steps there was no warrant or authority of law. It is true a law had been passed and filed with the secretary of state on March 29, 1917, but section 1c of article II of the constitution provides:

> "* * No law passed by the general assembly shall go into effect until ninety days after it shall have been filed by the governor in the office of the secretary of state, except as herein provided * *."

As said before, the law as it stood prior to the enactment of the White-Mulcahy law gave no authority to the county commissioners and village council to proceed in the manner in which they did proceed, and the said law which was filed with the secretary of state on March 29, 1917, did not become effective until the 28th day of June, 1917. Hence the only theory upon which the procedure taken by your county commissioners and the village council could be sustained would be to hold that the authorities might anticipate the provisions of the new law. This I do not believe can be done. The fundamental law provides that no act shall become effective for ninety days after the same is filed with the secretary of state. Its provisions are held in abeyance for a time, until the people of the state may decide as to whether they desire to express their opinion at the ballot box as to its merits and demerits.

If the law is not to be effective for ninety days after the filing of the same with the secretary of state, no one can look to its provisions to secure a right or enforce a remedy during this period. If this principle is not followed, great confusion would likely arise. If the provisions of law filed with the secretary of state may be anticipated for one thing, they may be anticipated for all things. If they may be anticipated a day before the referendum period ends, they may be anticipated ninety days before it expires. There would be a great uncertainty among the people as to whether they should base their rights and enforce their remedies under the one law or the other.

Further, if the law has no effect until the ninety-day period has expired, the repealing clause of the said law has no effect until the expiration of that time. If this be true, the old law stands in full force and effect. And if this be true, the rights and remedies of the people must be based upon it and not upon a law the provisions of which have no effect because the going into effect of the same is held in abeyance by the supreme law of the land.

Hence it is my opinion that the steps which the county commissioners of your county and the village council of Stockport have taken under the old law, in the matter of a road improvement lying entirely within the limits of the municipality, are of no effect whatever and they could not be used as a basis for further procedure in reference to the matter of said improvement.

2. You state that the village of Stockport has held an election and has

voted favorably upon the question of issuing bonds to create a fund for the improvement of the said street, and you especially ask whether it will be again necessary to hold an election for this purpose.

In reference to this matter I desire first to note section 6951 General Code. This section as it stood in the old law, and as it is found in the new, provides that the municipality *in anticipation of the collection of taxes levied for the purpose of providing for the payment of the municipality's share of the cost of such improvement is authorized to sell its bonds.*

Under the provisions of this section, bonds could be issued in municipalities in anticipation of the collection of taxes without the necessity of submitting the question to a vote of the people of the municipality. This would be true, provided the bonds issued by the municipality had not reached the limits provided by law. Hence, inasmuch as the village had submitted the question of a bond issue to the people, I am assuming that this step was necessary for the reason that the bonded indebtedness of the village had already reached the limit provided by law without a vote of the people.

With this in mind let us now turn to the provisions of section 3939 General Code. This section provides that the council of a municipal corporation, when it deems necessary, may issue and sell bonds in such amount and denominations, for such period of time and at such rate of interest, not exceeding 6% per annum, as said council may determine and in the manner provided by law for any of the purposes therein specified. Sub-division 22 of said section 3939 sets forth the following purpose:

> "For resurfacing, repairing or improving any existing street or streets as well as other public highways, whether such resurfacing, repairing or improving is done directly by the municipal corporation, or contracted by it, or by the county commissioners under an agreement with the municipal corporation by which it has agreed to assume and pay any part of the cost thereof."

Thus we see, from the provisions of this section, that the council of Stockport can issue bonds under a vote of the people for the purpose of improving the streets of the village, whether the improvement was to be made by the municipality alone or in conjunction with the county commissioners. But while this section gives authority to issue bonds for the purpose set out in subdivision 22 of section 3939 of the General Code, yet it is my opinion that the power to issue said bonds could not be exercised unless the authorities have the power to proceed with the improvement for which they are issued, and as said before the authorities had no power to proceed with the improvement under contemplation for the reason that there was no provision of law authorizing them to construct the improvement. That is, section 6949 of the General Code was not broad enough prior to its amendment to permit the county commissioners and the village council to join in the matter of the improvement lying wholly within the municipality. Hence, at the time the bonds were voted for, the improvement for which the bonds were voted for could not have been made at all.

While there was authority under the provisions of section 3939 of the General Code to issue bonds for the purpose set out above, yet this authority could not be exercised by the municipality for the reason that it was impossible to construct the improvement for which the bonds were issued.

Therefore, it is my opinion that the municipality of Stockport cannot issue bonds as a result of the election held in said village, and this for the reason that the village had no right or authority to hold the election.

From this it follows that it will be necessary, in my opinion, for the proposition of issuing bonds to take care of the municipality's share of the cost and expense of said improvement to be again put up to a vote of the people.

3. You also submit a question in reference to the provisions of sections 6887 and 6889, both inclusive, of the General Code, which provide for the laying out of a road or outlet from a man's premises through the premises of another, leading to the public highway. These sections form a part of what was known as the "Cass Highway Law." Sections 6860 to 6889, both inclusive, made up the first chapter of said act, and the chapter is headed:

> "Locating, establishing, altering, widening, straightening, vacating or changing the direction of the road."

Seitions 6860 to 6886, both inclusive, G. C., embodied provisions which existed before the Cass act became a law. But the provisions of sections 6887 to 6889, both inclusive, G. C., are first found in the law as set out in the Cass act. They seem to have been in a way engrafted on the former provisions in reference to locating, establishing, altering, etc., roads. However, they do not seem to have been engrafted upon these other sections in such a way as to warrant one, in placing a construction upon them, to go to the provisions of the former sections, in order to help out in the scheme or plan set out in the latter sections.

Sections 6860 to 6886, supra, relate to public roads, while sections 6887 to 6889, supra, have to do with private roads or outlets. It is true section 6860 is broad enough to include not only public but also private roads, but the very next section starts out to deal with public roads, and the subject of public roads is considered from that section on through to section 6886.

With this analysis in mind, let us turn to your question. You ask whether the county commissioners should require a bond upon the filing of a petition under section 6887 G. C.

Section 6863 G. C. provides that the county commissioners shall require the petitioners, or some one or more of them, to enter into bonds conditioned for the payment of the cost and expenses incurred in the proceedings, but there is no such provision made in sections 6887 to 6889, supra. As said before, I do not believe that we can turn to the provisions of section 6883 G. C. for this matter.

Hence, I conclude that the statute does not require the giving of a bond, and if the statutes does not require it, I do not believe that the county commissioners would have any authority to require same.

It is almost universally held by our courts that the matter of security for costs in the United States is statutory, and where the statutes do not require security to be given, the courts or officials having jurisdiction over any matter have no right or authority to demand that a bond be filed to secure costs.

In reference to these sections, you also make inquiry if the commissioners should decide to dismiss the petition, then how may they proceed to collect the costs?

Section 6868 G. C. provides that the petitioners shall be liable for all the costs of said proceedings and the commissioners may abandon said improvement and adjudge the costs against the petitioners, and in case of the failure of the petitioners to pay the costs adjudged against them, the same may be recovered in an action against them by the prosecuting attorney of the county. But said provisions relate to public roads and there is no such provision whatever applicable to private roads. There seems to be no provision made for assessing costs against any one, nor any made for collecting costs.

Hence it is my opinion that the county commissioners have no authority to assess costs; neither has any one authority to collect them.

> "Costs can be imposed and recovered only in cases where there is statutory authority therefor. While the power to impose costs must ultimately be found in some statute, the legislature may nevertheless grant the power in general terms to the courts, which in turn may make rules or orders under which costs may be taxed and imposed; but the courts cannot make such rules or orders and impose costs thereunder, unless the power to do so is expressly given them by statute."

This is the rule laid down in 11 Cyc. 24 and from the cases therein cited to substantiate said proposition, I believe the rule is correctly stated.

I desire also to state that it is my opinion that the county would in no event be liable for the payment of the costs, for the reason that the proceeding set out in these three sections in no sense is of a public nature, but is purely private. For this reason I might suggest that I doubt very much whether sections 6887 to 6889, inclusive, G. C., are constitutional. It would hardly seem probable that a private individual could be given the right to condemn the property of another for his own personal use, but upon this question I am not passing. I am only passing upon the question that the costs made in such a proceeding cannot be assessed by the county commissioners; neither can they be collected from anyone.

4. Another question you submit is whether the county commissioners would have authority to build a crib in a navigable river, to sustain a drawbridge pier, and levy taxes to redeem the bonds issued for the payment of the same, said bridge having been washed out by the floods of 1913, and make the said tax levy outside the maximum limit as otherwise provided by law.

From your communication I gather that the bridge has been reconstructed, but that the middle pier of the same is not as well protected from the flowing waters of the stream as it should be. The act relative to the matter under consideration is found in 103 O. L. 141. Section 1 of said act provides for the temporary repairing, reconstruction or replacement of public property or public ways. Section 2 thereof provides for the removing of any obstruction or matter deposited by the flood. Section 3 of the act relates particularly to the question under consideration and reads as follows:

> "For the purposes mentioned in sections 1 and 2 of this act, and for the permanent repair, reconstruction or replacement of public property or public ways destroyed or injured in the manner, and at the time described in section 1 of this act, any board of county commissioners, board of education, township trustees or council of any municipal corporation or the road commissioners of any road district may issue bonds or notes of the corporation, subdivision or district as needed. Resolutions or ordinances providing for the issuance of such notes or bonds shall not be published, shall not require the approval of the electors nor be subject to any referendum. Such resolution or ordinances shall state the facts bringing them within the terms of this act, so far as the emergency is concerned, shall require for their passage the votes of two-thirds of all members elected to such board or council and the recitals therein contained shall be conclusive evidence of the facts recited."

Section 6 of the act provides that taxes may be levied for the redemption of bonds, beyond the maximum limit otherwise provided by law.

The provisions of section 3 of the act are still in full force and effect, and if the board of county commissioners is able to make the statements necessary to bring the matter about which you write within the provisions of the act, there would seem to be nothing to prevent their taking advantage of the provisions of this act.

I might suggest that section 3 of the act under consideration was amended in 106 O. L. 354, but so far as the answer to your question is concerned, the amendment therein made has no effect.

5. You inquire what remedies the public has against an owner of a hedge fence, who refuses to cut or trim the same in accordance with the provisions of the law.

Sections 5935 et seq. G. C. seem to contain the only provisions of law which give any remedy to the public or to private individuals in reference to this matter, and, as will be readily seen in an analysis of said sections, this remedy merely goes to the matter of damages; that is, a private individual who is damaged from the fact that the owner of the hedge on a partition line permits it to remain at a greater height or width than six feet, for a longer period than six months, may recover damages not to exceed twenty cents a rod of such hedge fence. If the same be along a public highway, the trustees of the township may recover damages not to exceed fifteen cents per foot of the hedge fence. There seems to be no provision of law by virtue of which the owner can be compelled to keep his hedge fence trimmed so that the same will be within the dimensions provided for by law, namely, six feet high and six feet wide.

Section 5942 G. C. provides that the owner of lands shall keep all brush, briers, thistles or other noxious weeds cut in the fence corners, etc., but this would not include the hedge fence.

Section 3374-2 G. C. (107 O. L. 94) provides:

> "All brush, briers, burrs, vines, Russian or Canadian, or common thistles or other noxious weeds growing along the public highway shall be cut (at different periods of the year)."

This would not include hedge fences. Hence it is my opinion that there is no remedy other than that found in sections 5935 et seq. G. C.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

536.

CLERK OF COURTS—APPOINTED TO FILL VACANCY—WHEN SUCCESSOR ELECTED.

1. *Where J. L. F. was appointed Clerk by reason of a vacancy caused by the death of L. B. T., on the 23rd day of December,* 1916, *and said L. B. T. had been re-elected county clerk at the November election,* 1916, *said J. L. F. would hold the office under his appointment from that date, December* 23, 1916, *until his successor is elected and qualified.*

2. *Such successor should be elected for the unexpired term at the November election,* 1918, *at which election there should also be elected a clerk for the regular term commencing on the first Monday of August,* 1919.

COLUMBUS, OHIO, August 15, 1917.

HON. P. H. WIELAND, *Prosecuting Attorney, Mt. Gilead, Ohio.*

DEAR SIR:—I am in receipt of your communication of August 7, 1917, wherein you state:

> "I desire to submit the following questions for an opinion from your department:
>
> "On the 23d day of December, 1916, John L. Fargo received a commission as clerk of the courts of Morrow county, Ohio, to fill the unexpired term caused by the death of L. B. Terry, clerk, which commission was to end the first Monday of August, 1917. The late L. B. Terry had also been elected for a second term, to begin the first Monday of August, 1917.
>
> "On the 16th day of July, 1917, the commissioners of Morrow county reappointed John L. Fargo to serve for the term beginning the first Monday in August, 1917, and a commission was given said John L. Fargo on the 28th day of July, 1917. On the first Monday in August, 1917, the commissioners of Morrow county being in doubt as to whether their appointment of July 16, 1917, was legal and regular, again appointed John L. Fargo as clerk of the court of Morrow county.
>
> "Q. (1.) Could the commissioners of Morrow county, at their July meeting, make this appointment, or should they wait until Monday, August 6, 1917, at which day the first term of John L. Fargo expired?
>
> "Q. (2.) Is the commission issued by the governor on July 28, 1917, sufficient or should the clerk be required to get a new commission dated from August 6, 1917, when the appointment was again made by the commissioners?"

Section 2870 G. C. provides:

> When a vancancy occurs in the office of clerk of the court of common pleas, the county commissioners shall appoint a clerk pro tempore, who shall give bond and take the oath of office prescribed for the clerk-elect. If the commissioners are not in session when such vacancy occurs, the county auditor shall forthwith give written notice thereof to each of them, and thereupon they shall meet and make the appointment. If

the commissioners fail to make an appointment for ten days after they severally have had such notice of vacancy, the appointment shall be made by the county auditor."

Section 8 G. C. provides:

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

Section 10 G. C. provides:

"When an elective office becomes vacant, and is filled by appointment, such appointee shall hold the office until his successor is elected and qualified. Unless otherwise provided by law, such successor shall be elected for the unexpired term at the first general election for the office which is vacant that occurs more than thirty days after the vacancy shall have occurred. This section shall not be construed to postpone the time for such election beyond that at which it would have been held had no such vacancy occurred, nor to affect the official term, or the time for the commencement thereof, of any person elected to such office before the occurrence of such vacancy."

Section 10 G. C. was section 11 of the Revised Statutes and before its codification read as follows:

"When an elective office becomes vacant, and is filled by appointment, such appointee shall hold the office till his successor is elected and qualified, and such successor shall be elected at the first proper election that is held more than thirty days after the occurrence of the vacancy; but this section shall not be construed to postpone the time for such election beyond that at which it would have been held had no such vacancy occurred, nor to affect the official term, or the time for the commencement of the same, of any one elected to such office before the occurrence of such vacancy."

In the case of State ex rel. v. Speidel, et al., 62 O. S., 156, our supreme court held the following, as found in the second paragraph of the syllabus:

"When one who is holding the office of sheriff, and is a candidate for election to succeed himself, dies before entering upon the new term, a vacancy is thereby created in the term in which he was serving, but not in the term for which he was a candidate, and upon which he had not entered; and one who is duly appointed and qualified to fill the vacancy thus created will hold the office for and during the unexpired term of his predecessor, and until his successor is elected and qualified; and such election must be had at the first proper election that is held more than thirty days after the occurrence of the vacancy."

The facts in that case were that Buvinger, who was the sheriff and a candidate for re-election, died upon election day and received the highest number of votes cast for office of sheriff. Cover received the second highest number of votes and claimed that since Buvinger died before the close of the polls, he (Cover) had

received the highest number of votes of any person entitled to be elected and was authorized to receive a certificate of election. Walker was appointed on November 9, 1899, two days after the election, to fill the vacancy in said office created by the death of Buvinger, and qualified, gave bond and entered upon the duties of his office. Walker claimed that by virtue of this appointment he held the office until his successor was duly elected and qualified. The first term of Buvinger would expire on the 31st day of December and Speidel, on the theory that Walker only filled out the unexpired portion of Buvinger's first term, was appointed for the vacancy beginning the first Monday in January, 1900.

Davis, J., at page 159, held that Buvinger did not live to qualify and that disposed of his future term. He further held:

> "Walker was, it is conceded, duly appointed, commissioned, qualified and inducted into the office of sheriff of Clermont county, for the unexpired term of Buvinger. This much was done under and by virtue of section 1208 of the Revised Statutes; but section 11 of the Revised Statutes read into his commission the words: 'Until his successor is elected and qualified.' Speidel was appointed, and not elected, and is a mere intruder in the office. Walker is still the legal sheriff and will continue so to be 'until his successor is elected and qualified, and such successor shall be elected at the first proper election that is held more than thirty days after the occurrence of the vacancy.' Revised Statutes, Sec. 11.
>
> "In order that we may not be misunderstood it may be added that there was no vacancy in the office of sheriff of Clermont county on the first Monday in January, 1900. The death of Buvinger did not create a vacancy in his term which would have begun in January, 1900, assuming that he was duly elected because he did not live to be installed in his second term. State ex rel. v. Dahl et al., 55 Ohio St., 195. Walker was incumbent at the time when that term would have begun had Buvinger lived, with the right to remain until his successor was elected and qualified. There could be no vacancy then, unless Walker should die, resign, or be lawfully removed for cause. State ex rel v. Wright, 56 Ohio St., 540. Therefore, the county commissioners, in appointing Speidel, acted altogether without authority; and Speidel can have no right to act as sheriff."

I am not unmindful of a case decided by the superior court of Cincinnati in 1897, in Harte v. Bode, et al., 4th N. P., 421, where the court held, as shown by the syllabus, as follows:

> "1. That, by virtue of the appointment by the county commissioners, Monfort held the office of clerk until the first Monday of August, 1898; and therefore, there was no unexpired term to be filled.
>
> "2. That the person elected at the November election would be elected for the full term of three years, beginning on the first Monday of August, 1898.
>
> "3. That the board of elections properly refused to print the name of any nominee for such office more than once upon the official ballot."

In this case Smith, J., held that there was no unexpired term, and that at the first proper election the clerk should be elected for the full term, but, as a reading of the opinion will disclose, the fact that section 11 of the Revised

Statutes did not provide for any unexpired term was one of the reasons assigned by the court for his decision. It probably was in view of that fact that the codifying commissioners changed Revised Statutes section 11, now section 10 of the General Code, and expressly provided that unless otherwise provided by law, such successors shall be elected for the unexpired term at the next general election for the office that is vacant that occurs not more than thirty days after the vacancy occurred.

In view of the decision in 62 Ohio State, above quoted, and this appointment being controlled by the provisions of section 10, General Code, it is my opinion that Mr. Fargo, who was appointed to fill the unexpired term caused by the death of Mr. Terry, on the 23d day of December, 1916, continues under his commission by virtue of the provisions of section 8 of the General Code until his successor is elected and qualified, and that said successor, by virtue of the provisions of section 10 will be elected for the unexpired term at the November election in 1918, at which election, in addition to electing the county clerk for the unexpired term, there will also be an election for the clerk for the full term commencing on the first Monday in August, 1919.

In conclusion, my answer to your specific question is:

(1.) There was no necessity for the commissioners, at their July meeting, to make any appointment. Mr. Fargo, because of his appointment on the 23d of December, 1916, would hold over until his successor was elected and qualified.

(2.) In view of my answer to your first question, it is, of course, unnecessary to answer the second, since the commission that Mr. Fargo received on his appointment the 23d of December, 1916, would be sufficient authority for his holding his office until a successor was elected and qualified.

The above views are not in accord with the conclusions reached by my predecessor, Hon. Edward C. Turner, in his opinion under date of April 2, 1915, found in Vol. I of the Opinions of the Attorney-General for 1915, p. 354, with which opinion I do not concur.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

537.

JOINT CITY AND COUNTY WORKHOUSE—MUSKINGUM COUNTY—WHAT EMPLOYES UNDER CIVIL SERVICE.

The secretary of the joint city and county workhouse directors of Muskingum county and the city of Zanesville is subject to the civil service law, and is to be selected from the eligible list and not to be discharged except for cause in accordance with the provisions of the civil service law. But the said board is entitled to select two secretaries, assistants or clerks who are, by virtue of such selection, withdrawn from the operations of the civil service act; and if the said board has not heretofore made such selection of the two such secretaries, assistants or clerks it may do so, including its secretary appointed under section 14551 *General Code.*

COLUMBUS, OHIO, August 15, 1917.

HONORABLE PERRY SMITH, *Prosecuting Attorney, Zanesville, Ohio.*

DEAR SIR:—On August 2, 1917, you addressed the following inquiry to this department:

> "First. The secretary of the workhouse board for Muskingum county and city of Zanesville, passed the civil service examination in 1915, and each two weeks he draws his money as secretary of said board, and having received his appointment by passing the examination can he as secretary be removed unless charges are preferred against him?
>
> "In other words, having passed the examination under the civil service and being employed since 1915, the mayor having appointed a new board of trustees, can the new board elect a secretary to succeed the old secretary without preferring charges against the secretary who was duly elected and appointed by the old board under the civil service law."

The institution you mention was created by a special act of March 17, 1887, which is now found in the General Code, sections 14548 et seq. Section 14549 vests the control of this institution in "the board of joint city and county workhouse directors," who shall be freehold electors of the county.

Section 14550 provides for the appointment of the board by the mayor of the city with the approval of council.

Section 14551 provides:

> "The board of such joint city and county workhouse directors shall elect annually, at its first regular meeting in May, one of its members as president, and at the same meeting appoint a secretary and clerk. * * *"

Section 14553 is as follows:

> "The board shall have power to appoint a superintendent, deputy superintendent and such subordinate officers, guards and employes as may be necessary, fix their compensation and prescribe their duties, and to make all such regulations for their management and government as it may deem expedient."

The above are the provisions for the employes of the board,—one section providing for the secretary and clerk, the other for the superintendent, deputy superintendent, subordinate officers, guards and employes.

There is no doubt that these officers and employes are subject to the civil service law of the state, the first paragraph of the first section of which is: (Sec. 486-1 G. C.)

> "The term 'civil service' includes all offices and positions of trust or employment in the service of the state and counties, cities and city school districts thereof."

So that, whether this workhouse be a city or county institution, or a combination of both, would not matter in this respect. The subsequent provisions of the act place all officers and employes in the classified civil service, with certain exceptions set out in the statute. (Section 486-8 G. C.) The secretary is not in any of these exceptions, unless by the election by the board he is placed there under paragraph 8 of subsection 8, which is as follows:

> "Three secretaries, assistants or clerks, and one personal stenographer for each of the elective state officers; and two secretaries, assistant or clerks, and one personal stenographer for other elective officers, and each of the principal appointive executive officers, boards or commissions, except civil service commissions, authorized by law to appoint such secretary, assistant or clerk and stenographer."

Under favor of this subsection such board has authority to select two secretaries, assistants or clerks and one stenographer. It is therefore within the power of this board to withdraw this position from the classified service and make the appointment otherwise than from the eligible list if it sees fit to select this secretary as one of the two provided in the section. If the board already has two exempted employes by virtue of having selected them as exempt heretofore, it has no option to substitute another person as secretary unless upon a discharge upon charges regularly preferred according to the civil service law. If the board has not availed itself of the benefits of this section and not claimed any employes as exempted from the classified service, it may select the secretary and another or any two assistants as it may desire.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

538.

STOCK—SURRENDERED TO CORPORATION—UPON SALE OF PART OF PROPERTY—NOT RESTORED TO STATUS OF UNISSUED STOCK—HOW TAX COMPUTED ON SUCH STOCK.

1. *The surrender by the shareholders, of the part of the stock in such corporation held by them, to the corporation itself by reason of the sale of a part of the property of the corporation and pro-rata distribution of the proceeds thereof among the stockholders does not restore such stock so surrendered to the company to the status of unissued stock,—it continues to retain its character as subscribed or issued and outstanding stock.*

2. *The fee or tax required of a corporation under section* 6488 *General Code should be computed upon all its subscribed or issued and outstanding stock, regardless of the fact that a part of such stock has been subsequently acquired and is owned by the corporation.*

COLUMBUS, OHIO, August 15, 1917.

HON. WILLIAM D. FULTON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—Under date of July 18, 1917, you submitted to me a communication addressed to you by The Carroll Foundry and Machine Co., of Bucyrus, Ohio, under date of July 11, and another letter dated July 17, 1917. From these communications it appears that The Carroll Foundry and Machine Company was organized with an authorized capital stock of $400,000.00, all of which was later subscribed for and issued. Sometime thereafter the company sold its steel foundry department, which department so sold as property of the company represented a capitalization of $200,000.00. The proceeds of the sale of this property was distributed prorata amongst its stockholders and thereupon all outstanding certificates of stock were called in and new ones issued to the stockholders in the amount of $200,000.00, the remaining $200,000.00 of stock by the surrender becoming the property of the corporation, which it has since held as treasury stock.

The precise question made by the company in the communications to you is whether the franchise tax described by section 5498 General Code should be computed upon the sum of $400,000.00,—the amount of the capital stock of this corporation originally issued and outstanding, or only on $200,000.00, the amount of capital stock now issued and outstanding in the stockholders of the company.

Section 5495 of the General Code provides that annually during the month of May each corporation organized under the laws of this state for profit shall make a report in writing to the tax commission in such form as the commission may prescribe.

Section 5496 provides the manner in which such report shall be signed and verified; and sections 5497 and 5498 General Code provide as follows:

"Sec. 5497. Such report shall contain:

"1. The name of the corporation.

"2. The location of its principal office.

"3. The names of the president, secretary, treasurer and members of the board of directors, with the postoffice address of each.

"4. The date of the annual election of officers.

"5. The amount of authorized capital stock and the par value of each share.

"6. The amount of capital stock subscribed, the amount of capital stock issued and outstanding, and the amount of capital stock paid up.

"7. The nature and kind of business in which the corporation is engaged and its place or places of business.

"8. The change or changes, if any, in the above particulars, made since the last annual report."

"Sec. 5498. Upon the filing of the report, provided for in the last three preceding sections, the commission, after finding such report to be correct, shall, on the first Monday of July, determine the amount of the subscribed or issued and outstanding capital stock of each such corporation. On the first Monday in August, the commission shall certify the amount so determined by it to the auditor of state, who shall charge for collection, on or before August 15th, as herein provided, from such corporation, a fee of three-twentieths of one per cent., upon its subscribed or issued and outstanding capital stock, which fee shall not be less than ten dollars in any case. Such fee shall be payable to the treasurer of state on or before the first day of the following October."

From the provisions of section 5498 General Code it will be noted that the franchise fee or tax of three-twentieths of one per cent. may be computed upon the subscribed capital stock or upon the issued and outstanding capital stock. It is evident that stock may be subscribed for without being issued and outstanding. Issued and outstanding stock, on the other hand, must in some form be subscribed for. In the instant case it appears that all of the authorized capital stock of the corporation prior to the time of the sale of one of its departments was issued and outstanding. We are not, therefore, in this case necessarily called upon to consider the provisions of section 5498 General Code in so far as they authorize the computation of the franchise tax upon the subscribed capital stock, but the question here presented may be considered to be with respect to the amount which, for the purpose of the computation of the franchise tax prescribed by section 5498, represents the issued and outstanding capital stock of the company.

As above noted, it appears that $200,000.00 of the capital stock of this corporation originally issued and outstanding was surrendered by the stockholders and thereafter held by the company as treasury stock, and the precise question here presented is whether the franchise tax provided for by section 5498 can legally be computed upon the amount of the capital stock thus surrendered to the company by the stockholders, as well as upon the amount represented by the certificates now held by the shareholders in the amount of $200,000.00, or only on the latter amount.

A diligent search fails to discover any extended line of authorities on this question. In the case of the Knickerbocker Importation Company v. State Board of Assessors et al., 74 N. J. L. 583, a case decided by the court of errors and appeals of the state of New Jersey, the court was called upon to consider this precise question under the provisions of section 519 of the compiled statutes of New Jersey, which required corporations organized under the laws of that state to make an annual return to the state board of assessors, and to state therein the amount of the capital stock issued and outstanding as of the first day of January preceding; said statute further providing that such corporations shall pay an annual franchise tax of one-tenth of one per cent. on all its issued and outstanding capital stock up to and including the sum of $3,000,000. In the case just referred to the report of the Knickerbocker Importation Company stated that as of January 1, 1904, its entire issue of $500,000.00 was fully paid, but that prior to January 1, 1904, 3,460 shares of stock of the said com-

pany of the par value of $100.00 each had been returned to the treasury of the company, and the company claimed that therefore only $154,000.00 of its stock was issued and outstanding on that date. The state board of assessors fixed the franchise tax at one-tenth of one per cent. upon $500,000.00 of the stock issued.

Upon a writ of certiorari procured by the company in the supreme court to the finding of the state board of assessors, that court held that stock owned by the corporation which issued it should not be considered in determining the amount of the franchise tax under the corporation tax law above referred to, and ordered the tax assessed by the state board of assessors reduced to the sum of $154,000.00.

On error prosecuted by the state board of assessors in the court of errors and appeals the judgment of the supreme court, the court of errors and appeals, reversed the judgment of the lower court and held that stock of a corporation once issued is and remains outstanding, within the purview of the New Jersey franchise tax law above noted although owned by the corporation issuing the same until retired and cancelled in the manner provided by statute for the reduction of the capital stock.

This decision of the court of errors and appeals of the state of New Jersey was later followed by the supreme court of that state in the case of Goldstein-Fineberg Company v. State Board of Assessors et al., 83 N. J. L. 61.

In opinion 1,825, addressed to the Tax Commission of Ohio, under date of August 2, 1916, my predecessor, Hon. Edward C. Turner, was called upon to consider the question here presented in a matter relating to the affairs of The France Slag Company, a corporation for profit organized under the laws of this state.

In the matter before Mr. Turner it appears that prior to January, 1916, The France Slag Company had authorized capital stock of $250,000.00, all of which was issued and outstanding. Sometime thereafter and prior to the month of May, 1916, the corporation sold a portion of its assets to some of its stockholders, in consideration of which the purchasing stockholders surrendered to the company stock therein held by them aggregating in amount the sum of $125,000.00 par value. The certificates evidencing such stock being cancelled, the corporation in May, 1916, filed its franchise tax report with the state tax commission, and set out in this report that the amount of capital stock subscribed for, issued and outstanding was $125,000.00, being the balance of the authorized capital stock remaining outstanding after the surrender to the company of the stock above mentioned in the sum of $125,000.00 par value.

Without having before him the New Jersey decisions above cited, Mr. Turner arrived at the same conclusion on the question before him as that announced in said decisions, and held that The France Slag Company was required to pay a franchise tax at the rate prescribed in section 5498 on the total amount of the stock of said corporation originally issued and outstanding, towit, the sum of $250,000.00.

Mr. Turner, in the said opinion, sets out the provisions of section 8700 General Code, which authorizes corporations to reduce their capital stock and prescribes the method whereby this may be accomplished, and held that until the corporation has exercised the power conferred by this section it would have to pay the Willis franchise tax upon the whole amount of its original issued and outstanding stock.

Upon the considerations and authorities above noted, in the absence of authorities and decisions of our own courts to the contrary, I am constrained to the view that the fee or tax required of a corporation, under section 5498 General Code, should be computed upon all its subscribed or issued and out-

standing stock regardless of the fact that a portion of such stock has been subsequently acquired by the corporation; and with respect to The Carroll Foundry and Machine Company I am of the opinion that until it takes proper steps in accordance with statutory provisions to reduce the amount of its capital stock, it will be required to pay the franchise fee computed at the prescribed rate upon the full amount of its subscribed, issued and outstanding stock in the sum of $400,000.00.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

539.

APPROVAL—TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE OF THE COUNTY COMMISSIONERS OF HIGHLAND COUNTY.

COLUMBUS, OHIO, August 15, 1917.

Industrial Commission of Ohio, Columbus, Ohio.
GENTLEMEN:—

> "IN RE:—Bonds issued by the county commissioners of Highland county, in the sum of $12,000.00, the same being 20 bonds of the denomination of $600.00 each, issued in anticipation of collection of assessments on property assessed for the improvement and construction of certain highways located partly in Paint township and partly in Marshall township, said county."

I have carefully examined the transcript of the proceedings of the board of county commissioners of Highland county, Ohio, relating to the above bond issue, and find the same, with corrections made as per my request, to be in conformity to the provisions of the General Code relating to bond issues of this kind, and I am of the opinion that bonds of said county covering said issue will, when properly drawn and signed by the proper officers, constitute valid and binding obligations of said county.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

540.

STATE HIGHWAY COMMISSIONER—WHEN HE MAY PROCEED UNDER FORCE ACCOUNT—CANNOT CONSTRUCT INTERCOUNTY HIGHWAY IN CONJUNCTION WTH COMMISSIONERS OR TOWNSHIP TRUSTEES—ALTERNATIVE.

1. *The state highway commissioner, in the maintenance and repair of the intercounty highways and main market roads of the state and in the construction and improvement of the main market roads, may proceed under force account.*

2. *The state highway commissioner cannot construct or improve intercounty highways in conjunction with the county commissioners or township trustees, either by force account or under alternative bidding, the one alternative being that the state will furnish the labor and material for the improvement, the contractor furnishing the equipment and overseeing the work in the matter of said improvement.*

COLUMBUS, OHIO, August 16, 1917.

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

DEAR SIR:—I have your communication of June 26, 1917, in reference to a certain matter, as follows:

> "I desire to call your attention to a situation now existing in Ohio, and to request your opinion as to the legality of a proposed method of meeting this situation.
>
> "This proposed method has been suggested and strongly endorsed by a joint committee representing the Ohio Good Roads Federation, Ohio State Grange, County Surveyors' Association, County Commissioners' Association, road material and machinery manufacturers, and related interests. The members of this organiation are Hon. W. A. Alsdorf, secretary of the Ohio Good Roads Federation, Hon. A. P. Sandles, Mr. Royal Scott of the Willys-Overland Company, and president of the Ohio State Automobile Association, Hon. Ralph D. Cole, Mr. Charles Deckman and Mr. L. S. Bixler.
>
> "The state and many of the counties and other political subdivisions have already provided funds for the construction and repair of roads, and these funds are, in many cases, in the treasury and available for use.
>
> "There are a large number of contractors who have the equipment with which to do good work. Contractors and others report that for the present at least there is no shortage of labor, and it is hoped that transportation difficulties which have prevented the shipment of material and retarded road work will be largely overcome in the near future.
>
> "There seems to be substantial ground for the prevailing sentiment that there should not for the present at least be an abandonment or serious curtailment of road construction, and especially of road repair, and yet the uncertainties which the future holds as to labor supply and transportation of materials make it well nigh impossible in some instances to judge accurately as to future costs. For this reason contractors hesitate to bid and the situation is such that contracts which may now be made on the usual basis may in the future prove unfair

and oppressive either to the state or to the contractors. In other words, contractors, along with all other persons, are unable to accurately forecast the future, even the question of freight rates being unsettled, and for this reason contractors find it well nigh impossible to assemble accurate data on which to base their bids.

"I am aware of the provisions of section 1206 G. C., and the related sections requiring advertisement and the letting of contracts to the lowest and best bidder, but desire your opinion as to the legality of a modification of the present practice of this department to meet the situation above presented.

"As you undoubtedly know, the present practice is to require the contractor to furnish all the labor and material and equipment necessary for the construction of the work.

"The plan which has been suggested and which I desire to submit to you for consideration would be to advertise intercounty and main market improvements upon the basis that the state should meet all bills for labor and material, fix a maximum price for the same from time to time which the contractor in making purchases and employing labor could not exceed, and for the contractor to assume entire supervision of the work under the direction of the department, and furnish all necessary tools and equipment, the contractor to receive for the use of his tools and equipment, and for his services in supervising the work a certain percentage of the amount expended for labor and materials, the percentage to be received by the successful contractor to be that named in his bid. A modification might be necessary in cases requiring the use of heavy equipment, in which case bidders would be required to state the per diem compensation to be received by them for the use, for instance, of a steam shovel or heavy roller.

"Under such an arrangement, the contract would, of course, be awarded to the responsible contractor offering to furnish the necessary equipment and supervise the work for the lowest percentage, or for the lowest percentage and per diem compensation for machinery. Such an arrangement would seem to preserve both the spirit and substance of the statutes requiring competitive bidding, and from some points of view at least, a contract of this character would be more fair and equitable than one made upon the basis which has been in use. Should present labor costs and transportation difficulties increase beyond anticipations, contractors would not be bankrupted by conditions beyond their control, and, on the other hand, if, as we all hope, conditions grow better rather than worse, the state would be the gainer.

"It might be advisable, even if a system such as the above can be worked out legally under the statutes, to so frame advertisements that bidders might, if they preferred, bid upon the old basis of furnishing all the labor, material and equipment, or might, on the other hand, bid upon the basis herein outlined.

"Whatever differences of opinion may exist as to the proper policy to be followed in reference to road building activities, there seems to be a general view that the state must at least hold fast to what it has and give careful attention to the maintenance and repair of all existing improved roads, and that many pieces of new work forming connecting links in important through roads must, if at all possible, be built in order to render possible the prompt and efficient marketing of the products of our farms.

"If this is to be accomplished, the situation which I have herein out-

lined must be met in some way and I, therefore, desire to request your most earnest consideration of the plan herein suggested, and desire you to advise me as to its legality and will, of course, be very glad to have you suggest any changes or modifications necessary to fit the outlined procedure to the existing statutes.

"I sincerely trust that you will be able to either approve this plan or suggest some other similar means of meeting the difficulties under which this department labors in this particular."

Your question, briefly stated, is this: May the state highway commissioner under the law advertise for bids in the matter of the construction or improvement of intercounty highways and main market roads, with the condition that the state highway commissioner will furnish the labor and material for the same, and the contractor merely submitting a bid as to what percentage of the amount expended for the improvement he would charge to furnish the equipment necessary for doing the work and to exercise supervision over the same, thus making the only competitive feature of the bid the percentage to be charged by the contractor or the price at which he would furnish the equipment and an oversight of the work; or asking for bids on an alternative basis—that is, the contractor bidding on the theory that he shall furnish all the material and labor and perform all the work in connection with the construction or improvement of the highway, and also submitting an alternative bid as set out, namely, that the state furnish the material and labor for the construction or improvement of the highway, the bidder to furnish the equipment and exercise a direct oversight of the construction or improvement.

This question arises by virtue of three different facts or conditions:

(1) That under the present circumstances there is no safe basis or foundation upon which contractors may submit bids for such work on the theory that they are to furnish the labor and material for the same, due to the fact that the price of labor and material is increasing rapidly.

(2) The matter as to whether labor can be secured, owing to the growing scarcity of the same, and whether material can be secured, owing to the inability of the railroads to deliver the same. Due to this condition the matter of bidding on contracts for road improvements is becoming so hazardous that the contractors are hesitating more and more in submitting bids, thus making it impossible to carry on road building with any certainty, and which eventually will lead to a practical abandonment of the same.

(3) That it would not be best at this time to curtail to any great extent the improvement of the state highways for the following reasons:

(a) Many contractors of the state are now in possession of ample equipment for road building and they ought not to be compelled to let this remain idle.

(b) Many of the counties and townships have money already arranged for in many cases, in the treasury, to bear their share of the cost and expense of improving the intercounty highways and main market roads of the state.

(c) At this time, if ever, there is pressing need for good roads, to deliver the crops to market and possibly later on to be used for carrying out war measures.

(d) There is much labor in the state which has been engaged so long in the building of highways that it could not readily adapt itself to other kinds of work.

That the above propositions are true to a great extent cannot be denied by anyone. That the propositions submitted by you would to a considerable

extent at least help out in the emergency with which we are now confronted, no one could successfully controvert, and that the object sought by you and others interested in this matter is a most worthy one, is plainly evident.

It is well to keep in mind that this is an emergency for which we are trying to make provisions. It is also well to remember that the legislature, in the enactment of laws, rarely takes into consideration the fact that emergencies may arise and therefore makes no provisions to take care of the same. In fact the legislature cannot in general do this, for the reason that it has no means of knowing in advance the nature or kind of emergencies that may arise. From this self-evident proposition, the probabilities are rather against our finding entirely satisfactory provisions of law to take care of such an emergency as now exists.

We will examine the law which took effect June 28, 1917, in order to ascertain whether any such provision has been made by the legislature, but I will first eliminate certain matters in connection with your communication.

1. The difficulties you suggest in your communication will not interfere with the proper maintenance and repair of the intercounty highways and main market roads of the state, for the reason that the provisions of the law are broad enough to enable you to take care of this matter.

The third subdivision under section 1221 G. C. provides that the funds derived from the registration of automobiles shall be used for the maintenance and repair of the intercounty highways and main market roads of the state, and provides that the state highway commissioner may establish a system of patrol or gang maintenance of intercounty highways and main market roads, and may employ such laborers and teams and purchase such equipment as may be necessary to enable him to perform his duties.

Section 1224 G. C. provides as follows:

> "* * * The state highway commissioner may enter into a contract with any individual, firm or corporation which gives sufficient bond for the faithful performance of said contract, or with the county commissioners of any county or the township trustees of any township in which such highway is situated for the repair and maintenance of such highway, or any part thereof, according to the plans and specifications provided by the state highway commissioner, or for the furnishing of the material or labor for such repair and maintenance, or the state highway commissioner may furnish the material or labor or both, and supervise the repair and maintenance. * * *"

Under these provisions you will have no difficulty in the maintenance and repair of the intercounty highways and main market roads which are already constructed, and it can be said that section 1224 G. C. has considerably extended the meaning of the terms "repair" and "maintenance."

2. Subdivision 2 of section 1221 G. C. provides:

> "Twenty-five per cent. of all the moneys paid into the treasury of the state by reason of the levy for the state highway improvement fund shall be used for the construction, improvement, maintenance and repair of the main market roads of the state. * * *"

Section 1231 G. C. provides as follows:

> "The state highway commissioner, subject to the provisions of this act, shall have power to purchase such equipment and materials, and

> employ such labor as may be deemed necessary to execute any work upon said main market roads, or he may let contracts for the execution of any work upon said roads. * * *"

It is plainly evident, from the above provisions of the statutes, that you will have no difficulty in the construction, improvement, maintenance and repair of the main market roads of the state. To be sure, in following the course set out in the above quoted part of section 1231 G. C., you could not avail yourself of the aid of counties, townships and villages, in the improvement of the main market roads. This is apparent from the further provisions of section 1231 G. C., which I will not quote.

With the above eliminations, we still have the question as to the construction and improvement of the intercounty highways of the state. The question is, can you follow one of the methods suggested by you, in the improvement of the intercounty highways of the state? What you really desire to know is as to whether you can apply the principle either of constructing the intercounty highways under what is known as a force account contract, or under the principle of alternative bidding, one alternative being that the bidder shall furnish all the material and labor and perform all the work in connection with the improvement, and the other being that the state will furnish the labor and material and the bidder will furnish the equipment and oversee the work in the matter of the improvement.

In answering this question it will be impossible for me to analyze the provisions of the act in so far as it applies to the jurisdiction of the state highway commissioner in the construction of intercounty highways. But suffice it to say that there are no provisions which give direct authority to the state highway commissioner to construct intercounty highways under either what is known as a force account contract or under alternative bidding. It can further be said that there are no provisions of the said act which seem to tend in this direction. Every step to be taken in the improvement of intercounty highways and every provision in reference thereto are apparently based upon the theory that the contract as a whole is to be let to the lowest and best bidder, the bidder to furnish all the labor, material and equipment and do all necessary work in connection with the improvement.

Furthermore, it can be said that the legislature seems to have deliberately limited and circumscribed the state highway commissioner in the above respects. It evidently had this matter of force account and alternative bidding in mind when this act was passed. This is obvious when we compare the law which applies in the construction of intercounty highways with the law that applies in the construction of county and township highways.

While, as said before, the law as it applies to the improvement of intercounty highways of the state makes no reference whatever to the matter of alternative bidding, yet section 3298-6 G. C. provides that:

> "* * * The township trustees may order the county surveyor to make alternate surveys, plans, profiles, cross-sections, estimates and specifications, providing therein for different widths of roadway, or different materials, and approve all or any number of such alternate surveys, plans, profiles, cross-sections, estimates and specifications,"

or the county surveyor may, without such instruction, prepare alternative surveys, plans, etc. To be sure, these alternative surveys, plans, etc., must be limited to different widths of roadway or different kinds of material, as is provided in said section.

When we come to the law which applies to the improvement of county highways, we find the provisions of the statute still more liberal.

Section 6911 G. C. provides that:

> "* * * The county commissioners may order the county surveyor to make alternate surveys, plans, profiles, cross-sections, estimates and specifications, providing therein for different widths of roadway, different materials or *other similar variations*, and approve all or any number of such alternate surveys, plans, profiles, cross-sections, estimates and specifications,"

or the county surveyor may, without instructions from the county commissioners, prepare alternative surveys, plans, etc.

Thus it is seen that in making alternative surveys, plans, etc., the county commissioners are not limited in widths of roadway and different materials, but may base them upon other similar variations. Further, while, as said before, there is no provision whereby the state highway commissioner may improve intercounty highways under force account, yet section 6948-1 G. C. provides:

> "If the county commissioners deem it for the best interest of the public they may, in lieu of constructing such improvement by contractor, proceed to construct the same by force account."

From all this it is clearly evident that the legislature did not intend that the state highway commissioner should have the power to receive alternative bids such as you suggest; neither did it intend that he should improve the intercounty highways of the state under force account contracts. This is possibly more evident from the fact that the legislature gave him the right to maintain and repair the highways of the state under force account, as well as to improve the main market roads under force account.

It appears that not only did the legislature not make such provisions as would enable the state highway commissioner to use either of the above methods in the improvement of intercounty highways, nor make any provisions tending in that direction, but on the other hand it is apparent that the legislature had these different methods in mind and deliberately failed to make them applicable to the construction and improvement of intercounty highways by the state highway commissioner. So there seems to be no warrant or authority whatever for placing such a construction upon the act as would enable the state highway commissioner to use the methods suggested, and thus place a construction upon the statute which the legislature did not intend to have placed thereon.

Hence, answering your question specifically, it is my opinion that while there is ample provision made in the law to enable the state highway commissioner to maintain and repair the intercounty highways and main market roads and also to construct and improve the main market roads under force account, yet there is no provision of law that would authorize the state highway commissioner to construct and improve the intercounty highways under force account or under alternative bidding such as herein discussed.

The policy of the legislature seems to be that the intercounty highways of the state should be constructed under contracts let by competitive bidding, as along this line the statutes of the state seem to have been drawn. For this reason I am not able to suggest any plan by which the said highways could be constructed under any other plan or policy.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

541.

SUPPLEMENTAL TO OPINION NO. 500—EMPLOYMENT OF CIVIL ENGINEERS BY COUNTY COMMISSIONERS.

COLUMBUS, OHIO, August 17, 1917.

HON. ROBERT P. DUNCAN, *Prosecuting Attorney, Columbus, Ohio.*

DEAR SIR:—Supplemental to my opinion rendered you on August 7, 1917, I desire to say that it has come to my attention, since rendering said opinion, that the Watson Engineering Co., a corporation with its principal place of business at Cleveland, Ohio, was employed by the county commissioners to make plans and specifications for two of the bridges in question.

In reference to this matter I might call attention to

State ex rel. v. Sayre, 15 C. C. (n. s) 267.

The decision in this case was affirmed by the supreme court without report, 86 O. S. 362.

I desire to say that my opinion did not go to the question as to whether a corporation could be employed under the provisions of section 2411 G. C. Neither was this question asked. My opinion was limited simply to the proposition of the constitutionality of section 2411 G. C., that if an engineer was properly employed under the provisions of said section, his plans and specifications could be used as a basis for proceedings under section 2343 et seq.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

542.

MAINTENANCE AND REPAIR FUND—WHERE IMPROVEMENT CHANGES WIDTH OF ROAD—COST CANNOT BE TAKEN FROM SAID FUND.

Where an improvement changes the width of the improved part of a highway from ten feet to fourteen feet, that part of the cost of such improvement to be borne by the state cannot be taken from the "Maintenance and Repair" fund of the state.

COLUMBUS, OHIO, August 17, 1917.

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

DEAR SIR:—I have your communication of recent date in which you enclosed among other final resolutions having to do with the construction of certain highways one in reference to the improvement of intercounty highway No. 330, Sec. "C," Trumbull county. I approved all of the final resolutions with the exception of this one, which I reserved for further consideration. The resolution is too lengthy to quote in full, but the material parts of the resolutions are these:

The resolution has to do with the construction of I. C. H. No. 330, in length about 3.38 miles. The improvement of the same is estimated to cost $33,800; of this amount the county agreed to pay the sum of $8,800, leaving $25,000.00 for the state to pay; the state highway commissioner has appropriated or set aside out of the maintenance and repair fund of the state the full amount to be borne by the state, namely: $25,000.00.

In addition to these facts, as shown by the final resolution itself, I have been informed by your department that the road about to be improved was originally constructed of macadam to the width of ten feet; that under the plans and specifications for the proposed improvement the road is to be built of macadam to the width of fourteen feet; that in the maintenance and repair of state highways the department must keep in repair about sixteen feet of the highway, including both improved and unimproved parts of the highway, that is, if the improved part of the highway is ten feet, six feet of the unimproved highway would have to be maintained and kept in repair for public travel; but if the improved portion of the highway is fourteen feet in width, then only two feet of the unimproved part of the highway would need to be kept in repair for public travel.

The question now is as to whether the said final resolution, in view of the facts contained within itself, and in view of the facts that have come to my knowledge through your department, is legal and therefore proper to be approved by me.

In answer to this question I desire to note the provisions of a number of sections of the statutes.

Section 1213 General Code provides that whenever there are one or more improvements to be made in a county, and the cost and expense thereof does not exceed twice the amount apportioned by the state to a county, then the state shall pay fifty per cent. of such cost and expense.

Section 1214 General Code provides in part as follows:

> "Except as otherwise provided in this chapter, the county shall pay twenty-five per cent. of all cost and expense of the improvement. Fifteen per cent. of the cost and expense of such improvement, except the cost and expense of bridges and culverts, shall be apportioned to the township or townships in which such road is located. * * * Ten per cent. of the cost and expense of the improvement, excepting therefrom the cost and expense of bridges and culverts, shall be a charge upon the property abutting on the improvement. * * *"

From these two sections it is quite evident that ordinarily the state is not authorized to pay more than one-half the cost and expense of the improvement of an intercounty highway. In the final resolution under consideration the state will assume $25,000.00, or about three-fourths of the cost and expense of the said improvement. The question is, has the state any authority to assume as large a portion of the cost and expense of the proposed improvement as this.

As shown above, it originally cannot. As stated above, the share of the cost and expense to be borne by the state is sought to be taken from the "maintenance and repair" fund of the state. The question immediately arises as to whether this can be done. The theory upon which this amount is sought to be taken from the maintenance and repair fund of the state is that the proposed improvement is a "repairing" of a highway which has already been constructed. Let us note the provisions of the statute in reference to the matter of maintenance and repair. The third division of section 1221 General Code provides as follows:

> "The funds derived from the registration of automobiles shall be used for the maintenance and repair of the intercounty highways and main market roads of the state. The state highway commissioner may use part of said funds as may be necessary in establishing a system of

patrol or gang maintenance on the intercounty highways and main market roads, and for that purpose may employ such patrolmen, laborers and other persons and teams and purchase or lease such oilers, trucks, machinery, tools, material and other equipment and supplies as may be necessary."

It is from this fund, namely the automobile license fund, which is set apart for the maintenance and repair of highways, that the money for this improvement is to be taken. The law becoming effective on June 28, 1917, materially broadened the meaning of the term "maintenance and repair," especially in this respect; that is different material may be used in the repair of the road than that which was originally used. For instance, if macadam has been used in the first place, brick may be used in the repair of the same road; but other than this there does not seem to have been any particular change made in reference to the matter of maintenance and repair of the road from that which existed prior to the taking effect of the new law. Hence, practically the same construction that was placed on the law prior to its amendment would be placed upon the law as it exists today insofar as the right to use the money which is placed to the credit of the maintenance and repair fund is concerned. I might suggest that the broader meaning placed upon maintenance and repair is set forth in section 1224 General Code.

Taking into consideration the provisions of section 1221 and the provisions of section 1224 General Code, can the automobile license fund be used for such an improvement as the one under contemplation? I do not think that it can.

In "maintaining" anything we simply keep it up to the standard at which it was at any given time; in "repairing" we simply perform work upon it to bring it up to the standard at which it was in the beginning. In neither instance do we materially or radically change the thing from the condition in which it was in the beginning. If the thing is radically changed we do not call it maintenance or repair.

In the improvement under contemplation the width of the highway is to be increased from ten feet to fourteen feet, thus making a practically new and different improvement from that which was originally made.

It does not seem to me that such a change could be brought under the term "maintenance and repair," and thus be paid for out of the fund which is particularly set aside for maintaining and repairing improved highways of the state.

My predecessor, Hon. Edward C. Turner, in Vol. I, of the Report of the Attorney-General for the year 1915, at page 990, called attention to this fact in an opinion rendered by him. On page 991, Mr. Turner uses the following language:

> "* * * Some substantial part of the original improvement must remain, and in order to constitute a repair the proposed operation must contemplate the use of that part of the old improvement still remaining and must further contemplate a completed work that will be substantially like the original. It will not, however, rob a contemplated operation of its character as a repair merely because it is proposed to so conduct the operation that the highway when repaired will possess certain improvements as compared with the original work. In the specific instance referred to by you, it is my opinion that the fact that some slight alterations are to be made in the grade of some parts of the road, that the margins are to be straightened up and that the roadway is to be widened in places will not change the character of the proposed

operation as a repair. The present cuts and fills will be utilized, substantially the present grade will be folowed and the old macadam not worn away will be used as a base. * * *"

It is my opinion that the rule laid down by Mr. Turner in the above opinion should not be extended at all beyond the language used therein and the facts to which it was applied.

I rendered an opinion on March 11, 1917, to Hon. James P. Wood, Jr., prosecuting attorney, Athens, Ohio, in which I discussed at considerable length the meaning which should be attached especially to the word "repair," and I am enclosing a copy of this opinion for your consideration.

Therefore, it is my opinion that said resolution should not be approved, and this for the reason that the improvement under contemplation could not be held to be a mere maintenance and repair of a highway already constructed, but is really and practically a new construction.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

543.

COUNTY ROADS AND TOWNSHIP ROADS—DEFINED.

The question as to whether a certain road is a county road or a township road under the present law depends upon the fact as to whether it comes under one or the other of the classes as enumerated in subdivision (b) of section 7464 G. C.

COLUMBUS, OHIO, August 17, 1917.

HON. HECTOR S. YOUNG, *Prosecuting Attorney, Marion, Ohio.*

DEAR SIR:—I have your communication of July 19, 1917, in which you ask my opinion in reference to certain matters therein set out. Your letter reads as follows:

"On June 4, 1917, the commissioners of Marion county, Ohio, acting upon a petition signed by one petitioner, who was the owner of all the land on both sides of the road in question, passed a resolution taking over an improved township road. The township trustees made no request for the change, and were not notified before action was taken by the board of county commissioners.

I wish to submit to your office for an opinion thereon, the question as to whether, under the above facts the road becomes a county road, or whether it remains a township road, under the control of the township trustees."

In answering your question I should like to call attention to the fact that the roads of the state have been divided into classes upon a different basis under the present scheme of highway laws than they were previous to the time the present scheme or plan was adopted. Section 7464 G. C. sets forth the classification of the roads of the state and the basis upon which this classification is made. In order to make the answer to your question clear it will be necessary, therefore, for us to note the provisions of this section, which reads as follows:

"The public highways of the state shall be divided into three classes, namely, state roads, county roads and township roads.

(a) State roads shall include such part or parts of the intercounty highways and main market roads as have been or may hereafter be constructed by the state, or which have been or may hereafter be taken over by the state as provided in this act and such roads shall be maintained by the state highway department.

(b) County roads shall include all roads which have been or may be improved by the county by placing brick, stone, gravel, or other road building material thereon, or heretofore built by the state and not a part of the intercounty or main market system of roads, together with such roads as have been or may be constructed by the township trustees to conform to the standards for county roads as fixed by the county commissioners, and all such roads shall be maintained by the county commissioners.

(c) Township roads shall include all public highways of the state other than state or county roads as hereinbefore defined, and the trustees of each township shall maintain all such roads within their respective townships; and provided further, that the county commissioners shall have full power and authority to assist the township trustees in maintaining all such roads, but nothing herein shall prevent the township trustees from improving any road within their respective townships, except as otherwise provided in this act."

From this section it will be noted that the state roads shall include (1) such parts of the intercounty highways and main market roads as have been or may hereafter be constructed by the state; and (2) such parts of the intercounty highways and main market roads that are taken over by the state as provided in this act.

It will thus be seen that there are no roads any longer coming under the designation of state roads other than certain parts of the intercounty highways and main market roads coming under the conditions of subdivision (a) of said section 7464.

Provision for taking over intercounty highways and main market roads by the state is made in section 7465 G. C. Before noticing the provisions of this section, however, let us first note the provisions of section 1203 G. C. This section provides that

"Nothing in this chapter shall be construed as prohibiting the county commissioners or township trustees from constructing, improving, maintaining or repairing any part of the intercounty highways within such county or township; provided, however, that the plans and specifications for the proposed improvement shall first be submitted to the state highway commissioner and shall receive his approval."

With this in mind let us turn now to the provisions of section 7465 G. C., which reads as follows:

"In all cases where a county or township has constructed or improved any main market or intercounty road, the state highway commissioner, upon request, shall, within sixty days indicate what changes or improvements will be required in said road in order to bring the same up to the approved standard of construction of such roads, or in any case where such road is about to be constructed, reconstructed or

improved, the state highway commissioner shall, upon application, indicate within sixty days what changes will be required in the plans and specifications therefor, to bring said road up to the standard required by the state for the construction of intercounty highways and main market roads. Whenever the changes so specified by the state highway commissioner have been made, or when such roads have been constructed according to the plans and specifications so approved by the state highway commissioner, such roads shall at once become state roads."

It will be noticed that there are two classes of roads set out in this section: (1) Such main market or intercounty roads as have been constructed or improved by a county or township; and (2) such main market or inter-county roads which are about to be constructed or improved by a county or township.

Subdivision (b) of said section 7464 G. C. defines county roads, and sets out three different conditions under which roads may be classified as county roads: (1) They shall include all roads which have been or may be improved by the county by placing brick, stone, gravel or other road building material thereon; (2) they shall include all such roads as have been heretofore built by the state and not a part of the intercounty or main market system of roads; and (3) such roads as have been or may be constructed by the township trustees to conform to the standards for county roads as fixed by the county commissioners.

Subdivision (c) of said section defines township roads as follows:

"Township roads shall include all public highways of the state other than state or county roads as hereinbefore defined."

It will be noted also in said section that the state highway department must maintain all state roads; the county commissioners all county roads, and the township trustees all township roads. This unless other arrangements or agreements are made.

Let us now come directly to the answer to your question.

It must be found under subdivision (b) of said section 7464 G. C., which has to do with county roads. Let us again notice carefully the three classes of county roads. They are first: such roads which have been or may be improved by the county by placing brick, stone, gravel or other road building material thereon; or, second, such as have been built by the state and are not a part of the intercounty or main market system of roads; or, third, such as have been or may be constructed by the township trustees to conform to the standards for county roads as fixed by the county commissioners.

If the road about which you inquire is one which has been improved by the county by placing brick, stone, gravel or other road building material thereon, then it is, from that fact alone, a county road, and the county commissioners would be compelled to maintain the same. Further, if the said road about which you write is not a part of the intercounty or main market system of roads, and has been built by the state, then it is, from that fact alone, a county road, and the county commissioners would be compelled to maintain it. Thus, in short, the roads in the two classes named are county roads owing to the fact that they come within certain conditions as set out in said subsection (b) of said section.

This leaves for consideration the third class found in subdivision (b) of said section. The provision is made that

"such roads as have been or may be constructed by the township

trustees to conform to the standards for county roads as fixed by the county commissioners, shall be county roads and shall be maintained by the county commissioners."

The question immediately arises in connection with this class as to the matter of the standard to which the roads must be made to conform. Who is to determine as to whether the roads are up to a certain standard fixed by the county commissioners, and how is it to be determined?

In answer to this question let us turn to the provisions of section 7466 G. C., which reads as follows:

"The county commissioners upon application by the township trustees, shall specify in like manner what changes are required in any township road in order to bring the same up to the standard of construction maintained for county roads, or in case of the construction of any new improvement, the county commissioners shall indicate what changes in the plans and specifications will be required in order to bring said road up to the standard of construction required for county highways, and when a township highway is so improved, or constructed, in accordance with the standard so fixed by the county commissioners, such road shall be a county road."

The provision here is that "the county commissioners, upon application by the township trustees, shall specify in like manner, etc." That is, in the manner provided in section 7465 G. C. for transferring roads classified as county roads to roads classified as state roads. There are two classes of roads mentioned in section 7465 G. C., as stated above; (1) those main market or intercounty roads which have been constructed or improved by a county or township; and (2) those roads which are about to be constructed or improved by a county or township.

In reference to the first class provision is made that the state highway commissioner, upon the request of the county or township, shall within sixty days indicate what changes or improvements will be required in said roads in order to bring them up to the approved standard of construction of state roads, and provision is made in reference to the second class that the state highway commissioner shall, upon application, indicate within sixty days what changes will be required in the plans and specifications therefor to bring said road up to the standard required by the state for the construction of intercounty highways and main market roads. Then the provision is made in said section that.

"whenever the changes so specified by the state highway commissioner have been made, or when such roads have been constructed according to the plans and specifications so approved by the state highway commissioner, such roads shall at once become state roads."

Remembering now that section 7466 G. C. provides that the county commissioners shall act in like manner to the provisions made in section 7465 G. C., let us apply the provisions of section 7465 G. C. to the question of township roads. In doing so, we have the following propositions:

(1) If the township trustees have already improved the township roads to a certain standard, they may request the county commissioners to indicate what changes or improvements will be required in said road in order to bring the same up to the approved standard of construction of county roads, and the county commissioners within sixty days must grant the request;

(2) If the township trustees are about to construct or improve a township road, they may make application to the county commissioners asking them to indicate what changes will be required in the plans and specifications therefor to bring said road up to the standard required by the county commissioners for the construction of county roads, and the county commissioners shall grant the request within sixty days.

Let us recapitulate: The first two classes of roads under subdivision (b) viz.: all roads which have been or may be improved by the county by placing brick, stone, gravel or other road building material thereon, or have been heretofore built by the state and not a part of the intercounty or main market system of roads, are county roads from the fact that they come within the conditions therein specified, and from that fact alone. But the third class under subdivision (b) viz.: such roads as have been or may be constructed by the township trustees to conform to the standards for county roads as fixed by the county commissioners, depends upon the question as to whether they come up to the standard fixed by the county commissioners. Whether the roads are already improved by the township trustees, or are to be improved, the township trustees may make application to the county commissioners asking them to indicate what changes must be made in the roads or in the plans and specifications of the proposed improvement to bring them up to the standard approved by the county commissioners. Then whenever the changes so specified by the county commissioners have been made, or when such roads have been constructed according to the plans and specifications so approved by the county commissioners, such roads shall at once become county roads.

From all the above I think the answer to your question is fairly evident. If the road about which you write comes either within the first or second class of subdivision (b) of section 7464 G. C., then, in that event the said road is from that fact alone a county road, and the county commissioners would be compelled to maintain the same, and the road would be under their jurisdiction. Further, if the road about which you write had been a township road under the provisions of section 7464 G. C., but was afterwards improved by the township trustees, they might make application to the county commissioners requesting them to indicate what changes or improvements would be required in said road in order to bring the same up to the approved standard of construction of such roads, and if the suggested changes or improvements were made then the road would become a county road. Or if the township trustees were about to improve said road, the township trustees would submit their plans and specifications to the county commissioners, and if said road were constructed according to the suggestions of the county commissioners, then the same would become a county road.

From all the above it is quite evident that the filing of the petition by the property owner has no place whatever in the law, and the question whether the road about which you write is a county road depends altogether upon the question as to whether it can be brought within one of the classes enumerated in subdivision (b) of said section 7464 G. C.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

544.

ROAD IMPROVEMENT—CONTINGENCIES CAUSING EXTRA WORK—MUST FOLLOW SECTION 1210 IN LETTING CONTRACT—HOW COST PAID.

Where unforeseen contingencies arise in the matter of completing a road improvement, the provisions of section 1210 *G. C. must be followed in letting a contract for extra work rendered necessary by such contingency. The cost of said extras shall be considered as a part of the total cost and expense of the improvement.*

COLUMBUS, OHIO, August 17, 1917.

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

DEAR SIR:—I have your communication of June 18, 1917, in which you ask my opinion as follows:

> "I respectfully direct your attention to the following letter from Division Engineer Waid of this department:
>
> A contract was awarded to McElfresh, Danford and Glover on May 19, 1916, for the construction of section L of the Marietta-McConnelsville road, I. C. H. 393 in Washington county, with bituminous macadam.
>
> The contractors performed the grading work, built the drainage structures and placed a few hundred feet of the foundation course last year.
>
> During the winter and past spring three extensive slips have developed on the road.
>
> (1) From approximately station 8+50 to 9+50 the hillside for a considerable height is slipping into the roadbed.
>
> (2) From approximately station 12+50 to 13+5 the roadbed is slipping into the Muskingum river.
>
> (3) From approximately station 22 to 26+30 the roadbed is likewise slipping into the river.
>
> I have had test holes sunk at various places to locate the slipping strata and believe the slips can all be stopped by proper drainage and the driving of piling. By taking action at once we could repair the slips so as not to delay or hinder the contractor. I do not think we should construct our road over these slips until they are properly drained.
>
> As it will require an expenditure of at least $2,000.00 to take care of these slips, I have consulted the county commissioners as to their willingness to bear half the expense of this extra work. They are not inclined to make any provision for the extra funds. They take the position that it is either a matter to be remedied by the contractor or to be maintained by the state.
>
> What funds, if any, are we at liberty to use in taking care of this situation, and what course do you wish to pursue?"
>
> This is not a main market road and may properly be said to have been an unimproved road at the time the contract was let.
>
> I therefore respectfully request that you advise me what course I may pursue in taking care of the above situation."

From your communication I take it certain unforeseen contingencies have

arisen in the matter of a certain improvement for which a contract was duly entered into by and between your department and McElfresh, Danford & Glover, on May 19, 1916.

The provisions of the statute applicable to such a situation are found in section 1210 G. C. This section reads in part as follows:

> "Sec. 1210. The foregoing provision relating to advertising for bids shall apply to the letting of a contract for extra work, resulting from unforeseen contingencies, not included in the original contract, provided the estimate of the cost and expense of such work amount to one thousand dollars or more. If the estimate is less than one thousand dollars, and more than two hundred dollars, fifteen days' notice of the letting of the work shall be given by posting it on a bulletin board, or writing it on a blackboard in a conspicuous place in the office of the county highway superintendent and the county commissioners of the county where the proposed work is located, stating the nature of the work, and when and where proposals in writing will be received. Plans and specifications for such extra work shall be kept on file at the office of the county highway superintendent during the fifteen days for which the same is being advertised and be open to public inspection. If the estimated cost and expense of the extra work does not exceed two hundred dollars, it may be let by the state highway commissioner at private contract without publication or notice thereof. * * *"

From the provisions of this section as quoted, it is evident that you will be compelled, in the matter of taking care of the extras suggested by you in your communication, to make plans, profiles, specifications and estimates of the extra work to be done. Then you will proceed to advertise for bids and let the contract under the provisions of sections 1206 and 1207 G. C.

As this matter of extras is directly connected with the improvement as originally contemplated and relates to the contract as originally let, it will not be necessary for you to submit the plans, profiles, specification and estimates to the county commissioners for their approval. This matter of extras must always be taken into consideration when the original contract is let and when the steps leading up to the same are taken. It must always be contemplated, in entering into a contract or taking steps leading up to it, that extras may have to be provided for before the improvement is fully completed, and as the provisions of section 1210 G. C. apply merely to the matter of advertising, it will not be necessary, as suggested, for you to submit the plans, etc., to the county commissioners. But the making of plans, etc., the advertising for bids and the letting of contracts for extras must, when the cost exceeds $1,000.00, be done in accordance with the provisions of sections 1206 and 1207 G. C. There is just one exception to this general rule and that is found in the latter part of section 1210 G. C., which reads as follows:

> "* * * If the state highway commissioner decides and the county commissioners by resolution adopted by majority vote and entered upon their journal, declare that an emergency exists which in their judgment will not permit of the delay necessary to advertise said extra work either by posting or newspaper publication, and the chief highway engineer shall in writing declare that an emergency exists, such a declaration shall be entered on the journal of the department, and

such contract for extra work may then be let without any advertising whatever, but such contract so let shall be absolutely void unless the provision hereof shall be strictly followed."

However, from the statements set forth in your communication, no such emergency exists in the matter you have in hand, which would warrant you in proceeding to let a contract for the same without complying with the provisions of sections 1206 and 1207 G. C.

The further question you suggest is as to who will bear the cost and expense of providing for the extras and from what funds the money will be taken to pay for the same. It must be kept in mind that these extras are referable to the original contract. They grow out of it. They are necessary before the improvement can be completed. Hence, the same rule will apply in the payment of extras as will apply to the improvement as originally contemplated and for which a contract was duly let.

Section 1211 G. C. provides as follows:

"Upon completion of the improvement, the chief highway engineer shall immediately ascertain the cost and expense thereof, and apportion the same to the state, county, township or townships and abutting property. He shall certify the total cost and expense of the improvement, and his apportionment thereof to the county commissioners, and the trustees of the township or townships interested therein."

Therefore, the same rule will apply to the matter of the cost and expense of the extras as does to the cost and expense of the improvement as originally contemplated, and the chief highway engineer will take into consideration the matter of the cost and expense of the extras, as well as the cost and expense of the improvement as originally contemplated and contracted for; that is, he will certify the total cost and expense of the improvement, which will include the cost and expense of the extras, and his apportionment thereof to the county commissioners and the trustees of the township or townships interested therein; and the state, county, township and abutting property owners will pay for the extras in the same proportion and from the same funds from which they will or might pay the amount for which the improvement was originally contracted.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

545.

OHIO NATIONAL GUARD—STATE NOT LIABLE FOR RENTALS ON LEASES FOR ARMORIES—GUARD IN FEDERAL SERVICE.

Under order No. 155, issued by the war department, the Ohio National Guard has been mustered out of the military service of the state and into the military service of the United States, and from and after said date of mustering out the state is no longer liable for rentals on leases for armories for the Ohio National Guard, for the reason that said leases provide that when the Ohio National Guard is mustered out the terms and conditions of the lease shall then and there terminate and be void.

COLUMBUS, OHIO, August 17, 1917.

HON. GEORGE H. WOOD, *Adjutant General of Ohio, Columbus, Ohio.*

DEAR SIR:—You have submitted to me a number of leases for armories for the use of the Ohio National Guard, and ask my opinion in reference thereto, as to whether the state of Ohio is liable for rental upon said leases until the expiration of the time for which they were given.

While there are quite a number of leases, they are all in the main uniform in terms, so that an answer to one will practically be an answer to all. The only condition of these leases which varies is the one as to time. They are drawn for a term of from two up to ten years.

In answering your communication I shall note but two conditions of the leases and these are found in all of them. The first condition is the one in reference to the length of time for which the leases are given.

In State v. Medbery et al., 7 O. S. 522, the court passed upon a proposition in which the board of public works had made contracts on behalf of the state, which contracts covered a period of five years. The court held in the syllabus as follows:

> "The board of public works made contracts on behalf of the state, stipulating to pay defendants in error and others yearly, for the period of five years, for materials and repairs of the canals of the state, an amount in the aggregate of $1,375,000. Held—
>
> "1. That, except in certain specified cases, no debt of any kind can be created on behalf of the state.
>
> "2. That no officers of the state can enter into any contract, except in cases specified in the constitution, whereby the general assembly will, two years after, be bound to make appropriations either for a particular object or a fixed amount—the power and the discretion, intact, to make appropriations in general devolving on each biennial general assembly, and for the period of two years.
>
> "3. The contracts of the board of public works, creating a present obligation to pay the defendants and others, for the period of five years, a certain amount, do not come within said constitutional exceptions, and are in contravention of the provisions of article 8, section 3, and article 2, section 2.
>
> "* * *"

If the principles laid down in this case could be applied to the provisions of the leases under consideration, there would be no question that the state of Ohio would not be liable under the terms of the leases, for the reason that the leases are void in all those cases in which the time is longer than two years;

but in this connection we are called upon to note the finding of the court in another case, namely, State ex rel., Ross et al., v. Donahey, Auditor of State, 93 O. S. 414. The court in this case was also passing upon a lease which was conditioned for a longer period than two years, and held the lease to be a valid and binding obligation against the state of Ohio, inasmuch as the same was not a debt or liability within the inhibition of the provisions of the constitution, and distinguished the Medbury case, above quoted. The court held in the syllabus as follows:

> "Where the general assembly of Ohio has authorized some department or sub-department of the state government, such as the industrial commission of Ohio, to secure suitable quarters necessary for the transaction of its business pursuant to law, and a contract is regularly executed and signed by the proper parties, which contract by its terms is made subject to an appropriation by the state legislature, and such legislature makes the necessary appropriation pursuant to said contract; Held: Mandamus is the proper remedy to compel the auditor to issue a warrant for any amount due from the state pursuant to such contract.
>
> The necessary and current expense growing out of the rental of suitable and necessary quarters for the transaction of the state's business, for which appropriation has been made by the state legislature, is not a debt or liability within the inhibition of the provisions of the constitution."

The court based its opinion mainly upon two propositions. The first one was that the law provided, in reference to the industrial commission of Ohio, as follows:

> "The commission shall keep and maintain its office in the city of Columbus, Ohio, and shall provide suitable room or rooms, necessary office furniture, supplies, books, periodicals, maps and appliances as they dem necessary, the expense thereof to be audited and paid in the same manner as other state expenses."

The contract itself provided as follows:

> "This lease is made subject to the appropriation by the state legislature and the individual members of the industrial commission are relieved from all liability for the payment of rent, if such appropriation is not made."

Based upon these two propositions, one statutory and the other contractual, the court held that this lease, even though it was for a period of five years, was a binding obligation on the part of the state of Ohio.

When we apply the principles laid down in this latter case to the facts as we find them before us in the matter of these leases, we are of the opinion that the leases are not void under the principles laid down in the Medbury case.

Section 5255 G. C., which was in force at the time these leases were drawn, provides as follows:

> "The board shall provide armories for the purpose of drill and for the safe keeping of arms, clothing, equipments, and other military property issued to the several organizations of organized militia, and may purchase or build suitable buildings for armory purposes when, in its

judgment, it is for the best interest of the state so to do. The board shall provide for the management, care, and maintenance of armories and may adopt and prescribe such rules and regulations for the management, government and guidance of the organizations occupying them as may be necessary and desirable."

Further, the contract of lease provides as follows:

"PROVIDED, HOWEVER, That nothing herein shall bind the STATE OF OHIO nor the members of the state armory board for any amount of money in excess of that portion of the amount appropriated by law for rent of armories, applicable to the rent of this particular property, under the laws and military regulations in force at the time of such appropriation."

These two provisions, one statutory and the other contractual, are very similar to the provisions considered by the court in the latter case above quoted; hence I feel these leases are valid and binding obligations against the state of Ohio and that mandamus would lie against the proper officer to compel the payment of the same, provided the general assembly would make an appropriation.

There is one other provision of these leases to which I desire to call attention. It reads as follows:

"It is understood and agreed that in the event of the muster-out or disbanding of the military organization occupying the premises herein described, under the terms and conditions of this lease, this lease and agreement shall then and there terminate and be void."

The question then arises as to whether under the present condition of affairs in this country the Ohio National Guard has not been mustered out and disbanded, owing to the fact that they have been mustered into the federal army, and whether the same will not be a part of the federal army, until it is discharged from the federal army and again mustered into the National Guard of the state of Ohio. It is my opinion that such is the case.

Under order No. 155, issued from the "War Department, The Adjutant General's Office, Washington, July 28, 1917," to "The Commanding General, Central Dept., Chicago, Ill.," we find the following provisions:

"All enlisted men of the National Guard drafted into the military service of the United States will be furnished with certificates of discharge. Form No. 525-1 A. G. O. will be used except for men that are not entitled to an honorable discharge under provisions of paragraph 150, Army Regulations, 1913.

The draft of the president completely separates from the National Guard all persons included in the draft and the provisions of paragraph 61, circular No. 21, Militia Bureau, 1916, and all other provisions of existing orders and regulations calling for the rendition of reports and returns by National Guard commanders to the adjutant generals of their respective states become inoperative from, and on the date of the draft, except as required by paragraph 5 above."

The above order was signed by the adjutant general, P. C. Harris, and was issued "by order of the secretary of war."

It will be noticed in said order that all enlisted men of the National Guard who were drafted into the military service of the United States will be furnished with certificates of discharge—that is, they are no longer connected with the Ohio National Guard.

Further, provision is made that the draft of the president completely separates from the National Guard all persons included in the draft, and that reports and returns by National Guard commanders to the adjutant general of the state become inoperative from and on the date of the draft.

From this order it is my opinion that the Ohio National Guard has been mustered out, that the military organization heretofore existing has been disbanded, and that the said guard has been mustered into the military service of the United States.

I desire also to quote section 111 of an act of congress for making further and more effectual provision for the national defense and for other purposes, as follows:

> "Sec. 111. NATIONAL GUARD WHEN DRAFTED INTO FEDERAL SERVICE—When congress shall have authorized the use of the armed land forces of the United States, for any purpose requiring the use of troops in excess of those of the regular army, the president may, under such regulations, including such physical examination, as he may prescribe, draft into the military service of the United States, to serve therein for the period of the war unless sooner discharged, any or all members of the National Guard and of the National Guard Reserve. All persons so drafted shall, from the date of their draft, stand discharged from the militia, and shall from said date be subject to such laws and regulations for the government of the army of the United States as may be applicable to members of the volunteer army, and shall be embodied in organizations corresponding as far as practicable to those of the regular army or shall be otherwise assigned as the president may direct. The commissioned officers of said organizations shall be appointed from among the members thereof, officers with rank not above that of colonel to be appointed by the president alone, and all other officers to be appointed by the president by and with the advice and consent of the senate. Officers and enlisted men in the service of the United States under the terms of this section shall have the same pay and allowances as officers and enlisted men of the regular army of the same grades and the same prior service."

From the provisions of this section and the order hereinbefore quoted, it is my view that the provision of the contract applies to the conditions now existing.

Answering your question specifically, it is my opinion that the state of Ohio is not liable for rentals under leases for armories for the Ohio National Guard, from and after the day that said guard was mustered out of the military service of the state and into the military service of the United States.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

546.

APPROVAL—ARTICLES OF INCORPORATION OF THE DRIVER'S MUTUAL INSURANCE COMPANY.

COLUMBUS, OHIO, August 20, 1917.

HON. WILLIAM D. FULTON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I am returning herewith to you with my approval articles of incorporation of The Driver's Mutual Insurance Company.

I find that these articles have been corrected in accordance with recommendations made on a previous reference of the articles for my approval, and as corrected I find the same to be in conformity to the provisions of the act of March 21, 1917, amending section 9607-2 and other sections relating to insurance companies other than life and other than mutual protective associations. I further find that said articles are not inconsistent with the constitution and laws of the state of Ohio, nor with the constitution and laws of the United States, and the same are therefore approved.

I also enclose herewith check for $25.00 which was attached to the papers submitted.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

547.

COUNTY SURVEYOR—UNDER WHAT CONDITIONS THE COURT MAY GRANT HIM ADDITIONAL ALLOWANCE FOR DEPUTIES AND ASSISTANTS.

A common pleas court of any county has authority, under amended section 2787 General Code to grant an additional allowance to the county surveyor to that which was allowed him for deputies and assistants by the county commissioners at the beginning of the present year; but the amount, if any, allowed by the court must not be used to pay the compensation of assistants earned before the additional allowance was secured.

COLUMBUS, OHIO, August 20, 1917.

HON. J. H. FULTZ, *Prosecuting Attorney, Lancaster, Ohio.*

DEAR SIR:—I have your communication of July 30, 1917, in which you ask my opinion in reference to a certain matter therein set out. Your communication reads as follows:

> "On July 18th I asked for an opinion as to whether or not the court of common pleas would have authority, or the prosecuting attorney would be justified, in making application for an allowance to the county surveyor under section 2787 General Code upon the following facts:
>
> On June 1, 1916, the county commissioners, under section 2787, fixed the amount of money to be paid by the county surveyor for clerk, draughtsman and office help for the year beginning September 1, 1916, and ending September 1, 1917, said money to be paid out and expended

under the provisions of sections 2787 and 2788 General Code. The surveyor wishes an additional allowance for the present year. Does the amended section 2878 authorize the allowance?

You declined to give an opinion, thinking the matter was pending in court. The matter is not in court and will not be asked until we have your opinion."

In answering your question let us first notice the provisions of sections 2787 and 2788 G. C., as they stood prior to June 28, 1917.

Section 2787 G. C. read as follows:

"On or before the first Monday of June of each year, the county surveyor shall file with the commissioners of such county a statement of the number of all necessary assistants, deputies, draughtsmen, inspectors, clerks or employes in his office for the year beginning September 1st next succeeding and their aggregate compensation. The county commissioners shall examine such statement and, after making such alterations therein as are just and reasonable, fix an aggregate compensation to be expended therefor for such year."

Section 2788 G. C. read as follows:

"The county surveyor shall appoint such assistants, deputies, draughtsmen, inspectors, clerks or employes as he deems necessary for the proper performance of the duties of his office and fix their compensation, but compensation shall not exceed in the aggregate the amount fixed therefor by the county commissioners. After being so fixed, such compensation shall be paid to such persons in monthly installments from the general fund of the county upon the warrant of the county auditor."

By taking the provisions of these two sections I find the scheme or plan to guide the county commissioners and the county surveyor in reference to the matter of assistants and deputies to the county surveyor and their compensation. This plan or scheme involves several steps. (1) On or before the first Monday in June of each year the county surveyor must file with the county commissioners of such county a statement of the number of all necessary assistants, etc., for the year beginning September 1st next succeeding, and their aggregate compensation. (2) The county commissioners shall examine such statement and after making such alterations therein as are just and reasonable, fix the aggregate compensation to be expended therefor for such year. (3) The county surveyor shall appoint such assistants, deputies, etc., as he deems necessary for the proper performance of the duties of his office. (4) He shall fix their compensation, but the compensation shall not exceed in the aggregate the amount fixed therefor by the county commissioners.

The following matter was added to section 2787 as it originally stood:

"Provided, however, that if at any time, any county surveyor requires an additional allowance in order to carry on the business of his office, such county surveyor may make application to a judge of the court of common pleas of the county wherein such county surveyor was elected; and thereupon such judge shall hear said application, and if upon hearing the same said judge shall find that such necessity exists he

may allow such a sum of money as he deems necessary to pay the salaries of such assistants, deputies, draughtsmen, inspectors, clerks or other employes as may be required."

The question now is as to whether the county surveyor has a right to avail himself for this present year of the remedy provided in the amendment to section 2787 General Code.

This addition to section 2787 provides an additional remedy to the county surveyor in that he is not compelled absolutely to rely upon the amount allowed him by the county commissioners, but may apply to the court of common pleas for an additional allowance. This being merely an additional remedy, there is no reason, in my opinion, why the county surveyor cannot take advantage of this remedy during this present year just as well as he can in any succeeding year. Therefore, I advise you specifically that a county surveyor may ask the court for an allowance in addition to that which was allowed by the county commissioners of your county. However, the amount allowed by the court of common pleas cannot be used for the purpose of paying the compensation of assistants before the order was secured, but must be limited to the payment of compensation of assistants after the additional allowance is secured.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

548.

HIGHWAY ADVISORY BOARD—APPROVAL OR DISAPPROVAL OF ACTS OF HIGHWAY COMMISSIONER SHOULD BE ENTERED ON JOURNAL —APPROVAL ALSO SHOULD BE WRITTEN ON INSTRUMENT APPROVED.

1. *The action of the highway advisory board in approving or disapproving of an act of the state highway commissioner must be entered on the journal of the board, as the statute makes the board speak through its journal. The form which the action of the board takes is not vital.*

2. *If the highway advisory board approves a contract or agreement entered into by the state highway commissioner, its action must be placed not only in its journal, but the approval of the board must be endorsed upon the instrument as well.*

COLUMBUS, OHIO, August 20, 1917.

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

DEAR SIR:—I have your communication of August 9, 1917, which reads as follows:

"I have been directed by the advisory board to request that you prepare and furnish us with the form of approval which is required by the statute that the advisory board sign."

The section of the General Code which embodies the provisions about which you make inquiry is section 1231-9 G. C. (107 O. L. 138.) This section reads as follows:

"No act of the state highway commissioner designating additional intercounty highways or main market roads or changing existing inter-

> county highways or main market roads; granting any application for aid from any appropriation by the state for the construction, improvement, maintenance or repair of intercounty highways or main market roads or any other fund created by the state for highway purposes; aid from any appropriation by the state for the construction, improvement, maintenance or repair of any intercounty highway or main market road; purchasing any material, machinery, tools or equipment for road improvement; entering into an agreement with the federal government relative to the securing of federal aid for road construction; or designating an engineer other than the county surveyor to have charge of the roads and bridges within any county under the control of the state, shall be valid or have any force and effect until such act has been approved by the highway advisory board, by resolution duly passed by majority vote and entered upon its journal. In the case of contracts or agreements requiring the approval of the highway advisory board such approval shall also be endorsed in writing thereon and signed by the members of the board or a majority thereof."

In answering your question it would be well to call attention especially to two or three provisions found in said section, one of which is as follows:

> "No act of the state highway commissioner (in relation to a number of matters set out therein) shall be valid or have any force and effect until such act has been approved by the highway advisory board by resolution duly passed by majority vote and entered upon its journal."

From this provision it is seen that the highway advisory board speaks from its journal, and from its journal only. The form of the motion or resolution that the board uses to indicate its approval or disapproval of any act of the state highway commissioner is not vital, only so it plainly indicates the board's action in reference to the same. The action of the board would be taken the same as would the action of any other body. For example, the following would be sufficient: Resolved, by the highway advisory board that the action of the state highway commissioner in awarding the contract for the construction, improvement, maintenance or repair of (here describe the road to be approved). Then indicate on the journal of the board the vote of the members of the board. Or, Resolved that the act of the state highway commissioner in appointing (here name the person appointed) as engineer for, say Richland county, to have charge of the highways, bridges and culverts within said county, and under the control of the state, be approved. Then indicate on the journal the vote of the members of the board upon the resolution; but as said before the particular form which the action of the board takes is not vital, but it is vital that their journal shows the action taken, and this for the reason that under the provisions of the section the board speaks from its journal.

Another provision of said section which ought to be carefully noted is as follows:

> "In the case of contracts or agreements requiring the approval of the highway advisory board such approval shall also be endorsed in writing thereon and signed by the members of the board or a majority thereof."

This is a provision that must be followed in addition to the entering of a resolution of approval of the board upon its journal. That is, in case of con-

tracts or agreements requiring the approval of the board, it must adopt a resolution of approval and place the same upon their journal as above set out, and also must endorse in writing their approval upon the contract or agreement. This endorsement may be very brief. For example: The within contract is approved by the highway advisory board. Date ..... Then the board or a majority thereof must sign the approval so endorsed thereon.

Of course, the question might arise as to the form which the board should follow in giving notice to the state highway commissioner of its action in reference to any matter upon which the board passes judgment. This part of the proceedings is not vital because, as said before, the board speaks through its journal. Hence it is the journal that controls, and no particular form need be followed in notifying the state highway commissioner. Any form of communication which will transmit the knowledge to the commissioner, whether oral or written, would suffice. The main thing is what the journal says. This must control in all matters.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

549.

CONTRACT FORM CORRECTED AND APPROVED.

COLUMBUS, OHIO, August 21, 1917.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your communication of July 26, 1917, in which you submit a form of contract for my approval. I have examined this form carefully, and I am of the opinion that the same is correct in form and legal, with two exceptions which I will note.

In the fourth division of said contract you provide that no part of the work shall be altered by the contractor from that prescribed in the specifications without the express sanction of the superintendent in writing.

Section 2321 General Code (107 O. L. 455) provides that:

> "after they are so approved and filed with the auditor of state, no change of the plans, details, bill of materials or specifications shall be made or allowed *unless the same are approved by the state building commission.*"

It is my opinion that you should make your contract conform to this provision instead of the way in which you have it now written.

Further, it is my opinion that you should set out in the contract the particular appropriation made by the legislature out of which you intend to pay the obligation so entered into under and by virtue of this contract.

The law requires that you submit to me the executed contract together with the bond, for my approval. This you can do when the contract is executed.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

550.

AUDITOR OF STATE—MUST MAKE CERTIFICATE PROVIDED FOR IN SECTION 2288-1 G. C.—BEFORE STATE OFFICER CAN ENTER INTO AGREEMENT FOR EXPENDITURE OF MONEY.

The certificate of the auditor of state, provided for in section 2288-1 G. C. (107 O. L. 457), must be made before the entering into of any contract, agreement or obligation involving the expenditure of money or the passing of any resolution or order for the expenditure of money by any officer, board or commission of the state, whether the contract be important or not, and whether the amount of money expended is large or small.

COLUMBUS, OHIO, August 21, 1917.

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

DEAR SIR:—I have your communication of July 27, 1917, in which you ask my opinion as follows:

> "I am not certain as to the scope of the words (referring to section 2288-1 G. C.) 'contract, agreement or obligation involving the expenditure of money, or * * * resolution or order for the expenditure of money,' and respectfully request that you furnish me with a comprehensive opinion for my guidance.
>
> "I should be glad particularly to be advised as to whether or not the above section applies in the purchase of material and equipment as used on our maintenance and repair work and also whether same covers such purchases of office equipment as are not secured through the state purchasing agent.
>
> "Referring to your opinion No. 449 and your answer to our question No. 5, I respectfully ask that you advise me whether or not the above section is applicable on contracts awarded subsequent to July 1, 1917, and for which bids were received prior to that date. I have a number of such contracts which I am ready to award, but do not deem it proper to do so until I have complied with all legal requirements."

1. Your first question arises under and by virtue of the provisions of section 2288-1 G. C. (107 O. L. 457), said section reading as follows:

> "Sec. 2288-1. It shall be unlawful for any officer, board or commission of the state to enter into any contract, agreement or obligation involving the expenditure of money, or pass any resolution or order for the expenditure of money, unless the auditor of state shall first certify that there is a balance in the appropriation pursuant to which such obligation is required to be paid, not otherwise obligated to pay precedent obligations."

You request me to place a comprehensive construction upon this section. This is difficult to do, my not knowing the exact matters you have in mind, but I will give a general idea as to the scope of this section, as I view it, and if other matters should arise in reference to same, you may ask for further information.

There is one word found in this section to which we must give considerable attention in placing a construction upon the section, namely, "any." This is a

comprehensive and all inclusive word, and when it is used in reference to a particular object or class or group of objects of any kind, it is difficult to limit or restrict in any way the class or group to which it applies. This section reads:

> "It shall be unlawful for any officer, board or commission of the state to enter into any contract, agreement or obligation involving the expenditure of money * * *."

It further provides that it shall be unlawful for any officer, board or commission of the state to pass any resolution or order for the expenditure of money, unless a certain condition first obtains, and that condition is that—

> "the auditor of state shall first certify that there is a balance in the appropriation pursuant to which such obligation is required to be paid, not otherwise obligated to pay precedent obligations."

There are two different parts to this provision; the one relates to the entering into of the contract, agreement or obligation, and the other is the passing of a resolution or order. There is no limitation or modification whatever found in the terms of this section. Whenever a contract, agreement or obligation involving the expenditure of money is entered into, whether the amount of money to be spent is large or small, and whether the contract or agreement is of little or great importance, are not material, but if the same involves the expenditure of money it cannot be entered into until the auditor of state certifies that there is a balance in the appropriation from which the obligation must be paid. It is the same with the resolution or order. If in any case there is not a formal contract, agreement or obligation entered into, in that event your department would have no authority to make an order for the payment of any work done or material furnished until said certificate is made and filed with your department.

I cannot see how the terms of this statute can be limited or circumscribed in any way, and if this construction is correct, the section would apply to the purchase of material and equipment used in the maintenance and repair work of your department, or to the resolution or order for the payment of an obligation due for labor performed or material furnished, and it is my opinion that the provisions of this section would cover the purchase of office equipment such as is not secured through the state purchasing agent.

2. As I understand it, the facts, upon which you request an opinion in the second branch of your communication, no longer exist, and for this reason I am not answering that part of your communication.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

551.

DITCH IMPROVEMENT—UPPER COUNTY NOT TAKING PART IN PROCEEDING—MUST BEAR PORTION OF COST—WHEN DRAINAGE SYSTEM OF SAID COUNTY IS IMPROVED THEREBY—WHAT COMMISSIONERS ENTITLED TO VOTE ON AMOUNT TO BE PAID BY THE VARIOUS COUNTIES.

Under the provisions of section 6540 G. C. an "upper county" not taking part in the proceedings to construct a ditch improvement or river improvement is required to bear a part of the cost thereof if the improvement so to be constructed may be an outlet for a ditch or stream of such upper county, or provide better drainage, or a more sufficient outlet for such ditch or stream, or if the construction of the improvement in question was rendered necessary in order to secure a sufficient outlet for an improvement to a ditch or stream of an upper county.

The meeting of the commissioners to endeavor to agree upon the amount so to be paid should be of all of the commissioners of the county or counties making the improvement, together with the commissioners of such upper county sought to be assessed, and in so far as the vote may be taken at such joint meeting each member would be entitled to a vote, but no agreement on the part of such upper county could take place until the majority of the commissioners of such county voted in favor of such agreement.

COLUMBUS, OHIO, August 22, 1917.

HON. HECTOR S. YOUNG, *Prosecuting Attorney, Marion, Ohio.*

DEAR SIR:—Under date of June 22, 1917, you addressed the following request to this office:

> "Proceedings have been started for the improvement of the Scioto river from the Marion and Hardin county line, through Marion county, and into Delaware county. All of the county commissioners of Marion county were interested in the improvement, and a special board was appointed under section 6538 G. C. The improvement has been started as a joint county improvement by Marion and Delaware counties. The area affected by the improvement is shown on the accompanying plat. Marion county wants the counties benefited to pay their portion of the cost.
>
> "I would like to submit to your office for an opinion thereon, the following questions:
>
> "1. Under section 6540 can Allen, Auglaize and Logan counties be made to bear a part of the expense of the improvement, and if so what county is entitled to contribution from them?
>
> "2. In the meeting for the apportionment of the amount to be paid by the different counties as provided in 6540 and 6541 G. C. what boards of commissioners should meet, that is, should there be a joint meeting of all the boards, or should the meeting be split up? What voting power have the commissioners at this meeting? If the joint board for the improvement meets with the board of county commissioners of another county, what voting power have the commissioners of the joint board?"

The statutes cited by you are part of a legislative scheme for the construction of drainage improvements extending into more than one county and constitute the chapter headed "Joint County Ditches." Prior to 1913 the pro-

visions were for ditch improvements only as distinguished from river improvements, the two kinds of improvements not having been separated in the understanding of the lawyers and the people of the state generally until a distinction was made by what is known as the Harbine case in 1905 (74 O. S. 318). In 1913 the different sections of the chapter were amended so as to include these river improvements in the same manner that they are included in the single county ditch law. 103 O. L. 836.

The first section of the chapter conferring the general authority for the making of these joint improvements is section 6536, which is as follows:

> "Ditches, drains or water courses which provide drainage, or, when constructed, will provide drainage for lands in more than one county, may be located and constructed, enlarged, cleaned, or repaired or boxed or tiled as provided in this chapter and the laws prescribed for constructing, enlarging, cleaning or repairing single county ditches, drains or watercourses, or the channel of a river, creek or run, ditch, or part thereof which provides drainage, or when improved will provide better drainage for lands in more than one county, may be improved by straightening, widening, deepenin or changing the channel or part thereof, of it, or by removing from adjacent lands, timber, brush, trees, or other substance liable to obstruct it, as provided in this chapter and the laws prescribed for the improvement of the channel of a river, creek or run or part thereof as provided in the laws for single county ditches."

Here are found the two species of improvements above referred to and which are the same as those contained in the single county ditch law, namely, on the one hand the commissioners may cause to be located and constructed, straightened, widened, altered, deepened, boxed or tiled a ditch, drain or watercourse; on the other they may cause the channel of a river, creek or run, or part thereof, to be improved by straightening, widening, deepening or changing it or by removing from adjacent lands timber, brush, trees or other substance liable to obstruct it. This language is taken from section 6443 providing for single county ditches and is in substance the same as in the joint county ditch law. For the purpose of clearness as well as brevity we will shorten these expressions, when referring to these improvements generaly or in quoting from the different sections of the statutes, by speaking of one as a "ditch improvement" and the other as a "river improvement." It will be noted that by the very last words of section 6536, above quoted, these joint improvements are to be made "as provided in the laws for single county ditches."

One of the principal subjects of the laws both in regard to single and joint county ditches is the method of payment for such improvements and that is undoubtedly included in the above phrase. The improvement is to be made as provided in the laws for single county ditches. This makes all provisions of the laws upon the subject of single county ditches govern the joint improvements in so far as they are applicable and not in conflict with the express provisions in the chapter upon the latter subject, and it must have been the legislative intent by the use of these general words to include not only the construction of the improvement, but the apportionment of the cost and in general the means for paying for the same. The importance of this fact will become apparent in a consideration of the succeeding sections.

The different steps for the making of these joint improvements are provided in the sections immediately succeeding. Section 6537, so far as applicable to the questions here involved, is as follows:

> "When a ditch or improvement is proposed, which will require a

location in more than one county, or it is sought to (make a river improvement), which improvement as proposed is in more than one county, application shall be made to the board of county commissioners of each of such counties. * * * Application for damages shall be made and appeals from the finding of the commissioners, in joint session (making a ditch improvement or river improvement), and from the assessment of damages or compensation, shall be taken to the probate court of the county in which the greatest length of such (ditch or river improvement) is located. * * *"

Section 6538 G. C. provides that when two or more of the commissioners of a county are personally interested in an improvement in which they are called upon to act, a suitable person shall be selected in the manner pointed out to take the place of each commissioner so interested.

Now it will be borne in mind that as to all proceedings not expressly provided in these sections recourse is had to the former chapter.

Section 6539 G. C. provides in part as follows:

"If a majority of the joint board of county commissioners in joint session find in favor of the proposed improvement or improvements provided for in section 6537, and are unable to agree as to the proportion of the costs of location and construction of the improvement or (river improvement), which shall be assessed against each of the counties, respectively, the commissioners of either county may petition the court of common pleas of the county in which the greatest length of (such ditch or river improvement) is located for the appointment of three disinterested freeholders, not residents of either of said counties, who * * * shall estimate and report to the court the amount which would be charged to the land respectively in each county interested in the improvement."

The section gives further proceedings in the case with reference to the division of the costs.

Here will be seen a method of dividing the cost between two or more counties, both or all of which have some part of the improvement within their boundaries and the commissioners of all of which are participating in the business of such construction. Attention is called to it because it is a different proceeding and a different method of dividing the cost from that provided for in forcing contribution from a county which has no part of the improvement within its bounds and which is not otherwise concerned in making it than by contributing to the payment on account of advantages gained by such county in the way of securing an outlet or otherwise.

The sections immediately succeeding not only provide for the latter described case, but control all cases where a county not containing any portion of the improvement and not participating in its construction has either an advantage or a burden imposed upon it by the improvement. In calling attention to these next sections it is necessary to note that there is some ambiguity as to whether they apply to single county ditches alone or as to what extent they apply to or govern joint county improvements.

Section 6540 G. C. is as follows:

"When *the* board of county commissioners cause to be constructed, enlarged, cleaned, or repaired, a ditch, drain or watercourse, or the channel or any part thereof of a river * * *, water from which flows into an adjoining county, or into or finds an outlet in a ditch, drain or

watercourse constructed or being constructed in an adjoining county, or finds an outlet in a river, creek, or run being improved in an adjoining county, or cause to be constructed, enlarged, cleaned or repaired, a ditch, drain or watercourse, or cause to be improved the channel or any part thereof of a river, creek or run, by cleaning out, straightening, widening or deepening the same, which is, or may be, an outlet for a ditch, drain, or watercourse, or river, creek, or run, of lands of an upper county, or which by reason of the improvement thereof, will provide better drainage, or a more sufficient outlet for a ditch, drain, or watercourse, or a river, creek or run, for lands of an upper county, or finds it necessary to construct, enlarge, widen, deepen or clean a ditch, drain or watercourse, or to improve the channel or part thereof of a river, creek or run of a lower county in order to secure a sufficient outlet for a proposed ditch, drain or watercourse, or river, creek or run of an upper county the commissioners of said upper county shall pay the commissioners of such lower county such sum as is agreed upon by a majority of the joint board of the commissioners of all counties for the use and benefit of such outlet. The commissioners of such upper county shall apportion such sum to the lands in their county, for whose benefit said ditch or improvement was or is made or constructed."

This section may be separated into the following cases:

1. When the board causes to be constructed a ditch improvement or river improvement, water from which flows into an adjoining county.
2. When they construct such improvement which finds an outlet in a ditch, drain or watercourse constructed or being constructed in an adjoining county, or a stream being improved therein.
3. When they construct an improvement which is or may be an outlet for a ditch or stream of lands of an upper county, or will provide better drainage or a more sufficient outlet for such ditch or stream for lands of an upper county.
4. When they find it necessary to construct a ditch improvement or river improvement of a lower county in order to secure a sufficient outlet for an improvement to a ditch or stream of an upper county.

The first two of these cases are where a burden is placed upon the outside county which it is necessary to pay for. The last two are where a benefit is secured to an outside county on account of which it ought to contribute to the cost of the improvement.

The one significant word in this whole section is the word "all" in the expression "such sum as is agreed upon by a majority of the joint board of the commissioners of all counties." In the old statute this word was "both" so that the conclusion cannot be escaped that more than two counties may be included under the operation of this section. This carries us back to the last line of section 6536 where the proceedings are to be "as provided in the laws for single county ditches."

Section 6540, although found in the chapter on joint county ditches, by its express terms is a provision in reference to single county ditches. Being such, however, there is no reason why it is not adopted by the clause above named into the joint county ditch law. It is a construction which has to be threshed out by a consideration of all the statutes together, and yet it appears to be the only one which furnishes a rational solution of the legislative intent. There is no reason for confining the phrase "as provided in the laws for single county ditches" to the chapter upon that subject. Section 6540, although found in the chapter on joint county ditches, is just as much a "law for single county

ditches" by its express terms as if it were found in the other chapter, and therefore it is adopted into the joint county ditch scheme of payment for improvements. It is not in such legislative scheme because found in the chapter upon that subject, but it is first cast out of that chapter by its express language and then taken back by the adoption above referred to. And this, as above stated, is an absolutely necessary construction by virtue of the change from "both" to "all," although it might be otherwise capable of this construction. This, however, renders it certain.

It therefore follows that in the payment by an outside county of part of the cost of construction of an improvement, which outside county is always in this case an upper county, the amount is to be agreed upon by a majority of the joint board of all the counties.

Some further difficulty as to this subject is found in the language of the next section, which also needs construction, to make it fit in with this notion. It is as follows:

> "Sec. 6541. Before work is begun in the construction, enlarging, cleaning, or repairing, of a ditch, drain or watercourse, or the improving of the channel or a part thereof, of a river, creek or run, in either of such counties, as provided in the next preceding section, the amount to be paid by the commissioners of the upper county to the commissioners of the lower county, for the use and benefit, or burden of such outlet, or better outlet, shall be agreed upon or be determined at a joint meeting of the commissioners of the upper and lower counties upon the line or proposed line of such ditch, drain, or watercourse, river, creek or run."

Read alone this section would seem to refer only to the commissioners of the two counties interested. However, construing it in connection with the preceding section the words "lower counties" in the expression "at a joint meeting of the commissioners of the upper and lower counties" would mean the counties participating in the improvement, who with the commissioners of such upper county would form the board to decide upon such amount.

Section 6542 G. C. has not been amended, but strictly speaking no amendment is necessary to make it fit in with the above interpretation. The refusal of either of said counties, as mentioned in that act, may still refer, as it originally did before "both" was changed to "all," to the two interested counties.

This is as far as it is necessary to quote or discuss the sections in order to determine the questions asked, which are both answered in the above discussion, except to add that no method of voting in such joint board is indicated and that therefore the only presumption can be that each member has a vote.

No agreement, however, can be reached unless a majority of the board of such "upper county" sought to be assessed vote in favor of it. This follows from the fact that the agreement was between the counties and is a necessary implication from section 6542, which provides that a refusal of a majority of the officials of any such county, or the failure to meet or to act upon ten days' notice shall be prima facie evidence of their failure to agree.

You are therefore advised that Allen, Auglaize and Logan counties may be made to bear a part of the expense of this improvement if the conditions exist as set out in section 6540 applicable to the situation which is the fourth case provided in said section as above divided; that is, if it is necessary to construct this improvement in order to secure a sufficient outlet for a proposed ditch improvement or river improvement in those counties, or under the third of said cases, if said improvement will provide better drainage or a

more sufficient outlet for a ditch, drain or watercourse, or river, creek or run, for lands in such upper counties.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

552.

APPROVAL—CONTRACT FOR AKRON ARMORY.

COLUMBUS, OHIO, August 23, 1917.

HON. GEORGE H. WOOD, *Adjutant General of Ohio, Columbus, Ohio.*

DEAR SIR:—There have been submitted to me for approval certain contracts in regard to the Akron armory, together with the bonds accompanying such contracts.

(1) Contract of The Theodore Kuntz Company, of Cleveland, Ohio, with the state armory board, in the sum of $4,322.16, for seating of the first floor of said armory, together with bond accompanying same.

I have examined said contract and bond and have approved the same as to form.

(2) Contract between The Portage Nursery and Landscape Company, of Akron, Ohio, and the state armory board, in the sum of $870.00, for the sodding and grading about the said armory, together with bond accompanying same.

and have approved the same as to form.

(3) Contract between The Carle Electric Construction Company, of Akron, Ohio, and the state armory board, in the sum of $560.00, for footlights and stage lights in said armory, together with bond accompanying same.

and have approved the same as to form.

(4) Contract between The American Seating Company, of Chicago, Illinois, and the state armory board, in the sum of $4,424.96, for seating of the balcony of said armory, together with bond accompanying same;

and have approved the same as to form.

In regard to the above contracts, the auditor of state has certified that there is available out of the appropriations made for said armory a sum sufficient for the aforesaid contracts, which certificates have been attached to the various contracts, and a copy of each of said contracts, together with bond accompanying same, filed in the office of the auditor of state.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

553.

APPROVAL—RESOLUTIONS BY STATE ARMORY BOARD FOR AKRON ARMORY.

COLUMBUS, OHIO, August 23, 1917.

HON. GEORGE H. WOOD, *Adjutant General of Ohio, Columbus, Ohio.*

DEAR SIR:—There have been submitted to me for approval four resolutions adopted by the state armory board on June 26, 1917, before said state armory board was abolished by senate bill No. 192 (107 O. L. 382). The said four resolutions pertain to the Akron armory now under construction by The Clemmer & Johnson Company, contractors.

The first resolution is as follows:

> "RESOLVED FURTHER: That the contractors, The Clemmer & Johnson Co., be allowed an extra of $1,360 for installing sidewalks and steps from building to sidewalks according to architect's plans and specifications. This extra is subject to approval of attorney-general."

If I am correctly informed, the question of installing sidewalks and steps from the said building to the sidewalk was not within the original contract of The Clemmer & Johnson Company, and it may well be doubted as to whether or not it could properly be considered as an extra in the construction of said building. However, I am of the opinion that payment for said work could be considered as within the appropriation made for the Akron armory, and if the bid of The Clemmer & Johnson Company has been obtained through competitive bidding, the said contract could be let to said Clemmer & Johnson Company. If, therefore, there are funds sufficient in the appropriation for such purpose the said contract could be so awarded.

The second resolution is as follows:

> "RESOLVED FURTHER: That the general contractors, The Clemmer & Johnson Co., be allowed an extra of $93.10 for providing 4-inch by 12-inch stone coping on area walls on north and south sides of building near east end, as per architect's details, price being approved by architect. This resolution is subject, however, to approval of attorney-general."

The work called for by this resolution seems to me clearly to be an extra on the building and could be properly allowed, provided the money is available.

The third resolution is as follows:

> "RESOLVED FURTHER: That the general contractors, The Clemmer & Johnson Co., be allowed an extra of $400 for painting ceiling of drill hall with one coat of white plaster finish paint as per architect's specifications and his recommendations as to price. This resolution is subject to approval of attorney-general."

This also seems to me clearly an extra and may be allowed provided there is sufficient money applicable to the payment thereof.

The fourth resolution is as follows:

> "RESOLVED FURTHER: Whereas, the architect has prepared

plans and specifications for construction of asphaltic concrete driveway from street curb lines to entrance to said armory as shown on said plans, and attempted to secure other bids therefor than one from general contractor, but no such bids were received; it is therefore

"RESOLVED: That general contractors, The Clemmer & Johnson Co., be allowed an extra of $2,920, being its bid for furnishing materials and completing work described in preamble hereto, using Trinidad Lake Asphalt, provided that this award be first approved by the attorney-general."

It appears from the above that there was an attempt to get further bids and that, therefore, the bid of The Clemmer & Johnson Company may be considered as a competitive bid. While the work contemplated is not strictly an extra to the original contract, nevertheless, having been let under competition, I am of the opinion that said contract may be awarded, provided, of course, that there is sufficient money available for such purpose.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

553½.

APPROVAL—ABSTRACT OF TITLE—GALLIA COUNTY—OHIO HOSPITAL FOR EPILEPTICS.

COLUMBUS, OHIO, August 25, 1917.

The Ohio Board of Administration, Columbus, Ohio.

GENTLEMEN:—You recently submitted to this department an abstract of title covering the following premises situate in the county of Gallia, in the state of Ohio, and in the township of Gallipolis, and bounded and described as follows:

"Situate in sections seventeen (17) and eighteen (18), township three (3), range fourteen (14), in the Ohio Company's Puchase, beginning at a point 57 links north of the southwest corner of eight acre lot number 1126 in section seventeen (17), said point is in the middle of the lane leading to the Keller residence; thence with said lane north 29 degrees east 4 chains and 45 links to a point in the middle of the lane leading to the Shepard residence; thence with said lane north 60 degrees west 7 chains and 98 links to a point on the north line of lot 1130, which point is 4 chains and 52 links west of the northeast corner of said lot; thence to the southwest corner of eight acre lot number 1119; thence north along the west line of eight acre lots 1119, 1114 and 1110 to the northwest corner of eight acre lot 1110; thence east along the north line of eight acre lots numbers 1110, 1109 and 1108 to a point 27 links west of the northeast corner of eight acre lot number 1108; thence south 27 links; thence east 5 chains and 16 links with the south line of the right of way belonging to Ella Hutsinpiller; thence south with the west line of the right of way of Ella Hutsinpiller 14 chains and 96 links to the north side of the right of way of The Gallipolis and Northern Traction Company; thence in a southwesterly direction with the north line of said right of way to the place of beginning, containing ninety-four and forty-three hundredths (94.43)

acres, more or less, and being all of eight acre lots numbers 1108, 1109, 1110, 1112, 1113, 1114, 1118 and 1119, section 18, township 3, range 14, O. C. P., and 7 acres in eight acre lot 1117, 50-100 acres in eight acre lot 1116, 6.50 acres in eight acre lot 1092, and 5.75 acres in eight acre lot 1088, section 18, township 3, range 14, Ohio Company's Purchase, and 4.81 acres in eight acre lot 1126, 4 acres in eight acre lot 1123 and 59-100 acres in eight acre lot number 1130, section 17, township 3, range 14, Ohio Company's Purchase."

You also submitted a deed covering the above described premises, wherein Lewin G. Davis deeds the said property to the state of Ohio.

I have carefully examined said abstract dated July 21, 1917, and note several lapses and defects in the title. These defects, however, except the ones hereinafter specifically mentioned, are immaterial, as they are cured by lapse of time. The defects above mentioned are as follows:

At section 70 of the abstract, Richard Willis, by deed dated July 25, 1891, deeded to Stephen G. Keller eight acre lot No. 1130 in the Ohio Company's Purchase, said deed containing a restriction as follows:

"It is expressly understood that the grantor, Edward Willis, shall have the privilege to fence the grave of Stephen Stewart on said lot 1130, and the grave shall remain undisturbed by the grantee, his heirs and assigns until the remains shall be removed by the relations or friends of Stephen Stewart, but as long as unfenced, the fact of the grave there being, shall not prevent pasturing, or like surface use of grantee, his heirs and assigns."

The abstract does not show whether or not the grave is located on the part of the lot included in the deed submitted, nor whether or not the said lot No. 1130 is still subject to this restriction.

C. W. Gee executed the following mortgages on the foregoing real estate. (Sec. 18.)

Mortgagee.	Amount.	Due	Date.
J. L. Vance, trustee.....	$1,000.00	1 year	12-31-69
Emily F. Vance.....	1,000.00	2 years	11- 1-70
R. F. Stewart.....	750.00	1 year	11- 3-71
H. N. Bailey.....	1,000.00	1 year	9- 3-72
Mina Long	542.00	1 year	9-20-73
J. L. Vance, trustee.....	1,000.00	1 year	5-27-74

The abstract does not show that any of the foregoing mortgages have ever been satisfied.

You will note that these mortgages were given 43, 44, 45, 46, 47 and 48 years ago, respectively, and in all probability have been satisfied, or the statute of limitation has run against them. In any event it is highly improbable that the mortgages above mentioned are a lien on the premises at this time. However, there is a bare possibility that one or more of said mortgages may be a valid lien against said premises. Still it would be well, in my opinion, to make an investigation to ascertain if releases have been had of the foregoing mortgages, but have not been placed on record. No doubt some of the mortgagees are living and can give this information, or, if deceased, their heirs might be in position to furnish same.

The deed submitted covenants that the premises are free and clear of all

incumbrances whatsoever, except the taxes due and payable on said real estate after June, 1917, and the crops now growing on said premises, and it is very probable that said deed will convey a clear title, with the exception of the above mentioned taxes and growing crops.

The deed which has been drafted for signing by Lewin G. Davis does not state whether he is married or an unmarried man. I would suggest that this description be placed in the deed before it is signed by Mr. Davis and his wife if married.

I am herewith returning said deed and abstract.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

554.

APPROVAL—CONTRACT FOR PIPE LINE AT OHIO UNIVERSITY.

COLUMBUS, OHIO, August 25, 1917.

HON. ALSTON ELLIS, *President Ohio University, Athens, Ohio.*

DEAR SIR:—Your architect, Mr. Frank L. Packard, for the furnishing of materials and the performing of labor necessary to construct steam and return line and pipe duct for the Ohio university, has just submitted to us, on your behalf, the contract entered into by your university with The Charles DeMolet Company, together with the bond to secure such contract.

We have carefully examined the contract and bond and find the same in accordance with law, have approved the same and filed the same with the auditor of state.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

555.

APPROVAL—ABSTRACT OF TITLE—GALLIA COUNTY—OHIO HOSPITAL FOR EPILEPTICS.

COLUMBUS, OHIO, August 25, 1917.

The Ohio Board of Administration, Columbus, Ohio.

GENTLEMEN:—You recently submitted to this department an abstract of title covering the following premises, situate in the county of Gallia, in the state of Ohio, and in the township of Gallipolis, and bounded and descrbed as follows:

> "Tract Number One. Being parts of eight-acre lots respectively numbered on the recorded plat in Gallipolis township, Gallia county, Ohio, 1132, 1136, 1137 and 1138, beginning 1 chain, 70 links west of the northeast corner of said lot No. 1136; thence west 8 chains and 46 links to the northwest corner of said lot No. 1136; thence south 22¼° east 18 chains and 76 links to the middle of the public road; thence along said road N. 75° E. 50′ two chains and fifty links; thence N. 40° 51′ east four (4) chains and fifty-seven (57) links; thence N. 15½° west 12 chains and 31 links to the place of beginning, containing 11 and 30/100 acres (11.30 A.) more or less, being the property conveyed to John L. Vance by Lucy H. Cherrington by deed dated April 2,

1882, recorded in book 63, page 24, Records of Deeds of Gallia County, Ohio, but excepting from this transfer the strip or parcel of above described property conveyed by said John L. Vance to The Columbus, Hocking and Toledo Railway Company for right of way as a railroad track for a spur of said railway, being and lying on the lower or southwest side of the property thereby conveyed, and now occupied by said railway company.

"Tract Number Two. The following real estate, situated in the county of Gallia, in the state of Ohio, and in section 23 and 24, township 3, range 14, Gallipolis township, and bounded and described as follows, to wit: A strip of land sixty-five feet in width across eight (8) acre lots 1135 and 1141 and one hundred (100- acre lot No. 520 and being twenty (20) feet wide on the west side and forty-five (45) feet wide on the east side of the center line surveyed and located by The Columbus, Hocking Valley and Toledo Railway Company, for a branch of its railway located as follows: Beginning in the south line of said eight-acre lot 1135, twenty feet east of the southwest corner thereof, thence north 22° 16′ west two hundred and forty feet, thence with a curve to the right of five hundred and seventy-three feet radius, five hundred and forty-two feet to the center of the main track of said railway as now located, containing about one acre of land, and being the property conveyed to said John L. Vance by Genevieve Maxon by deed dated August 13, 1892, and recorded in Vol. 63, page 26, Records of Deeds of Gallia County, Ohio; excepting, however, from this transfer the strip or parcel of last above described property conveyed by said John L. Vance to The Columbus, Hocking Valley and Toledo Railway Company for a right of way for railroad track for spur of said railway, and now held by the said John L. Vance."

You also submitted a deed covering the above described premises wherein Rowena P. Cherrington and Samuel M. Cherrington, her husband, deed said property to the state of Ohio.

I have carefully examined said abstract dated July 11, 1917, and note several lapses and defects in the title. However, these lapses and defects all appear prior to 1850, and are, therefore, cured by lapse of time.

I also note that the premises herein described are subject to the lien of a mortgage of one thousand dollars ($1,000.00) to W. J. Fulton, as set out in No. Three of said abstract.

I am of the opinion that the deed submitted will convey a clear title to the state of Ohio, save and except taxes due and payable on said real estate after June, 1917, and crops now growing on said premises, and the mortgage lien of one thousand dollars ($1,000.00) herein noted. However, as the deed covenants that he premises are free and clear from all encumbrances whatsoever, except the taxes due and payable on said real estate after June, 1917, and the crops now growing on said premises, the amount of said mortgage, together with the interest thereon, should be deducted from the purchase price.

I am herewith returning said deed and abstract.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

556.

JUVENILE COURT—HAS EXCLUSIVE JURISDICTION OF MINORS UNDER EIGHTEEN IN ALL BUT FELONY CASES—MAY FINE DELINQUENT—APPEAL—ERROR.

1. *When a juvenile court has found a minor to be delinquent such court may impose a fine not exceeding* $10.00, *by reason of the provisions of section* 1654 *General Code.*

2. *There is no provision in law for appealing or prosecuting error from the judgment of a juvenile court.*

3. *A juvenile judge has exclusive jurisdiction in all but felony cases with respect to minors under* 18 *years of age.*

COLUMBUS, OHIO, August 25, 1917.

HON. J. ARTER WEAVER, *Probate Judge, Bryan, Ohio.*

DEAR SIR:—I have your letter of August 12, 1917, as follows:

"I desire your opinion on section 1654 of the General Code as to whether a juvenile judge has the right to fine a minor under 18 years for violating a village ordinance and creating a disturbance and attacking a deputized officer and resisting arrest. We juvenile judges encounter *many* cases where the delinquent is over 16 and under 18 years of age that we do not care and in fact feel that a commitment to the boys' industrial school is not proper and a suspended sentence to said institution is not sufficient, while if we could impose a proper fine it would be far better.

In a juvenile case, when the defendant is under 18, can the case be appealed or taken up on error to the common pleas court?

Where the common pleas judge and probate judge select the probate judge as the juvenile judge, has the juvenile judge exclusive jurisdiction or has the common pleas judge concurrent jurisdiction?

I would like very much to have your opinion by the first of September, as the case where this point arises is set for trial at this date."

Sections 1644 and 1654 General Code read:

"Sec. 1644. 'DELINQUENT CHILD DEFINED.'

"For the purpose of this chapter, the words 'delinquent child' includes any child under 18 years of age who violates a law of this state, or a city or village ordinance, or who is incorrigible; or who knowingly associates with thieves, vicious or immoral persons; or who is growing up in idleness or crime; or who knowingly visits or enters a house of ill repute; or who knowingly patronizes or visits a policy shop or place where any gambling device or gambling scheme is, or shall be, operated or conducted; or who patronizes or visits a saloon or dram shop where intoxicating liquors are sold; or who patronizes or visits a public pool or billiard room or bucket shop; or who wanders about the streets in the night time; or who wanders about railroad yards or tracks, or jumps or catches on to a moving train, traction or street car, or enters a car or engine without lawful authority, or who uses vile, obscene, vulgar, profane or indecent language; or who is guilty of immoral

conduct; or who uses cigarettes, cigarette wrapper or substitute for either, or cigars, or tobacco; or who visits or frequents any theater, gallery, penny arcade or moving picture show where lewd, vulgar or indecent pictures, exhibitions or performances are displayed, exhibited or given, or who is an habitual truant; or who uses any injurious or narcotic drug. A child committing any of the acts herein mentioned shall be deemed a juvenile delinquent person, and be proceeded against in the manner hereinafter provided.

"Sec. 1654. Whoever abuses a child or aids, abets, induces, causes, encourages or contributes toward the dependency, neglect or delinquency, as herein defined, of a minor under the age of 18 years, or acts in a way tending to cause delinquency in such minor, shall be fined not less than ten dollars, nor more than one thousand dollars or imprisoned not less than ten days nor more than one year, or both. If in his judgment it is for the best interest of a delinquent minor, under the age of 18 years, the judge may impose a fine upon such delinquent not exceeding ten dollars, and he may order such person to stand committed until fine and costs are paid."

It will be noted that section 1644 provides that a juvenile under 18 years of age who violates a village ordinance, shall be deemed a delinquent child, and section 1654 provides:

"If in his judgment it is for the best interests of a delinquent minor, under the age of eighteen years, the judge may impose a fine upon such delinquent not exceeding ten dollars, and he may order such person to stand committed until fine and costs are paid."

In answer, therefore, to your first question, I would advise that the juvenile court may impose upon this juvenile a fine of not to exceed $10.00, as provided by section 1654, after the court has found the juvenile to be a delinquent.

Answering your second question, beg to advise that no means of appealing or prosecuting error from the juvenile court has been provided by the legislature, therefore none exists.

In In re Frank Januezewski, 10 O. L. R., 151, this fact was argued in support of the claim that the statute was invalid, but the court said:

"Nor is there any merit in the contention that the petitioner's rights were invaded because the statute did not afford him the opportunity of appealing or prosecuting error from the judgment of the juvenile court. It is a settled rule in Ohio that there can be no appeal or proceedings in error from the judgment of one judicial tribunal to another, unless the right thereto is given by statute. (Barr v. Closterman, 1 Ohio C. C., 387; Karb v. State, 54 Ohio St., 383.) It follows, therefore, that a federal court may not hold the statute invalid because it contains no provision for appeal or the prosecution of error. * * * * * * It is not urged and cannot be successfully maintained that a laxer rule obtains in distinctly criminal cases than in those of a civil or *quasi*-criminal nature."

Referring to your third question, as to whether or not a juvenile judge has exclusive jurisdiction in such a case as you submit, I beg to refer to an opinion rendered by Hon. Timothy S. Hogan, on November 13, 1914, to Hon. Homer E. Johnson, prosecuting attorney, Marion, Ohio, and found in the Annual Report of the Attorney General for 1914, Vol. 2, in which he held that "the juvenile

court and not the justice of the peace has jurisdiction over boys under 18 years of age arrested for violation of the hunting law." In that opinion Mr. Hogan said:

> "There seems to be only one case in which the legislature provided for the jurisdiction of any other court than the juvenile court over minors under 18 years of age. That provision is found in section 1681, G. C., which says that when a delinquent child is charged with the commission of a felony, the juvenile judge may bind such minor over to the court of common pleas to be proceeded against there in the same manner as any other person charged with a felony. Where such minor under the age of 18 is charged with a felony, the case would first be brought before the juvenile judge; and it seems to me that such judge has the exercise of a sound discretion whether the case should be transferred to the court of common pleas.
>
> "Therefore, it is my opinion that the state of Ohio, in the valid exercise of its police powers, intended by the act creating what is known as the 'juvenile court' to give to and vest in such court the exclusive jurisdiction over and with respect to minors under the age of 18 years of age, with the exception in regard to felonies, as provided in section 1681 G. C. If the jurisdiction of the justice of the peace, judges of the police court and mayors of villages were made concurrent with the jurisdiction of the juvenile court, the purpose and spirit of the act would be defeated. It therefore follows that in case referred to in your letter, the justice of the peace had no authority to retain and hear the same."

I also would refer you to an opinion rendered by Hon. Edward C. Turner, on June 14, 1915, found in Opinions of the Attorney General for 1915, Vol. 2, 1022, in which he held that "A mayor has no jurisdiction to dispose of a case against a minor under 18 years of age other than to transfer the case to the juvenile judge." In that opinion Mr. Turner said in part:

> "It is my opinion, therefore, that under the provisions of section 1659 of the General Code, as amended and quoted above, the juvenile judge has exclusive jurisdiction to try and dispose of cases involving violations of law by minors under the age of 18 years, subject to the exceptions made in section 1681 of the General Code; and that while a mayor has no jurisdiction to finally dispose of such a case, he is, by the provisions of section 1659 of the General Code, authorized to transfer the case to the juvenile judge, it then becoming the duty of the officer having the minor in charge to take him before such juvenile judge.
>
> "Section 1659 of the General Code, quoted above, does not specifically mention mayors; however, there can be no question but that it was the intention of the legislature to vest the jurisdiction over minors under the age of 18 years in the juvenile court for final disposition, except when the charge involving such minor was a felony. Therefore a mayor has no jurisdiction to dispose of a juvenile case brought before him other than to transfer it to the juvenile judge of the county."

I agree with these views of Mr. Hogan and Mr. Turner, and advise you that the juvenile court has exclusive jurisdiction in the case you submit in your communication. It therefore follows that the common pleas judge is without jurisdiction.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

557.

SECRET SERVICE OFFICER—PROSECUTING ATTORNEY MAY EMPLOY AND PAY FROM FURTHERANCE OF JUSTICE FUND—NO AUTHORITY FOR TWO OR MORE COUNTIES TO HIRE SUCH AN OFFICER JOINTLY.

1. *A prosecuting attorney may expend from his "furtherance of justice" fund (section 3004 G. C.) for secret service work, when a regular secret service officer provided by section 2915-1 G. C. is not serving, or in addition to such services.*

2. *There is no provision of law for two or more counties to join in employing a secret service officer.*

COLUMBUS, OHIO, August 27, 1917.

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

DEAR SIR:—In your request for my opinion you submit the following:

"(1.) In a county in which a secret service officer is appointed under the provisions of statute for a month at a time, there probably being something like three appointments during the year, is the prosecuting attorney authorized to expend for secret service work any part of the funds in his hands under section 3004 of the General Code, when such work is done at a time when there is no secret service officer serving? That is, after the expiration of one monthiy appointment and before the making of another appointment?

"The statute provides that the compensation of a secret service officer when appointed under the law shall not be less than one hundred and twenty-five dollars per month during the time actually employed; that the total amount so expended in a year shall not exceed one-half of the prosecuting attorney's salary. It will thus be seen that it is impossible in a county in which the salary of a prosecuting attorney is $1,350.00 per year for a secret service officer to be appointed and constantly employed during the entire year, under the provisions of law providing for such appointments.

"(2.) I desire to inquire whether or not there is any legal manner in which two or three counties, acting together, may secure the services of a secret service man for the entire year. If so, what procedure is necessary."

Two questions are contained in the above statement: First, in a county in which a secret service officer is appointed under the provisions of section 2915-1 of the General Code, for a month at a time but not regularly, can the prosecuting attorney expend a portion of the funds in his hands under section 3004 G. C. for secret service work while the officer appointed under section 2915-1 is not working? Second, is there any legal manner in which two or more counties, acting together, can secure the services of a secret service man for the entire year?

Section 2915-1 of the General Code provides:

"The prosecuting attorney may appoint a secret service officer whose duty it shall be to aid him in the collection and discovery of evidence to be used in the trial of criminal cases and matters of a criminal

nature. Such appointment shall be made for such term as the prosecuting attorney may deem advisable, and subject to termination at any time by such prosecuting attorney. The compensation of said officer shall be fixed by the judge of the court of common pleas of the county in which the appointment is made, or if there be more than one judge, by the judges of such court in such county in joint session, and shall not be less than one hundred and twenty-five dollars per month for the time actually occupied in such service nor more than one-half of the official salary of the prosecuting attorney for a year, payable monthly, out of the county fund, upon the warrant of the county auditor."

Section 3004 G. C. provides in part:

"There shall be allowed annually to the prosecuting attorney, in **addition to his salary and to the allowance provided by section 2914,** an amount equal to one-half the official salary, *to provide for expenses which may be incurred by him in the performance of his official duties and in the furtherance of justice,* not otherwise provided for. Upon the order of the prosecuting attorney the county auditor shall draw his warrant upon the county treasurer, payable to the prosecuting attorney or such other person as the order designates, for such amount as the order requires, not exceeding the amount provided for herein, and to be paid out of the general fund of the county. * * *"

That is, the above provisions of law permit the prosecuting attorney, if he deems it advisable, the right to appoint a secret service officer, and it shall be the duty of such secret service officer to aid the prosecuting attorney in the collection and discovery of evidence to be used in the trial of criminal cases and in matters of a criminal nature. The prosecuting attorney may designate the term of such secret service officer and may make such terms of such length as he deems advisable, subject, however, to be terminated at any time by the prosecuting attorney. When a secret service officer is so appointed by the prosecuting attorney, the compensation of such officer shall be fixed by the judge of the court of common pleas of the county in which such appointment is made, or if there be more than one judge of the court of common pleas of such county, then such salary shall be fixed by the judges of such court of common pleas of the county in which such appointment is made and such judges shall fix such compensation in joint session; and the salary so fixed, whether fixed by the single judge or by the judges joint session, as the case may be, shall not be less than $125.00 per month for the time actually occupied in the services so performed by such secret service officer, nor shall such salary so fixed be more than one-half of the official salary of the prosecuting attorney during any year. Such salary shall be paid monthly out of the county funds of such county and upon warrants of the county auditor. But if such prosecuting attorney appoints no such secret service officer, under the provisions of section 2915-1 G. C., or if for any other reason in the furtherance of justice it is necessary for the prosecuting attorney to secure the services of a secret service officer in the performance of his official duties, then such prosecuting attorney shall be allowed to use the fund provided for in section 3004 G. C. to cover such expense. Even if a secret service officer is appointed by the prosecuting attorney in any county, as provided by section 2915-1 G. C., and a condition arises which warrants further or other secret service for the prosecuting attorney in the performance of his official duties, and in the furtherance of justice, then

and under such conditions the prosecuting attorney is allowed to also use the funds provided by section 3004 to cover the expenses of such services, if any there be.

In other words, section 2915-1 provides for the appointment of a secret service officer whose salary shall be paid out of the county fund, under the conditions above mentioned, and section 3004 G. C. provides a fund which is placed at the disposal of the prosecuting attorney to be used in the performance of his official duties and in the furtherance of justice.

The two matters are separate and distinct. Both can be used at the same time; neither need be used at any time if the conditions warrant such non-use.

My predecessor, Hon. Edward C. Turner, held in Opinion No. 1872, Opinions of the Attorney-General for 1916, volume 2, p. 1453, that the allowance made to a prosecuting attorney, under the provisions of section 3004 G. C., may be expended in the employment of a person or persons to procure evidence against violations of the law regulating the speed of motor vehicles, said evidence to be used before a grand jury or in the prosecution of said violations, if no secret service officer has been appointed by the prosecuting attorney under the provisions of section 2915-1 G. C., and if such secret service officer has been appointed said expenditure, aforesaid, may be made in addition to the services of such secret service officer.

Said official further held in Opinion No. 10, found in Vol. 1, Opinions of the Attorney-General for 1915, p. 16, that the evident purpose of the enactment of section 3004 G. C. was to place at the disposal of the prosecuting attorney a sum of money which he might expend in such manner as to render partial secrecy at the time when the expenses were incurred, and also add a requirement that on or before the first Monday of the year following he should render a statement under oath of the manner of his expenditures; that the statute contemplates two methods by which the special fund may be drawn from the treasury and expended by the prosecuting attorney.

(1.) He may secure from the county auditor a warrant for all or a portion of the amount to which he is entitled, after having given bond and securing its approval by the court; or

(2.) He may leave the entire amount in the county treasury and issue his order to the county auditor for each separate expenditure of money.

In no event does the statute contemplate that a court shall exercise any jurisdiction or have any control over this fund, other than to approve the bond when submitted, said official giving it as his opinion therefore that after a bond is given and has been approved by the court, the prosecuting attorney may withdraw either all or a portion of the amount to which he is entitled, and expend it in such a manner as is contemplated by the section in the furtherance of justice, and the court has no jurisdiction over the amount to be so drawn.

Again, in Opinion No. 260, Vol. 1 of the Opinions of the Attorney-General for 1915, p. 491, the same official held, in a matter wherein the prosecuting attorney had secured the attendance of witnesses from a foreign state, that:

> "If you will have the subpoenas issued and you mail them to the witnesses you may then have their attendance, and mileage from the state line, paid by order of the court, showing that the witnesses came upon the call of the prosecuting attorney, and taxed as costs in the case. *Any deficiency in the amount of their actual mileage is a proper charge against your 'in furtherance of justice fund' under section* 3004 *G. C.*"

My predecessor, Hon. Timothy S. Hogan, held in Opinion No. 789, Vol. 1, Annual Report of the Attorney-General for 1914, p. 270:

> "The question presents itself as to the meaning of 'not otherwise provided for.' Does it mean not otherwise provided for in law, or not otherwise provided for in fact? Suppose the prosecuting attorney had not proceeded agreeably to section 2915-1 and had not appointed a secret service officer under that section. May it then be said that we have an application of 'not otherwise provided for' in section 3004? I should be inclined ordinarily to hold that the expression, 'not otherwise provided for,' was a legal expression and did not relate to a fact, but I am loath to come to a conclusion that would unnecessarily put the greater expense upon the county; and, too, *I can conceive of a situation in which the prosecuting attorney might have his regular detective employed under section* 2915-1 *occupied and a situation would arise wherein it would be advisable in the furtherance of justice to employ a detective under section* 3004 *for special purposes.*
>
> "On the whole, I am not able to see any objection to the action of the prosecuting attorney who is prompted by considerations of economy to proceed under section 3004. Certain it is that the chief guiding official in transactions under either section is the prosecuting attorney. *Certain it is, also, that either section gives him the right to employ a detective.*"

The same official held in Opinion No. 836, Vol. 1, Annual Report of the Attorney-General for 1914, p. 399:

> "A prosecuting attorney who is employing a secret service officer regularly under section 2915-1, General Code, may employ another secret service officer when necessary under the provisions of section 3004, General Code."

So that, answering your first question, I advise you that in a county in which a secret service officer is appointed under the provisions of General Code section 2915-1 for a month at a time, but not regularly for the full year, the prosecuting attorney may use from the fund provided for under section 3004 G. C. whatever is necessary to cover the expenses of secret service for such prosecuting attorney in the performance of his official duties and in the furtherance of justice while such officer provided for in section 2915-1 G. C. is not serving.

Coming now to your second question: Section 2915-1, above quoted, provides a plan of procedure in the appointment of a secret service officer for one county only. The statute does not provide that the prosecuting attorneys of two or more counties may appoint, or that the common pleas judges of two or more counties may fix the salary of such secret service officers so appointed, but the entire section limits the act of appointing a secret service officer to each or any county. In the performance of such acts prosecuting attorneys and common pleas judges have only such powers as are specifically granted them by statute, and the statute limits the same to single counties.

I must advise you, therefore, in answer to your second question, that there is no provision of law whereby two or more counties may act jointly in securing the services of a secret service man for the entire year.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

558.

TOWNSHIP TRUSTEES AND CLERKS—COMPENSATION—BY WHAT LAW GOVERNED.

The special acts in 93 *O. L.*, 674 *and* 714, *fixing the compensation of township trustees and the township clerk of Canton township, Stark county, Ohio, are unconstitutional, and said officers are governed in regard to their fees by the provisions of section* 3294 *General Code as amended by the last general assembly*, 107 *O. L.*, 698.

COLUMBUS, OHIO, August 25, 1917.

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

GENTLEMEN:—On July 30, 1917, you submit the following inquiry to this office:

> "We respectfully call your attention to a special act fixing the compensation of the trustees and clerk of Canton township, Stark county, Ohio, as recorded in 93 O. L., 714 and 674, passed in 1898. You will note that the compensation therein fixed is higher than the compensation fixed by the general laws of the state for township clerk and township trustees. We also call your attention to section 3294 G. C., as amended 107 O. L., 698.
>
> "*Question*: Will the old law referred to in 93 O. L., or the new law referred to in 107 O. L. govern in ascertaining the compensation of the trustees and clerk of Canton township?"

The two special acts which you mention, passed in 1898, are as follows:

> "(93 O. L., 714.) Be it enacted by the general assembly of the state of Ohio, That the township trustees of Canton township, Stark county, Ohio, may receive as compensation, at one dollar and fifty cents for each day's service, a sum not to exceed three hundred dollars each in any one year, to be paid out of the township treasury; including services in connection with the poor.
>
> "(93 O. L., 674.) Be it enacted by the general assembly of the state of Ohio, That the township trustees of Canton township, Stark county, Ohio, may allow the clerk thereof a compensation not to exceed two hundred dollars in any one year, to be paid out of the township treasury."

The amendment of section 3294 General Code by the last general assembly (107 O. L., 698) would have no effect on these two special acts if they were valid before. The amendment makes no practical change in the law except as to the fixing of the maximum amount that each of the officials may draw in the year, and in no other manner would change the status of the trustees or clerks as they stood prior to its enactment.

Since 1898, when these special acts were passed, there has been an entire revulsion of opinion upon the subject of special legislation by the supreme court. For several years after the enactment such special acts were frequently passed and were observed without criticism or comment. In 1902, however, the court settled the interpretation of section 26 of article II of the constitution

requiring that all laws of a general nature shall have a uniform application throughout the state. In the case of State ex rel. v. Spellmire et al., 67 O. S., 77, Burket, J., in his opinion collated and distinguished the different cases unhesitatingly, overruling those which went to the limit of liberality in such legislation. In this case it was decided that a special school district could not be created by a special act of the legislature.

Just previous to that, however, in the same year, the court composed of the same judges, had rendered a decision more directly in point in the present instance (State ex rel. Guilbert v. Yates, 66 O. S., 546). The only difference in the facts of this case and the instant matter is that that was in reference to county officers and this in reference to township officers, a circumstance of no consequence. The syllabus of the case is as follows:

> "1. County officers are not local officers, but are a part of the permanent organization of the government of the state, and the subject of compensation to county officers is not local in its nature, and an act of the general assembly upon that subject is a law of a general nature which must operate uniformly throughout the state. *Pearson et al., v. Stephens et al.*, 56 Ohio St., 126, overruled.
>
> "2. The 'act relating to the duties and compensation of certain county officers in Pickaway county,' passed April 22, 1896 (92 O. L., 597), and the act amending sections 1, 2 and 5, thereof, passed March 29, 1898 (93 O. L., 507), are unconstitutional, being in conflict with the first clause of section 26, article II, of the constitution."

Speaking of a former case in which such special legislation had been sustained, Davis, J., speaking for the court, said:

> "* * We are constrained to, and do unhesitatingly, overrule the case of *Pearson et al v. Stephens*, because the doctrine therein declared, that local legislation on the subject of the compensation of county officers is constitutional, is exactly the opposite of our deliberately formed convictions."

A perusal of these two cases is sufficient to save time in going through all the cases on the subject, as all are briefly stated and considered in the two opinions.

It is the duty of all state departments, including this, to indulge every intendment in favor of the validity and constitutionality of the acts of the legislature. In reference to the subject of your inquiry, however, the question is so absolutely and emphatically settled by the decisions of the supreme court expressed in such positive terms and with such final decision that no question is left for consideration. The two acts cited in your inquiry are so plainly within the operation of the decisions of the supreme court that there is nothing left but to advise you that they are unconstitutional, and although believed to have been constitutional at the time of their enactment and acquiesced in as valid and constitutional for some years afterwards, they never were constitutional; on the contrary they were absolutely void and of no effect from the very date of their enactment, and should at once be disregarded, and the officials of this township should be held, in the future at least, to be under the operation of the general laws upon the subject of fees in common with all other townships of the state.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

559.

SECTION 1465-61 G. C.—RELATING TO PAYMENT OF PREMIUMS INTO STATE INSURANCE FUND BY CONTRACTORS—DOES NOT AFFECT CONTRACTS ENTERED INTO PREVIOUS TO JULY 1, 1917.

Section 1465-61, *passed March* 30, 1917, (107 *O. L.* 157) *does not affect contracts entered into prior to July* 1, 1917, *and uncompleted at time this act took effect.*

COLUMBUS, OHIO, August 27, 1917.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I have your letter of July 18th, requesting my opinion in regard to amended section 1465-61, sub-section 3, of the General Code of Ohio, which was passed March 20th, 1917, and filed in the office of the secretary of state on March 30th, 1917 (107 O. L., 157, at 159), and which reads as follows:

> "Sec. 1465-61. The terms 'employe,' 'workman' and 'operative' as used in this act, shall be construed to mean * *.
>
> "3. Every person in the service of any independent contractor or sub-contractor who has failed to pay into the state insurance fund the amount of premium determined and fixed by the industrial commission of Ohio for his employment or occupation, or to elect to pay compensation direct to his injured and to the dependents of his killed employes, as provided in section 1465-69, General Code, shall be considered as the employe of the person who has entered into a contract, whether written or verbal, with such independent contractor unless such employes, or their legal representatives or beneficiaries elect, after injury or death, to regard such independent contractor as the employer."

This act went into effect July 1st, 1917.

You request my opinion as to whether or not this section as amended applies to or affects contracts entered into previously to July 1st, 1917, and which are uncompleted at the time the above section went into operation.

I am of the opinion that this section does not apply to or affect contracts entered into previous to July 1st, 1917, and which are yet uncompleted.

Section 28 of article II of the constitution of Ohio provides:

> "The general assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts; but may, by general laws, authorize courts to carry into effect, upon such terms as shall be just and equitable, the manifest intention of parties, and officers, by curing omissions, defects and errors, in instruments and proceedings, arising out of their want of conformity with the laws of this state."

The supreme court, in Raridon v. Holden et al., 15 O. S., 207, adopted Justice Story's definition of the word "retroactive" to be as follows:

> "Upon principle, every statute which takes away or impairs vested rights, acquired under existing laws, or create a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past must be deemed retroactive."

The words "retrospective" and "retroactive," as applied to statutes of this character, seem to be synonymous.

It seems clear then that this section, if applied to contracts entered into previous to July 1st, 1917, would create a new obligation and impose a new duty with reference to such contract and hence would contravene section 28 of article II of the constitution of Ohio and would therefore be null and void.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

560.

APPROPRIATIONS—H. B. 701 (106 O. L., 751) REMAINING UNEXPENDED ON JULY 1, 1917—TO WHAT EXTENT REAPPROPRIATED IN H. B. 584 (107 O. L. 187).

Balance of appropriations made in H. B. 701 (106 O. L. 751) remaining unexpended on July 1, 1917, are only reappropriated by section 9 of H. B. 584 (107 O. L. 187) to the extent of contingent liabilities existing on said date.

COLUMBUS, OHIO, August 27, 1917.

The Public Utilities Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—On August 8, 1917, I received a communication from you as follows:

> "A consideration of your Opinion No. 493 of the third inst. holding that Mr. L. K. Langdon may be paid the difference between a salary at the rate of $6,000.00 per annum, and the salary he received at the rate of $4,500.00 per annum, during his incumbency of office, presents a new question, which we beg to herewith submit for your consideration and advice.
>
> "Does this commission possess authority to pay to Mr. Langdon any part of this salary out of monies which may be available, or should Mr. Langdon apply to the emergency board or the assembly for an appropriation covering the whole sum?"

In Opinion No. 493 I held that Mr. Langdon was entitled to a salary of $6,000.00 per year for services as member of the public utilities commission from the date upon which he was appointed, namely, May 27, 1915, up until the time that his term expired, namely, February 1, 1917. It appears, however, from the communication upon which Opinion No. 493 was based that Mr. Langdon received salary at the rate of $6,000.00 only until the eighth day of June, 1915, after which he was paid at the rate of $4,500.00 until the expiration of his term, making a total balance due him of $2,470.83.

It appears from the auditor of state's record that from June 8, 1915, to July 1, 1915, there was a balance due Mr. Langdon in the sum of $95.83.

House Bill No. 314 (106 O. L. 33) appropriated for current expenses of the state government for the period beginning January 16, 1915, and ending June 30, 1915, known as the short term budget bill. Section 6 thereof (106 O. L. 101) provided:

> "All liabilities incurred on or before June 30, 1915, shall be paid from appropriations herein provided in section 1."

There was appropriated for the salaries of the three commissioners the sum of $6,750.00 (106 O. L. 85). This act was passed on March 12, 1915, approved the same day and filed on the same day in the office of the secretary

of state. The appropriation would therefore lapse on the 12th day of March, 1917. There was $287.52 left of the appropriation foregoing mentioned, but the same lapsed, as before stated, on March 12, 1917. Therefore said $287.52 would not now be available for the payment of the $95.83 balance due Mr. Langdon which should have been paid from such amount, nor was said appropriation revived by the provisions of House Bill 701 (106 O. L. 666).

House Bill 701 was the general appropriation bill for the period beginning July 1, 1915, and ending June 30, 1917. In section 2 of said act it was provided that the sums therein set out "shall not be expended to pay liabilities or deficiencies existing prior to July 1, 1915, or incurred subsequent to June 30, 1917."

In section 2 of said act there was appropriated to the public utilities commission for the salaries of the three commissioners the sum of $15,000, and in section 3 of said act (106 O. L. 751) it was provided that the moneys appropriated in section 3 "shall not be expended to pay liabilities or deficiencies existing prior to July 1, 1916, or incurred subsequent to June 30, 1917," and in said section 3 there was likewise appropriated for the three commissioners of the public utilities commission the sum of $15,000.00.

From July 1, 1915 to July 1, 1916, there was a balance due Mr. Langdon of $1,500.00, and from July 1, 1916, to February 1, 1917, there was a balance due Mr. Langdon of $875.00.

Of the appropriation made in section 2 of said House Bill No. 701, there was on July 1, 1916, a balance in the appropriation for commissioners the sum of $862.50, and on July 1, 1917, there was a balance in the appropriation of $258.89.

In House Bill No. 584 (107 O. L. 187), being the general appropriation bill passed at the recent session of the legislature, there is a provision in section 9 thereof, as follows:

> "Unexpended balances of all appropriations, made by the eighty-first general assembly, against which contingent liabilities have been lawfully incurred, are to the extent of such liabilities only hereby reappropriated and made available for the purpose of discharging such contingent liabilities and for no other purpose."

While it true that there was the sum of $1,121.39 still in the fund available for the payment of the salaries of the commissioners of the public utilities commission on July 1, 1917, nevertheless that amount lapsed into the general fund of the state treasury, since under no circumstances could the amount due Mr. Langdon be considered as a contingent liability. The amount due Mr. Langdon is an absolute liability.

I am therefore of the opinion that there are no funds at present available from which to pay the amount of the balance due Mr. Langdon upon his salary nor can the said amount be obtained from the emergency board.

Section 2313 G. C. relative to the emergency board provides that in case of any deficiency in any of the appropriations for the expenses of an institution, etc., or in case of an emergency requiring the expenditure of money not specifically provided by law, application may be made to the emergency board. The amount due Mr. Langdon cannot be considered as being a deficiency in the appropriation nor is it a case of an emergency. I am therefore of the opinion that the emergency board cannot allow the amount. The only way, therefore, for the claim of Mr. Langdon to be paid is by an appropriation made in his behalf by the legislature.

Very truly yours,

JOSEPH MCGHEE,
Attorney-General.

561.

DISAPPROVAL—RIGHT OF WAY GRANTED BY STATE TO THE ATHENS ELECTRIC COMPANY.

COLUMBUS, OHIO, August 27, 1917.

The Ohio Board of Administration, Columbus, Ohio.

GENTLEMEN:—On August 1, 1917, you submitted a grant of right of way made by the state of Ohio to The Athens Electric Company across certain lands of the state, for approval or comment. The preamble of this grant recites that it is under the act of February 16, 1915, which act is found in Vol. 106 Ohio Laws, at page 7, the first and second sections of the same being as follows:

> "Sec. 1. That The Hocking Power Company, its successors and assigns be given the right to enter in and upon such part or parts of said Outlots Nos. 51 and 56 in said city of Athens and to construct, maintain and operate thereon an electrical transmission line consisting of poles, wires, cross arms, insulators and other material and equipment, that it be used for transmission line only and locate the same as may be agreed upon by said state board of administration upon the payment to the state of such sums of money as may be agreed upon by said board of administration and said The Hocking Power Company.
>
> "Sec. 2. The state board of administration is also hereby empowered to convey such right or rights to said The Hocking Power Company, its successors and assigns by deed or other proper instrument in writing, said conveyance to be made in the name of the state by said board; provided, however, that such instrument shall contain a condition that the state of Ohio shall not be liable to any person for any injury that may result from the construction, maintenance or operation of said transmission line across said premises."

The description in the grant consists of a single line having, of course, one dimension. It is preceded by the statement that it is to be located along the following route:

> "Being a part of said Outlots Nos. 51 and 56 in said city of Athens."

and continues, giving the location of a line across said lots.

Being only a line and having no width it is, strictly speaking, no part of the lots in question. This fact would not affect the grant, but it does leave the other necessary dimension—width—uncertain and to be determined by the test of reasonable necessity—about which, as to the width necessary to use for the purpose of the grant, or the amount of ground necessary to use in the construction and maintenance of the apparatus of the grantee, difference of opinion might exist at the present or in the future. This does not affect the validity of the grant, but it would be better to have its subject matter fully set forth in the instrument creating it, than to leave it for determination otherwise.

A stipulation is contained in the grant that the electric transmission line shall be used for a transmission line only. No penalty or consequence is attached to any misuse or other use of the grounds. This is exactly in accordance with what the special act provides, but it would not be inconsistent with the terms of that act to protect the state by a clause of forfeiture in event of any

other use. Without such clause the only remedy the state has would be mere prevention by injunction or otherwise of such use for other purposes. This, likewise, does not affect the validity of the grant, but it is a precaution and protection against violation of its terms that ought to be included in the instrument.

There is a further stipulation that the conveyance is made subject to the condition that the state of Ohio shall not be liable to any person for any injury that may result from the construction, maintenance and operation of said transmission line across said premises. This clause also is exactly in accordance with what is specified in the act, but it is of no benefit to the state and has no effect whatever, beng merely a stipulation between two persons attempting to bind a third. The state could not escape any liability to an injured person by any agreement that it might have with this company. If protection be desired it could be obtained by a stipulation to the effect that the company would save the state harmless, or would repay any damages that the state might incur. It is not at all probable that the state would ever become liable for such damages as the state is not maintaining the transmission line, but only permitting another to erect it across its property. However, if there be such possible liability and protection is sought against it, it is not secured by this provision, but could be by substituting the one above, and this would not be inconsistent with the terms of the act.

There is one other and serious defect in this conveyance. The statute above quoted requires the board of administration to make the grant only upon the payment of such sums of money as may be agreed upon. It might be argued that the word "sums" being in the plural, should be construed as requiring payment of rent from time to time, or periodically. However, admitting that the construction may be otherwise and that the statute would be complied wih by a single payment, the sum ought to be named, and its receipt acknowledged in the conveyance itself, otherwise it has the appearance of being made without consideration and in violation of the terms of the enabling statute.

For the above reasons said instrument is returned without approval.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

562.

IMPROVEMENT OF INTER-COUNTY HIGHWAY OR MAIN MARKET ROAD UPON COUNTY LINE—APPLICATION FOR STATE AID—ADVERTISEMENT FOR BIDS—WHEN FINAL RESOLUTIONS SHOULD BE ENTERED INTO—APPORTIONMENT OF COST BETWEEN COUNTIES—WHEN CERTIFICATE OF AUDITOR SHOULD BE FILED.

1. *While section* 1220 *G. C. may contemplate that, in the improvement of an inter-county highway or main market road upon a county line, county commissioners of the counties interested should make a joint application for state aid, yet where the board of county commissioners of each county separately makes application for the same improvement, and aid is given for the same by the state, and final resolutions are entered into by the counties and a contract let for the improvement, the fact that a joint application was not made cannot avail anyone and especially the contractor himself.*

2. *The language used in section* 1206 *G. C. is really susceptible of the construction that advertisement for bids for an improvement of a highway located on the county line may be made in two newspapers published in either county interested in the improvement.*

3. *The mere fact that in the specifications and advertisement for bids the road was referred to as lying entirely in one county, rather than on the line between the counties, cannot be complained of by anyone, and especially the contractor, when the description of the road was sufficiently clear to indicate its location and the work to be done under the contract entered into by and between the state and the contractor.*

4. *While logically and naturally, and under the provisions of section* 1206 *G. C., the final resolutions of the county commissioners should be entered into before advertising for bids, yet where advertisement is made and bids submitted and the contract awarded, no one can be heard to complain that the logical order was not followed, provided the county or counties later assumed their share of the cost and expense of the improvement.*

5. *The cost and expense of the improvement under the provisions of section* 1211 *G. C. need not be apportioned to the different counties, townships and abutting property owners until the completion of the improvement.*

6. *The certificate of the county auditor, filed with the county commissioners in accordance with section* 5660 *G. C. before they adopted the resolution to assume the county's share of the cost and expense of the improvement, and the final resolution adopted by the county commissioners upon the faith of said certificate, are sufficient authority to warrant the state highway commissioner in proceeding to let the contract for an improvement under the provisions of section* 1218 *G. C.*

COLUMBUS, OHIO, August 27, 1917.

Honorable Clinton Cowen, State Highway Commissioner, Columbus, Ohio.

DEAR SIR:—I have your communication of July 24, 1917, which communication reads as follows :

> "On Friday last Mr. James G. Stewart, representing The Jones Construction Company, called at this office and stated to me that he believed the agreement between this department and the above company for the improvement of section J-48 of the Salem-Alliance road, I. C. H. 84 in Columbiana and Mahoning counties, is not a valid con-

tract. The contractor has already entered upon the work and we have been urging upon him the necessity of prosecuting it vigorously. Representative citizens from the community in which the above improvement lies have called at this office and expressed a desire to assist in any way possible in the early completion of the work, inasmuch as the improvement of the road this year is of very substantial importance to the local industries. Mr. Stewart requested that I ask for an opinion from your office as to the legality of our agreement, to which request I assented, and am therefore attaching hereto a copy of his letter to me on behalf of The Jones Construction Company. I shall be glad to hand you our file or such part of it as you desire for examination at any time, and ask that you give this matter such early consideration as the press of other business in your office will permit."

There is a great amount of correspondence also in reference to the matter about which you write, which correspondence I have examined carefully, but the same is too lengthy to set out in this opinion. However, from your communication and from the correspondence which I have examined, I gather the following facts, and upon these facts I am basing my opinion.

The Jones Construction Company of Mt. Vernon, Ohio, entered into a contract with the state highway commissioner for the construction of the Salem-Alliance road, I. C. H. 84. This contract is dated May 19, 1916. The said road lies on the boundary line between Columbiana and Mahoning counties. The final resolution was entered into on August 10, 1916, by the county commissioners of Mahoning county in which they agreed to pay toward the improvement the sum of $45,250.00, and the state $250.00.

The certificate of the county auditor to the effect that the money was in the treasury to take care of the obligation of the county was made on the same date. A final resolution was entered into on September 11, 1916, by the county commissioners of Columbiana county agreeing to pay toward the improvement the sum of $40,000.00 and the state $5,500.00. The certificate of the county auditor to the effect that the money was in the treasury to meet the obligation entered into by the county commissioners was made on the same date.

Both of these final resolutions covered exactly the same improvement, namely, the improvement above designated.

The contract, while dated August 9, 1916, was not signed by the state highway commissioner and delivered to The Jones Construction Company until after the middle of September, 1916. The work on the highway was begun in the fall of 1916, and considerable grading was done that fall. No work has been done by said company since the fall of 1916.

The Jones Construction Company now is seeking to be relieved from the obligations of the contract thus entered into by it with the state highway commissioner. The said company offers a number of reasons why it feels that it should be so relieved. The company's attorneys, Mr. Charles H. Duncan and Mr. James G. Stewart, have filed a comprehensive brief in support of the claims made by The Jones Construction Company. These claims are set out clearly in the brief, and I shall consider them as set out therein. They are as follows:

1. The company complains that no joint application for state aid was made by the two boards of county commissioners, as provided for in section 1220 General Code.

2. That no advertisement for bids was ever published in Mahoning county, as required by section 1206 General Code.

3. That the plans, specifications, estimates, advertisement for bids, proposal, contract and bond all refer to the work as being located in Columbiana county, none of them making any reference to the fact that the road is on the line between the two counties.

4. That the bids were advertised for, opened, the lowest bidder determined and the contract signed by the bidder before any final resolution had been adopted by either board of county commissioners.

5. That the state highway commissioner has never taken action apportioning the cost between the two counties, as provided in section 1220 General Code.

6. That the county auditor's certificate of available funds in the Mahoning county treasury made at the time the county commissioners of that county passed the final resolution was false.

I shall take these different questions in their order.

1. Section 1220 General Code provides that the board of county commissioners of two or more counties interested may make application to the state highway commissioner for the construction, improvement, maintenance or repair of the inter-county highway or main market road upon a county line.

The Jones Construction Company maintains that the language of this section indicates a joint application from the fact that the language is: "the board of county commissioners of *two or more* counties," thus indicating that it is the *joint board* that acts.

I am of the opinion that this was the intention of the legislature in enacting this provision, but when the county commissioners of each county make application for state aid for a road located on the county line and each board afterwards enters into a final resolution or agreement with the state highway commissioner, each agreeing to assume a certain part of the cost and expense of the improvement, and when the state highway commissioner enters into a contract with someone to construct the road on the faith of this final resolution, then I am of the opinion that any irregularity in the matter of making application would be cured, and that especially would this be true in reference to the contractor himself. I do not believe that this claim of the contractor is well taken.

Further, in reference to this matter, I would like to call attention to the language used in the latter part of said section 1220, which is as follows:

> "Two or more townships may make application for state aid in the construction or improvement of inter-county highways or main market roads upon a county or township line, and all the provisions of law relating to an improvement upon the application of a board of county commissioners or two or more boards of county commissioners shall apply as far as applicable."

Here we find the language that two or more townships may make application, and that the provisions of law relating to an improvement where two or more boards of commissioners may make application will be applicable. This language is almost as strong to the point that separate boards may make application as is the language used in the first part of the section, that the application must be by the joint board.

2. The second claim made by the contractor is that the advertisement for bids was not in accordance with law, in that the publication was made only in Columbiana county papers, one a democratic newspaper and the other a republican paper.

In reference to this claim, let us turn to section 1206 General Code and note what provisions are made in reference to advertising, as follows:

> "* * The state highway commissioner shall advertise for bids

for two consecutive weeks in two newspapers of general circulation and of the two dominant political parties published in the county or counties in which the improvement or some part thereof is located."

This languge seems to be fairly capable of the construction that the advertisement shall be made in two newspapers published either in the county or in the counties in which the whole improvement is located, or it may be published in two newspapers in a county in which some part thereof is located. A part of this improvement lies in Columbiana county, and it seems to me that when the state highway commissioner advertised in two papers of general circulation and of opposite politics in Columbiana county, where a part of the improvement lies he complies with what is a reasonable construction of said statute.

3. The company complains for the reason that the plans, the advertisement, the proposal, the contract and the bond all refer to the work as being located in Columbiana county.

This undoubtedly is a technical irregularity. Strictly speaking, the road lies in both counties with the boundary line of the counties as the center of the road, but I cannot see how anybody could be injured from this irregularity. Bidders could certainly locate the road with exactness; they would not be misled in any respect, and so far as I can see no one else could be injured by this irregularity. Certainly anybody desiring to bid would have opportunity to bid, and that is all that can be asked of any advertiser, and the bidder who was awarded the contract, contracted to do a certain amount of work according to certain plans and specifications, and the fact that the half of the road lies in Mahoning county instead of all of it lying in Columbiana county certainly could have no effect whatever in the way of influencing the bid of any person.

Hence, I feel that while this is a technical irregularity, yet no one was injured thereby.

4. The next complaint is to the point that bids were advertised for, opened and the lowest bidder determined, contract prepared and signed by the bidder before any final resolution had been adopted by the said county.

In order to understand this point clearly it might be well to note the practice that is followed by the state highway commissioner in reference to the reception of bids. It is his rule to demand that each bidder with his bid submit a contract duly signed for the faithful performance of the work, together with a bond duly executed, guaranteeing the faithful performance of the work, and this contract is always dated as of the same date as the opening of the bids. Hence in this case, as set out in the statement of facts, the contract is dated May 19, 1916, the day upon which the bids were opened, while the final resolutions of the county commissioners were not entered into until August 10, 1916, and September 11, 1916.

The question now is as to whether this is in violation of sections 1206 and 1218 General Code.

Section 1218 General Code provides that:

"No contract shall be let by the state highway commissioner in a case when the county commissioners or township trustees are to contribute a part of the cost of said improvement, unless the county commissioners of the county in which the improvement is located shall have a written agreement to assume in the first instance that part of the cost and expense of said improvement over and above the amount to be paid by the state."

"No contract shall be let" is the language used. It must be remembered in

this case that the contract was not let; that is, was not signed by the state highway commissioner and delivered to the successful bidder until some time after the middle of September, 1916, which was after both final resolutions had been entered into. Hence, I am of the opinion that the provisions of section 1218 General Code were not violated.

How about section 1206 of the General Code? This section reads in part:

> "Upon the receipt of a certified copy of the resolution of the county commissioners or township trustees, that such improvement be constructed under the provisions of this chapter * * the state highway commissioner shall advertise for bids * * *."

It is quite evident that the provisions of these sections were not logically followed; that is, logically the final resolutions are to be entered into before the state highway commissioner shall advertise for bids, but here again while there is a mere irregularity no one could be injured thereby or suffer therefrom. The bidders submitted their proposals with certain plans, specifications and estimates in view. The fact that the final resolutions were not entered into has no bearing upon the matter of bidding, and if the county commissioners afterwards entered into final resolutions agreeing to assume a certain part of the cost and expense of the improvement, they or those whom they represent cannot complain.

Hence, while there is an irregularity in the face of the provisions of section 1206 General Code, yet it is an irregularity of such a nature as to cause no one to suffer or permit anyone to complain in reference thereto.

5. The Jones Construction Company complains that the state highway commissioner has never taken action apportioning the cost between the two counties, as provided for in section 1220 General Code, which provides that:

> "The cost and expense of the construction of such improvement, over and above the amount to be paid by the state shall be equitably apportioned by the state highway commissioner between the counties interested therein."

In connection with this I think that we ought to consider the provisions of section 1211 General Code, which reads as it was amended in the White-Mulcahy act and as it practically read under the old law:

> "Upon the completion of the improvement, the state highway commissioner shall immediately ascertain the cost and expense thereof, and apportion the same to the state, county, township or townships and abutting property."

I think that this same provision would apply in the matter of an improvement located on the line between two counties, and further it must be remembered that each county has in the final resolutions entered into by it agreed to assume a certain portion of the cost and expense of the improvement. Hence, I am of the opinion that there is no irregularity in reference to this matter.

6. The construction company makes the claim that the county auditor's certificate to the effect that money was in the treasury of Mahoning county to take care of its share of the cost and expense of the improvement was false. Of this I am not informed other than in the brief of the attorneys for the construction company, but I am assuming it to be a fact.

It is further stated in the brief that the county commissioners of Mahoning

county sold the bonds in March of this year to take care of its share of the cost and expense of the improvement. This would seem to indicate that the money was not in the treasury when the certificate was made.

This is possibly the most vital question that is raised by The Jones Construction Company. The courts have held in numerous cases that the failure to make a certificate by the proper officer invalidates or makes null and void a contract entered into involving the expenditure of money; but there is no case with which I am familiar in which the court passed upon the question as to the effect of the proper official making a false statement in reference to the matter of the necessary funds being in the treasury.

Section 5660 General Code provides that the commissioners of a county shall not enter into any contract unless the auditor first certifies that the money required for the payment of such obligation is in the treasury to the credit of the fund from which it is to be drawn. The certificate in this case was made and the contract was duly entered into in view of said certificate. Hence, at least with a technical construction placed upon said section, the county commissioners acted in accordance with the provisions of this section and entered into the final resolutions which were filed with the state highway commissioner, and at least I am of the opinion that these final resolutions entered into by the county commissioners were of sufficient force to warrant the state highway commissioner in entering into the contract with The Jones Construction Company.

It must be remembered that this certificate which is questioned has nothing to do with the contract entered into by the state highway commissioner with The Jones Construction Company, but it has to do with the final resolutions of the county commissioners. However, I am not unmindful of the fact that section 1218 General Code provides that no contract can thus be entered into for an improvement until the final resolutions of the county commissioners are filed with the state highway department. There is no complaint made that the money is not now in the treasury. The fact of the matter is that the money is in the treasuries of both Columbiana and Mahoning counties, and for that reason I am of the opinion that The Jones Construction Company has no right to complain in reference to this matter.

Counsel for the company state in their brief that an injunction suit might be brought at any time by a taxpayer against the county's paying out the money which they are obligated to pay. It seems to me that this is too remote a proposition to consider.

While, as said before, there are some irregularities in these proceedings, yet it seems to me that there are none of sufficient importance that a court would be warranted in granting relief to a taxpayer, especially when he has sat by until the work has progressed to the extent to which it has now come.

In general, I desire to say that The Jones Construction Company in this matter was not in any way interfered with in the matter of the progress of the work. They accepted the contract some time in September; they began the work under the contract; they received their money upon estimates made by the engineer, and the money today necessary to take care of the obligation entered into by the state highway commissioner is at hand.

Hence, I am of the opinion that there is nothing connected with the proceedings in reference to the improvement of the highway in question which would warrant the state in releasing The Jones Construction Company from the obligations which it has assumed under the terms of the contract.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

563.

MUNICIPAL CORPORATION—BOND ISSUE—NECESSARY VOTE UNDER SECTION 1259—LAW GOVERNING AFTER 1917 AMENDMENTS—NOT PART OF PROCEEDING BEFORE STATE BOARD OF HEALTH.

Section 1259 G. C., as amended in 1917, must be interpreted as requiring an affirmative vote on the question of the issuance of bonds, required therein to be submitted to the electors, of a majority of the electors voting at the election.

The issuance of bonds by a municipal corporation is no part of the proceeding before the state board of health to compel the installation of water or sewage facilities.

After the amendments of 1917 go into effect, all bonds issued by municipal corporations under the Bense act must be governed by such amendments; but no other feature of the administration of the law as to proceedings instituted prior to the amendments are affected thereby.

COLUMBUS, OHIO, August 27, 1917.

State Board of Health, Columbus, Ohio.

GENTLEMEN:—I acknowledge receipt of your letter of recent date, requesting my opinion upon the following question:

> "In March, 1917, House Bill No. 262 was enacted, amending sections 1249, 1250, 1251 and 1259 of the General Code, and repealing the said original sections. As amended, section 1259 requires that the question of the issuance of bonds shall be submitted to a vote of the electors.
>
> "Query: What affirmative vote will be required for the issuance of such bonds?
>
> "A number of proceedings under sections 1249 to 1261, inclusive, General Code, will have reached the following stages when the amended sections take effect. These may be classified as follows:
>
> "1. Matters concerning which complaints have been received by this department but no further steps taken.
>
> "2. Matters which have been complained of and investigated, and concerning which the board has adopted findings but has not issued orders.
>
> "3. Matters concerning which the board has adopted orders, which orders have not received approval of the governor and the attorney-general.
>
> "4. Matters concerning which orders duly approved by the governor and the attorney-general have been issued but in which the municipalities so ordered have not provided the necessary funds for compliance."
>
> "Query: To what extent and in what manner will the said sections 1249, 1250, 1251 and 1259 General Code, as amended, affect the foregoing proceedings?"

Section 1259 G. C., as amended by H. B. No. 262, provides in full as follows:

> "Each municipal council, department or officer having jurisdiction to provide for the raising of revenues by tax levies, sale of bonds or otherwise, shall take all steps necessary to secure the funds for any

such purpose or purposes. The council of a municipality, by an affirmative vote of not less than two-thirds of the members elected or appointed thereto, by ordinance shall issue and sell bonds in such amounts and denominations, for such period of time, and at such rate of interest, not exceeding six per cent per annum, as said council shall determine and in the manner provided by law, in order to provide the funds necessary and proper to carry out and perform all of the conditions of said finding and order and to make and install any or all of the improvements and changes herein provided, and the question of the issuance and sale of said bonds shall be submitted to a vote of the electors. When the funds are so secured, or the bonds therefor have been authorized by the proper municipal authority, such funds shall be considered as in the treasury and appropriated for such particular purpose or purposes, and shall not be used for any other purpose. The bonds authorized to be issued for any such purpose or purposes, in any one year, shall not exceed six per cent. of the total value of all property in any city or village, as listed and assessed for taxation, and shall be in addition to the total bonded indebtedness of such city or village otherwise permitted by law, and as to such bonds the limitations of sections 3940, 3941 and 3952 of the General Code shall not in any manner apply or prevent or delay the issuance and sale of said bonds. The interest and sinking fund levies on account of bonds issued under this section by any municipal corporation, in compliance with said orders of the state board of health, shall be exempt from all limitations on tax levies provided by sections 5649-2, 5649-3a and 5649-5b of the General Code."

Prior to its amendment, this section provided that the question of the issuance and sale of the bonds should not be required to be submitted to the electors, but did not provide (as it does since the amendment has gone into effect) that the interest and sinking fund levies on account of the bonds should be exempt from the limitations of what is popularly known as the Smith law. Evidently the general assembly, in creating the exemption from tax limitations, thought best to safeguard the issuance of such bonds by requiring their submission to a vote of the electors. It is only proper to say that these are not the only changes made in the section, as the limitation on the amount which may be issued is changed from five per cent. generally in the old section to six per cent. in any one year in the amended section.

It is clear, both by expression and by necessary implication, that the power to issue bonds, conferred upon municipal corporations by section 1259 as amended, is an independent substantive power. Not only do the limitations of the Longworth act not apply, but the procedure of the Longworth act is necessarily not applicable; otherwise it would not have been necessary for the legislature expressly to provide, as it did for the first time in the amendment of section 1259, by H. B. No. 262, that:

"* * The council of a municipality, by an affirmative vote of not less than two-thirds of the members elected or appointed thereto, by ordinance shall issue and sell bonds in such amounts and denominations, for such period of time, and at such rate of interest, not exceeding six per cent. per annum, as said council shall determine and in the manner provided by law. * *."

Here is another change as compared with the old section, for under that act the council is merely directed to

> "take all steps necessary to secure the funds for any such purpose or purposes."

The steps to be taken must be in accordance with and under the authority of other statutes. But the intention to take the proceedings under section 1259 G. C. out of the operation of the Longworth act for all purposes, is, I think, rather clearly manifested on the face of the section as amended.

It follows, therefore, that merely because the somewhat analogous provision of the Longworth law (sections 3943 to 3947 inc. G. C.) require a favorable vote of two-thirds of the voters at such election, upon the question of issuing bonds under that law, it does not therefore follow that the vote required under section 1259 G. C. shall be a two-thirds vote. It might nevertheless be argued that section 1259, in requiring the submission of the question to a vote of the electors, provides no machinery such as is elaborately set forth in sections 3943 to 3947 inc. G. C. Thus it does not provide how the council or other department or officer shall proceed in determining to submit the question to a vote of the electors, nor what shall be the duties of the deputy state supervisors of elections, where the election shall be held, how it shall be canvassd, when it shall be held, what notice thereof shall be given, nor what shall be the form of the ballots.

Therefore it might be concluded that inasmuch as the legislature had not provided the necessary machinery in section 1259, it must have intended that that machinery which exists and is available for use in the most similar case, viz., that of the issuance of bonds under the Longworth act by vote of the people, should be followed in acting under section 1259, even though in the academic sense the power to act under section 1259 is separate and distinct from that embodied in the Longworth act.

Even if this reasoning must be accepted and if, to save section 1259 from fatal ambiguity and inconsistencies and to give effect to the probable intention of the legislature, the submission to a vote must be in the manner provided by sections 3943 to 3946 inc. G. C., being a part of the Longworth act, still such a conclusion is not equivalent to holding that the question shall require the favorable vote of two-thirds of the electors, as this requirement of section 3947 G. C. is, strictly speaking, not a machinery provision, but rather a substantive requirement.

Ordinarily, a vote of the electors is determined by the express will of the majority, and in the absence of any express or implied requirement that a larger proportion shall vote in favor of the proposition in order to carry it, a majority vote is to be understood.

However, I cannot shut my eyes to the fact that no municipal corporation is authorized under other existing laws to issue bonds by a vote of the electors, otherwise than upon the approval of two-thirds of the electors. See section 3931 G. C., providing for the issuance of deficiency bonds. There may be exceptions, but it would seem to be the general policy of our state legislature to require that municipal bonds should be approved by two-thirds of the electors, if the approval of the electors is required at all.

These considerations bring the issue raised by your first question to a fine point. On the one hand, in order to save section 1259 G. C. from hopeless ambiguity, it might be regarded as necessary to read at least part of the machinery provisions of the Longworth act into the section. The requirement in the

Longworth act, that two-thirds of the electors shall vote favorably on the proposition, is very closely connected with such machinery provisions, and in one sense may be said to be a part of it; also it may fairly be said to be the general policy of the state to require the concurrence of two-thirds of the electors of a corporation, in order to sustain the issuance of bonds when such question is submitted to the electors.

On the other hand we have the facts that section 1259 G. C. embodies what is in its essence at least an independent, substantive power to issue bonds, and that by its silence, respecting the vote which shall be required on the part of the electors to authorize such issuance, it brings into play the general principle that a majority vote alone is sufficient.

I have come to the conclusion that the choice between these two views is dictated by the fact that section 1259 G. C. (107 O. L. 185) as amended, standing by itself and quite independent of the Longworth act, may be given force and effect.

Section 4785 G. C. provides as follows:

> "Except when otherwise provided by law, all public elections in this state shall be conducted according to the provisions of this title."

Section 4840 G. C. provides :

> "Unless a statute providing for the submission of a question to the voters of a county, township, city or village provides for the calling of a special election for that purpose, no special election shall be so called. The question so to be voted upon shall be submitted at a regular election in such county, township, city or village and notice that such question is to be voted upon shall be embodied in the proclamation for such election."

Section 5122 G. C. provides:

> "Where it is provided by statute that a question shall be submitted to the qualified voters of a county, township, city or village, and such statute is silent as to the number of votes necessary to authorize the performance of the act voted upon, such statute shall mean that a majority of all the qualified voters voting at such election must vote in favor thereof, in order to authorize such act."

These sections have the effect of fixing the time of holding the election referred to in section 1259 G. C., if it is not otherwise fixed, of providing for the giving of notice thereof, and of determining beyond question the precise thing inquired about by you, namely, the number of votes necessary to authorize the issuance of bonds. Indeed, the effect of section 4785 G. C. is still more far-reaching, as it makes applicable to the special election in question, so far as appropriate, all the provisions of the title relating to public elections.

It is true, however, that some things which really ought to be provided for, in order to complete the machinery for holding such an election, are not specifically dealt with in the general election laws. Nowhere is there a specific provision as to the form of the ballots for the purpose of ascertaining the will of the electors, nor is any board or officer given authority to prescribe such form. Perhaps there is not quite enough machinery to enable one to determine exactly how the votes shall be canvassed and the results certified to the proper officer.

An argument might be advanced to the effect that these omissions would make it impossible to sustain section 1259 G. C. as an independent section, so that recourse would have to be had to the Longworth act, which does specifically provide for all these things, in order to furnish the complete machinery.

The weight of any such an argument would be destroyed, I think, by consideration of the fact that there are many sections in the General Code providing for the submission of questions to electors of different subdivisions, which are silent in some and perhaps all of the vital respects in which section 1259 G. C. is silent. Let me refer to sections 3211, 3077, 3981, 4142 and 3260 G. C. as instances of this sort of legislation.

It is true that by far the greater number of statutes authorizing or requiring submission of questions to the electors do specifically provide for such an important matter as the form of ballots, in particular. But in view of the fact that a respectable number of statutes do not so provide, I cannot find that it is the legislative policy of this state to make such provision in all cases. Therefore I am unable to conclude, on grounds of legislative policy, that section 1259 G. C. must be interpreted in connection with the Longworth act.

For similar reasons it will not do to say that section 1259 G. C. cannot stand alone, regardless of the question of policy and for the mere reason that it is ineffectual without such additional provision. To do so would be to hold all the other sections referred to void for a like reason.

However, the most satisfactory dispostion of the question would seem to be to hold that where a statute providing for the submission of a question to a vote of the electors of a sub-division fails to provide for such matters as the form of ballots and the like, the authority to make such provision must result as an implied power in some officer or tribunal. The officer or tribunal having such implied power must be either the authority which submits the question to the electors or the board of deputy state supervisors of elections.

Whatever may be the case, where the submitting authority is an executive officer and the statutes are silent, I feel quite certain that the council of a municipal corporation, in which is vested all the legislative powers granted by the municipal code and allied sections, is the proper authority to determine the form of the ballots for election to be held under section 1259 G. C. The subject matter of the action of council is essentially legislative—the borrowing of money on behalf of the city—and full power is by necessary implication vested in the council to provide the necessary machinery for the submission of the question to the electors to the extent that the statutes themselves are silent.

My conclusion with respect to your first question is, then, that the election to be held under section 1259 G. C., as amended (107 O. L. 185), must be held on the day of holding the regular November election. This means that there is opportunity to vote upon such a question only once in every two years, except in charter cities where the frequency with which there may be an opportunity to vote upon the question may be determined by the frequency with which municipal elections may be held under the charter.

It might be argued that section 4740 G. C. authorizes the submission of a question at any regular election. I should like to bring myself to this conclusion for the purposes of your inquiry, but I cannot do so. The election must be an election "in such city or village," and notice of it must under section 4740 G. C. "be embodied in the proclamation for such election."

The only occasion upon which the proclamation for a regular election in a city or village is authorized or required, is when there is to be an election "for

municipal officers" (section 4837 G. C.). The proclamations for general elections are to be made by the sheriff under section 4827, and such proclamations are to be made "throughout the county."

Reading all the statutes together, it seems clear to me that section 4840 G. C. does not apply to any regular election, but only to an election for which a proclamation, addressed to the electors of the particular subdivision who are to vote on the question, is to be issued.

Further answering your question, I am of the opinion that under section 5122 G. C., above quoted, the affirmative vote of a majority of all the qualified voters voting at the election is necessary. This means that the proposition must receive the support of such number of affirmative votes as constitutes more than half of the highest total vote cast for the candidates for any office filled at such election or upon any question submitted thereat. It does not mean a majority of the votes cast on the proposition, nor does it on the other hand mean a majority of the number of voters qualified to vote at the election.

State ex rel. v. Foraker, 46 O. S. 677.

Your second general question, or group of questions, involves consideration of section 26 G. C., as applying to the effect of H. B. No. 262 upon pending proceedings. The act itself contains no express provision as to what that effect shall be and therefore the general section referred to comes into play. It provides as follows:

> "Sec. 26. Whenever a statute is repealed or amended, such repeal or amendment shall in no manner affect pending actions, prosecutions, or proceedings, civil or criminal, and when the repeal or amendment relates to the remedy, it shall not affect pending actions, prosecutions or proceedings, unless so expressed, nor shall any repeal or amendment affect causes of such amendment or repeal, unless otherwise provided in the amending or repealing act."

I have carefully examined the amendments of sections 1249, 1250 and 1251 G. C. as contained in H. B. No. 262. None of them could possibly have any effect save by the mere fact that they involve a repeal and a simultaneous re-enactment of these sections upon proceedings of the classes that might have been instituted and carried to any particular point under the old sections bearing the same numbers. That is to say, none of the substance of the old sections is taken away by these amendments; on the contrary, new authority is merely added.

Thus, in section 1249 G. C., the changes consist of authorizing a petition to the state board of health on the part of ten of the qualified electors of a city or village, and extending the subject matter of such complaints to the inadequacy of a public water supply and waterworks distribution system and the flushing of sewers and the disposal of sewage by means of water, in addition to the subject matter which might be made the foundation of the complaint under the original section.

Without going into detail, the changes made in sections 1250 and 1251 G. C., by H. B. No. 262, are of the same general character—nothing is destroyed or taken away; all that is done is to add new matter, which does not of itself have any modifying effect upon powers existing under the old section.

This being the case, section 26 G. C. is not even invoked by these amendments; for it is well settled that even in the absence of a saving clause, the simultaneous repeal and re-enactment of a section for the purpose of amending

it, does not affect the continuing existence of the law in the respects in which it is not amended, but it is taken to have been the law all the time, without interruption.

See authorities cited in State xe rel. v. Spiegel, 91 O. S. 13.

As above stated, however, radical changes are made by H. B. No. 262 in the substance of section 1259 G. C., and this fact raises the question as to whether the issuance of bonds under original section 1259 was a part of the proceeding which for the purpose of the statement of the question might be assumed to have commenced upon the filing of the initial complaint with the state board of health.

In my opinion this question must be answered in the negative. The Bense act, so called, provided generally for the making of complaints to the state board of health, for certain investigations, hearings, appeals, references, etc., all culminating in an order of the board, to a municipal corporation, for example, requiring it to do certain things. This order in my opinon was and is the end of the proceeding described. The subsequent steps of the city council, in raising funds necessary to comply with the order, were and are separate and independent proceedings.

This position is sustained in principle, I think, by the decision in Alexander v. Spencer, 13 G. C. (N. S.) 475, affirmed without report at 83 O. S. 492, wherein it was held that the levy of taxes to pay for the redemption of bonds issued in payment of a sewerage improvement was no part of the proceeding to improve the sewer.

I am of the opinion, therefore, that while in a strict sense the amendments of H. B. No. 262 will not affect any of the proceedings enumerated by you, yet section 1259 G. C., as amended, will apply to and govern the power of any municipal corporation to borrow money for the purpose of complying with the orders of the board of health on and after the day when it becomes effective, regardless of when any proceeding resulting in such order may have been instituted.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

564.

TOWNSHIP HIGHWAY SUPERINTENDENT—OFFICE CEASES JUNE 28, 1917—COMPENSATION—TOWNSHIP TRUSTEES—COMPENSATION.

1. *The office or employment of the township highway superintendent ceases on June 28th, 1917, by virtue of the provisions of amended section 3370 G. C. and he is entitled to no compensation on and after said date.*

2. *The township trustees are entitled to a compensation of* $2.50 *per day on and after the taking effect of the new law. But they cannot receive to exceed more than* $250.00 *for this or any succeeding year.*

COLUMBUS, OHIO, August 27, 1917.

HON. GEO. F. CRAWFORD, *Prosecuting Attorney, Greenville, Ohio.*

DEAR SIR:—I have your inquiry under date of August 6th, 1917, relative to the method to be pursued by the township trustees under the new road law (H. B. No. 300).

Your communication reads, in part, as follows:

> "* * * Section 3370 provides three methods of procedure. If the trustees proceed under the first method of designating one of their number to look after the maintenance of the roads, or if they proceed

under the second and divide it into three road districts, each member superintending his district, it would necessarily greatly increase the burdens and duties, respectively, of one member or of the three members of the board of trustees.

"House Bill No. 176 amends section 3294 of the General Code, increasing the compensation of township trustees from $1.50 to $2.50 per day, and the total compensation from $150 to $250 per year.

"* * * * * * * * * * * * * *

"1. Was the township highway superintendent's office abolished June 28th, 1917, by the amendment of section 3370?

"2. Would a payment to such road superintendent, subsequent to June 28th, be legal?

"3. If the trustees were to proceed under method one, could such trustee appointed be legally paid his fee for such work?

"4. If the second method mentioned in section 3370 were followed, could each trustee be paid for such work?

"5. Is the compensation, as provided in said H. B. No. 176 available to the present incumbent in the office of township trustee, or will such payment be deferred until new officers are elected and take office?"

In your communication you ask for an opinion upon five different propositions:

(1.) Was the township highway superintendent's office or employment abolished June 28th, 1917 The office or employment of the township highway superintendent ceased to exist on the 28th day of June, 1917, the day upon which the new highway law became effective. Under the new law township trustees must adopt a resolution, duly entered upon their journal, setting forth the method to be followed in their township in the matter of the maintenance and repair of township roads. They may select any one of the three methods set out in section 3370 of the White-Mulcahy act.

From this it is quite evident that the legislature intended that the duties of the township highway superintendent, appointed under the former law, should cease upon he new law becoming effective.

(2.) You ask whether it would be legal to pay a road superintendent appointed under the old law after the new law became effective, viz., June 28th, 1917.

From the answer to the first question it is readily seen that such superintendent cannot be paid after June 28th, 1917, and this for the reason that his appointment or employment ceases.

(3.) You ask if the trustees were to proceed under method one as set out in section 3370 of this act, could such trustee be legally paid his fee for such work.

(4.) This question is the same in principle as the fourth, which inquires if the second method mentioned in section 3370 were followed, could each trustee be paid for such work.

In answer to both these questions I will say that the trustees could be paid for work rendered under and by virtue of the provisions of section 3370 G. C. with this condition, that they could not receive to exceed $250.00 for the present year's work. That is, the compensation of the township trustees was changed from one dollar and fifty cents to two dollars and fifty cents per day. This change became effective at the date the law, of which the section was a part, became effective, with this condition, however, that the maximum compensation of the township trustees should not exceed in any one year $250.00. This limitation would apply to the present year.

You suggest in your letter that the same principle possibly should be made to apply to the county surveyor and to the township trustees, and you further suggest that in an opinion heretofore rendered by me I held that the salary of the county surveyor would not change until the first Monday in September, that is, when the present term of the county surveyor expired. There is a difference between the county surveyor and township trustees. When the section pertaining to the pay of the county surveyor is considered, it will be noticed that the county surveyor draws a salary; under the old law a salary not to exceed $4,000 and under the new law, a salary not to exceed $6,000. Hence, section 20 of article II of the constitution would apply to the county surveyor, but the pay of township trustees is not in any sense a salary. It is merely compensation, and our courts have always held that said constitutional provision while it applies to salary does not apply to compensation.

(5.) The answer I have given to the questions thus far answers your fifth question, viz., the compensation provided for in House Bill No. 176 is available to the present incumbent of the office of township trustee, and he need not wait until the expiration of his present existing term to have the advantage of this section.

I have been very brief in answering your questions for the reason that, in the main, I have treated the questions you ask at length in former opinions rendered by me, and I am enclosing a copy of these opinions for your consideration; one was rendered on June 18th, 1917, to Hon. Jared P. Huxley, prosecuting attorney, Youngstown, Ohio, and the other to the Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

565.

TOWNSHIP CLERKS—TRUSTEES—TREASURERS—COMPENSATION—WHEN LAW BECAME EFFECTIVE.

1. *The sections of the statute modifying the compensation of township clerks, treasurers and trustees became effective on the same day that the acts of which they are a part became operative. Section 20 of article II of the constitution does not apply because said officers draw compensation and not salaries.*

2. *Trustees will be entitled to receive not to exceed $250 for the present year; the clerk, $250; the treasurer in townships where there is no city, $150; and wherein there is a city, $250; excepting that the treasurer is entitled to all the fees earned before July 2, 1917, even though they should exceed the said limitation.*

3. *The compensation provided for clerk by section 3298-15m General Code is included within the maximum amount allowed, and is not over and above the said amount.*

4. *The change in compensation in reference to township trustees takes effect when the act of which section 3372 General Code is a part becomes operative. There is no particular conflict between the provisions of section 3372 and 3294 General Code.*

COLUMBUS, OHIO, August 27, 1917.

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

GENTLEMEN:—I acknowledge receipt of your letter requesting my opinion upon the following:

"In view of sections 3308 and 3318, General Code, being amended

by H. B. 406, filed with the secretary of state April 3, 1917, and becoming a law on July 2, 1917, and section 3294, General Code, being amended by H. B. 176, filed with the secretary of state April 3, 1917, and becoming a law on July 2, 1917, together with the provisions of article II, section 20 of the constitution of Ohio, which provides that the salary of any officer cannot be changed during his existing term, and the various court decisions thereunder as to the difference between compensation and salary:

"Question I. Do these laws as amended become operative on July 2, 1917, during the term of the township clerk, treasurer and trustees, or not until the term of the present officials mentioned has been completed?

"Question II. If such laws become operative on July 2, 1917, would the proper method of computation be to compute compensation for the first six months of 1917 under the old law with the maximum limitation of one-half year's compensation, and the compensation for the last six months of 1917 under the new law with one-half year's portion of the maximum limitation?

"Question III. Does the compensation provided for the clerk by section 3298-15m, of H. B. 300, embracing both the amounts for making record and reasonable compensation allowable, come within the limitations of the maximum amount already mentioned, or is this in addition thereto?

"Question IV. In view of the provisions of section 3298-15m, and section 3372, of House Bill 300, filed in the office of the secretary of state March 29, 1917, and becoming a law June 27, 1917, and House Bills 406 and 176, becoming laws July 2, 1917, how may the same be reconciled as to which date the officials mentioned in these sections will commence to draw their new compensations?"

Your questions relate to the compensation of township trustees, township treasurer and township clerk, as affected by certain recent amendments of the statutes. The changes made in the statutory law are shown by the following quotations:

Section 3294 G. C., as it existed prior to 1917, was as follows:

"Each trustee shall be entitled to one dollar and fifty cents for each day of service in the discharge of his duties in relation to partition fences, to be paid in equal proportions by the parties, and one dollar and fifty cents for each day of service in the business of the township, to be paid from the township treasury. *The compensation of any trustee to be paid from the treasury shall not exceed one hundred and fifty dollars in any year including services in connection with the poor.* * * *"

The same section as amended (107 O. L. 698) (filed in the office of the secretary of state April 3, 1917) reads as follows:

"Each trustee shall be entitled to one dollar and fifty cents for each day of service in the discharge of his duties in relation to partition fences, to be paid in equal proportions by the parties, and two dollars and fifty cents for each day of service in the business of the township, to be paid from the township treasury. The compensation of any

trustee to be paid from the treasury shall not exceed *two hundred and fifty dollars* in any year including services in connection with the poor. * * *"

The foregoing section relates to the compensation of the township trustees.

Section 3308 G. C. as it existed prior to 1917 was as follows:

"The clerk shall be entitled to the following fees, to be paid by the parties requiring the service: twenty-five cents for recording each mark or brand; ten cents for each hundred words of record required in the establishment of township roads, to be opened and repaired by the parties; ten cents for each hundred words of records or copies in matters relating to partition fences, but not less than twenty-five cents for any one copy, to be paid from the township treasury; ten cents for each hundred words of record required in the establishment of township roads, to be opened and kept in repair by the superintendents; for keeping the record of the proceedings of the trustees, stating and making copies of accounts and settlements, attending suits for and against the township, and for any other township business the trustees require him to perform such reasonable compensation as they allow. *In no one year shall he be entitled to receive from the township treasury more than one hundred and fifty dollars.*"

The same section as amended, 107 O. L. 651 (filed in the office of the secretary of state April 3, 1917) reads as follows:

"Sec. 3308. The clerk shall be entitled to the following fees, to be paid by the parties requiring the service: twenty-five cents for recording each mark or brand; ten cents for each hundred words of record required in the establishment of township roads, to be opened and repaired by the parties; ten cents for each hundred words of records or copies in matters relating to partition fences, but not less than twenty-five cents for any one copy, to be paid from the township treasury; ten cents for each hundred words of record required in the establishment of township roads, to be opened and kept in repair by the superintendents; for keeping the record of the proceedings of the trustees, stating and making copies of accounts and settlements, attending suits for and against the township, and for any other township business the trustees require him to perform, such reasonable compensation as they allow. In no one year shall he be entitled to receive from the township treasury more than *two hundred and fifty dollars.*"

Section 3298-15m G. C., as enacted in 107 O. L. 69, 82 (filed in the office of the secretary of state March 29, 1917) reads as follows:

"The trustees shall provide the township clerk with a suitable book in which he shall keep a complete record of proceedings for the construction, reconstruction, resurfacing or improvement of public roads. For making such record he shall receive ten cents for each one hundred words and for all other services in connection therewith he shall receive such reasonable compensation as may be allowed him by the township trustees."

The foregoing sections relate to the compensation of the township clerk.

Section 3318 G. C., as it existed prior to 1917, was as follows:

> "The treasurer shall be allowed and may retain as his fees for receiving, safe keeping and paying out moneys belonging to the township treasury, two per cent of all moneys paid out by him upon the order of the township trustees."

The same section as amended, 107 O. L. 652 (filed in the office of the secretary of state April 3, 1917) reads as follows:

> "Sec. 3318. The treasurer shall be allowed and may retain as his fees for receiving, safe keeping and paying out moneys belonging to the township treasury, two per cent of all moneys paid out by him upon the order of the township trustees, *but in no one year shall he be entitled to receive from the township treasury more than one hundred and fifty dollars, except that in a township wherein a city is located and such city is a part of such township, a township treasurer shall be entitled to receive from the township treasury not more than three hundred dollars in one year.*"

1. For the purposes of your first question, it is to be noted that with respect to the compensation of township treasurer, the same prior to its last amendment consisted entirely of fees, but that by such amendment the limitation on the amount of fees receivable in any one year was imposed; that with respect to the compensation of the other officers named, the law in force prior to 1917 provided for fees with a maximum limitation on the amount to be paid from the public treasury in any one year, and that the amendments of 1917 raised these maximum limitations.

The answer to your first question depends upon whether or not these changes are violated by article II, section 20 of the constitution, which provides that:

> "The general assembly, in cases not provided for in this constitution, shall fix the term of office and the compensation of all officers; but no change therein shall affect the salary of any officer during his existing term, unless the office be abolished."

From the earliest times in this state it has been uniformally held that the word "salary," as used in this section, is designedly employed in contradistinction to the term "compensation" as used in the same section; that a change of compensation other than salary, to take effect during the existing term of an officer, is not prohibited, and that a salary is compensation dependent upon the lapse of time only, and in nowise dependent upon the amount of official services performed.

These principles furnish a direct answer to the question relating to the change made in the compensation of the township treasurer. Prior to 1917 this officer was on a straight fee basis. It is competent for the legislature at any time to change such compensation. I am of the opinion, therefore, that when the amendment relating to the compensation of the township treasurer went into effect, it immediately applied to the compensation of the township treasurers then in office.

The question is not essentially dissimilar as regards the other two officers inquired about. The mere fact that there was a maximum limitation upon the amount that might be drawn from the public treasury in favor of either of these officers, as compensation in any one year, did not make that compensation a

"salary." While limited by a rule which had reference to the lapse of time, yet such compensation was not absolutely dependent upon a lapse of time, but was also dependent upon the amount of services rendered. That is to say, while not more than one hundred and fifty dollars could be drawn from the treasury in any one year, under the old law, by either of these officers, yet, unless the requisite official services were performed, that amount could not be so drawn. In essence, then, these officers too were on a fee basis, and in my opinion the change in the law applied to and governed the compensation of the trustees and clerks in office at the time the amendment became effective.

2. Your second question requires me to consider just how this change operated. In my opinion the suggestion made by you should not be followed. There never was any limitation in the law upon the amount that might be received by any of these officers in any given period of time less than a year. It was perfectly lawful for a township treasurer, for example, to draw his percentages on the amount of money paid out as they were earned, so long as the old law was in effect, and if these percentages so drawn exceeded in amount the sum fixed by the new law, there is nothing in the new law requiring him to refund what he has already drawn. He is simply prevented from drawing any additional compensation for duties he performs during the remainder of the year by the operation of the newly effective limitation. To be sure, if he has not drawn an amount in fees up to the maximum limit, he would be entitled to draw fees for services rendered under the new law during the remainder of the year up until the limit is reached.

Similarly, a township trustee or clerk might have drawn fees only slightly less than one hundred and fifty dollars in amount, in that portion of the year preceding the day when the new law became effective, without violating the old law, for under such old law he was entitled to his fees as fast as they were earned, until the limit had been reached. When the new law became effective and raised the limit, either of such officers would be permitted to go on drawing his fees as they were earned, until the aggregate drawn in the year reached the limit set by the new law.

The only difficult question which arises here is that which is made by a case in which a trustee or clerk may have drawn up to the limit of one hundred and fifty dollars before the new law went into effect. In such case it is clear that after the new law went into effect he could commence drawing fees again until the aggregate drawn by him during the year would reach the limit fixed by the new law.

The question is as to whether such officer would be entitled, after the new law went into effect, to receive from the public treasury, for his own use, the fees for the services performed after the limit had been reached under the old law and before the new law went into effect. In my opinion he would not be entitled to do this; for at the time fees were earned the law then in force prohibited him from receiving them for his own use.

So if a trustee, for example, had drawn one hundred and fifty dollars on June 1 within the year, and then performed official services for which fees payable from the township treasury might otherwise have been charged and retained by him during the month of June and until the new law went into effect, then after the new law went into effect such trustee might again retain for his own use the fees payable from the public treasury, for services performed by him, until he had reached the two hundred and fifty dollar limit of the new law; but he could not go back and receive for his own use the fees earned for services performed during the month of June.

I take it that the bureau is assuming that the "year," to which all these sections refer, is the official year, i. e., the year of the term of office of one of these designated officers. This assumption is, in my opinion, correct.

3. In answer to your third question I am of the opinion that the compensation provided for in section 3298-15m of the General Code is embraced within the limitations referred to. Regardless of the respective dates of the enactment of this section and the amendment of section 3294 of the General Code, it is rather clear to me that this particular section is to be interpreted in the light of the fact that at all times before and after its enactment there was in force a general limitation on the compensation of the township clerk. I think the legislature must be deemed to have had this fact in mind, and as there is nothing in section 3298-15m of the General Code which shows that the legislature intended that compensation receivable thereunder should be outside of the maximum limitation, I conclude that it is within that limitaton.

I have heretofore rendered an opinion upon this particular question, and I am enclosing a copy of the same herewith for your consideration.

4. Your last question, in so far as it relates to section 3298-15m G. C., is of course made unnecessary by what has just been said, as the special compensation receivable under that section must be drawn as fees, subject to whatever limitation may have been in force at the time the particular services thereunder were rendered.

So far as section 3372 G. C. is concerned, the question which you have in mind arises from the fact that this section covers the same subject matter as that covered by section 3294 G. C. above quoted. Section 3372 G. C., as amended, 107 O. L. 93, is as follows:

> "Sec. 3372. When the trustees of any township determine to proceed in either the first or the second method hereinbefore provided, the trustee or trustees designated to have charge of the maintenance and repair of roads and culverts within the township, or within a road district thereof, shall receive two dollars and fifty cents for each day of service in the discharge of such duties, *but the total* compensation of any township trustee to be paid from the treasury under this and all other sections of the General Code shall not exceed two hundred and fifty dollars in any year."

This law, as you have observed, went into effect a little before section 329 G. C., as amended, became effective. Both sections, as observed, relate to the same subject matter, yet they are in no way inconsistent with each other. Section 3372 G. C. certainly covers the entire ground, and from the date when it became effective it furnishes the maximum limitation on the compensation of township trustees payable from the township treasury. The mere fact that the other section coming along later also imposes the same limitation, is of no significance. The change in the limitation as to township trustees is determined by the date at which section 3372 of the General Code became effective, and the subsequently arising effectiveness of the amendment to section 3294 of the General Code is of no significance.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

566.

FINES—COSTS—FEES—COLLECTED FOR VIOLATION OF DAIRY AND FOOD LAW—PAID TO SECRETARY OF BOARD OF AGRICULTURE.

The words "fines, costs and fees" as used in section 1177-14 *General Code, providing for the payment of such fines, etc., to the secretary of agriculture means the same as fines, costs and fees in other statutes, and require the payment of all such fines, costs and fees collected under the dairy and food provisions of the act reorganizing the department of agriculture.* (107 *O. L.*, 460.)

COLUMBUS, OHIO, Aug. 28, 1917.

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

GENTLEMEN:—On July 28, 1917, you requested my opinion as follows:

> "We refer you to the provisions of section 1177-14 General Code as amended 107 O. L. page 478, relative to fines, fees and costs which shall be paid to the secretary of agriculture.
>
> "Do the words, 'fines and costs,' herein, embrace the regular court costs and fees, the same as any other case in a police court, municipal court, or justice's court, or do these words refer only to the fees and costs that may be connected therewith through the action of a representative of the board of agriculture?"

On July 31, you sent the following supplemental communication:

> "In connection with our request for opinion under date of July 28th, relative to fines and costs in section 1177-14 G. C., we are enclosing herewith blank form used by the state board of agriculture which may throw a little light upon the matter. It would appear from this form that the words 'Costs and Fees,' as embodied in this section, had been interpreted by the board of agriculture to mean costs and fees of inspection and analysis by employes of said board."

The section you refer to is as follows:

> "Section 1177-14. (107 O. L. 478.) All fines, fees and costs collected under prosecutions begun, or caused to be begun, by the secretary of agriculture, shall be paid by the court to the secretary of agriculture within thirty days after collection, unless error proceedings have been properly begun and prosecuted and in case the judgment of the justice of the peace is sustained the fine shall be paid within thirty days after such judgment or affirmance, and by the secretary paid into the state treasury to the credit of the general revenue fund."

No reason is apparent for giving the language of the above section any other than its usual and natural meaning. The plain statement is that all fines and fees and costs when collected in suits started by the secretary of agriculture shall be paid to the secretary, and there is nothing either in the context or in the reason of the case requiring any restrictive significance. In fact we have to look to the context or elsewhere than to the plain terms of the act itself to raise any question of interpretation, and it is probably by such reference to what precedes the section that the person who prepared the blank attached was led into some doubt and confusion.

The terms "fines," "fees" and "costs" have an ordinary and well understood

meaning. The word "fees" taken alone might have a different meaning and might apply to other than judicial proceedings, but being found between "fines" and "costs" determines its nature in the present case. By the application of the maxim *noscitur a sociis* it is in the present instance confined to *fees in the sense of costs*, two terms that are often used interchangeably, and yet between which there is a slight distinction; as we say "witness fees" and sometimes "attorney fees" are to be taxed as "costs." In the present case it applies to any such fees—any fees that are incident to the judicial proceeding in which a fine is imposed and costs attach. This section by its express terms, which are as general as they could be made, includes all prosecutions carried on by the secretary of agriculture. It was formerly section 378 General Code and was in a chapter headed "Dairy and Food Commissioner," the principal change being the change of the name of the office. The secretary of agriculture, however, has in addition to all the power formerly exercised by the dairy and food commissioner a number of other departments. This statute by its plain language clearly extends this power to the other departments as well as the dairy and food department, he being the equal successor of all. However, there are other sections in the act which are contradictory to this act, and in order to give effect to all it is necessary to read them as exceptions, as for instance, by section 1140 it is provided:

> "All moneys derived from the provisions of sections 1122 to 1140 inclusive of the General Code shall be paid to the board of agriculture and by it deposited in the state treasury to the credit of the agricultural fund, and to be expended in promoting and protecting the horticultural interest of the state."

This, then, must be subtracted from the general provisions contained in section 1177-14 providing that these fines and costs go into the general revenue fund, and this is plain and easy of application, the section in question applying to the subject of nursery stock and the fines and fees being imposed for violations of that branch of the act.

A more serious question arises with reference to the other provisions, of which the following is one:

> "Section 1177-51. The moneys received under the provisions of this act shall be paid into the state treasury accredited to the agricultural fund. * * *"

Here, as was said, is a contradiction. The money received under this act would mean all money received under any of the provisions of the whole act and no other or restricted meaning can properly be given to it. It is, however, found in the immediate connection of certain sections regulating the sale of lime and limestone, and is the successor of an act originally referring to that subject alone. The words "this act" in the former restricted act being carried into the section in question apparently without any reflection on the part of the draftsman or compiler of the new agricultural law that the act in which they would afterwards be found would be more extensive than the one in which they had formerly been, and that the provisions would be contradictory to the others contained in the new act.

If it be said that there is a distinction between "the money received under this act" in section 1177-51, and "all fines, fees and costs collected under prosecutions begun, or caused to be begun, by the secretary of agriculture" and that an application could be found applying this distinction, we refer to another section:

> "Section 1460. All fines, penalties and forfeitures arising from prosecutions, convictions, confiscation or otherwise under this act, unless otherwise

> directed by the board of agriculture shall be paid by the officer by whom the fine is collected to the board of agriculture and by it paid into the state treasury to the credit of a fund which is hereby appropriated for the use of the board of agriculture. * * *"

Here we have in one case "all fines, fees and costs collected under prosecutions" by the secretary of agriculture; in another "all fines, penalties and forfeitures arising from prosecutions, convictions, confiscations or otherwise under this act." Here is clearly an absolute contradiction. One section gives the money to the general revenue fund of the state; the other to the credit of a fund which shall be appropriated for the use of the secretary of agriculture. As both of these sections are parts of the same act, passed at once and going into effect at the same instant, the contradiction is hopeless. It is likely, however, that the courts would go far enough in the way of judicial legislation to restrict the meaning of each of these provisions to the subject of the act in which it was originally found and among the provisions of which each is still located.

There are other sections equally contradictory to section 1177-14, but the above are enough to illustrate the point. It is possible that a judicial interpretation would confine section 1177-14 to the provisions formerly found in the food and dairy act of which it was a part, but so doing would be to legislate and to make laws where the legislature has not, or in contradiction of what the legislature has expressly said. Such a course, however, is often thought necessary as the uncertainty and contradiction of the present act are unfortunately so general. The department of agriculture has been recreated a number of times to suit the fancy of successive legislatures, but in each revision, instead of comparison of contradictory provisions and eliminations, of contradictions, the whole mass of legislation applied to the different departments in detail before the consolidation is embodied with little or no change in each new act. We therefore have upon this one subject a vast body of law consisting of an enormous amount of detail thrown together, as we find it, without any effort to make it comprehensively include the subject of its enactment. As a result, it is full of contradiction, uncertainty and impossibility. It is lacking in cohesion, continuity or concatenation, and utterly lacking in anything like homogeneity.

Your question, however, is answered in accordance with the conclusion first announced herein: "fines, costs and fees" are those in judicial proceedings, and include the items commonly passing under those names and are not restricted to such as are payable to an employe of the state. It should be stated that they do not include any fees or costs which the officials, justices or constables, are permitted to retain for their services, or witness fees from one other than an employe of the department.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

567.

REMONSTRANCE—AGAINST NEW SCHOOL DISTRICT—SIGNERS MAY WITHDRAW NAMES THEREFROM.

Persons who sign a remonstrance against the formation of a new school district may withdraw their names by petition or otherwise and shall not be counted as remonstrating by the county board of education.

COLUMBUS, OHIO, Aug. 28, 1917.

HON. CALVIN D. SPITLER, *Prosecuting Attorney, Tiffin, Ohio.*

DEAR SIR:—You request my opinion upon the following proposition:

> "The required notices were filed as provided by section 4736 G. C. and within thirty days, namely, on the 21st day of April, 1917, a remonstrance was filed containing the names of one hundred and thirty-six electors in the territory affected.
>
> "On April 20th, the day before the remonstrance was filed, forty-nine of the one hundred and thirty-six signers filed a petition with the county board of education asking that their names be withdrawn from the remonstrance.
>
> "If these forty-nine names can be taken from the remonstrance then the remonstrance would not contain a majority of the electors of those living in the district attempted to be created.
>
> "The question is whether the forty-nine signers have the right to withdraw their names from the remonstrance voluntarily, within the thirty days, without first obtaining the consent of the other signers to the remonstrance, and thereby defeat the purpose of the remonstrance."

Your question grows out of the act of the county board of education of your county in the formation of a new school district as provided by section 4736 G. C., which section, after providing that the county board of education shall file, with the board or boards of education in the territory affected, a written notice of such proposed arrangement in so forming such new district, further reads:

> "* * * which said arrangement shall be carried into effect as proposed unless, within thirty days after the filing of such notice with the board or boards of education, a majority of the qualified electors of the territory affected by such order of the county board, file a written remonstrance with the county board against the arrangement of school districts so proposed. * * *"

In your case a remonstrance was filed within the thirty days after the giving of said notices but on the day previous to the filing of said remonstrance a petition was filed by certain persons who had signed the remonstrance, asking that their names be taken from the remonstrance so to be filed, or, in other words, that their names be not counted or considered among those who are remonstrating. If those who signed the petition be not counted as among those remonstrating, then the remonstrance does not contain a majority of the electors in such newly created district and your question is, shall those names appearing upon the petition, and which also appear upon the remonstrance, be counted in making up the number who are remonstrating, or not?

The remonstrance, to have any effect, must be filed with the county board of education within thirty days after the filing of the notices with the various district

boards of the proposed order of the county board, and when such remonstrance is filed the county board of education must find that, to have the effect of keeping the order of the county board of education in the formation of the new district from becoming effective, it must contain the names of a majority of the qualified electors of the territory affected.

Bearing upon your question is the case of Hays et al. v. Jones et al. 27 O. S. 218. In that case a petition was filed with the board of county commissioners for a road improvement under what was commonly called the two mile road improvement statutes, and the commissioners could have jurisdiction only when a majority of the resident land owners of the county, whose lands are reported as benefited and ought to be assessed, shall have subscribed a petition praying for said improvement. It was ascertained that the number necessary to constitute such majority was one hundred and twenty-four; that the petition praying for said improvement was signed by one hundred and thirty-two; and that a remonstrance was later filed by fifty-seven of said land owners, thirteen of whom had signed the petition.

One of the questions raised was, could said persons be counted as remonstrating after having signed the petition, or would their names be counted as petitioners only?

The court held: (Page 231.)

> "They are for the improvement, as prayed for, or against it, and can not be allowed to occupy any middle ground. The statute cannot mean that, if there is a majority of qualified persons at some time between the commencement of the proceedings and the time the final order is to be made, whether there be such majority at that time or not, the improvement may be ordered. * * * this jurisdictional majority must be found in the attitude of asking for the improvement *at the time the proposed final order is to be made, and one who has subscribed the perition may, at any time before the board makes the final order by remonstrance or other unmistakable sign, signify his change of purpose. His assent is within his own control up to the time the commissioners move to make the final order.* He could not, after having signed the petition for the improvement, be silent until after the order had been made for the improvement, and then put in a remonstrance that would avail him anything. The form or manner in which his dissent is made known is immaterial. If it is clearly made known to the board of commissioners, that is sufficient. Story on agency, treating upon the subject of revoking an agency, section 474, says: 'It may be express as by a direct and formal declaration publicly made known, or by an informal writing, or by parol, or it may be implied from circumstances.' "

So in your case, when the remonstrance was filed, any person who had signed the same has within his control his assent or dissent thereto. If he dissents, such dissent should be made known to the county board of education prior to the time the county board of education acts thereon. How could it be more clearly made known than to file with the board a petition asking that his name be not considered as assenting to said remonstrance when the same is filed? There would be no more direct or public manner of making his desire known to the board, whose duty it is to file and consider the same.

It was held in Dutten v. Village of Hanover, 42 O. S. 215, that upon the presentation of a petition to the council of a municipality for the submission of the question of the surrender of its municipal powers, it is the duty of the council, before taking action thereon, to satisfy itself that such petition contains the requisite number of qualified petitioners, and for that purpose it may refer the said petition to a committee, to make necessary examination and investigation in relation thereto, and while such petition is under consideration and before action thereon is taken by the council,

signers thereof may withdraw their names from such petition, and if thereby the number of names is reduced below the requisite number, it is the duty of the council to refuse to order such election.

So in your case, when the remonstrance was filed with the county board of education, it was the duty of said board to examine and investigate the same, to the end that it satisfy itself that such remonstrance contains a majority of the qualified electors of the territory affected by the order of the county board. And if during such examination and investigation, and before the board takes action thereon, signers thereto desire to withdraw their names therefrom, they may do so, following the decision last above cited.

In Sedalia (City) v. Montgomery, 109 Mo. App. 217; 88 S. W. 1014, a public improvement was being projected. A protest was filed, objecting to said improvement. The court held that a person who had signed the protest against the public improvement might withdraw his name from same at any time within the statutory period for signing the protest. That is to say, and applying the same to your case, a person who had signed said remonstrance had a right to withdraw his name by petition filed with the county board of education and he would not be counted among those who remonstrated.

Answering your question specifically then, I advise you that the forty-nine signers had a right to withdraw their names from the remonstrance, without first obtaining the consent of the other signers to the remonstrance and thereby defeat the purpose of the remonstrance.

Very truly yours,
JOSEPH McGHEE,
Attorney-General.

568.

APPROVAL—TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE BY COUNTY COMMISSIONERS OF AUGLAIZE COUNTY.

COLUMBUS, OHIO, August 28, 1917.

Industrial Commission of Ohio, Columbus, Ohio.
GENTLEMEN:—

> "IN RE:—Bonds of Auglaize county, Ohio, in the sum of $26,500.00, in anticipation of the collection of taxes and assessments for the construction and *improvement of Fisher road.*"

I have carefully examined the transcript of the proceedings of the county commissioners of Auglaize county, Ohio, relative to the above bond issue, and find said proceedings to be in conformity to the provisions of the General Code relating to improvements of this kind.

I am, therefore, of the opinion that bonds properly prepared according to the bond form submitted will, when signed by the proper officers of Auglaize county, constitute valid and binding obligations of said county.

Very truly yours,
JOSEPH McGHEE,
Attorney-General.

569.

BOARD OF EDUCATION—APPOINTED BY COUNTY COMMISSIONERS—HOW SUCCESSORS NOMINATED AND ELECTED.

1. *Where a board of education has been appointed by the board of county commissioners as provided by section 4736-1 G. C., the successors to the members of such board must be elected at the first election for members of the board of education held in such district after such appointment, two members to serve for two years and three for four years.*

2. *Members of boards of education shall be nominated for the terms for which they are to be elected, that is, if two members are to be elected for two years and three for four years, nominations must be made for the short and long terms.*

COLUMBUS, OHIO, Aug. 28, 1917.

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

DEAR SIR:—You submit for my opinion the following statement of facts:

> "The question has arisen in this county as to the method of nominating and electing members of a school board who were appointed under section 4736-1 G. C.
>
> I am enclosing herewith copy of letter written by me to the county superintendent of our county and would like to inquire whether or not, in your opinion, this letter is sustained by the provisions of said section."

That part of your letter necessary for our consideration is as follows:

> "I am of the opinion that section 4736-1 authorizes and requires the election of two members for two years and three for four years at the general election to be held in 1917, and while I have found no express statutory provision on the subject, construing this section with section 4839, I am of the opinion that the ballots to be used at such election might properly designate the respective terms for which members of the board were to be elected and that the petitions filed by candidates might state which term the candidate was seeking."

Your questions arise from the fact that certain members of a board of education have been appointed and the regular election for members of boards of education will occur November 6, 1917, and the question is, as I understand you, how many of the five members appointed will be elected and for what term and how shall the nominations be made for same.

General Code section 4736-1 provides that in rural school districts hereafter created by a county board of education, the members of a board of education for such newly created districts shall be elected as provided by section 4712 G. C., and that wherever there exists such newly created district or any other district which has no board of education, the board of county commissioners of the county to which the district belongs shall appoint such board of education. The successors of the members so appointed shall be elected at the first election for members of the board of education held in such district after such appointment, two members to serve for two years and three members for four years, and thereafter their successors shall be elected in the manner and for the term as provided by section 4712 G. C.

Section 4712 G. C. provides that in rural school districts the board of education shall consist of five members elected at large at the same time at which township officers are elected and in the manner provided by law, and that the term of such

school board members shall be four years. That is to say, at all regular elections for members of boards of education the term is for four years, but section 4736-1 G. C. provides that at the first election after such board has been appointed two of such members shall be elected for two years and three for four years, thus preventing the terms of the entire board from expiring at the same time, and thereafter each member shall then be elected for four years.

Section 4713 G. C., which is now repealed, provided that at the first election in a township district a board of education shall be elected, two members to serve for two years and three members to serve for four years, and at the township election held every second year thereafter their successors shall be elected for a term of four years. Said section, as above noted, was repealed at the time the new school code, so called, was enacted, namely, February 5, 1914 (104 O. L. 133), but at the same time there was enacted section 4735 G. C., which provided that all officers and members of boards of education of existing school districts shall continue to hold and exercise their respective offices and powers until their terms expire and until their successors are elected and qualified. That is to say, the machinery which was provided for the conduct of the schools was permitted to remain intact at the time the radical change in our laws became effective, and the members of the boards of education continued to serve for the terms for which they had been originally elected or appointed and until their successors were duly elected and qualified.

Provision was therefore made for all existing members and with the enactment of section 4736-1 G. C. provision is made for boards of education in newly created districts and for the election of the successors thereto. Candidates for members of boards of education shall be nominated as provided by section 4997 G. C., in which section it is provided that nominations of candidates for the office of member of the board of education shall be made by nominating papers signed in the aggregate for each candidate by not less than twenty-five qualified electors of the school district, of either sex, and in village and city districts by not less than two per cent. of the electors voting at the next preceding general school election in such city or village school district.

Such nominating papers shall be filed with the board of deputy state supervisors of elections as provided by section 5004 G. C., which reads in part as follows:

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

Section 5032 G. C. provides that the names of candidates for members of the board of education of a school district, however nominated, shall be placed on one independent and separate ballot without any designation whatever, except for member of board of education and the number of members to be elected.

Section 5018-1 G. C. provides that where the names of several persons are grouped together upon the ballots as candidates for the same office, the ballot shall contain immediately above the names of such candidates the words "vote for not more than —." The blank space shall be filled with the number representing the persons who may lawfully be elected to such office. In your case the word "two" will be written in said space on the ballot for the one class of candidates, and the word "three" will be written in the blank space for the other class.

Section 4998 G. C. provides that when nominations of candidates for members of the board of education have been made by nomination papers filed with the board of deputy state supervisors, then the board of deputy state supervisors shall publish on two different days prior to the election a list of the names of such candidates in two

newspapers of opposite politics in the school district, if there is such printed and published therein, and if no newspaper is printed in such school district, the board shall post such list in at least five public places therein.

Section 4838 G. C. provides that all elections for members of boards of education shall be held on the first Tuesday after the first Monday in November of odd numbered years, and section 4839 G. C. provides that the clerk of each board of education shall publish a notice of all such elections in a newspaper of general circulation in the district or post written or printed notices thereof in five public places in the district at least ten days before the holding of such election, and that such notices shall specify the time and place of the election and the *number of members of the board of education to be elected and the term for which they are to be elected.*

It was held in the case of State v. Schafer, 10 Cir. Dec. 36, that:

> "Where three members are to be elected to the board of education, two of them for the full term of three years and one to fill an unexpired term of one year, and the names of six candidates appear on the ballots, but with nothing to indicate which are candidates for the long term and which are candidates for the short term, *there is no valid election.*"

Therefore, answering your questions specifically, I advise you that all five members of the board of education shall be elected on November 6, 1917; that two of such members shall be elected for two years and three shall be elected for four years; that the nomination papers of the candidates to be voted for at said election shall be filed with the board of deputy state supervisors of elections of your county "not less than sixty days" previous to the date of election, and that candidates shall be nominated for the terms for which they are to be elected and the designation thereof shall be made upon the ballots; that is, the term for which the candidate is to be elected.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

570.

CONTRACT—RENDERED IMPOSSIBLE BY GOVERNMENT—SUSPENDED WHILE PROHIBITION REMAINS IN EFFECT—ALIEN ENEMIES—RESTRICTED AREA.

A contract of employment as instructor at the Ohio state university between the trustees of the said university and a person who is an alien enemy is rendered impossible of performance by an order denominating the campus of the university as a restricted area and excluding alien enemies therefrom except on permit, if the permit is refused to the person so employed such impossibility of performance at least suspends the force of the contract during the time that the prohibition remains in effect; whether or not it discharges the contract of employment depends upon whether or not the matter is entire.

COLUMBUS, OHIO, August 28, 1917.

DR. W. O. THOMPSON, *President of Ohio State University, Columbus, Ohio.*

DEAR SIR:—I acknowledge receipt of your letter of August 22, requesting my opinion as follows:—

> "The trustees of the university at their summer meeting elected the instructional force for the coming year. This election included one Professor K. Mr. K. is an alien enemy. The government has now refused him a permit

to come upon the university grounds because it is a restricted area. Will you therefore furnish the university an opinion on the following question:

"Whether the action of the government in declining the permit to Professor K. automatically cancels the contract entered into between the university and Professor K., who had accepted his election for the ensuing year."

It is obvious that the action of the government renders it impossible for the contract of employment to be discharged in the ordinary way, in as much as that would require the attendance of the instructor at the appointed places on the campus of the university for the purpose of conducting classes.

The well established rule of law is, that a contract for personal services is discharged by impossibility of performance produced by action of the government, unless there is something about the contract that manifests an intention on the part of one party or the other to assume the risk of such happenings. I take it that nothing of that sort appears in the case mentioned by you, and that the general rule therefore would apply.

Page on Contracts, at section 1363, mentions as one of the three classes of cases in which impossibility of performance not contemplated by the parties operates as a discharge:

"Where contracts are made for personal services which cannot be performed by an assignee or personal representative."

He gives as an instance, in section 1366, the arrest of an employe and his detention for a considerable period of time.

It is stated, however, that if the law or an act of government stops performance for a limited time only, the contract is temporarily suspended rather than discharged. (Section 1373, citing *School District v. Howard.* 98 N. W., 666).

The case you have in mind may be an instance of this kind. The order excluding alien enemies from restricted areas may undoubtedly be regarded as temporary. Should the war cease within a week, and the exclusion of Professor K. from the campus be soon thereafter lifted in consequence thereof, there would be nothing to prevent him from offering performance, and nothing to justify the trustees of the university in declining his tender of performance. Should, however, the order and its application to Professor K. remain effective for any part of the college year within which teaching services under the contract would have to be rendered, the university, of course, would not be liable to him for such part, at least, of his compensation as might relate to the period of time during which he was excluded from the campus. Whether or not the board of trustees would be under obligation to accept the services of Professor K. if they should be again tendered after having been interrupted during the college year would depend upon whether the contract should be regarded as entire, i. e., interpreted as being a contract for a year's services, or a contract of employment as instructor for a year, the right to compensation *pro rata temporis* not to be dependent upon the rendition of an entire year's service. This question, however, hardly arises at the present time, and will never arise if the duration of the war, or the order of the goverment covers the entire college year.

At the present time you are advised that the university is under no obligation to pay Professor K. for any services which he is prevented from rendering by virtue of the order of exclusion; that such order, at least *pro tanto,* discharges the contract; and that if the order of exclusion remains operative during the entire life of the contract the impossibility of performance produced thereby will completely discharge the contract.

Very truly yours,

JOSEPH MCGHEE,
Attorney-General.

571.

APPROVAL—TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE OF THE COUNCIL OF TOLEDO, OHIO.

COLUMBUS, OHIO, Aug. 28, 1917.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:

"IN RE: Bonds of the city of Toledo, Ohio, in the sum of $300,000.00, for the purpose of paying the city's share of the cost and expense of certain street improvements.

I am herewith returning, with my approval, transcript of the proceedings of the city council and other officers of the city of Toledo, Ohio, relating to the above bond issue.

The bonds in question are issued for the purpose of paying the city's share of the cost and expense of certain specifically named street improvements, seven in number, and the issue thereof has been provided for by a resolution of the city council, duly passed by more than two-thirds of the members thereof and published in accordance with the provisions of section 57 of the charter of the city of Toledo, which provides as follows:

> "Every ordinance or resolution upon its final passage shall be recorded in a book kept for that purpose, and shall be authenticated by the signature of the presiding officer and clerk of the council. Within ten days after its final passage, every ordinance of a general nature shall be published at least once in full in the city journal. Other ordinances and resolutions shall be published in the city journal in full or in condensed form, as the council may direct. There shall be no other publication at the expense of the city."

Four of these street improvements were initiated by the passage of resolutions of necessity prior to the time the charter of the city of Toledo went into effect, to wit, January 1, 1916, and three of said improvements were initiated in like manner after the charter went into effect and in pursuance to its provisions.

With respect to the four improvements projected before the charter of the city went into effect the legislation as to three of them, down to and including the ordinance to proceed, was complete at the time of the adoption of the resolution providing for this bond issue; while as to one of them no ordinance to proceed had as yet been passed.

With respect to the three street improvements projected under the charter of said city the legislation with respect to one of said improvements, down to and including the ordinance to proceed, was complete at the time of the adoption of the resolution providing for the issue of the bonds; while as to two of said improvements no ordinance to proceed had as yet been passed.

In the consideration of the transcript relating to the above bond issue only two questions have given me any serious concern with respect to the validity of this bond issue.

The case of Heffner v. Toledo, 75 O. S. 413, involved an issue of bonds of the city of Toledo for the purpose of paying the city's part of the cost and expense of certain street and sewer improvements. The court in this case had under consideration section 53 of the Municipal Code of 1902, which, with slight amendment, has since been carried into the General Code as section 3821, authorizing municipal corporations to issue and sell bonds as other bonds are sold to pay the corporation's part of

any improvement authorized and provided for under the assessment statutes. The court likewise had under consideration the provisions of section 2835 of the Revised Statutes, which is now section 3939 of the General Code. The court held that the bonds authorized by section 53 of the Municipal Code (section 3821 G. C.) could not be provided for by resolution or ordinance until after the passage of the ordinance to proceed. The court held further, however, that under section 2835 Revised Statutes (section 3939 G. C.) the council of the city may, by a resolution or ordinance passed by the affirmative vote of not less than two-thirds of the members elected or appointed thereto, provide for the issuing of bonds to pay the city's part of the cost of a specific improvement before the passage of either the ordinance to proceed or the resolution of necessity with respect to such improvement.

Chapter XI of the charter of the city of Toledo is devoted to the subject of assessments and improvements. The chapter is comprehensive in its terms and covers in a large measure the same subject covered by the chapter of the General Code relating to the subject of improvements by assessments. Section 208 of the charter of said city, the same being a part of said chapter XI relating to the subject of assessments and improvements, provides as follows:

> "The city shall pay such part of the cost and expense of improvements for which special assessments are levied as the council deems just, which part shall not be less than one-fiftieth of all such cost and expense; and in addition thereto, the city shall pay the cost of intersections. The council may provide for the payment of the city's portion of all such improvements by the issuance of bonds or notes therefor, and may levy taxes, in addition to all other taxes authorized by law ,to pay such bonds or notes and the interest thereon."

The provisions and setting of this section of the charter of the city of Toledo authorizing the city to issue bonds for the purpose of paying its share of improvements under the chapter in which the section is contained are quite similar to section 53 of the municipal code of 1902, which was under consideration by the court in the case of Heffner v. Toledo, supra, and which, as before noted, has been carried into the General Code as section 3821. If, as a charter provision, section 208 above quoted is to be considered the exclusive authority of the city of Toledo to issue bonds for the purpose of paying its share of the cost of specific street improvements, the question would naturally arise under the decision of the court in the case of Heffner v. Toledo, supra, whether the issue of such bonds could be provided for until an ordinance to proceed affecting the street improvements covered by the bond issue had been passed. I find, however, that section 10 of the charter of the city of Toledo provides as follows:

> "The enumeration of particular powers by this charter shall not be held or deemed to be exclusive; but in addition to the powers enumerated or implied therein, or appropriate to the exercise thereof, the city of Toledo shall have and may exercise all other powers which under the constitution and laws of Ohio now are, or hereafter may be, granted to cities. Powers proper to be exercised, and not specially enumerated herein, shall be exercised and enforced in the manner prescribed by this charter; or, when not prescribed herein, in such manner as shall be provided by ordinance or resolution of the council, or by statute."

I am of the opinion, therefore, that by reason of the provisions of the section of the charter just quoted the city of Toledo has power to issue bonds not only under section 208 of the charter of said city, but under the provisions of section 3939 of the General Code as well. This section of the General Code, among other things, speci-

fically authorizes municipal corporations to issue bonds for the purpose of resurfacing, repairing or improving any existing street or streets as well as other public highways.

The other question which has called for some consideration arises by virtue of the provisions of section 4 of the charter of said city, which provides as follows:

> "All contracts entered into by the city for its own benefit prior to the taking effect of this charter shall continue in full force and effect. All public work begun prior to the taking effect of this charter shall be continued and perfected hereunder. Public improvements for which legislative steps shall have been taken under laws in force at the time this charter takes effect may be carried to completion in accordance with the provisions of such legislation."

It is obvious that if the word "legislation" found at the end of the section refers to the general statutes of the state and the proceedings relating to this bond issue is one of the things to be carried to completion in accordance with the provisions of such "legislation," the proceedings relating to the bond issue are defective for the reason that the ordinance providing for the same was not published in compliance with the provisions of section 4228 of the General Code. However, I am unable to give this effect to the language above quoted, and am of the opinion that the word "legislation" as used in said section 4 of the charter of the city of Toledo refers to the "legislative steps" of the city council previously mentioned therein, and that the only force of the provisions of the section is to give validity to such legislative steps which may have been taken before the charter went into effect with respect to improvements which might have to be completed after the same went into effect, and that the section cannot be given the effect of requiring that the subsequent ordinance providing for the issue of bonds covering such improvement should be published otherwise than in conformity with the provisions of section 57 of the city charter, specifically providing how all ordinances should be published.

The proceedings of the council and other officers of the city being in other respects regular, and this issue itself being within the limitations of the Longworth law, I am of the opinion that said issue is in all respects valid and that properly prepared bonds covering said issue will, when signed by the proper officers, constitute valid and subsisting obligations of said city.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

572.

LOCOMOTIVES—FLAGMAN OR RED LIGHT NOT REQUIRED THEREON UNDER SECTION 8945-4 G. C.

The act found in 107 *Ohio Laws*, 605, *does not require that a flagman or red lights be placed upon locomotives allowed to stand on running tracks during the night season.*

COLUMBUS, OHIO, August 29, 1917.

Public Utilities Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I acknowledge receipt of your letter of August 4th, requesting my opinion with reference to the interpretation of an act found in 107 Ohio Laws, 605.

The specific question in which you are interested, which has been submitted by counsel for the Bessemer and Lake Erie Railroad Company, is as to whether or not the act referred to requires that red lights be placed upon locomotives allowed to stand on running tracks and within the yard limits during the night season.

The act in question, with its title, is in full as follows:

"AN ACT

"To compel common carriers to place lights on front and rear ends of all trains, part-trains, cuts of cars, cabooses and locomotives, while on the main railroad tracks.

"BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF OHIO:

"Section 1. It shall be unlawful for any superintendent, trainmaster, yardmaster, or other employe of the railroad company doing business in the state of Ohio, to allow or permit passenger or freight car to stand on a track commonly called a running track, within yard limits unless flagman or red light is on end of car during the period from thirty minutes before sunset to thirty minutes after sunrise.

"Section 2. Whoever being superintendent, trainmaster, yardmaster, or other employes of a railroad company, violates section 1 of this act, shall be guilty of misdemeanor, and shall be fined not less than twenty-five dollars nor more than three hundred dollars for each and every offense.

"Section 3. The public utilities commission shall be empowered to enforce the foregoing sections and prosecute any violations thereof."

It will be observed that the title of the act mentions "locomotives," but that this word is not found in the body of the law. Section 1 of the latter refers only to passenger or freight cars, and it is clear to me that this term does not include locomotives.

The title of an act may be consulted to resolve ambiguities apparent on the face of the body of the law; it is not, however, a part of the act and cannot be given effect to enlarge or restrict the clearly expressed provisions of the latter.

I am of the opinion, therefore, that despite the title of the act, no part of the law in any way governs the placing of flagmen or red lights upon locomotives under any circumstance.

You have submitted an opinion to the commission by Hon. C. A. Radcliffe, attorney for the commission, which is consistent with the opinion which I have expressed, and which goes further and deals with questions not raised by counsel for the Bessemer and Lake Erie Railroad Company. Mr. Radcliffe expresses the view that the body of the act not only does not apply to locomotives, but also does not apply to trains, part trains, cuts of cars and cabooses, as referred to in the title. That is to say, Mr. Radcliffe expresses the view that the operative effect of the act is limited to the lighting or safeguarding of single cars.

I am not clear as to this point, and in as much as the commission's letter to me refers to the communication of counsel for the Bessemer and Lake Erie Railroad Company, I assume that the point raised by them is the only one submitted to me for decision. I, therefore, express no opinion as to the effect of the act in so far as trains part trains, cuts of cars and cabooses are concerned.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

573.

BOARD OF EDUCATION—APPOINTED BY COUNTY BOARD FOR NEW DISTRICT—WHEN AND HOW SUCCESSORS ELECTED.

Where a board of education has been appointed for a newly created district by a county board of education, the successors thereto shall be elected at the first election for members of the board of education held in such district after such appointment. Two of such members shall be elected for the term of two years and three for the term of four years.

COLUMBUS, OHIO, Aug. 29, 1917.

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

MY DEAR SIR:—In your letter of August 25, 1917 you ask my opinion upon the following statement of facts:

> "We have a number of school districts created under section 4736 G. C., and the county board of education appointed the board of education under the provisions of that section. In all of these districts thus created no elections have been held to elect members of such board of education.
>
> "Section 4736 says nothing about how long the members shall be elected for, that is, the members to be chosen this fall. It only provides that they shall be elected as provided by law. Section 4736-1 G. C. makes provision for the electing successors, but this is where the board has been appointed by the county commissioners.
>
> "Section 4712 G. C. provides that all members shall be chosen for four years.
>
> "All the districts that I have reference to are rural districts. We have no village districts created under this law.
>
> "What I desire to know is: For how long a term shall the members of these boards be chosen? Are they all to be chosen for four years, or shall two of them be chosen for two years and three chosen for four years?"

Section 4736 G. C. provides that the county board of education is authorized to create a school district from one or more school districts or parts thereof and that:

> "* * * The county board of education is authorized to appoint a board of education for such newly created school district and * * *. Members of the boards of education of the newly created district shall thereafter be elected at the same time and in the same manner as the boards of education of the village and rural districts."

That is to say, it is necessary to look to the statutes which provide for the election of boards of education in village districts and also to the statutes which provide for the election of boards of education in rural districts, and from the various statutes determine how members shall be elected to succeed the members of the board of education of a newly created district, which board was appointed by the county board of education.

I shall first take up the sections which refer to village districts.

Section 4709 G. C. provides:

> "At the first election in such district, a board of education shall be elected, two members to serve for two years and three to serve for four years. At the proper municipal election held thereafter, their successors shall be elected for a term of four years."

That is, at the first election in a village district two members of the board of education shall be elected to serve for the term of two years and three members of such board shall at the same time be elected to serve for the term of four years, and thereafter and at the end of the expiration of the terms of the various members, their successors shall be elected for a term of four years. So that if the successors to the members of a board of education of a newly created district, which was appointed by a county board of education, would be elected in the same manner as the members of a board of education of a new village district, then under such an arrangement two members would have to be elected at the coming election for two years and three members would have to be elected for four years, and thereafter and when the successors thereto would be elected, all would be for the term of four years, because their terms would alternate, two to be elected at one election and three at the next election.

The sections relating to the election of members of boards of education for rural districts are very similar to those which relate to the election of members of village districts. The general section of the school code which applies to the election of members of boards of education in rural districts is section 4712 G. C., which reads as follows:

> "In rural school districts, the board of education shall consist of five members elected at large at the same time township officers are elected and in the manner provided by law, for a term of four years."

The section which made provision for the first election in a township district, and which provided that two members should be elected for two years and three for four years was numbered 4713, and was repealed when the new school code was enacted in 1914, and provision was not made at that time for the election of members in a new rural school district.

But in 1915 the legislature enacted section 4736-1 G. C. which reads as follows:

> "In rural school districts hereafter created by a county board of education, a board of education shall be elected as provided in section 4712 of the General Code. When rural school districts hereafter so created or which have been heretofore so created, fail or have failed to elect a board of education as provided in said section 4712, or whenever there exists such school district which for any reason or cause is not provided with a board of education, the commissioners of the county to which such district belongs shall appoint such board of education, and the members so appointed shall serve until their successors are elected and qualified. The successors of the members so appointed shall be elected at the first election for members of the board of education held in such district after such appointment, two members to serve for two years and three members for four years. And thereafter their successors shall be elected in the manner and for the term as provided by section 4712 of the General Code. The board so appointed by the commissioners of the county shall organize on the second Monday after their appointment."

This department held in opinion No. 368, rendered June 16, 1917, to Hon. Phil H. Weiland, Prosecuting Attorney, Mt. Gilead, Ohio:

> "That if at the time the county board of education creates a new district it appoints a board of education for such district, said board of education thereby becomes the legally constituted board for such district, but if, for any reason or cause the county board of education fails to appoint a board of education for such newly created district, then I am of the opinion that the board of commissioners have the right to appoint such board."

Said opinion harmonized the provisions of sections 4736 and 4736-1 G. C. in reference to the appointing of a board of education for a newly created district, the object being to provide for a board of education for such newly created district and to eliminate any contradiction in the provisions of said sections.

I also held in opinion No. 569, rendered to Hon. Dean E. Stanley, Prosecuting Attorney of Warren county, on the 28th day of August, 1917, that as between the general provisions of section 4712 and the special provisions of section 4736-1 G. C., the provisions of the latter section must control as to the first election had after a board has been appointed by the board of county commissioners, and I am of the opinion that the same conclusion should be reached where a board has been appointed by the county board of education, for in both instances it is the successors of the members of a board of education which was appointed in a newly created district, that are being elected at the first election for members of boards of education, which is held in such district after such appointment is made.

So that whether the procedure in relation to the election of members of boards of education in village districts or in relation to the election of members of boards of education in rural districts is followed, the same result is reached.

Answering your question, I advise you that two members of the board of education which was appointed for the newly created district by your county board of education shall be elected for two years and three members shall be elected for four years, and the nomination papers shall be filled accordingly.

Very truly yours,
JOSEPH McGHEE,
Attorney-General.

574.

APPROVAL—FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN ADAMS COUNTY.

COLUMBUS, OHIO, August 30, 1917.

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

DEAR SIR:—I am herewith returning, with my approval, final resolution relating to the improvement of

> "Section 'B,' West Union-Hillsboro road, inter-county highway No. 441, Pet. No. 2004-T, Wayne township, Adams county."

In this instance the application for state aid in the improvement of this road was made by the board of township trustees of Wayne township, said county, and provides for an appropriation by the township trustees in the sum of $2,450.00, said amount being one-fourth of the total estimated cost and expense of said improvement.

Section 1214 of the General Code provides in general terms for the division of the cost and expense of making such inter-county highway improvements, to-wit: that twenty-five per cent. thereof shall be paid by the county, fifteen per cent. thereof by the township or townships, and ten per cent. thereof by the owners of abutting property.

The amount appropriated by the township trustees covers only the proportion of the cost and expense to be borne by said township and by abutting property owners. However, I note that by section 1217 of the General Code it is provided that where the application for such improvement is made by the township trustees the state may assume all or any part of the county's proportion of the cost of said improvement.

The certificate of your department, over the signature of Mr. Hastings, chief clerk, is to the effect that there has been appropriated from the inter-county highway fund of the state highway department of Ohio the sum of $7,350.00 to the credit of Wayne township, Adams county. This sum covers not only the portion of the cost and expense of said improvement to be borne by the state of Ohio under the provisions of section 1213 of the General Code, but likewise the part apportioned to the county under the provisions of section 1214 G. C., and constitutes, therefore, a sufficient assumption by the state of the county's share under section 1217 of the General Code.

Said final resolution being in other respects in regular and proper form, the same is herewith approved.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

575.

APPROVAL—FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN WARREN COUNTY.

COLUMBUS, OHIO, Aug. 30, 1917.

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

DEAR SIR:—I am herewith returning, with my approval, final resolution relating to the improvement of

> "Section 'D,' Cincinnati-Chillicothe Road, inter-county highway No. 8, Pet. No. 3051, Warren county."

I note from the recitals of the resolution that the particular section of this road to be improved is 513 feet of new location, together with new culverts at point where I. C. H. No. 8 crosses under the tracks of the B. & O. S. W. R. R. about one-half mile southwest of the village of Blanchester. This description of the improvement indicates a deviation of the line of the road from the existing highway and calls into consideration the provision of section 1201 of the General Code, which provides that if the line of the proposed improvement deviates from the existing highway, the county commissioners or township trustees making application for such improvement must provide the requisite right of way.

Application for state aid in the present instance was made by the board of county commissioners of Warren county, and the final resolution having been found to be in other respects regular and in proper form, the same is approved on condition that the county commissioners of said county have secured the necessary right of way for the improvement in so far as the same deviates from the existing highway.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

576.

APPROVAL—FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN HIGHLAND COUNTY.

COLUMBUS, OHIO, Aug. 30, 1917.

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

DEAR SIR:—I acknowledge receipt of your communication of August 17, 1917, transmitting to me for examination final resolution relating to the improvement of

"Section 'K' of Hillsboro-Piketon road, inter-county highway No. 261, Petition No. 2488, Highland county."

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

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

577.

APPROVAL—FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN JACKSON COUNTY.

COLUMBUS, OHIO, Aug. 30, 1917.

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

DEAR SIR:—I acknowledge receipt of your communication of August 17, 1917, transmitting to me for examination final resolution relating to the improvement of

"Section 'F,' Chillicothe-Jackson road, inter-county highway No. 364, Pet. No. 2530, Jackson county."

With the exception that the name of the township or townships in which said improvement is located is not stated in the final resolution, the same is in regular and proper form. Subject to the correction of said final resolution by the insertion of the name of said township or townships, said final resolution is herewith approved.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

578.

DISAPPROVAL—FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN BROWN COUNTY.

COLUMBUS, OHIO, August 30, 1917.

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

DEAR SIR:—I am herewith returning, without my approval, final resolution transmitted to me under date of August 25, 1917, relating to the improvement of

> "Section 'A,' Ripley-Hillsboro road, inter-county highway No. 177, Pet. No. 2112-T, Union township, Brown county."

The application for state aid in the improvement of this road was made by the township trustees of Union township, Brown county, Ohio. It does not appear that the county is to bear any portion of the cost and expense of said improvement as provided for in section 1214 of the General Code, but with respect to this it sufficiently appears from the appropriation made by your department that the state has assumed the county's share of the cost and expense of said improvement, as provided for by section 1217 of the General Code.

The final resolution is disapproved for the reason that the section of said road approved by the state highway commissioner for improvement is not sufficiently definite. With respect to this point I note that the application of the township trustees of Union township, said county, filed with your department under date of April 29, 1916, described the section of the road with respect to which such aid is requested as follows:

> "Beginning at the intersection of I. C. H. No. 177, with the east corporation line of the village of Ripley, thence in a general northerly direction along the route of I. C. H. No. 177, passing through the villages of Red Oak P. O., Carlisle, Macon and Fincastle to where same intersects the boundary line between Highland and Brown counties, about two and one-half miles northeast of the village of Fincastle, in all a distance of 21.0 miles."

The final resolution recites that the state highway commissioner has approved said application and has caused a map of the following described section of said highway to be made in outline and profile, to-wit:

> "Beginning at the intersection of I. C. H. No. 177, with the east corporation line of the village of Ripley, thence in a general northerly direction along the line of I. C. H. No. 177."

Section 1195 of the General Code provides that if upon receipt of an application for state aid, the state highway commissioner approves of the construction, improvement, maintenance or repair of such inter-county or main market roads or any part thereof, he shall certify his approval of the application, *for any part thereof*, to the county commissioners of the township trustees, as the case may be.

This section contemplates that if the state highway commissioner approves of the construction or improvement of a particular inter-county highway, and is unable or does not elect to approve the application to the extent of the whole improvement set out in the application for state aid, he shall approve some definite part thereof, and,

in my opinion, the description of the particular section of said highway which the state highway commissioner has approved does not meet the intent and purpose of the section of the General Code above quoted.

I assume that in all probability the recital in the final resolution with respect to the section of inter-county highway No. 177 approved by the state highway commissioner for construction is but a clerical error, and that in point of fact the proper description of said section so approved for construction is a definite part of said road. If this be the case, I am of the opinion that the said recital may be corrected to show the fact.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

579.

APPROVAL—FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN MONROE COUNTY.

COLUMBUS, OHIO, August 30, 1917.

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

DEAR SIR:—I am herewith returning, with my approval, final resolution transmitted to me under date of August 27, 1917, relating to the improvement of

> "Section 'N,' Ohio river road, inter-county highway No. 7, Pet. No. 2715, Monroe county."

Aside from the fact that the name of the township or townships in which the proposed improvement is located is not set out in said final resolution, the same is in all respects regular and in proper form and, subject to the correction to be made as above indicated, is herewith approved.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

580.

COUNTY BOARD OF EDUCATION—NO RIGHT TO ESTABLISH HIGH SCHOOL—WHEN VILLAGE BOARD REFUSES TO DO SO—TUITION.

A county board of education has no right under section 7610-1 *G. C.* (107 *O. L.* 623) *to establish a high school in a village district, when the village board of education refuses to do so.*

A village which maintains no high school must pay the tuition of its high school pupils in other districts where they attend.

COLUMBUS, OHIO, August 30, 1917.

HON. CHESTER PENDLETON, *Prosecuting Attorney, Findlay, Ohio.*

DEAR SIR:—In your request of August 23 you ask my opinion on the following:

> "The school situation in the village of Arlington in this county has been very bad for a number of months. The electors of the village by an overwhelming vote recently rejected a bond issue for the building of a new school building, and the state department of public instruction has taken away

the charter from the Arlington high school because of inferior housing conditions. The industrial commission has ordered many repairs to be made upon the village school building before it is used for the elementary grades this fall.

"For reasons which seemed good to the village board of education it decided either to discontinue giving high school instruction during the coming school year, and make provision for the payment of the tuition of high school pupils in other districts, or to establish a third grade high school and pay the tuition for the advanced pupils of Arlington.

"A great many of the citizens of Arlington have objected to this conclusion of the village board, and it has resulted in the filing of the enclosed application with the county board of education by some of those interested.

"First: Under these circumstances what power, if any, does the county board have, under section 7610-1, to act over the heads of the village board of education and provide a first grade high school for the village?

"Second: Does section 7610-1 apply only to elementary schools, or does it include within its terms high schools as well?"

Section 7610-1 G. C. (107 O. L. 623) provides:

"If the board of education in a district fails to provide sufficient school privileges for all the youth of school age in the district, or to provide for the continuance of any school in the district for at least thirty-two weeks in the year, or to provide for each school an equitable share of school advantages as required by this title, or to provide suitable school houses for all the schools under its control, or to elect a superintendent or teachers, or to pay their salaries, or to pay out any other school money, needed in school administration, or to fill any vacancies in the board within the period of thirty days after such vacancies occur the county board of education of the county to which such district belongs, upon being advised and satisfied thereof, shall perform any and all of such duties or acts, in the same manner as the board of education by this title is authorized to perform them. All salaries and other money so paid by the county board of education shall be paid out of the county treasury on vouchers signed by the president of the county board of education, but they shall be a charge against the school district for which the money was paid. The amount so paid shall be retained by the county auditor from the proper funds due to such school district, at the time of making the semi-annual distribution of taxes."

The question is, can the county board of education, under the authority granted in the above quoted section, provide a first grade high school for the pupils of said village, since the village board of education has decided to have no high school or only a third grade high school and to pay the tuition for the advanced pupils of the village to some other first or second grade high school?

Section 7644 G. C. provides that each board of education shall establish a sufficient number of elementary schools to provide for the free education of the youth of school age within the district under its control; such elementary schools shall be located at such places as will be most convenient for the attendance of the largest number of the youth who attend such schools in such district; and that every elementary day school, so established, shall continue for not less than thirty-two weeks in any school year, nor more than forty weeks therein, and that all the elementary schools within the same school district shall be continued for the same length of time.

An elementary school is defined by section 7648 G. C. as one in which instruction and training are given in spelling, reading, writing, arithmetic, English language,

English grammar and composition, geography, history of the United States, including civil government, physiology and hygiene; but that nothing in said section shall abridge the power boards of education to cause instruction and training to be given in vocal music, drawing, elementary algebra, the elements of agriculture and other branches which they deem advisable for the best interests of the schools under their charge.

A high school is defined by section 7649 G. C. to be one of higher grade than elementary school, in which instruction and training are given in approved courses in the history of the United States and other countries; composition, rhetoric, English and American literature; algebra and geometry; natural science, political or mental science, ancient or modern foreign languages, or both, commercial and industrial branches, or such of the branches named as the length of its curriculum makes possible; also such other branches of higher grade than those to be taught in the elementary schools, with such advance studies and advanced reviews of common branches as the board of education directs.

Section 7663 G. C. provides that a board of education *may* establish one or more high schools whenever it deems the establishment of such a school or schools proper or necessary for the convenience or progress of the pupils attending them, or for the conduct and welfare of the educational interests of such district.

Section 7651 G. C. provides that all high schools of the state shall be classified into schools of the first, second and third grades.

Section 7748 G. C. provides that a board of education providing a third grade high school, as defined by law, shall be required to pay the tuition of graduates from such school residing in the district, at any first grade high school for two years, or at a second grade high school for one year. Should pupils residing in the district prefer not to attend such third grade high school, the board of education of such district shall be required to pay the tuition of such pupils at any first grade high school for four years, or at any second grade high school for three years and a first grade high school for one year, except that a board of education which maintains a third grade high school is not required to pay such tuition when the maximum levy permitted by law for such district has been reached and all the funds so raised are necessary for the support of the schools of such district.

Section 7747 G. C., as amended in 107 O. L. 625, provides that the tuition of pupils who are eligible for admission to high school and who reside in *village* or rural districts, in which no high school is maintained, shall be paid by the board of education of the school district in which they have legal school residence.

No question is raised in your inquiry as to the elementary schools and it is to the maintenance of this class of schools that the statute is mandatory. That is, it is provided that such board of education *shall* establish a sufficient number of elementary schools and there can be no doubt that if a board of education did not establish a sufficient number of elementary schools, then under the authority of section 7610-1 G. C. (107 O. L. 623), the county board of education has authority to provide such sufficient school privileges for all the school youth who might desire to attend such elementary schools. But the establishment of high schools is optional with a board of education. If such village board of education fails or refuses to establish a high school, then under the provisions of section 7747 G. C., as last amended 107 O. L. 625), such village board of education must pay the tuition of pupils who are eligible for admission to high school and who attend high school in another district.

You state that if a high school is established it will be only a third high grade school and that if the board of education establishes such third grade high school it will then pay the tuition of those high school pupils within the district who attend other high schools, and I assume from said statement that the limits of taxation have not been reached or that there will be sufficient funds in the hands of the board to cover what-

ever tuition expenses might arise in event that course is taken. This would provide all pupils in the district with proper school facilities and the conditions of section 7610-1 supra could not attach.

Many of the provisipns now contained in section 7610-1 G. C. (107 O. L. 623) were taken from original section 7610 G. C. (section 3969 R. S). and said section was considered in Board of Education v. Commissioners, 10 O. N. P. (N. S.) 505, the syllabus of which case reads as follows:

> "In fixing the school levy and in determining the number of schools which shall be maintained in a school district, a board of education performs judicial acts, and in the case under consideration did not adopt a policy so unmistakably wrong as to show a gross abuse of the discretion confided in it by law, and the county commissioners were not justified, therefore, in reversing the action of the board of education by ordering a larger tax levy and the establishment of another sub-district."

Henderson, J., on p. 507 says:

> "The school electors in each school district elect a board of education for their district schools. Into the hands of this board of education the law of our state commits, in general, all the powers granted respecting the maintenance of schools in such districts; * * * these powers are broadly vested in the local board, who, in the judgment of the law, are best qualified by residence, interests and local knowledge to exercise them carefully, wisely and with discrimination, to the best interest of the school children of the district, which is the ultimate aim and just purpose of all school legislation.
>
> "As a rule courts will not interfere with boards of education in the exercise of these functions. The control and management of the schools of this state is given to the boards of education by the statute, and these boards cannot be interfered with in any manner by the court unless there is a gross abuse of the discretionary powers given. * * * Nevertheless, the authority of the board of education is not final in all matters; a certain supervisory power (is) vested in the county commissioners by R. S. 3969 (G. C. 7610). * * * Some of these powers committed to the county commissioners after default on the part of the board of education, such as certifying the levy, hiring and paying teachers, etc., are ministerial merely in their nature, and that some of them are judicial. As to the ministerial acts, the law is simple; if the local board of education fails to perform them, the county commissioners step in, upon being advised and satisfied of such default, and perform them in the place and stead of the local boards.
>
> "As to the exercise of judicial powers the case is different. The county commissioners in such cases can not interfere merely by reason of a difference of opinion; they certainly have no higher powers than the courts have; that is, they can only interfere and assume the functions of the local board, when that board has acted, or declined to act, in such a way as to show gross abuse of discretion."

The county board of education in your case stands in the same position as did the board of county commissioners in the case above quoted, and following the reasoning therein I advise you that under the circumstances you relate, the county board of education has no power under section 7610-1 supra to act over the heads of the village board and establish a high school.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

581.

DISAPPROVAL—FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN BUTLER COUNTY.

COLUMBUS, OHIO, August 30, 1917.

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

DEAR SIR:—I am herewith returning, without my approval, final resolution transmitted to me under date of August 25, 1917, relating to the improvement of

> "Section 'I,' Hamilton-Middletown road, inter-county highway No. 179, Pet. No. 2121, Butler county."

Said final resolution is disapproved for the reason that it appears that the improvement of said highway is on application of the board of county commissioners of Butler county for state aid, but it does not appear that said section approved by the state highway commissioner for improvement constitutes any part of the improvement which was the subject of the application of the board of county commissioners. Said final resolution recites that on the 8th day of December, 1915, the board of county commissioners of said county made application for state aid in the improvement of the following section of a certain road:

> "Beginning at the intersection of I. C. H. No. 43 with the boundary line between Hamilton and Butler counties, thence in a northwesterly direction along the route of I. C. H. No. 43 to where the same intersects the south corporation line of the city of Hamilton, 'and located in the township of Fairfield, in all a distance of about 5.6 miles.' "

Said final resolution further recites that the state highway commissioner has approved said application and has caused a map of the following described section of said highway to be made in outline and profile, to-wit:

> "Beginning at the intersection of I. C. H. No. 179 with the eastcorporation line of the city of Middletown, thence in a northeasterly direction along the route of I. C. H. No. 179, to its intersection with the Butler-Warren county line, in all a distance of 16,803 feet, or 3.18 miles."

It is evident that the particular section of road approved by the state highway commissioner for construction is no part of the road for the improvement of which the board of county commissioners made application for state aid under date of December 8, 1915. The recitals of said resolution do not, therefore, show a compliance with the provisions of section 1195 of the General Code, which provides that if upon the receipt of an application for state aid, the state highway commissioner approves of the construction, improvement, maintenance or repair of such inter-county highway or main market roads, or any part thereof, he shall certify his approval of the application, *or any part thereof*, to the county commissioners or the township trustees, as the case may be.

For this reason the final resolution as it now reads is disapproved.

I am inclined to the view that in all probability the recital of the final resolution with respect to the particular road and section thereof contained in the application of the board of county commissioners for state aid is erroneous, and that in point of fact the road mentioned in said application was said inter-county highway No. 179, in said county. Though the recitals of said final resolution are stated as preliminary

to the contract of the commissioners of said county, wherein they agree to assume in the first instance the share of the cost and expense of said improvement over and above the amount to be paid by the state and guarantee the state highway commissioner that such money shall be available at such time or times as it may be needed in the construction of said highway, I am inclined to the view that a false recital in a matter of this kind binds nobody against the fact, and that the final resolution may be corrected so as to recite the fact as it exists with respect to the point above discussed.

Very truly yours,
JOSEPH McGHEE,
Attorney-General.

582.

CAROLINA DOVE—IS IN SONG BIRD LIST—SAME BIRD AS MOURNING DOVE.

The Carolina dove is in the song bird class in this state and comes under the provisions of section 1409 *G. C., and therefore under said section* 1409 *it is illegal to catch, kill, injure, pursue or have in possession, either dead or alive, or purchase, expose for sale, transport or ship to a point within or without the state, the Carolina dove at any time during the year.*

It is also illegal to sell any part of the plumage, skin or body of such bird or to have the same in possession for sale.

The above holding is made on the assumption that the statement of the acting chief of the United States bureau of biological survey, to the effect that the Carolina dove and mourning dove are one and the same, is correct.

COLUMBUS, OHIO, August 3, 1917.

HON. JOHN C. SPEAKS, *Chief Warden, Fish and Game Division, The Board of Agriculture, Columbus, Ohio.*

DEAR SIR:—I have your letter of August 20, 1917, as follows:

> "Much confusion exists with reference to the status of the Carolina dove. Will you kindly advise whether or not this bird is protected by Ohio laws?
>
> "Section 1412 enumerates a list of birds which 'shall be classed as game birds in contradistinction to all other birds.' The Carolina dove is not mentioned in this section.
>
> "Section 1409 enumerates the song and protected birds and contains a sweeping clause which includes 'any wild bird other than a game bird.'
>
> "Section 1413 provides that no person shall kill more than twelve Carolina doves in any one day.
>
> "The federal law does not protect the Carolina dove.
>
> "Many inquiries reach this office inquiring as to the status of the Carolina dove and whether it can be hunted and killed this fall. The last open season for dove shooting was from September 1st to October 20th, 1916."

I note from a letter of Hon. W. C. Henderson, Acting Chief, United States Bureau of Biological Survey, that the Carolina dove is the same as the turtle or mourning dove and that it is a wild bird, usually classed as a game bird.

Section 1412 G. C. (107 O. L. 17) enumerates the different birds and reads:

> "No person within this state shall catch, kill, injure or pursue with such intent a Hungarian or gray partridge, a ruffled grouse, Mongolian pheasant, English pheasant, ring-necked pheasant or other pheasant, before the fifteenth day of November, 1917, or after that date except from the fifteenth

day of November to the fourth day of December, both dates inclusive; a wild duck, wild goose, brant, or other wild waterfowl, except from the first day of September to the fifteenth day of December, both dates inclusive, and from the first day of March to the twentieth day of April, both dates inclusive; a wood duck before September first, 1918; a rail, coot, or mud hen, or gallinule except from September first to November thirtieth, both dates inclusive; a black breasted plover, golden plover, Wilson or jack snipe, the greater and lesser yellowlegs except from the first day of September to the fifteenth day of December, both dates inclusive; a woodcock, except from October first to November thirtieth; but no person shall catch, kill, injure or pursue with such intent a wild duck or other wild waterfowl on Sunday or Monday of any week, or shoot such wild duck or wild waterfowl before sunrise or after sunset of any day during the time fixed herein when it shall be lawful to kill them; no person shall catch, kill, injure or pursue with such intent any game bird or game animal on any Sunday. The birds named in this section shall be known and classed as game birds in contradistinction to all other birds and the sum of four thousand dollars is hereby appropriated for the propagation of quail for the years nineteen hundred and seventeen and nineteen hundred and eighteen."

Section 1409 G. C. (107 O. L. 17) provides:

"No person shall catch, kill, injure, pursue or have in his possession either dead or alive, or purchase, expose for sale, transport or ship to a point within or without the state a turtle or mourning dove, Virginia partridge, quail or bobwhite, sparrow, nuthatch, warbler, flicker, vireo, wren, American robin, catbird, tanager, bobolink, blue jay, oriole, grosbeck or redbird, creeper, redstart, waxwing, woodpecker, humming bird, killdeer, swallow, bluebird, blackbird, meadow lark, bunting, starling, redwing, purple martin, brown thresher, American goldfinch, chewink or ground robin, pewee or phoebe bird, chickadee, fly-catcher, gnat-catcher, mousehawk, whippoor-will, snow-bird, titmouse, gull, eagle, buzzard, or any wild bird other than a game bird. No part of the plumage, skin or body of such bird shall be sold or had in possession for sale."

It will be seen from section 1412, supra, that the Carolina dove is not a game bird in Ohio, since it is not enumerated in that section and since the section provides that birds

"named in this section shall be known and classed as game birds in contra-distinction to all other birds."

This language undoubtedly excludes the Carolina dove from the game bird class.

It will also be noted that section 1409 G. C. makes it unlawful to kill "a turtle or mourning dove" or to kill "any wild bird other than a game bird."

Since from the statement of the United States Bureau, the Carolina dove is the same as the turtle or mourning dove, it is clear that it comes within the purview of section 1412, and even if this statement of the department is incorrect, the Carolina dove is undoubtedly a "wild bird," and as section 1409 prohibits the killing of "any wild bird other than a game bird," it falls within this section.

Attention is called to the fact that section 1413 G. C. provides in part:

"Section 1413. * * * No person shall * * * kill in one day more than twelve * * * Carolina dove * * * ."

Sections 1409, 1412 and 1413 G. C. were originally sections 22, 25 and 26 of an act passed May 9, 1908 (99 O. L. 364-369, 370). At that time section 22 classed a "turtle or mourning dove" as a song bird and afforded it protection during the entire year.

Section 25 classed the Carolina dove as a game bird and allowed it to be killed within a certain period of the year.

Section 26 provided that no person should kill in one day more than twelve Carolina dove.

The Carolina dove and the turtle or mourning dove being one and the same bird, it is evident that at the time this act was passed those sections were in conflict, in so far as the Carolina dove was concerned.

Section 22, enumerating song birds, became section 1409 G. C. and remained as enacted in 99 O. L. until it was amended, 107 O. L. 17. However, this amendment did not affect the "turtle or mourning dove" since it remained on the song bird list.

Section 25 of the act referred to became section 1412 G. C. and was amended in 101 O. L. 161, 103 O. L. 167, 104 O. L. 169 and 106 O. L. 110.

But during all these enactments the Carolina dove remained classified as a game bird, the killing of it being authorized during a certain period of the year.

However, in 107 O. L. 17, the legislature, apparently realizing the inconsistency in the former act, removed the Carolina dove from the game bird list.

Section 26 of the act of 1908 became section 1413 G. C. and has remained in the same form ever since.

In other words, when the act of 1908 was passed, there was a conflict between sections 22 and 25, the legislature apparently not realizing that the mourning or turtle dove was the same as the Carolina dove. This conflict continued until 1917, when the legislature in 107 O. L. 17 struck the Carolina dove from the game bird list. This act upon the part of the legislature clearly classified the Carolina dove or turtle or mourning dove as a song bird.

Section 26 of the act of 1908, above referred to, which later became section 1413 G. C., has been allowed to remain unaltered and still retains the provision that no person shall kill in one day more than twelve Carolina dove. However, this provision is now without force. Section 1413 G. C. never authorized the killing of Carolina dove. The authorization is found in section 1412 and the lawful period therein set out. Section 1413 only restricted the number of Carolina dove which could be killed in any one day of the season prescribed in section 1412 G. C. When the Carolina dove was stricken from section 1412, the provision of section 1413, to the effect that not more than twelve Carolina dove could be killed in any one day, ceased to have application.

It is therefore my opinion that the Carolina dove is in the song bird class in this state and comes under the provisions of section 1409 G. C., and therefore under said section 1409 it is illegal to catch, kill, injure, pursue or have in possession, either dead or alive, or purchase, expose for sale, transport or ship to a point within or without the state, the Carolina dove at any time during the year. It is also illegal to sell any part of the plumage, skin or body of such bird or to have the same in possession for sale.

In rendering the above opinion, I assume that the statement of Hon. W. C. Henderson, Acting Chief, United States Bureau of Biological Survey, to the effect that the Carolina dove and the mourning dove are one and the same, is correct.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

583.

APPROVAL—CONTRACT FOR AKRON ARMORY.

COLUMBUS, OHIO, August 31, 1917.

HON. GEORGE H. WOOD, *Adjutant-General of Ohio, Columbus, Ohio.*

DEAR SIR:—There has been submitted to me for approval, in regard to the Akron Armory, a certain contract of A. J. Lab, of Akron, Ohio, with the Ohio State Armory Board, in the sum of $1,335.37, for the construction and completion of certain sidewalks and retaining walls for said Armory, together with the bond accompanying same.

I have examined said contract and bond and have approved same as to form.

The Auditor of State has certified that there is available out of the appropriations made for said Armory a sum sufficient for said contract and said certificate has been attached to same and a copy of said contract together with the bond accompanying same has been filed in the office of the Auditor of State.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

584.

SEPARATE SUPERVISION DISTRICT—MAY BE CONSOLIDATED WITH OTHER DISTRICT ANY TIME DURING YEAR—DOES NOT AFFECT DISTRICT WHERE SUPERINTENDENT HAS BEEN EMPLOYED FOR YEAR AND THE CERTIFICATE RELATIVE TO HIS SALARY HAS BEEN MADE, ETC.—SUPERINTENDENT—SALARY—STATE AID.

1. *The county board of education may grant the petition of the board of education of a separate supervision district to become a part of some other supervision district of the county school district at any time during the year, but such can not affect a supervision district after the district superintendent thereof has been employed for the ensuing year and the certificates with reference to his salary have been made and distribution made by the county auditor of the semi-annual appropriation of taxes.*

2. *A superintendent who gives none of his time to teaching can have no part of his salary included in an application for aid to weak school districts.*

COLUMBUS, OHIO, August 31, 1917.

HON. WALTER W. BECK, *Prosecuting Attorney, Lisbon, Ohio.*

DEAR SIR:—In your request for my opinion you submit the following questions:

> "A question has been presented to this office as to the interpretation of section 4740 G. C., relative to when 'the board of education of a separate village school district can by resolution petition to become a part of a supervision district of the county school district.'
>
> Can a separate village school district under section 4740 (amended by Senate Bill No. 239) receive state aid after July 1st for a superintendent who gives all his time to supervision. This separate village school district also expects to ask for aid for both superintendents and teachers."

Your first inquiry involves the consideration of section 4740 G. C. Said section was amended in 107 O. L., 622, and reads as follows:

> "Any village or wholly centralized rural school district or union of school

> districts for high school purposes which maintains a first grade high school and which employs a superintendent shall upon application to the county board of education before June 1st of any year be continued as a separate district under the direct supervision of the county superintendent *until the board of education of such district by resolution shall petition to become a part of a supervision district of the county school district.* Such superintendents shall perform all the duties prescribed by law for a district superintendent, but shall teach such part of each day as the board of education of the district or districts may direct."

That is to say, a village school district which is a part of a county school district may in any year be established as a separate supervision district provided the application therefor is filed with the county board of education prior to June 1st, and provided the district maintains a first grade high school and employs a superintendent; and when such application, which sets forth said conditions, is filed with the county board of education, then the county board of education shall establish such district as a separate supervision district. When once established as a separate supervision district such district continues as such separate supervision district until the board of education of the separate supervision district by resolution shall petition to become a part of some other supervision district of the county school district. In other words, it is not necessary that the application be made annually or that there be an annual filing in order that the district might continue as a separate supervision district, but it shall continue as such separate supervision district until the resolution above mentioned is passed by the board of education having control of such separate supervision district.

This department held in opinion No. 244, rendered to Hon. Benton G. Hay, Prosecuting Attorney, Wooster, Ohio, on May 5, 1917, that "it was not the intention that the filing was to be an annual affair;" for the section provides that such district shall

> "be continued as a separate district under the direct supervision of the county superintendent *until the board of education of such district by resolution shall petition to become a part of a supervision district of the county school district.*"

The statute uses the words "continued as a separate district;" but it was held in the same opinion above mentioned that said section meant to authorize the establishment of separate supervision districts under the provisions thereof and that said districts would not only continue but could be established thereunder as well.

Before said separate supervision district, which has heretofore been established as such, becomes then a part of some other supervision district of the county school district, some act is necessary to be performed on the part of the various boards; that is, on the part of the district board, the act of passing the resolution petitioning the county board to assign such district to some other supervision district of the county school district, instead of permitting such district to longer remain as a separate supervision district.

The question then is, when can such resolution be passed by the board of education of such separate supervision district, and when can it be acted upon by the county board of education? There is nothing in our laws which directs when the same shall be passed or which prevents the same from being passed at any time. The statutes do not say it shall be passed on any particular day or at any particular meeting, nor do they place any limitation in any manner upon the same, with the exception that the petition shall be by resolution of the board having control of the separate supervision district. I must conclude then that said resolution can be passed at any proper

and legal meeting of the board of education at any time during the year and that the same may be acted upon and become effective at any time during the year, unless such acts are prevented from becoming effective by other matters hereinafter referred to and considered.

It is suggested that on account of the language in section 4742 G. C., probably such resolution could not be passed after June 1 in any year. Said section provides for the re-election of district superintendents not less than sixty days before the expiration of the term of any such superintendent, but the language of said section is directory only, and if such district superintendent be not employed "not less than sixty days before the expiration of the term of such superintendent," such employ ment can be made after that time, and if such superintendent is not employed on or before September 1, by the presidents of the boards of education of the supervision district, or the members thereof, as the case may be, then the county board of education shall employ such superintendent. In other words, the failure of the presidents of the various boards of education or of the members of the boards, as the case may be, to elect a district superintendent prior to sixty days before the expiration of a term does not bar the electing power from performing the statutory act at a later date than June 1 in any year and up to September 1. But if such act is not performed by September 1, then the county board of education shall perform such act instead.

Said section, therefore, can not have the effect of preventing the passing of the resolution referred to in section 4740 G. C.

The question is raised as to just what effect the granting of said application by the county board of education will have upon the supervision district to which such separate supervision district is attached by such county board; that is, suppose a county board of education in any year has divided the county school district into supervision districts, and suppose further that the presidents or members of the boards, as the case may be, have met and elected a district superintendent for the year. Can the county board of education grant the application of the separate supervision district, thus change such supervision district and make the lines thereof different by adding another district thereto, after a district superintendent has once been elected?

If there is anything in our laws which will prevent such act on the part of the county board of education, that one thing would be the election of the district superintendent, for it is provided that when a district superintendent is elected his compensation shall be fixed at the same time and by the same authority which elects or appoints him, and that such salary shall be certified to the county auditor of the county in which such district is located.

The county auditor, when making his semi-annual apportionment of the school funds to the various village and rural school districts, shall retain the amounts necessary to pay such portions of the salaries of such district superintendents and other amount as may be certified by the county board of education, and such money shall be placed in a separate fund to be known as the "county board of education fund."

If such funds have been so distributed by the county auditor, or, in other words, retained at the time of distribution and another district is then added to such supervision district, then such district which is so added to such supervision district would pay no part of the salary of such district superintendent and would still be entitled to the services of such district superintendent. I do not believe that such was intended by the legislature, for it is provided in section 4744-2 G. C. that the county—

> "board of education shall also certify to the county auditor the amounts to be apportioned to *each district for the payment of its share of the salaries of the county and istrict superintendents*"

That is to say, each district of each supervision district shall pay its share of the salaries of the county and district superintendents and the amount necessary for the contingent expenses of the county board of education and such amounts are retained from the semi-annual distributions of the county auditor and as certified by the county board of education. It must therefore follow that the petition or resolution of the board of education of the separate supervision district can not be granted by the county board of education after such distribution is made by the county auditor.

It was held in opinion No. 2069, found in Vol. II of the opinions of the Attorney-General for 1916, p. 1855, that:

> "When a certification has once been made to the county auditor, according to the provisions of section 4744-2 G. C., 104 O. L. 142, no subsequent certification may be made for that year."

In other words, when the duty imposed upon said boards was once performed, there is no authority to act a second time.

I concur in the above opinion and applying the same to the matter before us, I am compelled to hold that when the presidents of the various boards which compose a supervision district, or the members thereof, as the case may be, have acted once in the election of a district superintendent and have fixed his salary and certified such acts to the county board of education, there is no authority for them to act again when there is no vacancy.

All the above then brings us to the conclusion that when the county board of education has divided the county school district into supervision districts and the presidents of the various boards of education, or the members thereof, as the variou boards of education, or the members thereof. as the case may be, of such supervision districts, have met pursuant to law and elected a district superintendent and fixed his salary, and have certified such acts to the county board of education, and the county board of education has certified such acts to the county auditor, and the county auditor has made his semi-annual apportionment of the school funds, any or all of such acts are of such a nature as to prevent a redistricting of the county during the same year which will in any manner affect or change such supervision district.

Answering your first question, then, I conclude that the county board of education may grant the petition referred to in section 4740 G. C. at any time during the year, subject, of course, to the provisions above set forth.

In your second question you inquire whether or not a village school district, which has been established as a separate supervision district and which employs a superintendent whom you say gives all of his time to supervision, can receive state aid. You state that said district expects to ask aid for both superintendent and teachers.

State aid, as far as teachers are concerned, is controlled by section 7595-1 G. C. Said section reads as follows and is found in its amended form in 107 O. L. 623:

> "Section 7595-1. Only such school districts which pay salaries as follows shall be eligible to receive state aid; elementary teachers without previous teaching experience in the state, fifty dollars a month; elementary teachers having at least one year's professional training, fifty-five dollars a month; elementary teachers who have completed the full two years' course in any normal school, teachers' college or university approved by the superintendent of public instruction, sixty dollars per month; high school teachers not to exceed an average of eighty dollars per month in each high school."

Nothing is said in said section in relation to superintendents or the salaries there

of, and therefore such salaries cannot be included in an application for state aid under said section, unless such superintendent can be considered as a teacher or unless state aid can be given to such person for only that part of the time in which he is engaged in teaching.

In your letter you state that such person will give all of his time to the duties as superintendent and I draw the inference from said language that you mean he will spend none of his time in teaching. If such be the case, no part of his salary should be included in the application for state aid to weak school districts, for only such school districts as pay salaries to teachers shall receive aid therefor.

That is to say, state aid for weak school districts is only for teachers' salaries and not superintendents' salaries.

I am not passing upon the question, however, as to whether or not it is legal for a board of education to direct the superintendent to do no teaching, but I am holding that if no teaching is done by him then no part of his salary shall be included in aid to weak school districts.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

585.

APPROVAL—TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE BY CITY COMMISSION OF SPRINGFIELD.

COLUMBUS, OHIO, August 31, 1917.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

RE:—Bonds of the city of Springfield, Ohio, in the sum of $28,834.00, issued by said city in anticipation of the collection of assessments to pay the cost and expense of improving certain streets in said city.

I have carefully examined the transcript of the proceedings of the city commission and other officers of the city of Springfield relating to the above bond issue, and I find said proceedings to be in all respects regular and in conformity with the provisions of the General Code and of the charter of the city of Springfield relating to said proceedings, and I am of the opinion that bonds properly prepared covering said bond issue in accordance with the bond form submitted will, when properly signed and delivered, constitute valid and subsisting obligations of said city.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

586.

APPROVAL—TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE BY CITY COMMISSION OF SPRINGFIELD.

COLUMBUS, OHIO, September 1, 1917.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

RE:—Bonds of the city of Springfield, Ohio, in the sum of $3,466.00, issued in anticipation of the collection of special assessments for the construction of certain sewers, three in number, of said city.

I have carefully examined the transcript of the proceedings of the city commission and other officers of the city of Springfield relating to the above bond issue, and I find said proceedings to be in all respects regular and in conformity with the provisions of the General Code and of the charter of the city of Springfield relating to said proceedings.

I am of the opinion that bonds properly prepared covering said bond issue in accordance with the bond form submitted will, when properly signed and delivered, constitute valid and subsisting obligations of said city.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

587.

PETITION FOR COUNTY DITCH—NAME MAY BE WITHDRAWN THEREFROM ANY TIME BEFORE ACTION TAKEN—MORTGAGOR QUALIFIED TO SIGN PETITION—BY WHAT COUNTIES ACTION TAKEN (1) IN LOCATING AND CONSTRUCTING DITCH (2) TO APPORTION COST.

A petitioner for a county ditch improvement may withdraw his name from the petition at any time before action has been taken on it.

As between mortgagor and mortgagee, the mortgagor is the land owner qualified to sign a petition for such improvement.

In the construction of a single county ditch or joint county ditch the action in locating and constructing the ditch is by the county or counties in which the improvement actually made is located. The commissioners of the other counties affected by the improvement only act and sit in joint session with such commissioners engaged in such construction for the purpose of determining the amount of contribution or apportionment to be paid by an upper county to a lower county for the benefit received or burden imposed.

COLUMBUS, OHIO, September 1, 1917.

HON. CHARLES C. CHAPMAN, *Prosecuting Attorney, Ashland, Ohio.*

DEAR SIR:—Under date of August 9, 1917, you submit the following inquiry:

"Sometime in May a petition was filed to straighten, deepen and widen a part of the Mohican creek, which is entirely in Ashland county; Muddy Fork creek flowing into Mohican river from the east, being in Wayne county.

"The petitioner originally obtained fifty-seven signers. Parties opposing

the same filed a remonstrance with ten names on it and obtained the signatures of these parties by misrepresenting the same. The petitioner went to see those parties who had signed the petition and also the remonstrance, and a sufficient number of them withdrew their name from the remonstrance thereby leaving fifty-one signers upon the original petition.

"Two of the parties on the petition hold a mortgage upon the land, which would be benefited and assessed for this improvement, but as we understand it, these two parties would not be interested in any other way.

"Therefore, the question in my mind is whether a party who would not be assessed and yet holds a mortgage on the premises has a sufficient interest in the same to be legally counted on the petition?

"Question No. 2: The petition itself calls for a joint county ditch, while, as I have stated above the ditch is entirely in Ashland county, and only furnishes an outlet for the Muddy Fork creek, which comes directly from Wayne county. Would the petition in your opinion ask for sufficient relief to proceed further with it as a joint county ditch?"

Your first question involves the right of one signing a petition for a river improvement to withdraw therefrom, and really involves two separate questions:

(a.) As to the right of a signer of a petition for such improvement to withdraw his name therefrom.

(b.) As between the mortgagor and the mortgagee which is the land owner for the purpose of signing such petition.

Authority is not wanting upon either of these questions and both seem to be definitely settled; upon the first question—the right to withdraw from the petition—the authorities seem conflicting. Upon comparison, however, they are reconcilable and consistent. The supreme court, passing upon the question in reference to a road proceeding under an act in force in 1875, held:

"3. Resident land holders, who have subscribed a petition praying for such road improvement, may, at any time before such improvement is finally ordered to be made by the board of county commissioners, withdraw their assent by remonstrance, or having their names stricken from the petition, and after withdrawal of consent, such persons can no longer be counted as petitioning for the improvement."

Hays et al. v. Jones et al., 27 O. S. 218.

This case is followed in *Makemson v. Kauffman et al.*, 35 O. S. 444, which was under the same statute; and again in

McGonnigle et al. v. Charles Arthur, et al., 27 O. S. 251.

The apparent contradiction arises in the following syllabus:

"After the jurisdiction of county commissioners, in the matter of laying out or altering a county road, has attached by the filing of a proper petition, etc., such jurisdiction can not be defeated by any number of the petitioners afterward becoming remonstrants against the granting of the prayer of the petition."

Grinnell v. Adams, 34 O. S. 44.

The explanation, however, is that in Hays, et al. v. Jones, et al. the statute au-

thorizing the improvement contained a provision that the order establishing it could not be passed unless a majority of the adjoining land owners had signed, and it was held that those who had withdrawn their names previous to that time by the signing of a remonstrance could not be counted. The case, however, clearly recognizes the right of a petitioner to withdraw from a petition.

In Grinnell v. Adams the statute was different and the decision is to the effect that after the petition is acted upon such withdrawal can not take place. The court said:

> "The filing of such petition, the giving of certain notice, and the execution of a bond to pay the expenses, in case the application shall fail, confer upon the county commissioners power to act in the premises, and the only question now before us is, after jurisdiction is thus conferred and assumed by the commissioners, is their power to proceed defeated by all or any number of such petitioners subsequently remonstrating against the prayer of the petition being granted."

They decided in the negative, and thereby fixed the limits of such right to withdraw confining it to such times as it had not been acted upon, and denying it after such action. This case is followed by the supreme court, placing the decision rather upon the ground of estoppel.

Columbus v. Slyh, 44 O. S. 484.

The court says:

> "The case is distinguished from *Hays v. Jones*, 27 Ohio St. 218. There, one of the land owners who had petitioned for the improvement, with others, signed a remonstrance before the petition had been acted on by the commissioners of the county; and this the court held he could do; not that he could do so after the order for the improvement had been made."

The court distinguished the case from Hays v. Jones, supra, but in doing so seemed to mistake the *ratio decidendi* of the latter case. As in that case the court based its decision upon the peculiar provision of the statute above referred to rather than upon the fact that the petition had not been acted upon. The result, however, of the decisions in these different cases is the very reasonable and common sense conclusion that the name of a petitioner may be withdrawn before any action has been taken upon it, but not after it has been ao acted upon as to confer jurisdiction upon the board or body to whom it is addressed to proceed with the improvement prayed for.

Your inquiry does not state whether the remonstrance in this case has been filed with the commissioners or not. It is not provided for by statute, however, and can have no legal effect otherwise than as constituting a withdrawal from the petition, so that if the remonstrance were never filed there would never be any withdrawal perfected; or, if it were filed the same principle above stated would be true in the case of the remonstrance just the same as the petition, and it would be cancelled or withdrawn in like manner leaving the names on the petition still in full effect and to be counted in its favor.

The last branch of this question is as to whether, when land is mortgaged, the mortgagor or the mortgagee is a proper person to sign the petition. The requirement as to such petitioners is contained in section 6446 General Code, above cited, and is that

> "it shall be signed by one of more *owners* of the lots or lands which will be drained or benefited."

so that the qualification for the petitioner is as to whether he is the owner of any lots or lands which will be drained or benefited by the improvement.

The question of whether the mortgagee or the mortgagor is such owner has not been uniformly decided one way or the other at all times. Originally a mortgage was taken strictly upon its terms and was drawn in the form of a conveyance of land therein described just as much as would be a deed in fee simple. In fact, it usually was a deed in fee simple, and is so in form at the present time. The payment of the debt incurred was a condition subsequent upon which the conveyance might afterwards be defeated and was construed as being in no manner different from any other condition having that effect. At an early date, however, the courts of chancery began to interfere and decreed such debts to be a simple security for the money, and so it came to be considered and held generally in England and in the different states. It has not, however, in Ohio entirely lost the character indicated by its form, and it has always been held that the mortgagee after condition broken might enter and take possession of the land and might maintain an action of ejectment against the mortgagor putting the latter off the land, and taking possession of it himself. This is the law today as much as it has ever been, but this remedy is seldom resorted to by reason of the fact that under the equitable doctrine above referred to as established, at any time after such eviction the mortgagor may still redeem by payment of the debt and interest, in doing which he is entitled to an accounting and credit of the value of the rents and profits received by the mortgagor while in possession, and as this equitable right would continue and might be enforced until defeated by the statute of limitation, the remedy by ejectment is seldom, if ever, resorted to.

Of course it follows that the mortgagee must be the owner in order to maintain an action of ejectment, and so we have this sort of double ownership recognized by a uniform line of decisions. In order to make such ownership consistent, however it is held that the mortgagee is the owner as between himself and the mortgagor, but as to all the world, aside from the mortgagee, the mortgagor is the owner of the land. This has been held and this line of decisions approved by the supreme court in a comparatively late case.

Bradfie d et al. v Hale et al., 67 O. S., 316.

This action was one in which the decision was upon the statute of limitations. However, the question of ownership is necessary to be determined and is determined. Price J., in the opinion collates and adjusts authorities on this subject, reference to which opinion is made instead of repeating such collation herein.

Quoting from the opinion of Judge Burket in

Kerr et al. v Kydecker, Adm'r. 51 O. S., 240,

he says:

> "The mortgage being, in equity, regarded as a mere security for the debt, the legal title to the mortgaged premises remains in the mortgagor, as against all the world, except the mortgagee, and also as against him until condition broken, but after condition broken the legal title as between mortgagor and mortgagee is vested in the mortgagee."

The ownership, therefore, of the mortgagor is recognized against all the world but the mortgagee. The mortgagee may assert his ownership by legal proceedings including the action of ejectment, or he may omit to do so and leave the mortgagor in possession and enjoyment of the property with all the attributes of ownership still treating his conveyance thereof as a mere security for his debt. He usually takes this course, and usually proceeds by foreclosure to have the property sold, equity of

redemption foreclosed and the debts paid out of the proceeds of the sale. The mortgagor being the owner as against all the world except the mortgagee, it follows that he has the ownership so far as concerns the interest of the county commissioners or other land owners interested in the construction of an improvement, and is therefore the proper owner to sign a petition for such improvement.

The answer to your second question is found in section 6537, as it is evidenced from your discussion of the number of petitioners that your question is whether fifty signatures are left. This is a comparatively new provision in the drainage laws, consisting of a very long section, the substance of which is as follows:

> "When a ditch or improvement is proposed, which will require a location in more than one county, or it is sought to improve the channel of a river * * * which improvement as proposed is in more than one county, application shall be made to the board of county commissioners of each of such counties, * * *. A majority of the joint board of commissioners, when in joint session, shall be competent to locate and establish such ditch or improvement, or to grant the order improving the channel of a river * * *. Or in case the members of the said joint board of commissioners when in joint session shall be equally divided on the locating or establishing such ditch improvement, or the granting the order for improving the channel of a river * * * said joint board shall certify that fact to the governor of the state of Ohio, who shall within twenty days appoint an experienced civil engineer * * *. Said civil engineer shall thereupon be competent to sit with said commissioners in joint session and vote on all questions relating to such proceedings as fully and completely as any commissioner of said joint board. * * *"

Your question does not state whether your petition is filed in more than one county. It does show that the whole improvement to be constructed lies in one county and that the benefit to be derived partly accrued to another county, known in other sections of the joint county ditch law as the "upper county." This case is provided for in section 6540 General Code under the provisions of which your proceedings as to locating and constructing the ditch would be a single county proceeding before the commissioners of Ashland county acting under the provisions of said section. Wayne county, under your statement of facts, would be required to help pay for the improvement. The method of enforcing, which payment would be under section 6541, to hold a general meeting of the commissioners of Ashland and Wayne counties in order to agree upon the amount to be paid by Wayne county, which meeting may be called in a manner pointed out by section 6542 General Code, and if there be an entire failure to agree, section 6543 General Code provides for the bringing of an action which in this case would be in Ashland county, and before the court of common pleas to determine the amount to be apportioned against Wayne county. Your question No. 2 states that the petition called for a joint county ditch from which it follows that it is a joint proceeding, and that the commissioners of both counties have been called upon to act upon the loaction of the ditch and is answered in the negative.

If it be an improvement constructed entirely in Ashland county and it is sought to require Wayne county to assist in paying for the construction on account of the benefits received by Wayne county the proceeding should be a single county ditch proceeding under favor of section 6540 et seq. It does not follow that a proceeding might not be had under this section in case it were a joint improvement constructed by Ashland county and a lower county. This question has been fully considered and an opinion rendered thereon to Hon. Hector S. Young, prosecuting attorney of Marion county, being opinion No. 551, to which we refer you.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

588.

APPROVAL—TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE BY COMMISSIONERS OF COLUMBIANA COUNTY.

COLUMBUS, OHIO, September 1, 1917.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

IN RE: Bonds of Columbiana county in the sum of $84,700 issued by the commissioners of said county in anticipation of taxes and assessments levied and assessed for the construction of the Lisbon-Bayard-Canton public roads.

I have carefully examined the transcript of the proceedings of the county commissioners and other officers relating to the above bond issue, and find said proceedings to be in all respects legal and in conformity with the provisions of the General Code relating to bond issues of this kind.

I am, therefore, of the opinion that bonds properly prepared covering said issue in accordance with the bond form submitted will, when signed by the proper officers of Columbiana county and delivered, constitute valid and subsisting obligations of said county.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

589.

BOARD OF EDUCATION—WHERE SCHOOL FUNDS DEPOSITED—LIABILITY OF MEMBERS WHEN NO DEPOSITORY DESIGNATED.

Where two banks are located in a school district, one with a capital stock of $50,000 *and the other with a capital stock of* $25,000, *the board of education may designate either or both of said banks as a depository for the school funds.*

Where more money comes into the hands of a board of education, through the issue of bonds, than can be lawfully deposited in the banks of such district by reason of the limit of the capital stock being reached, such board may contract with outside banks for the excess.

If a board of education fails or refuses to establish a depository for its school funds the members of such board shall become liable in a sum of at least two per cent. on the average daily balance of such funds and shall also be liable for any loss of such funds.

COLUMBUS, OHIO, September 4, 1917.

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

DEAR SIR:—You request my opinion upon the following proposition:

> "One of the school districts of Warren county, Ohio, which contains two banks, has in its treasury, arising from the sale of bonds for the purpose of erecting a school house, the sum of approximately $100,000.00. In addition to that sum, said district has a certain amount of funds arising from taxation for the use of the contingent and tuition funds of said district. There are located within this district two banks, one of which, I am told, has a capital of $50,000.00 and I understand a surplus in addition thereto. The other bank has a capital, I am informed, of $25,000.00. It would thus appear to be impossible for the board of education to comply strictly with the provisions of the

sections 7604 and 7605 inasmuch as section 7605 attempts to require the money to be deposited in the two banks within the district and the aggregate of the two banks being $75,000.00, being less than the amount on hand.

If the limitation prescribed in section 7604 is followed, an amount in excess of $25,000.00 could not be deposited in these two banks. On this state of facts I desire to inquire as follows:

First. Should all of the money be deposited in the two banks located within the district?

Second. Should $75,000.00 be deposited in the two banks located within the district and the balance be retained by the treasurer of the school district?

Third. Can the provisions of section 7607, in which the following language is used 'in all school districts containing less than two banks' be construed to mean in all districts containing less than two banks capable of receiving the amount of money the board of education has to deposit and if such construction should be placed on that section, should the board of education then deposit all of the funds in its hands in the two banks in said district?

Fourth. Should any part of the money be deposited with the county treasurer (the $100,000.00, it will be noted, never was in the hands of the county treasurer but was paid to the board of education direct by the purchaser of its bonds)?

Fifth. If any part of this money should be deposited with the county treasurer, what steps should be taken to get the same into his hands?

Sixth. What liability will the members of the school board be under with regard to this money if they follow the course above outlined?

Owing to the cost of building materials and some questions surrounding the site upon which the school building will be erected, it will probably be some time before any considerable part of the $100,000.00 mentioned above will be expended."

Section 7604 G. C. provides that within thirty days after the first Monday of January, 1916, and every two years thereafter, the board of education of any school district shall by resolution provide for the deposit of any or all moneys coming into the hands of its treasurer, but no bank shall receive a deposit larger than the amount of its paid in capital stock.

Section 7605 G. C. reads:

"In school districts containing two or more banks such deposit shall be made in the bank or banks, *situated therein* that at competitive bidding offer the highest rate of interest which must be at least two per cent. for the full time the funds or any part thereof are on deposit. Such bank or banks shall give a good and sufficient bond, or shall deposit bonds of the United States, the State of Ohio, or county municipal, township or school bonds issued by the authority of the state of Ohio, at the option of the board of education, in a sum not less than the amount deposited. The treasurer of the school district must see that a greater sum than that contained in the bond is not deposited in such bank or banks and he and his bondsmen shall be liable for any loss occasioned by deposits in excess of such bond. But no contract for the deposit of school funds shall be made for a longer period than two years."

Section 7606 G. C. provides that the board shall determine in the resolution mentioned in section 7604 the method by which bids shall be received and the au-

thority which is to receive them. The time for which such deposits shall be made and all details for carrying into effect the authority given by the sections of our laws which refer to the deposit of school funds.

Sections 7607 G. C. provides:

> "In all school districts containing less than two banks, after the adoption of a resolution providing for the deposit of its funds, the board of education may enter into a contract with one or more banks that are conveniently located and offer the highest rate of interest, which shall not be less than two per cent. for the full time the funds or any part thereof are on deposit. Such bank or banks shall give good and sufficient bond, or shall deposit bonds of the United States, the state of Ohio, or county, municipal, township or school bonds issued by the authority of the state of Ohio, at the option of the board of education, in a sum at least equal to the amount deposited. The treasurer of the school district must see that a greater sum than that contained in the bond is not deposited in such bank or banks, and he and his bondsmen shall be liable for any loss occassioned by deposits in excess of such bond."

Section 7609 G. C. provides:

> "When a depository is lawfully provided, and the funds are deposited therein, the treasurer of the school district and his bondsmen shall be relieved from any liability occasioned by the failure of the bank or banks of deposit or by the failure of the sureties therefor, or by the failure of either of them, except as above provided in cases of excessive deposits. Upon the failure of the board of education of any school district to provide a depository according to law the members of the board of education shall be liable for any loss occassioned by their failure to provide such depository, and in addition shall pay to the treasurer of the school funds two per cent. on the average daily balance on the school funds during the time said school district shall be without a depository. Said moneys may be recovered from the members of the board of education for the use and benefit of the school funds of the district upon the suit of any taxpayer of the school district."

Section 4763 G. C. provides in part:

> "* * In all village and rural school districts which do not provide legal depositories as provided in sections 7604 to 7608 inclusive, the county treasurer shall be the treasurer of the school funds of such districts."

Section 4782 G. C. provides that when the depository has been provided for the school moneys of a district, as authorized by law, the board of education of the district, by resolution adopted by a vote of a majority of its members, shall dispense with a treasurer of the school moneys and the clerk shall perform all the services and be subject to all the obligations required by law of the treasurer of such school district.

The object of the above sections of our laws is to provide for the depositing and safe keeping of the school funds of a school district. By the terms of section 7609 G. C. it is provided that upon the failure of the board of education of any school district to provide a depository according to law, the members of the board of education shall be liable for any loss occasioned by their failure to so provide such depository and that in addition to being liable for any such loss, such board of education shall pay to the treasurer of the school funds two per cent. on the average daily balance

on the school funds during the time such school district is without a depository, thus providing a penalty for the failure on the part of a board of education to establish a depository.

In the district you mention the board of education did attempt to follow the statutes in creating the depository. Two banks were located in said district and it is provided by section 7605 G. C. that in school districts which contain two or more banks the school funds of such districts shall be deposited in the bank or banks *which are situated in such district* and which at competitive bidding offer the highest rate of interest for said funds. There being two banks located therein, it was obligatory upon the board of education to select one or more of such banks as the depository for its school funds, unless the board of education finds that there has been collusion between or among the bidders for such funds, in which case the board may reject any and all bids and arrange for the deposit of such funds in a bank or banks outside of such district by entering into a contract with one or more banks which are conveniently located and which offer the highest rate of interest, but not less than two per cent. Such arrangements with such outside banks can not be so made if there has been no collusion between the bidders representing the banks located within the district, and from the fact that no such condition is mentioned by you, and from the further fact that both banks in your district have been awarded funds, I must conclude that there has been no collusion, and therefore the board was not only warranted in awarding funds to said banks, but was compelled under the law to do so.

It is provided that no greater sum shall be deposited in any bank than the amount of its paid in capital stock and you state that one of such banks has a capital stock and I am assuming that it is fully paid up, of $50,000.00, and that the other in said district has a capital stock of $25,000.00. So that the maximum amount which could be deposited in both of said banks would be $75,000.00. After said $75,000.00 was so deposited there remains in the hands of the acting treasurer $25,000.00 or more undeposited and with no legal depository under contract to receive the same.

As to this last amount, that is the amount of approximately $25,000.00 undeposited, there arises a condition in relation to which there is no bank in the district in which said amount can be deposited. One of two courses must be taken in relation to said amount; either the district must be considered as having no bank therein or such funds must be placed in the county treasury.

Section 4763 G. C. provides that where districts do not provide legal depositories as provided in sections 7604 to 7608 inclusive, the county treasurer shall be the treasurer of the school funds of such district. I take it that the provisions of said section mean that where a board of education of a district refuses or neglects to establish a depository as provided by said sections, then and in that event the county treasurer shall be the treasurer of the school funds. I do not believe said section was meant to apply to a district where the board of education acted within the law and established a depository or depositories within said district and deposited funds therein to the limits allowed by law, and still had other funds to be deposited. It is more particularly a case as though there existed a bank in a school district which had no capital stock and which on account of that or some other fact was unable to be designated as such depository. It is possible for more than two banks to be located in the school district with none of which a school board may contract for the deposit of its school funds.

It was held by my predecessor, Hon. Timothy S. Hogan, in opinion No. 189, found in the Annual Report of the Attorney-General for 1912, Vol. II, p. 1197, that:

> "A private bank owned by an individual has no 'paid in capital stock' and therefore can not be made a public depository * * * under section 7604 G. C."

Such bank could not bid to become a depository for the school funds, nor be contracted with as such depository. It would be, as far as establishing a depository is concerned, as though no bank existed within the school district.

I believe what applies to a bank having no capital stock in relation to being unable to contract as a depository also applies to a bank which has received the maximum amount allowed by law; that is, neither one being able to bid for the amount of money which remains undeposited in each class, it would be as though no bank was located in the district.

Therefore, if no bank is located in the district which can be designated as a depository, and if there are funds to deposit, then the board of education has a right to proceed under the provisions of section 7607 G. C. and enter into a contract with one or more banks which are conveniently located and which offer the highest rate of interest of not less than two per cent for the funds so to be deposited.

Answering your several questions then, in the order in which they are asked. I advise you:

1. Only that amount of money should be deposited in the two banks located within the district to which they are legally entitled according to law and in no event to exceed the amount of their paid in capital stock.

2. If the two banks located in the district are entitled to and do receive the amount of $75,000.00, then the balance should be deposited in a depository outside of the district which is legally established according to law.

3. The answers to your first and second questions answer your third.

4. The board of education should deposit none of said money with the county treasurer, but should establish a depository for same as provided by law.

5. Your fifth question is answered by the answer to the fourth.

6. If the members of your school board follow the courses outlined in this opinion, there will be no liability. If they do not provide legal depositories for the funds of said school district, they will be liable under the provisions of section 7609 G C. above quoted.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

590.

COMMISSION—APPOINTED TO CODIFY DITCH LAW—WHEN REPORT MAY BE FILED—COMPENSATION AND EXPENSES AFTER JANUARY 1, 1918.

1. *The commission appointed under and by virtue of an act found in* 107 *O. L.,* 611 *may file its report after January* 1, 1918, *if it finds itself unable to complete its report by said date.*

2. *The members of the commission would be entitled to their compensation and expenses while engaged on the work of the commission, after January* 1, 1918, *as well as before said date.*

COLUMBUS, OHIO, September 5, 1917.

HON. F. E. BAILEY, *Chairman of Ditch Codifying Commission, Wapakoneta, Ohio.*

DEAR SIR:—I have your communication of July 25, 1917, in which you ask for my opinion upon the following:

> "I desire to call your attention to senate bill No. 110, found in 107 O. L. at page 611, and to inform you that in the opinion of the commission, the

appointment of which is provided for by that bill, it will be impossible to give the necessary attention to the work imposed upon it and to make a full report by the first day of January, 1918, and ask an opinion of your office as to what authority remains in the commission under this legislation, to perform any of its duties after the first day of January, 1918; also whether or not the commission would be authorized to expend any of its appropriation of $3,000.00 after said date, for payment of any expenses and compensation which may be incurred and which are provided for under the act."

Section 1 of the act about which you inquire provides as follows (107 O. L. 611):

"Section 1. The governor is hereby authorized to appoint a commission of three members to consist of a county surveyor, a farmer and a lawyer, all of whom have had experience in ditch matters, to codify, consolidate and clarify the ditch laws of the state. The commission shall organize within ten days after appointment by electing a chairman and secretary, and shall make a report to the governor prior to January 1st, 1918."

Section 3 of said act reads as follows:

"Section 3. To carry out the provisions of this act there is hereby appropriated out of any moneys in the state treasury to the credit of the general revenue fund and not otherwise appropriated, the sum of three thousand dollars."

Section 2 of the act provides that each member of the commission shall be paid five dollars for each day actually engaged on the work of the commission, and shall also be paid his actual and necessary expenses incurred while engaged in such work.

The answer to your inquiry depends upon the question whether the language contained in section 1 of the act is merely directory, or whether it is mandatory—whether the provision that the report shall be filed with the governor prior to January 1, 1918, is material, or whether the date upon which the report is to be filed is immaterial. In order to answer this question I desire to note the construction which courts place upon matters similar to the one about which you inquire.

In Spencer's Appeal, 78 Conn. 301, the court say in the syllabus:

"The provision of general statutes, section 3718, which requires that the decision of the railroad commissioners upon any matter relating to the removal of grade crossings shall be communicated to the parties within twenty days after the final hearing, is directory only, not mandatory; and therefore a failure by the railroad commissioners to give such notice does not render their decision void."

In the opinion the court say:

"It is of course difficult to lay down a general rule to determine in all cases when the provisions of a statute are merely directory and when mandatory or imperative, but of the rules mentioned, the test most satisfactory and conclusive is, whether the prescribed mode of action is of the essence of the thing to be accomplished, or in other words, whether it relates to matter material or immaterial—to matter of convenience or of substance."

In Hurford v. The City of Omaha, 4 Neb. 336, the court lays down the two following fundamental principles in its opinion:

"1. That when the particular provision of the statute relates to some immaterial matter, where compliance is a matter of convenience rather than substance, or where the directions of the statute are given with a view to the proper, orderly and prompt conduct of business merely, the provision may generally be regarded as directory.

2. When the statutory provision relates to acts or proceedings immaterial in themselves, but contains negative terms, either express or implied, then such negative terms clearly show a legislative intent to impose a limitation, and therefore the statute becomes imperative, and requires strict performance in the mode or manner prescribed."

In People v. Lake Co., 33 Calif. 487, the court in the syllabus says:

"Where a statute specifies the time at or in which an act is to be done, it is usually held to be directory, unless time is of the essence of the thing to be done, or the act contains negative words, or shows that the designation of the time was intended as a limitation of power or authority or right."

Now, when we consider the nature of the act under consideration, the nature of the duties to be performed by the said commission, the use to which the results of the labor of the commission are to be put, and the language used in the first section of the act, I am clearly of the opinion that the language is merely directory.

(1) In the first place it is well to remember that the action of the commission is not at all final. Whatever the commission does must be acted upon by the general assembly and by the governor of the state, before it has any force or vitality.

(2) The results of the labor of the commission are for the use of the general assembly, that it may be better able to enact proper and necessary legislation in reference to ditches. The legislature has held its regular session and will not meet again in regular session until the first Monday of January, 1919. Hence the results of the commission's labor will not likely be used before the year 1919.

(3) There is nothing whatever in the section of a negative character—that is there is nothing to indicate that the report will not be effective provided it is not filed prior to January 1, 1918.

(4) The section provides that the commission shall make *a* report to the governor prior to January 1, 1918. This would seem to indicate that the commission might make, if it so desired, a partial report to the governor, and its final report later on; or in other words, it could postpone its entire report to a later date than January 1, 1918.

So that when we come to apply the law, as set out above, to the facts as we find them in this case, I am of the opinion the commission may, if it considers it necessary so to do, put off the filing of its report until after January 1, 1918. What the legislature undoubtedly desired is a report full and comprehensive in its scope, and if the commission finds it impossible to prepare such a report in the time limited within the statute, the legislature no doubt intended that a longer time might be used by the commission.

In People v. Earl, 42 Colo. 238, the court touches upon this matter and says in the syllabus:

"The requirements of a statute which are mandatory must be strictly construed, while the requirements which are directory should receive a liberal construction to the accomplishment of *the intent and purpose of the law.*"

The third section of the act provides for an appropriation of three thousand dollars to carry out the provisions of this act. This appropriation does not lapse until the first of July, 1919.

Section 2 of said act provides that each member shall be paid five dollars for each day actually engaged on the work of the commission and also shall be paid his expenses. Hence it is my opinion that the members of the commission would be entitled to their compensation and expenses from the time they are engaged in their work after January 1, 1918.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

591.

CANDIDATES—NOMINATED BY PETITION—FOR TOWNSHIP AND MUNICIPAL OFFICES—NOT REQUIRED TO PAY FEE—IN MUNICIPALITIES OF LESS THAN 2,000 POPULATION.

Candidates for township and municipal offices in municipalities which have less than two thousand population, when not nominated under the primary election act, do not come under section 4970-1 *General Code, and hence are not required to pay the fee provided by said section.*

COLUMBUS, OHIO, September 6, 1917.

HON. E. A. SCOTT, *Prosecuting Attorney, West Union, Ohio.*

DEAR SIR:—Under recent date you inquire as follows:

> "Under section 4970-1 G. C. does the words in said section 'for any office' apply to township officers and municipal officers, when not nominated as candidates at a primary election? My question for opinion is this: Are township and municipal candidates required to pay fee under the above section? All towns in Adams county are less than two thousand population and are not required to hold primary."

Section 4970-1 General Code provides as follows:

> "At the time of filing the declaration of candidacy for nomination for any office, each candidate shall pay a fee of one-half of one per cent of the annual salary of such office, but in no case shall such fee be more than twenty-five dollars. All fees so paid in the case of candidates for state offices, office of United States senator and congressman-at-large, shall forthwith be paid by the officer receiving the same into the treasury of state. All other fees shall be paid by the officer receiving the same into the treasury of his county to the credit of the county fund. No fee shall be required in the case of candidates for committeeman or delegate or alternate to a convention or for president or vice-president of the United States, nor for offices for which no salary is paid."

Section 4970 General Code provides, among other things, the form of the declaration of candidacy and the certificate which must be filed with the state supervisor of elections by the candidates for office seeking to have his name printed on the primary ballot. Both of these sections are found in chapter VI, title XIV, subdivision II (III) part first, and is headed "Primary Elections." Section 4951 General Code provides:

> "The provisions of this chapter shall not extend nor be applicable to the nomination of candidates for township offices or for the elective offices of

any municipality which has less than two thousand population as ascertained by the federal census next preceding such nominations unless the voter o such towns ip or municipality shall so petition the board of deputy state supervisors of elections which petition shall be filed at leas ninety days before the regular date for holding the primary to nominate the officers mentioned in this section and shall be signed by qualified electors of such township or municipality equalling in number at least a majority of votes cast in such township or municipality at the last general election therein. In the event that such petition is filed then all nominations of party candidates in such township or municipality shall be made as in this chapter provided."

Inasmuch as section 4951 expressly states that the provisions of this chapter shall not extend or be applicable to nominations of candidates for township offices or for elective offices of any municipality which has less than 2,000 population, and since you state that all of the towns in Adams county are less than two thousand population and are not required to hold primaries, it necessarily follows that section 4970-1 does not apply.

I therefore hold that township and municipal candidates who are not nominated at the primary elections are not required to pay any fee under section 4970-1 General Code.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

592.

TEACHER—MAY TEACH UNDER MAIDEN NAME—IF MARRIED SUBSEQUENT TO ENTERING INTO CONTRACT OF EMPLOYMENT.

A teacher who is single when a contract of employment is en'e ed into, but subsequently marries, may continue to teach under her name before marriage, if not prevented by a rule of the board rejecting all married women.

COLUMBUS, OHIO, Sept. 6, 1917.

HON. MILTON HAINES, *Prosecuting Attorney, Marysville, Ohio.*

DEAR SIR:—In your letter of August 29, 1917, you submit for my opinion the following proposition:

"Recently a rumor came out that a teacher re-employed as a 'Miss G.' was married before her re-employment but which fact was not known by the board of Education.

"The teacher being called before the board, she stated that she was married before her re-employment both this spring and also last spring; that is, she taught last year as a Miss G., signing reports and drawing her salary as Miss G. but in fact her name was Mrs. Gertrude G. Was the re-employment legal? Did the board re-employ a Miss G. as the minutes state? Could she take up her school work this fall as Mrs. G. when Miss G. was employed?"

General Code section 7705 provides that the board of education of a rural school district shall employ the teachers of the public schools of such district but nothing is said in said section, or in any other section of our school laws, that the teacher shall be employed by the family or any other particular name. So that, if there is any

inhibition in the use of any particular name by a person who engages himself or herself as a teacher, the same must come not from our statutory law but from the general law upon the subject of the use of names.

The word "name" is defined in Uihlein v. Gladieux, 74 O. S. 247, as:

> "The distinctive appellation by which a person or thing is designated or known; or, as better given by another lexicographer, that by which an individual person or thing is designated and distinguished from others."

So that, when a person is known or designated by an appellation, that appellation by which he or she is so designated or known is considered to be the name of such person. But it is not in all cases necessary that a person shall always use the name by which he is commonly designated or distinguished. He may, without abandoning his real name, adopt any name, style or signature wholly different from his own by which he may transact business, execute contracts, issue negotiable paper, and sue or be sued, and such assumed or fictitious names may be purely artificial names or may be names that are or may be applied to natural persons.

It is held in 29 Cyc. 271, that:

> "A man may lawfully change his name without resorting to legal proceedings and for all purposes the name thus assumed will constitute his legal name just as much as if he had borne it from birth."

And in Clark v. Clark, 19, Kansas, 522, that:

> "Where a married woman eloped with a man and was commonly known in the community in which she lived after elopement by the name of her paramour with whom she lived as a wife, she can sue in such reputed name."

It is further held in 29 Cyc. 271, citing Goodenow v. Tappan, 1 Ohio 60; Mack v. Schlotman, 4 Ohio Dec. Rep. 307; Donaldson v. Donaldson, 31 Cin. Law Bulletin 102, that it is sufficient in legal proceedings for a person to be designated by a name by which he is commonly known and called, even though it is not his true name.

So that, when in your case Mrs. G. continued to teach school under the name by which she was commonly known prior to the time of her marriage and by which name certificates to teach were issued to her, and by which name she entered into school teaching contracts, she was doing a thing which is entirely permissible by law.

It frequently happens that persons of certain professions or employments use names other than those by which they are commonly designated or distinguished. The family or surnames of many of the most noted authors, actors, journalists, etc. commonly remain entirely unknown and instead thereof those persons are known only by their professional or business names and the contracts which are entered into by such persons using such professional or business names are as valid as though they were entered into by the family name of such person. If, however, a board of education should make a rule that no married person should be employed as teacher in the public schools of a district, and if a person who desired to be so employed and knowing of such rule would falsely represent her name and thereby cause the board to believe that such teacher was a single person, when in fact such person was married this would be such a fraudulent condition that the contract would be on the part of the board of education a voidable one upon the discovery of same by the board. Your inquiry, however, sets forth no such condition or rule of your board and I am therefore compelled to conclude that none such exists.

So that, answering your question specifically, I advise you that the board did re-employ the teacher who was commonly known as Miss G. and that she can take up her school work this fall in that name if she so desires.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

593.

DOG AND KENNEL FUND—TO WHAT SOCIETIES COMMISSIONERS MAY AWARD SAID FUND.

1. *Under the provisions of section* 5653 *General Code, as found in* 107 *O. L.* 537 *the county commissioners may make an award of a part of the dog and kennel fund arising from the registration of dogs and dog kennels to more than one branch of the Ohio Humane Society, if there be more than one such branch in the county.*

2. *In order to make such award it is not required that the society receiving it be a branch of the Ohio Humane Society or have the approval of the latter, but only that it be incorporated and organized as provided by law and have one or more agents appointed in pursuance of law.*

COLUMBUS, OHIO, September 6, 1917.

HON. SAMUEL DOERFLER, *Prosecuting Attorney, Cleveland, Ohio.*

DEAR SIR:—On August 8th, you addressed the following communication to this department:

> "Sometime ago the county commissioners of this county awarded The Cleveland Humane Society and The Cleveland Animal Protective League equal sums out of the sheep fund and the action of the commissioners was then submitted to me for my approval.
>
> Inasmuch as there seems to be some ambiguity in the statutes concerning the right of the commissioners to make this award, I am respectfully asking for your opinion in this matter.
>
> The questions involved are as follows:
>
> 1. Can an award be made to more than one society in the same county?
>
> 2. If so, can an award be made to a society not under the supervision of The Ohio State Humane Society and not approved by such state society?
>
> The Cleveland Humane Protective League has not been approved by the state society, not having asked for such approval.
>
> You will note that section 5653 (104 O. L.), which is the statute that authorizes these awards provides that this fund shall be transferred as follows:
>
> 'In a county in which there is a society, for the prevention of cruelty to children and animals, incorporated and organized as provided by law which has one or more agents appointed in pursuance of law, all such excess as the county commissioners deem necessary for the use * * * of such a society.'
>
> It occurs to me by reason of the wording of the statute, that it is possible that the legislature had in mind but one society in each county and also had in mind that it was to be such a society as made itself a part of the general humane society scheme of the state."

Section 5653 General Code, referred to by you, was amended by the last general assembly March 21, 1917, (107 O. L. 537), and now reads as follows:

> "After paying all horse, sheep, cattle, swine, mule and goat claims at

the December session of the county commissioners, if there remain more than one thousand dollars of the dog and kennel fund arising from the registration of dogs and dog kennels for such year the excess at such December session shall be transferred and disposed of as follows: In a county in which there is a society for the prevention of cruelty to children and animals, incorporated and organized as provided by law, which has one or more agents appointed in pursuance of law, all such excess as the county commissioners deem necessary for the uses and purposes of such society by order of the commissioners and upon the warrant of the county auditor shall be paid to the treasurer of such society, and any surplus not so transferred to the county board of education fund at the direction of the county commissioners."

It is true that the humane society referred to in said statute is in the singular number, and that the statute appears to contemplate but one such society. It is not within the operation of section 10213 enacting among other things that words in the singular include the plural number, for said section by its express terms applies only to the civil code, yet while this statute is expressed in the singular number and seems to contemplate but one humane society in a county, this may be because the legislative intent finding expression in the language of the person who framed the act, was not so expressed because of a design to contribute only to humane purposes involved through one sole organization, but rather because they contemplate that which is doubtless the fact that there would be but one such society in each county, which is true of the smaller counties. Considered with exactness, the act does not prevent contribution to more than one society. It certainly does not expressly do so, and if at all it is only done by inference from the use of the name in the singular number. The portion of the section giving this power reads substantially as follows:

"In a county in which there is a society for the prevention of cruelty to children and animals * * * all such excess as the county commissioners deem necessary for the uses and purposes of such society by order of the commissioners * * * shall be paid to the treasurer of such society. * * *"

After that has been done once, is there anything in the statute to prevent its repetition in the event there be another such society? You still have a county in which there is such society unprovided for, and you still have a surplus. May the commissioners not turn over to such society all of such excess as they deem necessary for its uses and purposes? Is not the second transfer just as much within the purpose and object of the act, and just as much within its language as the first? The same object is there to be accomplished. The first society has been provided with all that the commissioners deem necessary for its uses and purposes. The situation is just the same as it was in the first place. You still have an excess and you still have a society of the proper description, and if there is still humane work for this last society to do, the letter and spirit of this act permits the transfer of funds to it. Of course, if the purpose is fully accomplished by the donation to the first society, then the second society would receive nothing because the commissioners would deem nothing necessary for them. It is the plain intent of the section that the commissioners may contribute such part of this excess fund for this purpose as they deem necessary to accomplish it, and that the residue shall go to the county board of education.

Your first question is, therefore, answered in the affirmative—an award can be made to more than one humane society in the county. Such has been the practice at least to some extent.

State ex rel v. Struble et al., 15 N. P. N. S. 233.

Your second question is whether such award can be made to such society not under the Ohio state humane society and not approved by such state society.

The requirement of the society as given in the above section is that it shall be

> "a society for the prevention of cruelty to children and animals incorporated and organized as provided by law, which has one or more agents appointed in pursuance of law."

We are therefore relegated to the statutes governing humane societies for the further consideration of what is requisite, which is chapter V, division VI, title IX, part second, (sections 10062 to 10084.) The local societies are provided by section 10066, which is as follows:

> "Branches of such society consisting of not less than ten members may be organized in any part of the state to prosecute the work of the societies in their several localities, under rules and regulations prescribed by this society. Societies organized in any county under the next following section may become branches of such society by resolution adopted at a meeting thereof called for that purpose, a copy of which resolution shall be forwarded to the secretary of state."

Also by section 10067 G. C., which is as follows:

> "Societies for the prevention of acts of cruelty to animals may be organized in any county, by the association of not less than seven persons. The members thereof, at a meeting called for the purpose, shall elect not less than three of their members directors, who shall continue in office until their successors are duly chosen."

It would seem strange that two adjacent sections of the statutes would provide for two similar societies for the same purpose and having the same powers but make them of a different nature and composed of different numbers of members. No reason is apparent for the two kinds of local humane societies and especially is no reason apparent why one of these should have ten members and others required to have only seven. This incongruity arose in the usual way and is an example of what is frequently found in the Ohio statutes.

The laws governing humane societies constitute chapter V, division VI, title IX, part second of the General Code, consisting of sections 10062 to 10084. The original act upon which this chapter is founded was passed March 29, 1875. Section 10066 was not found in it, but was subsequently enacted. The original act consisted of twenty-four sections, largely providing for the protection of animals and declaring the offenses constituting cruelty and the penalties for the same. Sections 12 and 21 provided for societies for the enforcement of law. Section 12 is present section 10067 providing for county societies. Section 21 provided for state societies, now constituting section 10062 and the main provisions of the three succeeding sections authorizing the appointment of agents etc.

From this it appears that the state society and the county society are entirely independent of each other, were created by the same act, and the county society by the prior section of that act. By the original act and by the present form of that act, omitting the excrescence which was afterwards attached to it, the act is cohesive, homogeneous and effective for the purpose for which it was passed.

Section 10066 is a part of an act passed March 21, 1887, vol. 84 O. L., page 207 the title of which is as follows:

"AN ACT.

"To amend section 3714 of the Revised Statutes of Ohio, so as to provide for changing the name of 'the Ohio state society for the prevention of cruelty to animals,' to 'the Ohio humane society,' and to more clearly define the purpose and scope of said state society and its auxiliaries."

Section 10066 G. C. provides for branches of the state humane society, and also provides that the county societies already existing may become branches of the state society in a certain manner. You therefore have certain branches of the state society with ten members and certain other branches with seven members.

No effectual connection with the state society is found in the act and none is found in the original act providing for the department because none was then intended so that the connection of the branches with the state society is nominal only and may exist in one case and not exist in another at random or at the caprice of the members constituting any particular society. Either kind of local society comes under the description in section 5653 as being "incorporated and organized as provided by law," and either is authorized by law to have one or more agents appointed in pursuance of law; therefore either is entitled to participate in the fund as provided in said section.

Your statement as to the Cleveland Humane Protective League is that it has not been approved by the state society and has not asked for such approval. It is impossible to tell from this whether it is organized according to law or not. As appears above, it might be organized according to law and have no connection whatever with the state humane society. It was probably the intention of the framer of the act of March 21, 1887, to exclude local societies not becoming branches of the state society from any of the privileges of the original act, but the provisions of section 10067 were not expressly repealed and are in the law now, have been carried into the General Code and are still in effect as a part of the legislative provisions upon the subject.

Your first question is therefore answered in the affirmative—an award can be made to more than one humane society in the county; and your second question is sufficiently answered above to the effect that a local humane society may be entitled to receive this appropriation without being a branch of the state society or having any approval therefrom.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

594.

BOARD OF EDUCATION—WHEN ADVERTISEMENT FOR BIDS FOR SCHOOL HOUSES MAY BE DISPENSED WITH—"URGENT NECESSITY"—DEFINED.

A board of education can only dispense with advertisement for bids for the building of a new school building in case there exists an "urgent necessity" therefor.

"Urgent necessity" means more than convenience and more than ordinary necessity, It is something which requires immediate action. Something that cannot wait. When pleaded as an excuse for a failure to comply with any statutory requirement, it must be decided by the circumstances of the particular case in which it arises.

The mere fact of itself that a school building is unfit for use of the schools does not create a case of urgent necessity, but, coupled with other circumstances, may do so.

COLUMBUS, OHIO, September 6, 1917.

HON. ADDISON P. MINSHALL, *Prosecuting Attorney, Chillicothe, Ohio.*

DEAR SIR:—In your letter of August 28, 1917, you request my opinion upon the following statement of facts:

> "The board duly passed a resolution submitting to the electors of the district the question of the issuance of bonds for the erection of a high school building. The bonds were issued after the election had been held and the question favorably passed upon. Plans and specifications were prepared, advertisement for bids duly made but no bids within the estimate were received. A high school has been in operation for severl years in a building wholly unfit for such purposes.
>
> Under section 7623 of the General Code of Ohio can the board now proceed to enter into contracts for the construction of the building costing about $8,000.00, without advertising for bids, and is this a case of 'urgent necessity' such as will permit of dispensing with the advertisement?"

Pertinent to said inquiry is section 7623 G. C., which provides in part as follows:

> "Section 7623. When a board of education determines to build, repair, enlarge or furnish a schoolhouse or schoolhouses, or make any improvement or repair provided for in this chapter, the cost of which will exceed in city districts, fifteen hundred dollars, and in other districts five hundred dollars, *except in cases of urgent necessity*, or for the security and protection of school property, it must proceed as follows:
>
> 1. For the period of four weeks, the board must advertise for bids in some newspaper of general circulation in the district, and in two such papers, if there are so many. If no newspaper has a general circulation therein, then by posting such advertisement in three public places therein. Such advertisement shall be entered in full by the clerk, on the record of the proceedings of the board. * * * *"

That is to say, the board, when it decides to build a school building the cost of which, in city districts, is more than fifteen hundred dollars, and in other districts five hundred dollars, shall advertise for bids in a newspaper or newspapers which have a general circulation in the district, or by posting notices in three public places, unless there is urgent necessity for such building or the security and protection of school property will not permit such advertisement or such posting of notices.

In your case it is not a question of the protection of school property or the security of the same, but only a question of "urgent necessity" in the building of a new school building for the accommodation of the schools of said district which is raised. The term "urgent necessity" has been defined in Mueller v. Board of Education 11 O. N. P. (n. s.) 113-120, as follows:

> "Urgent necessity is a very strong expression. It means more than convenience and more than ordinary necessity. It is something that requires immediate action. Something that can not wait. When pleaded as an excuse for failure to comply with any statutory requirement it must be decided by the circumstances of the particular case in which it arises. An illustration of a case which might arise under the statutes referred to would be where there is a single school building of which a number of pupils would be prevented from occupancy for a considerable time, and left without any chance for instruction, pending the construction or repair of such building."

It is thus to be noted that the facts in each particular case must determine what is meant by the expression "urgent necessity" in that particular case.

It was held by my predecessor, Hon. Timothy S. Hogan, in Opinion No. 1087 rendered to Hon. Hugh S. McCall, City Solicitor, Portsmouth, Ohio, on August 3 1914, found in Annual Report of the Attorney-General for 1914, Vol. 1, p. 1078, that:

> "If, therefore, before the schoolhouse in question must be used by pupils for school purposes the next school year, such changes, for example, in the floors and ventilating systems or otherwise as might seriously interfere with the use of the schools can be completed, and the remaining repairs, such as changes in the plumbing, toilet room equipment, drinking fountains, etc., can be undertaken and prosecuted without endangering the safety of the pupils or the efficiency of the schools during the session of the school, or can be done outside of school hours, in such event *it would be unlawful to dispense with competitive bidding as required by section* 7623. But if on the other hand, * * * the work can not be completed before it would be necessary to use the school building for the accommodation of pupils, and if such work as would remain undone at that time would be such as to interfere with the use of the schools, in that event I would be of the opinion that the board of education might lawfully declare a case of 'urgent necessity' involving the 'security and protection of school property' and proceed without inviting competitive bids."

You state in your letter that the high school building is wholly unfit for the purposes of a high school and for that reason there exists a case of urgent necessity. But it must occur to you that it would be impossible for you to complete said building prior to the time it would be necessary for you to use a school building for school purposes this year, and that either the old building would have to be used for high school purposes or arrangements made for the convenience of said high school pupils elsewhere than in said building this year. A case of urgent necessity might have existed at such time during the year as would have permitted the completion of the school building for service during the school year, but since said building can not be completed for use during this school year and arrangements must be made for housing such pupils this year, and ample time exists in which to advertise for bids and complete said new building before its use is necessary another year, then it would seem to follow that a case of urgent necessity does not exist and that said section 7623 G. C. must be followed in the matter of advertisement.

Holding these views, then, and from the citations above given, I advise you that I am of the opinion that a case of urgent necessity does not exist in the matter mentioned by you and that the board of education should advertise for bids as required by section 7623 G. C.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

595.

DENTIST—MAY ADMINISTER ANAESTHETICS.

The holder of a certificate to practice dentistry in the State of Ohio is permitted to administer anaesthetics both in the exclusive practice of dentistry and otherwise.

COLUMBUS, OHIO, Sept. 6, 1917.

The State Dental Board, Columbus, Ohio.

GENTLEMEN:—An inquiry is made for my opinion on a matter which is of such general importance to the profession of dentistry that I am directing my answer thereto to you and will send a copy hereof to inquirer. The question is as follows:

> "Under what circumstances are the members of the dental profession permitted to administer anaesthetics; that is, can a member of said profession administer anaesthetics except when performing a dental operation?"

Part I, title III, Div. 2, Ch. 22 of the General Code of Ohio provides for the appointment, organization and duties of the state dental board. Section 1321 of said chapter provides that each person who desires to practice dentistry in this state shall file with the secretary of the state dental board a written application for a license and shall furnish satisfactory proof that he is at least twenty-one years of age, of good moral character and present evidence satisfactory to the board that he is a graduate of a reputable dental college as defined by the board.

Section 1321-1 G. C. provides that the applicant shall also present with his application a certificate of the state superintendent of public instruction that he is possessed of a general education equal to that required for graduate from a first grade high school, and that the superintendent of public instruction shall issue to such applicant a certificate, without examining the applicant, provided such applicant presents the following credentials:

> "A diploma from an approved college granting the degree of A. B., B. S. or equivalent degree; a certificate showing graduation from a high school of the first grade, or from a normal or a preparatory school, legally constituted, after four years of study; a teacher's permanent or life high school certificate; a certificate of admittance by examination to the freshman class of an approved college granting the degree of A. B., B. S. or equivalent degree. In the absence of the foregoing credentials and before issuing certificate, the applicant shall be examined by said superintendent of public instruction, in such branches as are required from a first grade high school and to pass such examination shall be sufficient qualification to entitle such applicant to a certificate; provided, however, that the superintendent of public instruction may designate any county superintendent of schools to hold such examination at such times and places as may be necessary or convenient. * * * Granting of certificates by examination by said superin-

tendent of public instruction, and acceptance by said superintendent of certificates of admittance by examinations to the freshman class of approved colleges granting the degree of A. B., B. S. or equivalent degree, shall cease after January 1, 1919. This shall not apply to students already enrolled in accredited dental colleges."

If permitted to take the examination, such applicant shall, as provided by section 1322 G. C.,

"pass a satisfactory examination, consisting of practical demonstrations and written or oral tests, or both, in the following subjects: anatomy, physiology, chemistry, materia medica, therapeutics, metallurgy, histology, pathology, bacteriology, prothetics, operative dentistry, oral surgery, *anesthetics*, orthodontia and oral hygiene."

If such applicant passes the examination provided for in said chapter, he shall receive a license from the state dental board which entitles him to practice dentistry in this state.

Part I, title III, Div. 2, Ch. 20 of the General Code provides for the appointment, organization and powers of the state medical board. Section 1287, which is a part of said chapter, reads as follows:

"Section 1287. Nothing in this chapter shall prohibit service in case of emergency, or domestic administration of family remedies. This chapter shall not apply to a commissioned medical officer of the United States army, navy or marine hospital service in the discharge of his professional duties, or to a regularly qualified dentist when engaged exclusively in the practice of dentistry, or when administering anaesthetics or to a physician or surgeon residing in another state or territory who is a legal practitioner of medicine or surgery therein, when in consultation with a regular practitioner of this state; nor shall this chapter apply to a physician or surgeon residing on the border of a neighboring state and duly authorized under the laws thereof to practice medicine and surgery therein, whose practice extends within the limits of this state; provided equal rights and privileges are accorded by such neighboring state to the physicians and surgeons of Ohio residing on the border of this state contiguous to such neighboring state. Such practitioner shall not open an office or appoint a place to see patients or receive calls within the limits of this state."

When said section was amended as above quoted, on April 18, 1913, the words "or when administering anaesthetics" were added. An applicant for a license to practice dentistry in this state was compelled to pass an examination in anaesthetics and it was contended, prior to the time section 1287 G. C. was last amended, that because a knowledge of anaesthetics was required of dentists, the holder of a certificate to practice dentistry in this state was also permitted, on account of said required knowledge and said certificate, to administer anaesthetics generally.

But it was held in opinion No. 243, annual report of the attorney-general for 1912, Vol. I, p. 843, that—

"Regularly qualified dentists are authorized to administer anaesthetics in the exclusive practice of dentistry, but it is not lawful for them to administer anaesthetics in surgical operations not incident to the practice of dentistry."

Said opinion, it is noted, was rendered under the statute as it read prior to the

amendment as above quoted; that is, prior to the time the words "or when administering anaesthetics" were added. It must be presumed that said amendment shall have some effect, for if a dentist could administer anaesthetics in the practice of his profession of dentistry, without said amendment, then the amendment must give added rights, and I am of the opinion that it was intended by said amendment to give to the holders of certificates to practice dentistry in Ohio the right to administer anaesthetics generally, or, in other words, at such times as the administration of same is necessary.

Holding these views, then, I advise you that a person who has a certificate to practice dentistry in the state of Ohio is permitted to administer anaesthetics, not only in the exclusive practice of dentistry, but also when otherwise properly required to do so.

In opinion No. 528, rendered by me on August 14, 1917, I held that the giving of the various drugs to produce ansaethesia, when surgical operations are being performed, constitutes the practice of medicine under the provisions of the medical laws of this state and therefore could not be given by persons not admitted to the practice of medicine, but the question raised in this opinion as to the exemption of a dentist was not before me and was not answered in that opinion.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

596.

SCHOOL BOARD—ELECTION OF MEMBERS THERETO—VACANCY.

1. *Where an attempt was made to elect members of a school board at the November election in* 1915, *but said election was invalid, the members of said board whose terms would have expired on the first Monday of January,* 1916, *will hold until their successors are duly elected at the November election in* 1919, *and begin their terms on the first Monday in January,* 1920.

2. *A vacancy does not occur in office where an incumbent is duly authorized to hold over and is legally qualified to perform the duties thereof.*

COLUMBUS, OHIO, September 6, 1917.

HON. HENRY W. CHERRINGTON, *Prosecuting Attorney, Gallipolis, Ohio.*

DEAR SIR:—You ask my opinion upon the following proposition:

> "At the November election, 1915, there was an election held for members of the board of education of Clay township, Gallia county, Ohio, rural school district. Prior to the time the election was held a member of the board had died, another had resigned, and the terms of two members had expired. There was an attempt made to elect four members of the board, and for various reasons in accordance with an opinion rendered me by Attorney-General Turner, the attempted election was declared null and void.
>
> "The situation confronting the election of officials this year is as follows: Owing to the illegal election held in 1915, two members, whose terms would have otherwise expired January 1, 1916, held over. Two members were appointed to fill the vacancies caused by the death of one member and the resignation of another. The term of the fifth remaining member expires January 1, 1918. The terms of the two members appointed to fill the un-

expired terms will expire January 1, 1918. It is my opinion that the terms of the two members who held over will expire immediately after the November, 1917, election or on January 1, 1918.

"I have advised the board of education that it will be necessary to elect five members of the board of education at the coming election. If this is correct, I desire to inquire for what length of time each member shall be elected. I also desire to inquire what should be printed on the ballots, and in the notices of election."

On account of the invalid election in 1915, two members of said board of education, whose terms would have expired on the first Monday in January, 1916, held over, and will so hold over until their successors are elected and qualified, for section 4745 G. C. provides:

"The terms of office of members of *each* board of education shall begin on the first Monday in January after their election, and each such officer shall hold his office for four years except as may be specifically provided in chapter II of this title *and until his successor is elected and qualified.*"

Chapter 2, which is referred to in said section 4745 of the title of which said section is a part, refers to city school districts.

The question then to determine is, when will the successors to said two members be elected?

Section 4712 G. C. provides:

"In rural school districts, the board of education shall consist of five members elected at large at the same time township officers are elected and in the manner provided by law, *for a term of four years.*"

Section 4748 G. C. provides that:

"A vacancy in any board of education may be caused by death, nonresidence, resignation, removal from office, failure of a person elected or appointed to qualify within ten days after the organization of the board or of his appointment, removal from the district or absence from meetings of the board for a period of ninety days, if such absence is caused by reasons declared insufficient by a two-thirds vote of the remaining members of the board, which vote must be taken and entered upon the records of the board not less than thirty days after such absence. Any such vacancy shall be filled by the board at its next regular or special meeting, or as soon thereafter as possible, *by election for the unexpired term. A majority vote of all the remaining members of the board may fill any such vacancy.*"

So that the terms of office of such members being for four years, those terms would have ended on the first Monday in January, 1916, if their successors had been elected and had qualified, but no successors having been elected and hence none being able to qualify, the incumbents held over and will so hold over until their successors are elected and do so qualify.

If a vacancy existed at the end of the term of said members, or, in other words on the first Monday in January, 1916, then said vacancy would be filled by the remaining members of said board, who would elect successors to such two members for the remainder of the unexpired term. That would be for the term ending on the first Monday in January, 1920, because there was no vacancy in the terms of the members which ended on the first Monday in January, 1916, and any such vacancy which could

have existed would have been in the term which began on the first Monday of January, 1916, and ended on the first Monday in January of 1920. But no such vacancy existed because said members must hold until their successors are elected and qualified and the offices have been regularly filled by those who were elected thereto and who were in possession of said offices and legally qualified to perform the duties thereof.

Bearing directly upon this question is the case of State v. Metcalfe, 80 O. S. 261 where the following language is used:

> "It has never been the policy of the state to create vacancies in office for the mere purpose of giving somebody an opportunity to fill them. Piling vacancy upon vacancy is an anomaly. * * *
>
> The policy to discourage the needless creation of vacancies is recognized in a number of decisions of this court. As instance the State, ex rel., v. Howe, 25 Ohio St. 588, where it is held by McIlvaine, J., that the general assembly may provide against the recurrence of vacancies by authorizing *incumbents to hold over their terms in cases where the duration of their terms is not fixed and limited by the constitution,* and that from this it results that the evils contemplated as likely to result from vacancies in office are guarded against by confining the exercise of the power to fill vacancies to those cases where no one is authorized by law to discharge the public duties; which, we think, is the constitutional scope of that power. Also, by the case of the State, ex rel., v. Bryson, 44 Ohio St., 457, where it is observed that the office (that of fire engineer) could not be regarded as vacant *while filled by one lawfully entitled to it, nor could an appointment made ostensibly to fill a vacancy create one.* Also, in The State, ex rel., v. McCracken, 51 Ohio St. 123, where, at page 129, it is observed that: 'The recognized policy of the state is to avoid, if practicable, the creation of a vacancy in an elective office, and where the right to hold over is given in language that is not limited, and the same is not otherwise qualified, a court would hardly be justified in seeking for an unnatural construction by which a limit would be placed upon the right. *In contemplation of law there can be no vacancy in an office so long as there is a person in possession of the office legally qualified to perform the duties.*' "

The above decision was rendered in a case in which the title to a judicial office was in question and in that kind of case section 13 of Article IV of the constitution applies. Said section reads:

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

That is to say, when a *vacancy* occurs in a judicial position, the same shall be filled by appointment, and such appointee shall hold said office only until his successor is elected and qualified, and such successor shall be elected for the unexpired term and at the first annual election which occurs more than thirty days after such vacancy occurs.

No such provision, as underscored in the last above quoted section, is contained in the school laws or in the laws which apply to the election of members of boards of education, for if a vacancy occurs in a board of education, the electors of the district are given no authority to fill such vacancy. The vacancy is filled by the majority vote of the remaining members of such board and the person elected to fill such vacancy holds for the remainder of the term which he is elected to fill.

However, if the decision in State v. Metcalf, supra, is followed, no vacancy existed and none will exist until the first Monday in January, 1920, for the term of office of a member of a board of education being four years, and the term which is being filled by the members who are holding over, having begun on the first Monday in January, 1916, it will not end until the first Monday in January, 1920, and the election of a successor to the persons now holding said offices will be had at the regular election in November, 1919.

It is urged, however, that the successors to said two members might be elected for the term of two years—that is to fill an unexpired term—and that section 10 G. C. is authority for same. Said section reads as follows:

> "Section 10. When an elective office becomes *vacant*, and is filled by appointment, such appointee shall hold the office until his successor is elected and qualified. Unless otherwise provided by law, such successor shall be elected for the unexpired term at the first general election for the office which is vacant that occurs more than thirty days after the vacancy shall have occurred. This section shall not be construed to postpone the time for such election beyond that at which it would have been held had no such vacancy occurred, nor to affect the official term, or the time for the commencement thereof, of any person elected to such office before the occurrence of such vacancy."

Said section manifestly can not apply for various reasons:

First, the elective office could not become vacant as long as there was a person in possession of the office legally qualified to perform the duties, and there was such person so in possession of the office in this case, who was holding over and was legally qualified to perform the duties thereof.

Second, the school laws provide another means of filling the vacancy. So that it is otherwise provided by law how a successor to an appointee shall be selected, and the provisions of said section 10 could not apply thereto.

Third. If the said section 10 were followed, the official term would be affected; that is the term would be for two years instead of four years, and there is no provision in our school laws for any such short or unexpired term.

I must hold, therefore, that the provisions of section 10 G. C. can not apply to a case of this nature. The only provisions of our school laws which permit an election to be held for a short term in rural districts are the provisions of section 4736-1 G. C., where it is provided that at the first election of members of a board of education in a newly created district and where the county commissioners have appointed a board, two members shall be elected to serve for two years and three for four years, and this department held in opinion No. 573, rendered August 29, 1917, to Hon. Otho W. Kennedy, Prosecuting Attorney, Bucyrus, Ohio, that said provisions also apply where a board has been appointed in a newly created district by the county board of education. And in no other case is it provided that members of a board of education be elected for a term other than the regular four year term.

I must advise you, therefore, that the two members whose terms expired on the first Monday of January, 1916, and who are holding over, will continue to so hold said positions until the first Monday in January, 1918, and that their successors shall be elected at the November election in 1919. As to the other three members, there can be no question. Their terms will expire on the first Monday in January, 1919. Their successors should be elected for the regular term of four years at the election which is held in November of this year and nominations should be made accordingly.

Candidates for members of boards of eduaction shall be nominated as provided by section 4997 G. C., in which section it is provided that nominations of candidates

for the office of members of boards of education shall be made by nominating papers signed in the aggregate for each candidate by not less than twenty-five qualified electors of the school district, of either sex.

Such nomination papers shall be filed with the board of deputy state supervisors of elections as provided by section 5004 G. C., which reads in part as follows:

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

Section 5032 G. C. provides that the names of candidates for members of the board of education of a school district, however nominated, shall be placed on one independent and separate ballot without any designation whatever except for member of board of education and the number of members to be elected.

Section 5018-1 G. C. provides that where the names of several persons are grouped together upon the ballots as candidates for the same office, the ballot shall contain, immediately above the names of such candidates, the words, "Vote for not more than ----------." The blank space shall be filled with the number representing the persons who may lawfully be elected to such office.

In your case the word "three" will be written in the blank space.

Section 4998 G. C. provides that when nominations of candidates for members of the board of education have been made by nomination papers filed with the board of deputy state supervisors, then the board of deputy state supervisors shall publish, on two different days prior to the election, a list of the names of such candidates in two newspapers of opposite politics in the school district, if there be such printed and published therein, and if no newspaper is printed in such district, the board shall post such list in at least five public places therein.

Section 4838 G. C. provides that all elections for members of boards of education shall be held on the first Tuesday after the first Monday in November of odd numbered years; and section 4839 G. C. provides that the clerk of each board of education shall publish a notice of all such elections in a newspaper of general circulation in the district, or post written notices thereof in five public places in the district at least ten days before the holding of such election, and that such notices shall specify the time and place of election and the number of members of the board of education to be elected and the term for which they are elected.

To recapitulate then and answering your questions specifically, I advise you:

1. The two members who are holding over will continue to hold their positions until the first Monday in January, 1920, and their successors should be elected at the November election in 1919.

2. The three members whose terms will expire on the first Monday of January, 1918, will be succeeded by the same number which should be elected at the November election this year for terms of four years.

3. The ballot should contain, immediately above the names of the candidates thereon, the words "Vote for not more than three."

4. The notices of such election shall be given by the board of deputy state supervisors of elections and by the clerk of said board of education as above provided.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

597.

TITLE GUARANTEE AND TRUST COMPANY—INSURING TITLES.

Under section 9850 General Code a title guarantee and trust company may not do the business of insuring titles generally, but when it gives an abstract or certificate as to a title it may then guarantee such title to be perfect.

COLUMBUS, OHIO, September 7, 1917.

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

DEAR SIR:—I have your communication of August 8, which reads as follows:

> "Supplementing our question to you under date of June 1, 1917, relative to section 9850 of the General Code, we desire to know if a title guarantee and trust company is authorized by law to issue its guarantee or policy of insurance to owners of real estate, or other interested parties, the titles of which real estate, said company has examined to its satisfaction but as a matter of fact has not issued an abstract of title therefor.
>
> We are enclosing herewith as a reason for this supplemental opinion a letter addressed to the Bankers Guarantee Title & Trust Co. of Akron by the comptroller of the Metropolitan Life Insurance Co. of New York. We are also enclosing a supplemental opinion which will be satisfactory to said company if you should find that such companies are authorized to insure or guarantee titles of real estate for which they have not actually issued an abstract of title."

The former inquiry to which you refer was in reference to the nature of the business of a title guarantee and trust company, as to whether it were guaranty or insurance, and it was answered that it was guaranty in its nature, although from the standpoint of benefit to the guarantee or abstract-holder it was not different from insurance; that it differed from insurance only in the nature of the business transacted, and from the fact that the guaranty was collateral to some other transaction taking place between the parties; whereas, insurance itself is the main contract. This being the nature of the inquiry, the opinion stated that the guaranty was an incident in each case to an abstract of title furnished. It was not meant thereby to hold that there should always be an actual abstract of title made, nor does the statute creating such company so contemplate.

Section 9850 quoted in that opinion is as follows:

> "A title guarantee and trust company *may prepare and furnish abstracts and certificates of title to real estate,* bonds, mortgages and other securities, and guarantee such titles, the validity and due execution of such securities, and the performance of contracts incident thereto, make loans for itself or as agent or trustee for others, and guarantee the collection of interest and principal of such loans; take charge of and sell, mortgage, rent or otherwise dispose of real estate for others, and perform all the duties of an agent relative to property deeded or otherwise entrusted to it."

Its business is not at all confined to the making of abstracts even in guaranteeing titles. It may prepare and furnish abstracts and certificates. The difference between abstracts and certificates is well known. The one sets out the substance of all that the records show in reference to a title; the other merely states the result as to whether

such title be complete or otherwise. It was held in that opinion that the guaranty of a title should be an incident to the abstract, which is usually the case. However, it is perfectly plain that the abstract need not be furnished; the guaranty should accompany the certificate of title, which certificate is a mere opinion or statement which amounts to no more than an opinion. The correctness of this opinion may be guaranteed by the company just as much as if a complete abstract were made and furnished.

It was held in that opinion substantially that such companies are not authorized to issue policies of insurance or make contracts warranting titles as an original agreement. Such business would be insurance pure and simple and is a character of insurance not authorized by the insurance laws of Ohio. Such company, however, without furnishing or even making such abstract, may give its opinion upon a title and guarantee the correctness of that opinion. In such case the guaranty is collateral to the service rendered,—the opinion given.

The purported expression of opinion furnished you in writing and signed by you and attached to the inquiry contains the following statements:

> "I am of the opinion that The Bankers Guarantee Title and Trust Company of Akron, Ohio, is authorized to guarantee or insure titles by an instrument in writing direct, and without an abstract of title.
>
> "I am of the opinion that companies of the character of The Bankers Guarantee Title & Trust Company of Akron, Ohio, incorporated under the laws of Ohio, are authorized to guarantee, by instruments in writing, the title to real estate located in the state of Ohio, separate from and without abstracts of title."

This language, while literally true, is calculated to give an impression of broader authority than actually exists. It is calculated and intended as a certificate that such company may do an insurance business pure and simple. This is not the law. While they do furnish insurance in the guaranty they give, such guaranty must be collateral to another transaction which they are authorized by law to have, that is, to passing upon titles to real estate. Whenever they do that they may guarantee the result. It is not intended to hold that they must make such examination of the title as would be required to make an abstract, showing a complete title back to the government, but only that they should go so far as in their own judgment may be necessary to justify a favorable opinion, which when they have given they may guarantee—that is, they may guarantee that the title concerning which they have given such certificate or opinion is good.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

598.

DEPUTY STATE SUPERVISORS OF ELECTIONS—ARE NOT COUNTY, TOWNSHIP OR MUNICIPAL OFFICERS—CORPORATION—OF WHICH MEMBER OF SAID BOARD IS AN OFFICER MAY PRINT ELECTION SUPPLIES.

1. *The conduct of elections belongs to the state, and is under the control of state officers and state agencies.*

2. *Deputy state supervisors of elections are neither county, township nor municipal officers, neither are they connected with the county, township or municipality within the meaning of sections* 12910 *and* 12911 *General Code.*

3. *Where an officer and stockholder of a printing and publishing corporation is a member of the board of deputy state supervisors of elections, such printing and publishing company is not prohibited under sections* 12910 *and* 12911 *G. C. from contracting for the printing of the ballots and other election supplies for such deputy state supervisors of elections.*

COLUMBUS, OHIO, Sept. 7, 1917.

HON. C. M. CALDWELL, *Prosecuting Attorney, Waverly, Ohio.*

DEAR SIR:—I am in receipt of your letter of August 27, 1917, in which you state

"The Waverly Watchman Publishing Company is a corporation under the laws of Ohio, printing and publishing a newspaper at Waverly, also doing job printing, etc.

One of the officers and stockholders of this company has been appointed deputy supervisor of elections for this county.

Question: If this stockholder and officers of said publishing company acts as deputy state supervisor of elections, can the publishing company do printing for the said board of elections, and furnish supplies for same, etc.?

See Doll v. State, 45 O. S. 445.

There would be no question if the appointee was the individual owner of the said enterprise, but being merely a stockholder and his interest in any contract being only incidental—that is, he might have such interest as the stockholders might derive from the profits of such contract—it occurs to me that his interest is not such as would disqualify the publishing company from accepting contracts for printing, etc., from this board of elections.

See case of Richardson v. Township.

6 O. N. P. (N. S.) 505, 18 O. D. (N. P.) 806.

I would like to have your opinion on the foregoing by early mail, and greatly oblige."

Section 12910 of the General Code provides:

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

Section 12911 General Code provides:

"Whoever, holding an office of trust or profit, by election or appoint-

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

In an opinion of my predecessor, Honorable Timothy S. Hogan, under date of April 4, 1912, attorney-general report for 1912, page 1238, it was held that:

"A deputy state supervisor of elections is appointed by the secretary of state and is, therefore, a state officer and not connected with the county, within the meaning of section 12910 General Code prohibiting contracts of public officials with political subdivisions, with which they are connected. Such official is a public officer, however, and comes within the prohibition of section 12911 General Code providing against the interest in public contracts of an amount over $50,000 unless under advertisement and bid."

The same attorney-general had before him the question of whether a member of the board of sinking fund trustees of a city, who was the lowest bidder for furnishing ballots at a primary election, could legally enter into such contract and receive payment for the same in view of the provisions of section 12910. In an opinion under date of September 25, 1913, attorney-general's report for 1913, Vol. I, page 363, will be found the following at page 364:

"Section 12910 and the section immediately following are given a very broad scope in their effect by the legislature; the one prohibiting officers from being interested in contracts involving the political subdivision with which the officer is connected, and the other prohibiting such contracts with any other political subdivision of the state. Contracts on behalf of the state itself, or rather to be more definite, contracts for the purchase of property, supplies or fire insurance, for the *use* of the state, are not comprised within the terms of either statute.

In State v. Craig, 8 O N. P. 148, the court said (at page 150):

'From an examination of the election laws in this state it seems apparent that the legislature intended that the conduct of elections should belong to the state and be under the control of state officers.' Section 2966-2 (Revised Statutes) provides that: "By virtue of his office the secretary of state shall be the state supervisor of elections, and in addition to the duties now imposed upon him by law shall perform the duties of such office as defined therein." We have then the secretary of state as the principal election officer and the deputy state supervisors, as subordinate officers, for *carrying out the agencies of the state* for the conduct of elections.'

The question presented, therefore, is whether or not the supplies purchased in this case, which are used for municipal purposes, their use being managed and controlled by state agencies, and payment made in the first instance by the county, reimbursement being made therefor by the municipality, are supplies for the use of the municipality as is comprehended by the language of section 12910 General Code.

I am of the opinion that these supplies are for the use of the state, in the conduct of its general duties with reference to election matters. It is true they are used in behalf of the municipality. The municipality, however, has nothing to do with the actual use, conduct and management of these

supplies. The *control of their use* is vested in state agencies. Were it not for the statutory provision providing for a reimbursement of the county from the municipal treasury, this question would not have arisen; and I am of the opinion that the mere fact that reimbursement from the municipal treasury, is provided for the service of the state, administered in a case of municipal benefits, does not afford sufficient ground for holding that such supplies are for the use of the municipality as is intended by section 12910 General Code."

I concur in the reasoning and conclusions of the above opinions, and it is my holding that where a member of the deputy state supervisors of elections is also an officer and stockholder of a newspaper company which desires to bid for the work of furnishing necessary supplies, printing ballots, etc., and competitive bidding is had therefor, neither section 12910 nor 12911 General Code would have any application.

Further, I am of the opinion that such printing and publishing company can legally contract for the printing of ballots and necessary supplies.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

599.

BLUE SKY LAW—FEE FOR AGENTS NAMED IN LICENSE ISSUED UNDER SAID LAW.

The additional fee of five dollars for each agent named in a license issued under the blue sky law need not be paid annually upon renewal of such license.

COLUMBUS, OHIO, September 7, 1917.

HON. P. A. BERRY, *Commissioner of Securities, Columbus, Ohio.*

DEAR SIR:—In your letter of August 21 you request my opinion upon the following questions:

"Section 6373-4 provides that 'a licensed dealer in such securities' must pay an annual fee of fifty ($50.00) dollars for such license, and five ($5.00) dollars for each agent named in the application for said dealer's license.

"Kindly advise this department if the agent's fee of five ($5.00) dollars, as set forth in said section, should also be collected annually when said dealer's license is renewed?"

Section 6373-4 G. C., referred to by you, provides in part as follows:

"* * * If the 'commissioner' be satisfied of the good repute in business of such applicant and named agents, he shall, upon the payment of an *annual fee* of fifty dollars, and an *additional fee* of five dollars for each agent named in the application, register the applicant as a licensed dealer in such securities, and issue to him a license, containing the name of the applicant and all such agents, renewable annually upon payment of *such annual fee,* unless revoked as herein provided. * * *"

Section 6373-5 G. C. deserves consideration in this connection. It provides as follows:

"Sec. 6373-5. Such license shall be taken out at the beginning of each

calendar year, but it may be issued at any time for the remainder of such year, and in such case the annual fee shall be reduced four dollars for each expired month but in no case shall it be less than ten dollars. Upon the payment of a fee of five dollars for each specified agent not named in such license the same may at any time be amended or supplemented to include such agent. Upon the written request of such applicant, accompanied by a fee of two dollars, such license shall be revoked as to any agent or agents of such applicant, and an amended license shall thereupon be issued for such applicant and his remaining agents and thereafter the applicant shall not be bound by the acts of the agent whose license has been revoked. * * *."

The language of section 6373-4 G. C. does not appear to me as ambiguous. The applicant, if he names agents, must pay not one fee, but at least two fees. The principal fee is denominated the "annual fee." The fees on account of agents are called "additional fees." When the section names the conditions of renewal of the license only one of these fees is referred to. Because the "additional fee" is no part of the "annual fee," and because the former is not mentioned in defining the terms of renewal, I am forced to the conclusion that the agent's fee of five dollars should not be collected annually when the dealer's license is renewed.

I have quoted section 6373-5 G. C. because I think it supports this view of the section. It will be observed that if the license is taken out after the beginning of the calendar year, there is a reduction, but the reduction applies again to the "annual fee." There is no similar reduction or scaling down of the "additional fee." Thus the separation between the two is kept distinct.

The provision in section 6373-5 G. C. for amendment of a license or its revocation as to a particular agent or agents sheds some light also upon the question. It is to be noted that but one original license is issued. Such license is renewable annually; but this does not mean that a new license is issued each year. On the contrary, the first license is perpetual, in the sense that it is good for one year and automatically renewed upon payment of the annual fee.

Inasmuch, however, as no new license is issued each year, provision would necessarily have to be made for changes in the personnel of agency forces. This is done by the second and third sentences of section 6373-5 G. C.

Because, then, the statute is not ambiguous, there must be given the meaning which it clearly expresses; and because also, that meaning is consistent with the general framework as evidenced by the other provisions referred to, I am of the opinion that the agent's fee of five dollars should not be collected annually, when the dealer's license is renewed.

Very truly yours
JOSEPH McGHEE,
Attorney-General.

601.

ILLEGITIMATE CHILD—REPUTED FATHER CAN NOT BE PROSECUTED FOR NON-SUPPORT—WHEN SECURITY HAS BEEN GIVEN FOR PAYMENT OF SUM ORDERED BY COURT FOR MAINTENANCE OF SAID CHILD.

Where a defendant has been adjudged the reputed father of a child under section 12123 *G. C. and has either paid or given security for the payment of the sum in which the court has ordered him to stand charged with the maintenance of such child this constitutes a complete bar to a subsequent proceeding against him, under section* 13008, *for failure to support the child.*

COLUMBUS, OHIO, September 10, 1917.

HON. GEORGE S. MAY, *Prosecuting Attorney, Napoleon, Ohio.*

DEAR SIR:—I have your letter of August 17, 1917, as follows:

"About two years ago a bastardy case was tried in the court of common pleas of this county, resulting in a conviction and defendant was adjudged to be the putative father of the child. He was fined by the court $300 which the mother received and expended in attorney fees, doctor bills and other incidents arising out of the affair. I have been called upon to arrest the putative father for non-support of this illegitimate child.

"I would like your opinion as to whether or not I would be safe in now indicting this putative father for non-support, having in mind the decision in the case of McKelvy v. State, 87 O. S., p. 1, and State of Ohio v. Veres, 75 O. S., 138."

Sections 12123, 12114, 13008 and 13010 of the General Code provide as follows:

"Section 12123. If, in person or by counsel, the accused confesses in court that the accusation is true, or, if the jury find him guilty, he shall be adjudged the reputed father of the bastard child, and stand charged with its maintenance in such sum as the court orders, with payment of costs of prosecution. The court shall require the reputed father to give security to perform such order. If he neglects or refuses to give it, and pay the costs of prosecution, he shall be committed to the jail of the county, there to remain, except as provided in the next following section, until he complies with the order of the court.

"Section 12114. If during the examination before the justice, or before judgment in the court of common pleas, the accused pays or secures to be paid, to the complainant, such amount of money or property as she agrees to receive in full satisfaction, and gives bond to the state with sufficient surety, to be approved by the justice, court, or judge in vacation, conditioned to save any county, township, or municipal corporation within the state free from all charges for the maintenance of such bastard child, such justice, court, or judge shall discharge him from custody, on his paying the costs of prosecution. Such agreement must be made or acknowledged by both parties, in the presence of the justice, court, or judge, who thereupon shall enter a memorandum thereof on his docket, or cause it to be made upon the journal."

"Section 13008. Whoever, being the father, or when charged by law

with the maintenance thereof, the mother, of a legitimate or illegitimate child under sixteen years of age, or the husband of a pregnant woman, living in this state, being able by reason of property, or by labor or earnings, to provide such child or such woman with necessary or proper home, care, food and clothing, neglects or refuses so to do, shall be imprisoned in a jail or workhouse at hard labor not less than six months nor more than one year, or in the penitentiary not less than one year nor more than three years."

"Section 13010. If a person, after conviction under either of the next two preceding sections and before sentence thereunder, appears before the court in which such conviction took place and enters into bond to the state of Ohio in a sum fixed by the court at not less than five hundred dollars nor more than one thousand dollars, with sureties approved by such court, conditioned that such person will furnish such child or woman with necessary and proper home, care food and clothing, or will pay promptly each week for such purpose to a trustee named by such court, a sum to be fixed by it, sentence may be suspended."

In the case of State v. Veres, 75 O. S., 138, it was held:

"The pendency of a bastardy proceeding instituted against the father of an illegitimate child, is neither a bar to, nor ground for the abatement of, a criminal prosecution subsequently commenced against him by the state under section 3140-2 Revised Statutes."

Section 3140-2 Revised Statutes, referred to in the above case, was much the same as the present section 13008 G. C. The court in that case said:

"As will be observed, there is nothing whatever in the language of the above act that indicates or suggests a purpose or intent on the part of the legislature that the provisions thereof should be invoked only after a proceeding under the bastardy act had been commenced and terminated. Nor is there anything in the nature of the relief given or the punishment prescribed, that discloses a reason why the mere pendency of a bastardy proceeding previously instituted, should be a bar to or should furnish a ground for, the abatement of a criminal prosecution subsequently commenced under this section. While the two acts are so designed and drawn that each provides a remedy for the enforcement of the same natural duty, namely: the support by the father of his illegitimate child, in this respect only are they alike either in their provisions or purpose. And the remedies they afford for the enforcement of this duty being entirely consistent with each other the rule is well settled that the satisfaction of one is the only bar to the prosecution of the other."

In the case of McKelvy v. State, 87 O. S., p. 1, it was held:

"2. Where a bastardy proceeding has been compromised under and in full accordance with Section 12114, General Code of Ohio, and all the provisions of the compromise have been complied with and carried out by the defendant, this constitutes a complete bar to a subsequent proceeding against him under either Section 13008 or section 12970, General Code, for failure to support his same illegitimate child."

In that case the court said:

"The legislation which is not included in section 13008, et seq., under

which the present proceeding is prosecuted, is of comparatively recent origin and is much more comprehensive. It includes within its provisions the mother as well as the father of an illegitimate child, the parents of legitimate children and the husband of a pregnant woman. The punishment is also much more severe, making the offense a felony, and this statute has therefore been construed to be of a criminal nature. For this and other reasons it is claimed that the prosecution of the father of a bastard child under the former statutes, is not a bar to his prosecution under the latter, but that their provisions are cumulative and attention is called to the case of State v. Verse, 75 Ohio St., 138, where it was held that the pendency of a bastardy proceeding instituted against the father of an illegitimate child is neither a bar to nor ground for the abatement of a prosecution under section 13008 above. If the only purpose of this legislation were to declare the offense a crime and to punish the guilty father, there would be force in the contention that there could be no such bar to the criminal prosecution as is claimed herein. But it is provided by section 13010, General Code, that a person convicted under section 13008 may appear before the court in which the conviction took place, and enter into a bond to the State of Ohio in a sum fixed by the court not less than five hundred dollars nor more than one thousand dollars, with approved sureties, conditioned that he will furnish the necessary and proper support for his child, and that sentence may thereupon be suspended. In the bastardy proceeding, when a compromise is effected, the accused must furnish a bond to the approval of the justice, under section 12114, or when he is convicted upon trial in the common pleas court he must give security to the approval of the court, under section 12123, both conditioned for the maintenance of his child. The law has thus expressly provided practically the same remedy to accomplish the same purpose under both acts.

"Having established these two concurrent and identical means of protecting the state and the unfortunate child, by the authority and upon the deliberate judgment of tribunals especially designated under the law for the particular purpose, we can see no reason why the exercise of one remedy, with its complete satisfaction, should not operate as a bar to the exercise of the other, or why a defendant under such conditions should be harassed, and possibly persecuted, by the requirement of a double security, when he has fulfilled his obligation in the one instance and may be unable to do so in the other."

In the case you submit the defendant was convicted in the common pleas court under section 12123 in place of effecting a settlement under section 12114. Under section 12114 the defendant is required to give bond to the state with sufficient surety to be approved by the justice, conditioned to save the county, township or municipal corporation within the state free from all charges for the maintenance of the child. while under section 12123 he does not give bond to the state, but is required to give security to perform the order of the court, in which order is specified the sum in which the defendant shall stand charged for the maintenance of the child.

It may be urged that because section 12123 does not require a bond to the state to save "the county, township or municipal corporation" free from all charges for the maintenance of the child, a payment under said section does not operate as a bar to a prosecution under section 13008, as would a settlement under section 12114 G. C

However, the object of the two statutes is the same and in both cases the amount with which the defendant stands charged is fixed—by the bond in section 12114 and by the order of the court and security in section 12123. In either case, in the event that the defendant neglects to furnish the proper support, the public is only saved to the extent of the amount fixed. This being so, it would seem that, notwithstanding

that a bond is required by section 12114, and security for payment of the court's order in section 12123, both statutes effect the same object and are to be viewed, for the purpose of this opinion, in the same light. This is the view taken by the court in McKelvy v. State, supra, in the language above quoted.

Upon authority of the above cases, therefore, I would advise you that prosecution for non-support could not now be maintained in the case you submit.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

602.

WORKMEN'S COMPENSATION LAW—HOSPITAL, MEDICAL AND NURSING SERVICES—PAYMENT FOR SUCH SERVICES UNDER AMENDMENT OF SECTION 1465-89 G. C.

Section 1465-89 *G. C. relating to awards to be made under the compensation act for payment of medical, hospital and nursing services, etc., as amended* 107 *O. L. 528, relates to all such services rendered subsequent to time act took effect.*

COLUMBUS, OHIO, September 10, 1917.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—On August 31, 1917, you made the following request for my opinion:

> "Section 1465-89 of the General Code which relates to awards to be made under the compensation act for the payment of medical, hospital and nursing services and medicines, was amended at the last session of the general assembly. The purpose of the amendment was to grant authority to the commission to award in unusual cases of injury a greater amount than $200.00 for the payment of medical and hospital services, etc. The amended portion of this section reads as follows:
>
> "'* * * unless in unusual cases wherein it is clearly shown that the actually necessary medical, nurse and hospital services and medicines exceed the amount of $200.00, such commission shall have authority to pay such additional amounts upon a satisfactory finding of facts being made and upon unanimous approval by such commission, such finding of facts to be set forth upon the minutes;'
>
> "Your opinion is desired as to whether the above quoted amendment to section 1465-89 (as contained in senate bill No. 69) applies to cases of injury which occurred prior to the time the amendment became effective but which are still pending and not finally disposed of. In other words, is the above referred to amendment retroactive in its effect or does it apply only to cases of injury which have been actually sustained after the amendment went into effect?"

The amendment to which you refer, of section 1465-89 General Code, is found on page 528-107 O. L. and is as follows

> "Sec. 1465-89. In addition to the compensation provided for herein, the industrial commission of Ohio shall disburse and pay from the state insurance fund, such amounts for medical, nurse and hospital services and medicine as it may deem proper, not, however, in any instance, to exceed the sum of two hundred dollars unless in unusual cases, wherein it is clearly shown that

the actually necessary medical, nurse and hospital services and medicines exceed the amount of two hundred dollars, such commission shall have authority to pay such additional amounts upon a satisfactory finding of facts being made and upon unanimous approval by such commission, such finding of facts to be set forth upon the minutes. and in case death ensues from the injury, reasonable funeral expenses shall be disbursed and paid from the fund in an amount not to exceed the sum of one hundred and fifty dollars, and such commission shall have full power to adopt rules and regulations with respect to furnishing medical, nurse and hospital service and medicine to injured employes entitled thereto, and for the payment therefor."

This provision governs the payment of medical, nurse and hospital services and medicine, necessary on account of an injury to an employee; and does not govern the amounts payable to the injured employe, as compensation. The amendment is not retroactive, that is, it would not authorize payment of the additional amount for such purposes, where the services, or medicine had been furnished prior to the taking effect of the amendment; but payment for furnishing the services or medicine must be governed by the law in effect when the same were furnished, not by the date of the accident; I can think of no theory on which the right of payment for the services covered by this amendment should date back to the time of the accident, and be limited by the law then in force.

My opinion therefore, is that in all proper cases where medical, nurse and hospital services and medicines have been furnished since the date when the amendment to section 1465-89 G. C. went into effect, payment of the same should be made under said section as it now stands, irrespective of the date of the accident; but that payment under it can not be made for any such services or medicine rendered or furnished prior to the date said amendment went into effect.

Very truly yours,
JOSEPH MCGHEE
Attorney-General.

603.

APPROVAL—TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE OF THE TRUSTEES OF VALLEY TOWNSHIP.

COLUMBUS, OHIO, September 10, 1917.

The Industrial Commission of Ohio, Columbus, Ohio.

"In re bonds of Valley township, Guernsey county, Ohio, in sum of $40,000.00, for the purpose of improving certain highways therein."

GENTLEMEN:—

In opinion No. 306, rendered by me on May 25, 1917, to your department, I remitted to you the transcript of the proceedings of the township trustees and other officers of Valley township, Guernsey county, Ohio, relating to the above bond issue without my approval, for the reason that the transcript was defective, in that it did not show a number of matters material to the validity of the bond in question.

Since rendering said opinion I have received a transcript in reference to the proceedings had in the matter of said forty thousand dollar bond issue, and I am of the opinion that the proceedings in reference to the issuing of the same are regular in all respects which are vital to the validity of the bonds.

The transcript shows that the board of trustees levied a tax of three mills upon all the taxable property of Valley township, Guernsey county, Ohio, in accordance

with section 3298-1 G. C., and that by resolution the township trustees designated the particular road which was to be improved as provided in section 3298-3 G. C.

The question of issuing bonds was by resolution put up to a vote of the electors of Valley township in accordance with law and the results of the election were duly canvassed and the proposition to issue bonds carried 544 for the bond issue to 74 against the same, the election being held on April 6, 1917, after due notice being given.

On June 24, 1917, the trustees adopted a resolution to issue forty thousand dollars of bonds numbered from one to forty inclusive, of one thousand dollars each, all to mature in not to exceed ten years, in accordance with the provisions of section 3298-8 G. C., and the transcript shows that the levy made does not furnish sufficient funds for the contemplated improvement.

Provision was also made by resolution to levy a tax upon all the taxable property of the township, sufficient to pay the interest of the bonds and to create a sinking fund to redeem the bonds as they mature.

The transcript shows that the present bonded indebtedness of Valley township is $17,000.00, while it has a tax duplicate of $1,866,350.00. It also shows that the total tax rate of Valley township property is 14 mills, of Pleasant City corporation, a municipality located within the township, 19.20 mills, and of Pleasant City school district, 15.60 mills, of which tax rate for Pleasant City and Pleasant City school district 5.25 mills is for an emergency for school purposes and hence beyond all limitations.

From the transcript which I now have before me, the main facts of which are set out herein, it is my opinion that the township has full authority to issue the bonds herein set out, and that you would be justified in purchasing the same, should you so desire to do.

It is to be noted that the defects in the proceedings of the authorities of Valley township, as set out in my former opinion, have been cured by the facts set out in the transcript now before me.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

604.

APPROVAL—FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN BROWN, BUTLER, CLERMONT, ERIE, FAYETTE, KNOX, MUSKINGUM, ROSS, SCIOTO, SENECA, SHELBY, STARK AND WAYNE COUNTIES.

COLUMBUS, OHIO, September 10, 1917.

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

DEAR SIR:—I have your communication of recent date in which you enclose certain final resolutions, for my approval, in reference to the construction, improvement, repair and maintenance of certain highways, as follows:

Brown county—Section "A" of the Ripley-Hillsboro road, I.C.H. No. 177.

Butler county—Section "I" of the Hamilton-Middletown road, I.C.H. No. 179. Types "A" and "B."

Butler county—Section "J" of the Hamilton-Middletown road, I. C. H. No. 179. Types "A" and "B."

Clermont county—Section "L" of the Milford-Hillsboro road, I. C. H. No. 9.

Erie county—Section "P-2" of the Milan-Elyria road, I. C. H. No. 288.

Fayette county—Section "M" of the Hillsboro-Washington road, I. C. H. No. 259. (In duplicate.)

Knox county—Section "A" of the Mt. Gilead-Mt. Vernon road, I. C. H. No. 333.

Muskingum county—Section "L" of the Zanesville-Cincinnati road, I. C. H. No. 10.

Ross county—Section "N(n)" of the Chillicothe-Lancaster road, I. C. H. No. 361.

Scioto county—Section "A-1" of the Jackson-Portsmouth road, I. C. H. No. 403.

Seneca county—Section "A" of the Tiffin-Fostoria road, I. C. H. No. 270. Types 'A,' 'B' and 'C.'

Shelby county—Section "B-1" of the Piqua-St. Marys road, I. C. H. No. 170. Types 'A,' 'B' and 'C.'

Stark county—Section "F" of the Canton-Massillon road, I. C. H. No. 68.

Wayne county—Section "Q" of the Wooster-Canal Dover road, I. C. H. No. 414.

Wayne county—Section "A" of the Millersburg-Wooster road, I. C. H. No. 342.

Wayne county—Section "A" of the Orrville-Southern road, I. C. H. No. 465. Types "A," "B" and "C".

I have carefully examined these final resolutions and find them correct in form and legal and am therefore returning the same to you with my approval endorsed thereon (with the exception of I. C. H. No. 179, section 'I,' Butler county, which was heretofore returned to you for correction.)

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

605.

APPROVAL—FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN ATHENS AND GUERNSEY COUNTIES.

COLUMBUS, OHIO, September 10, 1917.

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

DEAR SIR:—I have your communication of September 1, 1917, in which you enclose, for my approval, certain final resolutions in reference to the improvement of highways, as follows:

Athens county—Section "A" of the Athens-Hockingport road, I. C. H. No. 156.

Guernsey county—Section "L" of the Cambridge-Caldwell road, I. C. H. No. 353.

I have carefully examined these final resolutions and find them correct in form and legal and am therefore returning the same to you with my approval endorsed thereon, as provided in section 1218 G. C.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

606.

APPROVAL—FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN GALLIA, GUERNSEY, HOCKING, LAKE, MAHONING, MERCER, PICKAWAY, PUTNAM, UNION, SUMMIT AND WASHINGTON COUNTIES.

COLUMBUS, OHIO, September 10, 1917.

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

DEAR SIR:—I have your communication of September 5, 1917, in which you enclose the following final resolutions and ask my approval on the same under and by virtue of the provisions of section 1218 G. C.:

Gallia county—Section "A-1" of the Ohio river road, I. C. H. No. 7.

Guernsey county—Section "A" of the McConnelsville-Cambridge road, I. C. H. No. 484.

Hocking county—Section "J" of the Logan-Athens road, I. C, H. No. 155. In duplicate.

Lake county—Section "B" of the Euclid-Chardon road, I. C. H. No. 34.

Mahoning county—Section "R-1" of the Akron-Youngstown road, I. C. H. No. 18. In duplicate.

Mercer county—Section "E-1" of the Ft. Recovery-Minster road, I. C. H. No. 171.

Pickaway county—Section "s," "t" and "u" of the Portsmouth-Columbus road, I. C. H. No. 5.

Putnam county—Section "A" of the Ottawa-Defiance road, I. C. H. No. 421. In duplicate.

Union county—Section "B" of the Marysville-Kenton road, I. C. H. No. 228.

Summit county—Section "R" of the Akron-Canton road, I. C H. No. 66.

Washington county—Section "M-1" of the Marietta-Athens road, I. C. H. No. 157.

Upon careful consideration of these final resolutions I find them correct in form and legal and am therefore returning the same to you with my approval endorsed thereon in accordance with the provisions of section 1218 G. C.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

607.

APPROVAL—FINAL RESOLUTION FOR ROAD IMPROVEMENT IN TRUMBULL COUNTY.

COLUMBUS, OHIO, September 10, 1917.

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

DEAR SIR:—I am writing you further in reference to the final resolution of the county commissioners of Trumbull county in reference to the improvement of the Warren-Meadville road, I. C. H. No. 330.

Section 1218 of the General Code provides as follows:

"Each contract under the provisions of this chapter (G. C. sections 1178 to 1231-3) except as otherwise provided in section 156 of this act (section

7199) shall be made in the name of the state and executed on its behalf by the state highway commissioner and attested by the secretary of the department. No contract shall be let by the state highway commissioner in a case where the county commissioners or township trustees are to contribute a part of the cost of said improvement, unless the county commissioners of the county in which the improvement is located shall have made a written agreement to assume in the first instance that part of the cost and expense of said improvement over and above the amount to be paid by the state. Where the application for said improvement has been made by the township trustees, then such agreement shall be entered into between the state highway commissioner and the township trustees. Such agreement shall be filed in the office of the state highway commissioner with the approval of the attorney-general endorsed thereon as to its form and legality."

The only part of this section which is material in the matter of my consideration of this final resolution is the following:

> "Such agreement shall be filed in the office of the state highway commissioner with the approval of the attorney general endorsed thereon as to its form and legality."

So far as the form of this final resolution is concerned, it is entirely regular and the different parts of the final resolution are in every respect legal. Hence, after further consideration, under the provisions of section 1218 G. C., I am returning this final resolution to you with my approval endorsed thereon.

In submitting this final resolution for my approval, as well as in the submission of other final resolutions for my approval, there is no question raised in reference to the matter of the use of the maintenance and repair funds of the state for the making of the improvements set out in final resolutions. This is plainly shown under the provisions of section 1218 and under the final resolutions themselves. As suggested in a former opinion rendered by me, it is my opinion that my predecessor, Hon. Edward C. Turner, in an opinion found at page 990 of the Opinions of the Attorney-General for 1915, has correctly stated the principles which should control in the matter of the use of the maintenance and repair funds of the state in the improvement of the highways of the state, and I therefore approve and confirm the opinion so rendered by my predecessor, as I did in a former opinion rendered your department.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

608.

OHIO BOARD OF CLEMENCY—NO JURISDICTION OVER CORRECTIONAL INSTITUTIONS—JURISDICTION LIMITED TO PENAL INSTITUTIONS.

The Ohio board of clemency has no jurisdiction over the correctional institutions of the state, namely, the boys' industrial school and the girls' industrial home, their jurisdiction being limited to the penal institutions, namely, the Ohio state reformatory, the Ohio reformatory for women and the Ohio penitentiary.

COLUMBUS, OHIO, September 10, 1917.

The Ohio Board of Administration and The Ohio Board of Clemency, Columbus, Ohio.

GENTLEMEN:—I have your communication of July 25, 1917, in which you ask my opinion as follows:

> "Are the institutions named in sections 2083 and 2101 of the General Code included in the institutions mentioned in section 7 of the act creating the Ohio board of clemency as 'reformatory institutions' "

The question presented by you is whether the powers and duties of the Ohio board of clemency extend to the girls' industrial home and the boys' industrial school, or whether their powers and duties are limited to the Ohio state reformatory, the Ohio reformatory for women and the Ohio penitentiary; in other words, whether the powers and duties of the Ohio board of clemency extend not only to those institutions of the state which are called penal, but also to those which are classified as correctional.

In considering your question, let us first notice the classification of our state institutions, made by the legislature itself. In the formation of the General Code, the legislature classified the institutions of our state as benevolent, correctional and penal. The benevolent institutions of the state are grouped under chapters 1, to 12 inclusive, division 2, title V, Part I of the General Code.

The correctional institutions are grouped under chapters 1 and 2, division 3, title V, Part I, G. C. They are the boys' industrial school and the girls' industrial home.

The penal institutions of the state are grouped under chapters 1, 1a, 2 and 3 of division 4, title V, Part I, G. C. They are the Ohio state reformatory, the Ohio reformatory for women and the Ohio penitentiary.

We thus see that the legislature itself has separated those institutions which may be termed penal from those which are correctional. The policy of the state has been to keep separate and distinct the correctional from the penal institutions. The aim seems to be to separate the two classes of institutions in order that none of the taint which often seems to attach to those persons who have been inmates of the penal institutions of the state, shall attach to those who have been inmates of correctional institutions. The correctional institutions are called homes and schools, thus in no way indicating that they are considered as institutions for punishment.

The courts also adhere to this distinction. In State ex rel. Wilson v. Stiles, 12 O. D. 338, the court holds as follows in the first branch of the syllabus:

> "The girls' industrial home is not a penal institution, but a school, in which the state should use its best endeavors for the reformation of incorrigible girls. The fact that girls are subjected to restrictions does not make the institution a prison."

In the opinion on page 341, the court uses the following language:

"The object and purpose of the establishment of the girls' industrial home is declared to be instruction, employment and reformation of evil disposed, incorrigible and vicious girls. The legislature of the state has provided for a committee of visitation composed of three women who shall, at stated times, visit the institution and make a thorough examination as to the general welfare and condition of the girls, and make a written report of the result to the president of the board of trustees. It is provided that the girls shall be under the charge and custody of the superintendent and such subordinate officers as the trustees appoint. The superintendent is required to be and is a constant resident at the home, and that he shall discipline, govern, instruct and employ, and use his best endeavors to reform the girls in such manner as shall, while preserving their health and permitting the development of their physical system, secure the formation, as far as possible, of moral and industrious habits, and regular thorough progress and improvement in their studies, trades and employments.

"It is manifest that this was not intended as a penal institution but as a school in which the state would use its best endeavors for the reformation of incorrigible girls. The fact that the girls are subjected to restrictions does not make it a prison, or their presence in the institution imprisonment, any more than the restrictions of home make home a prison. The welfare of children in all cases requires that they be subjected to wholesome restraint. This is true, especially, of those who show a disposition to be incorrigible and vicious, and the establishment of this institution was a wise and humane provision on the part of the state."

With the above in mind, we will now turn to the act itself, in order to ascertain what its provisions are with reference to the question under consideration. The act creating the Ohio board of clemency is found in 107 O. L. 598. Section 6 of said act reads as follows:

"Section 6. The Ohio board of clemency shall have all the powers and enter upon the performance of all the duties conferred by law upon the board of pardons."

There is no difficulty here. The board of pardons never did have any power or duties in reference to the correctional institutions. Hence the Ohio board of clemency has no jurisdiction over the correctional institutions, under the provisions of this section.

Section 7 of the act reads as follows

"Section 7. Upon the appointment of the members of the Ohio board of clemency as hereinbefore provided, and their qualifications, such board shall supersede and perform all of the duties now conferred by law upon the Ohio board of administration with relation to the release, parole, and probation of persons confined in or under sentence to the penal or reformatory institutions of Ohio; and thereafter the said Ohio board of clemency, shall be vested with and assume and exercise all powers and duties in all matters connected with the release, parole or probation of persons confined in or under sentence to the penal institutions of Ohio now cast by law upon the said Ohio board of administration. The parole officers of the several penal institutions of the state shall be appointed by and subject to the direction and supervision of the managing officers of the institutions herein named."

The provisions of this section cast some doubt upon the question submitted to me for my opinion, and the particular language which creates the doubt is as follows:

> "* * * such board shall supersede and perform all of the duties now conferred by law upon the Ohio board of administration with relation to the release, parole, and probation of persons confined in or under sentence to the penal *or reformatory institutions of Ohio;* * * *"

The particular words which raise the doubt are "reformatory institutions of Ohio." The question is, whether the word "reformatory," as used in this section, refers to the correctional institutions, namely, the girls' industrial home and the boys' industrial school.

It is my opinion that this word does not refer to the correctional institutions, namely, the girls' industrial home and the boys' industrial school, but that the word "reformatory" is used to distinguish the Ohio state reformatory and the Ohio reformatory for women from what is strictly the only penal institution we have in the state, namely, the Ohio penitentiary. While the Ohio state reformatory and the Ohio reformatory for women in one sense are penal institutions, yet in another they are intended to be reformatory in character and not strictly penal. When we come to consider the other parts of this act, I think the above conclusion is without a doubt the one that was intended to be placed upon this act by the legislature itself. The latter part of section 7 of the act bears this construction, which reads:

> "* * * and thereafter the said Ohio board of clemency, shall be vested with and assume and exercise all powers and duties in all matters connected with the release, parole or probation of persons confined in or under sentence to *the penal institutions of Ohio* * * *"

Thus we notice that when the legislature came to conferring power upon the Ohio board of clemency, it conferred the power which the Ohio board of administration has heretofore exercised in reference to only the penal institutions of Ohio.

Further, section 8 of said act reads as follows:

> "Section 8. Except during the month of August, the Ohio board of clemency shall meet once each month at each of the penal institutions of the state for the consideration of applications for clemency."

From the provisions of this section it is to be noted that the Ohio board of clemency shall meet once each month, except during the month of August, at each of the *penal institutions of the state.* It is clear, from this provision, that the legislature had in mind merely the penal institutions when it was making provisions for meetings of the Ohio board of clemency.

When there is doubt as to the construction which should be placed upon the provisions of any act, it is often helpful to look to the title of the act itself. The title is generally drawn with a view to manifesting the intention of the legislature in enacting the act itself. The title of the act under consideration reads as follows:

> "An act creating the Ohio board of clemency, abolishing the board of pardons, transferring all the powers and duties of said board of pardons and all of the powers and duties of the board of administration of Ohio, with relation to the release, parole and probation of persons confined in or under sentence to the penal institutions of this state to the Ohio board of clemency, and to repeal sections 86, 87, 88, 89, 90 and 91 of the General Code."

It will be noted in the title of the act that the board of pardons is abolished and all the powers and duties of the board of pardons are transferred to the Ohio board of clemency. But when it comes to the powers and duties of the board of administration, different language is used. Not all the powers and duties of the board of administration were transferred to the Ohio board of clemency, but only those with relation to the release, parole and probation of persons confined in or under sentence to the *penal institutions of this state* were transferred to the Ohio board of clemency.

It is but natural to infer that the legislature did not intend to transfer from the Ohio board of administration their powers and duties in reference to the correctional institutions, but only those relating to the penal institutions.

Hence, from all the above, it is my opinion that the Ohio board of clemency has no jurisdiction over the correctional institutions of the state, namely, the boys' industrial school and the girls' industrial home, and that the jurisdiction of the Ohio board of clemency is limited to the penal institutions of the state, namely, the Ohio state reformatory, the Ohio reformatory for women and the Ohio penitentiary.

Very truly yours,
JOSEPH MCGHEE,
Attorney General.

609.

APPROVAL—FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN BUTLER, LAWRENCE, PORTAGE AND VINTON COUNTIES.

COLUMBUS, OHIO, September 10, 1917.

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

DEAR SIR:—I have your communication of September 7, 1917, in which you enclose for my approval certain final resolutions in reference to the improvement of highways, as follows:

Butler county—Section "I" of the Hamilton-Middletown road, I. C. H. No. 179. Types "A" and "B."

Lawrence county—Section "K" of the Ohio River road, I. C. H. No. 7. Types "B," "C" and "D."

Portage county—Section "V" of the Akron-Youngstown road, I. C. H. No. 18. Types "A," "B" and "C."

Vinton county—Section "A-2" of the McArthur-Gallipolis road, I. C. H. No. 398.

Vinton county—Section "G-2" of the McArthur-Athens road, I. C. H. No. 160.

I have carefully examined these resolutions and find the same correct in form and legal, under the provisions of section 1218 G. C. and am therefore endorsing my approval thereon and returning the same to you.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

610.

APPROVAL—LEASE OF CERTAIN LANDS IN AKRON, OHIO, TO L. O. BECK.

COLUMBUS, OHIO, September 10, 1917.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your communication of recent date in which you enclosed a land lease in triplicate by the State of Ohio to L. O. Beck, of Akron, Ohio, of certain lands located in Akron, Ohio, the valuation of the same being appraised at $16,666.66⅔.

I have examined said lease carefully and find the same correct in form and legal.

I am therefore approving the same and forwarding it to the Governor of Ohio for his consideration.

Very truly yours,
JOSEPH McGHEE,
Attorney-General.

611.

APPROVAL—AGREEMENT BETWEEN SUPERINTENDENT OF PUBLIC WORKS AND THE DAYTON POWER AND LIGHT COMPANY OF DAYTON, OHIO.

COLUMBUS, OHIO, September 13, 1917.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your communication of September 11, 1917, in which you enclose memorandum of agreement, in triplicate, by virtue of which the state leases to The Dayton Power & Light Company of Dayton, Ohio, certain water privileges, for the consideration of twenty-four hundred dollars annually.

I have carefully examined this agreement and find the same correct in form and legal and am therefore endorsing my approval thereon and forwarding it to the Governor of the state for his consideration.

Very truly yours,
JOSEPH McGHEE,
Attorney-General.

612.

DOG TAX—EFFECT OF THE AMENDMENT OF SECTION 5652 G. C.

1. *The amendment of section 5652 of the General Code (107 O. L. 534), effective December 1, 1917, does not affect the collectibility of the special dog tax levied in 1917 under the provisions of said section as theretofore in force, but such tax should be collected vided by taxes and distributed in satisfaction of pending sheep claims in the manner pro- as other the sections of the General Code in e ect at the time the amendments made by said act became effective.*

2. *The imposition of the license tax provided for by the amendments to and supplements of section 5652 of the General Code on or prior to January 1, 1918, and the substantially contemporaneous payment of the special dog tax provided for under the former laws on the same subject are not for the same thing nor for the same year, though collectible substantially at the same time.*

3. *The dog registration or license act of 1917 does not exact the taxation of dogs as property. The sections providing for the listing of dogs are impliedly modified, but only to the extent of dispensing with the requirement that unvalued dogs be enumerated.*

COLUMBUS, OHIO, September 14, 1917.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I acknowledge receipt of your letter of August 24th, requesting my opinion as follows:

> "The Tax Commission of Ohio desires to call your attention to the act for the regulation of dogs and providing compensation for damages done thereby, enacted by the last general assembly, volume 107, page 534.
>
> "As this new law appears to conflict with the tax laws for the year 1917, we take the liberty of citing the provisions which we believe are in conflict.
>
> "In carrying out the provisions of the tax law for the year 1917, the owners of dogs were required to list same, and if they failed to do so, the assessor was required to list same, as provided in sections 5379 and 5380. Section 2583, volume 107, page 29, provides that the county auditor shall include the dogs in the tax duplicate, and section 5652 provides the amount of tax the auditor shall charge against the owners of dogs listed. Section 2583 further provides that the county auditor shall deliver the tax duplicate to the county treasurer on the first day of October of each year.
>
> The foregoing provides for carrying out the provisions of the law relative to the listing and taxing of dogs as required for the year 1917. The dogs as returned by owners under the voluntary tax return provision or by the assessors, are placed on the tax duplicate, the taxes charged against same, and the duplicate is delivered to the treasurer who makes up his tax receipts in accordance with the duplicate and proceeds to receive taxes as charged thereon.
>
> "We now call your attention to section 4 of the new dog law, volume 107, page 539:
>
> " 'This act shall take effect and be in force from and after the first day of December, 1917, but no registration of dogs or dog kennels shall be required or registration tags issued or required to be worn for any portion of the year nineteen hundred and seventeen.'
>
> "This section provides for the new law becoming effective from and after the first day of December, 1917. As the new law repealed section 5652, which provided for the tax and was in force and required to be carried out in listing and returning dogs up until December 1st, we inquire if the tax assessed

against dogs as returned by owners or by assessors for 1917 is to be collected, or does the repeal of section 5652 becoming effective December 1, 1917, make the taxing of dogs for the year 1917 void?

"We also take the liberty of calling your attention to the condition arising between October 1st and December 1st, as after October 1st when the tax duplicate has been delivered to the treasurer by the auditor, persons desiring to pay their tax before December 1st would be required by all the provisions of the law to pay the tax on the dogs.

"We note that the new dog law does not repeal certain sections of the old law, as follows: Section 5379 providing for owners and assessors to list dogs, section 5380 providing a penalty if the assessor fails to list the dog, and section 2583 requiring the auditor to place the dogs on the tax duplicate. These sections are not repealed, and are still in force.

"We respectfully ask your opinion on the foregoing as soon as possible, in order that we may give the information to the county auditors."

Pertinent provisions of the laws necessary to be consulted in answering your question are as follows:

Section 5652, General Code, as now in force:

"In addition to the proper tax on any valuation that is fixed upon dogs by the owners, which shall be included with the personal property valuation and taxed therewith, the auditor shall levy against the owner thereof one dollar on each male and spayed female dog, and two dollars on each unspayed female dog. The receipts from such tax shall constitute a special fund to be disposed of in the payment of sheep claims, as provided by law."

Section 5652, General Code, as amended 107 O. L. 534:

"Every person who owns, keeps or harbors a dog more than three months of age, annually, before the first day of January of each year, shall file together with a registration fee of one dollar for each male or spayed female dog, and registration fee of two dollars for each female dog unspayed, in the office of the county auditor of the county in which such dog is kept or harbored, an application for registration for the following year beginning the first day of January of such year, stating the age, sex, color, character of hair, whether short or long, and breed, if known, of such dog, also the name and address of the owner of such dog."

Section 4 of the Act found in 107 O. L. 534:

"This act shall take effect and be in force from and after the first day of December, 1917, but no registration of dogs or dog kennels shall be required or registration tags issued or required to be worn for any portion of the year nineteen hundred and seventeen."

Section 2583, General Code, as amended 107 O. L. 29:

"On or before the first Monday of August, annually, the county auditor shall compile and make up * * * separate lists of the names of the several persons * * * in whose names * * * property has been listed * * *, placing separately, in appropriate columns * * *

(among other things) the *number* of dogs, and the *value*, if given by the owner. * * * the county auditor * * * shall certify and on the first day of October deliver one copy thereof to the county treasurer. * * *."

Sections 5379 and 5380 of the General Code provide as follows:

"Section 5379. A dog over three months of age shall be listed, either by the owner or by the assessor in the name of the owner, without affixing a valuation thereto. The owner, if he so desires, may affix a value thereto, without swearing to such valuation. A person who keeps or harbors a dog, or who knowingly permits the keeping or harboring of a dog upon his premises, for the purpose of such listing and taxation, shall be the owner thereof. The assessor shall ascertain the owner or harborer of each dog within his territory, and may examine any person under oath for this purpose.

"Section 5380. If the assessor fails to list a dog kept or harbored within his territory, he shall forfeit and pay to the state not less than twenty-five dollars nor more than seventy-five dollars."

The last two named sections have not been expressly repealed.

While dealing with the laws apparently in force I may say that I find it unnecessary to quote the sections supplementary to section 5652 as they appear in 107 O. L. 534. These sections create, by detailed provisions, a system of licensure or registration for dogs and dog kennels as foreshadowed in section 5652 as amended, and the enforcement of its provisions by seizure of unlicensed dogs, etc. Other sections are amended in the act of 1917 relating to claims for damages on account of domestic animals injured or killed by dogs, but these sections need not be considered.

It is sufficient to observe as a starting point for the discussion of the questions raised by your letter that the legislation of 1917, effective December 1st of this year broadly considered, substitutes for a per capita tax on dogs, collected as a capitation or poll tax, so to speak, a license for the keeping of dogs, the proceeds of which are to be treated substantially in the same manner as the proceeds of the former per capita tax were used, viz: in paying claims for damages on account of the destruction or injury of domestic animals by dogs. In other words, the method of the exaction is changed from that of a straight per capita tax collected on the county duplicate to that of a license or registration fee collected by the county auditor.

In its essential aspects the exaction remains the same, for it was held in *Holst* v. *Roe*, 39 O. S., 340, that the per capita tax on dogs was sustainable as against the objection that it violated the uniform rule of property taxation prescribed by Article XII, section 2 of the constitution, on the ground that it was an exercise of the police power rather than of the taxing power; or, put with perhaps greater accuracy, an exercise of the taxing power as a method of the police power. Such combined exercise of the two powers is familiar, as in the case of the tax on the business of trafficking in intoxicating liquor, and our supreme court is thoroughly committed to the doctrine that it is compatible with the limitation on the power of property taxation imposed by the section of the constitution referred to.

What we have always had then is an exaction from owners or harborers of dogs based upon some rule of apportionment proper in itself and made under the police power for the purpose of protecting the public welfare by affording compensation for economic losses caused by the harboring of such dogs. That the assessing machinery of the state, including the functions of the local assessors and the county auditor and treasurer in the preparation of the duplicate have been used to make this exaction does not change its essential character.

Now the legislature proposes to change the method of this exaction by substituting an annual license which is to be payable for the first time in Janauary, 1918.

The old section providing for the listing of all dogs, whether valued as property or not, has not been repealed by express provision. I have no hesitancy, however, in arriving at the conclusion that on and after the time when the act of 1917 (107 O. L. 534) goes into effect sections 5379 and 5380 of the General Code, though not expressly repealed, will be so far modified as to dispense with the listing by the owner, harborer or assessor of each dog, whether valued or not, and that likewise section 2583 will be, by implication, amended so as to dispense with the necessity of listing on the duplicate the number of dogs, whether valued or not.

In so far as dogs are property and a valuation is placed upon them by the owner or the assessor—assuming without deciding that a fine animal clearly having a value as property is to be listed by the assessor under the general tax laws of the state, whether the owner places a value on him or not—they will, of course, continue to be valued and listed under the provisions of these sections; but dogs without value as property will no longer be required to be listed in the tax returns and on the duplicate, for this is manifestly inconsistent with the scheme of the act of 1917. The implied amendment—for it is not a complete repeal of anything—that is worked out here is clearly apparent; for the sole purpose of having the number of dogs, whether valued or not, listed under the sections which still remain in force was to afford a basis for the levying of the per capita tax provided for by section 5652 of the General Code in its present form and as it will be until changed by the going into effect of the act of 1917. Take away the authority to levy the per capita tax and the machinery provisions fall or become obsolete for lack of a foundation upon which to rest.

So that without further discussion I advise in answer to one of your questions that nothing in the act of 1917 affects the listing of valuable dogs as property, and that the taxing machinery of the state should move in the future as it has in the past with respect to such property. In other words, the new law could not constitutionally be, and on its face does not purport to be, a substitute for the taxation of dogs as property, but merely a substitute for the per capita tax on dogs considered not as property but merely as dangerous animals, the keeping or harboring of which is to be safeguarded by appropriate exercise of the police power.

Your first question, however, and the one in which you evince the greater interest is as to whether or not the per capita tax on dogs, which will have gone on the duplicate to be delivered up to the treasurer on October 1st of this year on the basis of the enumeration of such dogs taken in April, 1917, is to be collected in the face of the fact that a license fee for 1918 is payable January 1, 1918.

On the face of things it would seem as if there were some inconsistency in imposing simultaneously two exactions on the same ground. For if the per capita tax which the auditor, acting on the basis of the returns made to him, will under the old law which remains in force until December 1st place upon the duplicate will be collectible in December, 1917, unless the amendment of section 5652 makes it uncollectible, and if the license fees for the keeping of dogs and kennels of dogs for the year 1918 will be payable in January of that year, to the ordinary understanding it would appear that the owner of a dog were being taxed twice on the same account.

This is, however, but a surface view of the situation, assuming for the time that the amendment of section 5652 does not make the tax assessed under favor of that section uncollectible; for under the property tax laws, the machinery of which was adopted by the legislature in the exertion of its police power in the manner above described, the taxpayer is accorded the favor of paying his taxes several months after his liability therefor accrues. We are speaking of the per capita tax on dogs. Such dogs are enumerated as of some period in the early spring of the year. Let us say that A. has ten dogs on the date on which he is required to list them. He was not required to pay the per capita tax on those dogs until the following December—more than six months after the dogs were enumerated. A month after the enumeration

his dogs might all die. Nevertheless, he would have to pay this per capita tax, for his liability for it became fixed, though not due, on the date when the enumeration was taken.

It becomes clear, therefore, that the old per capita tax was an exaction payable long after the date on which the basis of it had existence. On the contrary, the new exaction under the form of a license is, like all licenses are, something payable in advance. The vital difference between the two laws is that one takes the tax long after the fact upon which the tax is based; the other takes it in advance, so to speak.

So there is nothing strange about the two payments falling due at the same time. The legislature has merely done away with postponed payment and exacted payment in advance for substantially the same thing, as a result of which two payments, representing different years, happen at the same time; yet they are not for the same thing and not necessarily on account of the same dogs. It is the dogs which existed in April 1917, which furnish the basis for the tax to be collected in December of that year; it is the dogs which have existence on January 1, 1918, that furnish the basis for the exaction in the form of a license then to be made. Consequently, it is not true that the same thing would be taxed twice, and I cannot say for any such reason that there is anything inconsistent between the idea of collecting the license tax in Janauary under the new law and the idea of collecting the per capita tax in December under the old law.

This discussion, however, has proceeded upon the assumption that the amendment of section 5652 will not when it goes into effect render uncollectible the special per capita taxes assessed on the duplicate. The correctness of this assumption remains to be considered.

In my opinion, quite independently of section 26 of the General Code, which may or may not have some bearing on the question, the taxes assessed on the duplicate which will be in the hands of the county treasurer for collection on December 1st, when the new law goes into effect, must be collected. By that time section 5652 except in so far as it relates to the receipts from the tax, will have expended its force. In its present form it provides that the "auditor shall levy" certain per capita dog taxes. This he will have done. Therefore, the amendment of this section, going into effect, at that time will not prevent him from discharging his duties under the present section. Authorities might be cited to show that after a tax has been levied its collection follows as a matter of course, even though the law providing for the levy be repealed. I quote from the opinion of Ranney, J., in *Debolt v. Trust Co.*, 1 O. S. 563.

> "The repeal of a statute will not destroy or affect rights already vested under it * * *. It is very clear to us, that this tax became a vested right in the public, fully perfected within the meaning of this rule, long before the passage of the act of 1852, and could not be affected by the repeal of the law under which it was levied, * * *. Every act required of the public authorities in the assessment and levy had been done, and the liability of the defendant fully fixed. Nothing remained but the payment of the money and the failure of the defendant to do this, surely could not render imperfect the right of the people to receive it, * * *."

This reasoning was partially based, as further quotation from the context would show, upon the inherent nature of the power to tax; nevertheless, it is applicable to the case at hand in so far as it is apparent that the amendment of section 5652 of the General Code can not affect the legal effectiveness of acts already done under that section. The tax is levied and the numerous statutes relating to the collection of taxes remain in effect and afford procedural remedies for its collection.

Indeed, the care of the legislature in postponing the effectiveness of the amendment to December 1, 1917, can be ascribed to no other motive than that of avoiding

interference with the collection of the 1917 dog tax. If the act of 1917 had been allowed to go into effect after the expiration of the usual referendum period—and there is some question whether it would not have gone into immediate effect as a law levying a tax—it would have interrupted the machinery of assessment of the old law at a point prior to the official action of the auditor under section 5652 as it then stood and still stands. With this authority taken away the old tax could not have been collected.

As it is, however, the legislature has preserved the effectiveness of the old law until such time as that the act commanded under section 5652 has been done.

Section 26 of the General Code does, in my opinion, so far operate as to preserve the proceeds of the tax collected in December, 1917, to be expended in the manner provided by the law formerly in force, so far as pending sheep claims are concerned. This is so because the amendments to the sections regulating such matters, being sections 5653 and 5840 et seq. of the General Code, speak of the "fund arising from the registration of dogs and dog kennels" and make no provision for any undistributed moneys arising from the payment of the per capita tax. I think it is clear that where a tax has been collected and a law providing for its distribution in satisfaction of specific claims is repealed or amended in such way as not to be applicable to it, a "proceeding" is under way within the meaning of section 26 of the General Code and the proceeds of the tax will have to be distributed as to such claims in the manner required by the law existing at the time it was levied.

This principle disposes of the only real difficulty in the case. Answering your questions specifically I advise:

(1) The amendment of section 5652 of the General Code (107 O. L. 534), effective December 1, 1917, does not affect the collectibility of the special dog tax levied in 1917 under the provisions of said section as theretofore in force, but such tax should be collected as other taxes and distributed in satisfaction of pending sheep claims in the manner provided by the sections of the General Code in effect at the time the amendments made by said act became effective.

(2) The imposition of the license tax provided for by the amendments to and supplements of section 5652 of the General Code on or prior to January 1, 1918, and the substantially contemporaneous payment of the special dog tax provided for under the former laws on the same subject are not for the same thing nor for the same year, though collectible substantailly at the same time.

(3) The dog registration or license act of 1917 does not exact the taxation of dogs as property. The sections providing for the listing of dogs are impliedly modified, but only to the extent of dispensing with the requirement that unvalued dogs be enumerated.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

613.

APPROVAL—TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE BY THE COUNTY COMMISSIONERS OF COLUMBIANA COUNTY.

COLUMBUS, OHIO, September 14, 1917.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:

IN RE bond issue in the amount of $28,000.00 for the improvement of the Lisbon-Salineville public road in Washington township, Columbiana county, Ohio.

I have had presented to me the transcript in reference to the proceedings of the

board of county commissioners of Columbiana county in the above bond issue. I have carefully examined this transcript and find the proceedings of said board of county commissioners regular in all respects, and that the bonds issued under and by virtue of said proceedings are a good and valid obligation against the county of Columbiana.

I am therefore placing my approval upon the same and send it to you for any consideration you may desire to give it.

Very truly yours,
JOSEPH McGHEE,
Attorney-General.

614.

ADOPTION—CONSENT NECESSARY BEFORE CHILD MAY BE LEGALLY ADOPTED—WHO MAY CONSENT.

In a proceeding for the adoption of a child, the consent of the juvenile court to such adoption, in place of the parents of the child, is insufficient and without effect in law. Such adoption must be consented to by the parents unless they are hopelessly insane, intemperate or have abandoned such child, in which case the legal guardian of the child, or a suitable person appointed by the probate court, may consent in the place of such parents, provided, however, that if the juvenile court has awarded a dependent or neglected child to an association, corporation or individual, under section 1672 *G. C., and has made the proper order in awarding such child, the association, corporation or individual so appointed may consent to the adoption of such child in place of its parents and such consent is binding.*

COLUMBUS, OHIO, September 14, 1917.

HON. B. O. BISTLINE, *Probate Judge, Bowling Green, Ohio.*

DEAR SIR:—I have your letter of August 24, 1917, as follows:

> "Can the judge of the juvenile court give the required legal consent (the parents of the child being alive) in a case where a person of good reputation and standing desires to adopt a child that has been declared a dependent and neglected child by the juvenile court and has been made a ward of the court? I understand that he can by authority of sections 1672 and 1673 G. C. delegate this power to others, but I am not clear as to his power to give the required consent himself."

Section 8024 of the General Code reads:

> "Any proper person not married, or a husband and wife jointly, may petition the probate court of their proper county, or the probate court of the county in which the child resides, for leave to adopt a minor child not theirs by birth, and for a change of the name of such child. A written consent must be given to such adoption by the child, if of the age of fourteen years, and by each of his or her living parents who is not hopelessly insane, intemperate, or has not abandoned such child, or if there are no such parents, or if the parents are unknown, or have abandoned the child, or if they are hopelessly insane or intemperate, then by the legal guardian, or if there is no such guardian, then by a suitable person appointed by the court to act in the proceedings as the next friend of the child."

Section 1645 G. C. reads:

> " 'DEPENDENT CHILD' defined. For the purpose of this chapter,

the words 'dependent child' shall mean any child under eighteen years of age who is dependent upon the public for support; or who is destitute, homeless or abandoned or who has not proper parental care or guardianship; or who begs or receives alms; or who is given away or disposed of in any employment, service, exhibition, occupation or vocation contrary to any law of this state; who is found living in a house of ill fame, or with any vicious or disreputable persons or whose home, by reason of neglect, cruelty or depravity on the part of its parent; step-parent, guardian or other person in whose care it may be, is an unfit place for such child; or who is prevented from receiving proper education because of the conduct or neglect of its parent, step-parent, guardian or other person in whose care it may be; or whose environment is such as to warrant the state, in the interest of the child, in assuming its guardianship."

In the case you submit the ground upon which the court found the child to be a dependent is not apparent; whether it has been abandoned, whether the parents of the child are intemperate or hopelessly insane does not appear. Under this section, however, if such is not the case the consent of the parents to the adoption must be obtained.

In re Maude Fay Olsen, 3 O. D. (N. P.) 668.

However, the legislature has made certain exceptions to the rule requiring parental consent.

Section 1653 G. C. reads:

"When a minor under the age of eighteen years, or any ward of the court under this chapter, is found to be dependent or neglected, the judge may make an order committing such child to the care of the children's home if there be one in the county where such court is held, if not, to such a home in another county, if willing to receive such child, for which the county commissioners of the county in which it has a settlement, shall pay reasonable board; or he may commit such child to the board of state charities or to some suitable state or county institution, or to the care of some reputable citizen of good moral character, or to the care of some training school or an industrial school, as provided by law, or to the care of some association willing to receive it, which embraces within its objects the purposes of caring for or obtaining homes for dependent, neglected or delinquent children or any of them, and which has been approved by the board of state charities as provided by law. When the health or condition of the child shall require it, the judge may cause the child to be placed in a public hospital or institution for treatment or special care, or in a private hospital or institution which will receive it for like purposes without charge. The court may make an examination regarding the income of the parents or guardian of a minor committed as provided by this section and may then order that such parent or guardian pay the institution or board to which the minor has been committed reasonable board for such minor, which order, if disobeyed, may be enforced by attachment as for contempt."

Section 1672 G. C. reads:

"If the court awards a child to the care of an association, corporation or individual, in accordance with these provisions, unless otherwise ordered, the child shall become a ward, and be subject to the guardianship of such

association, corporation or individual. Such association, corporation or individual may place such child in a family home and shall be made party to any proceedings for the legal adoption of the child, and if the court, when making such award so orders, may appear in any court where such proceedings are pending, and assent to such adoption. Such assent shall be sufficient to authorize the judge to enter the proper order or decree of adoption, and upon such order being made, all jurisdiction of the juvenile court over such child under section 1643 of the General Code, shall cease and determine. Such guardianship shall not include the guardianship of any estate of the child."

Section 1673 G. C. provides:

"The parents, parent, guardian or other person or persons having the right to dispose of a dependent or neglected child may enter into an agreement with any association or institution, incorporated under any law of this state which has been approved by the board of state charities as provided by law, for the purpose of aiding, caring for or placing in homes such children, or for the surrender of such child to such association or institution, to be taken and cared for by such association, or institution, or put into a family home. Such agreement may contain any and all proper stipulations to that end, and may authorize the association or institution, to appear in any proceeding, for the legal adoption of such child, and consent to its adoption. The order of the judge made upon such consent shall be binding upon the child and its parents, guardian or other person, as if such persons were personally in court and consented thereto, whether made party to the proceeding or not."

It will be seen from these sections that when the juvenile court has found a child to be dependent or neglected, and awards it to the custody of an association, corporation or individual, it may, if it should see fit, confer a special guardianship upon such association, corporation or individual, viz., one with the power of consent in the matter of adoption, regardless of the condition or attitude of the parents. If it confers such guardianship upon such association, corporation or individual, then it has transferred the right of consent in adoption from the parents to such association, corporation or individual. If it does not, but confers only the guardianship of the person of the child upon such association, corporation or individual, the association, corporation or individual so appointed is to be viewed as any other guardian and the consent of such association, corporation or individual, in place of that of the parents, is sufficient for adoption only when the parents are hopelessly insane, intemperate or when such parents have abandoned such child. In other words, section 8024 G. C lays down a certain rule as to when parental consent is necessary in the adoption of children, and that rule must be strictly adhered to. If the adoption is had without parental consent, special statutory authority must be relied upon to make the proceedings valid.

Section 1672, above quoted, provides that the association, corporation or individual to whom the child is awarded may, if the court has conferred such power upon it, in the order of award, consent to the adoption of the child in the place of the parent, but this section says nothing of such power of consent being vested in the juvenile court itself, nor do I know of any principle of law warranting the conclusion that because the court has the power to confer this authority upon a guardian, it of necessity has in itself this authorty to consent to such adoption.

If the juvenile court was the "legal guardian" of the child, it could of course, under section 8024 G. C., consent to the adoption of the child, if the parents were hopelessly insane, intemperate or if they have abandoned such child. However, the

juvenile court is not such guardian, although the child is a ward of such court and remains so for the purposes of discipline and protection until such child attains the age of twenty-one years.

For these reasons I am of the opinion that in a proceeding for the adoption of a child, the consent of the juvenile court to such adoption in place of the parents of the child, is insufficient and without effect in law. Such adoption must be consented to by the parents unless they are hopelessly insane, intemperate or have abandoned such child, in which case the legal guardian of the child, or a suitable person appointed by the probate court, may consent in the place of such parents, provided, however, that if the juvenile court has awarded a dependent or neglected child to an association, corporation or individual, under section 1672 G. C., and has made the proper order in awarding such child, the association, corporation or individual so appointed may consent to the adoption of such child in place of its parents and such consent is binding.

Yours truly yours,
JOSEPH McGHEE
Attorney-General.

615.

APPROVAL—ABSTRACT OF TITLE—MARY E. KAUTZ TO STATE.

COLUMBUS, OHIO, September 15, 1917.

HON. CARL E. STEEB, *Secretary, Board of Trustees, Ohio State University, Columbus, O.*

DEAR SIR:—You recently submitted to this department, for examination, an abstract of title covering the following premises:

> "Being Lots or Parcels Nos. Six (6) Seven (7) and Eight (8) of a subdivision of lands belonging to Jeremiah O. Lisle, which subdivision was made by the order of the court of common pleas, Franklin county, Ohio, in case No. 33550, as the same are numbered and delineated upon the recorded plat of said subdivision, of record in Plat Book No. 5, page 431, Recorder's office, Franklin county, Ohio."

With the abstract you also sent a deed covering the same piece of property, wherein Mary E. Kautz (widow) deeds said property to the State of Ohio.

I have carefully examined said abstract, dated August 27, 1917, and find that the title to the premises described is in the name of Mary E. Kautz and that the deed submitted will convey a clear title to the State of Ohio, save and except the taxes for 1917, which are now a lien on said premises and which the grantee assumes and agrees to pay.

I note that in the deed from Sarah E. Van Horn to Charles Kautz, Jr., (Section 47 of the abstract), the grantor covenants that the premises are free and clear of all encumberances except the unpaid balance of a mortgage for *$2250.00*, executed to The Citizens Savings Bank on or about the first day of November, 1898.

The abstract submitted does not show that a mortgage was given by the above mentioned Sarah E. Van Horn to said bank, in the sum mentioned in the deed, namely $2250.00. It does show, however, that on said date, November 1, 1898, Sarah E. Van Horn gave a mortgage to The Citizens Savings Bank in the sum of *$1750.00*, which mortgage has been cancelled and released.

Said Sarah E. Van Horn purchased lots Nos. Six (6), and Seven (7) from The Ctizens Savings Bank on November 1, 1898, the consideration being *$2250.00*, and on the same date gave a mortgage to said bank for $1750.00. In all probability the recital in the deed as to the amount of the mortgage is a mistake made by confusing

the consideration named in the deed with that of the mortgage, owing to the fact that both instruments were executed on the same day. However, as there is no record of a mortgage on the premises under investigation, given by Sarah E. Van Horn to The Citizens Savings Bank, in the sum of *$2250.00*, the recital in the deed, that there was such a mortgage, would not affect the title to the premises.

Therefore, I am of the opinion that the deed submitted, if accepted, will fully convey the title to the State of Ohio free and clear of all encumberances except the taxes above mentioned.

I am herewith returning you the abstract and deed submitted.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

616.

COSTS—SUIT BY TAXPAYER AGAINST BOARD OF EDUCATION—BOARD HAS NO AUTHORITY TO PAY WHEN INJUNCTION ALLOWED BUT NO ORDER FOR COSTS MADE BY COURT.

Where a tax payer brings action against a board of education and an injunction is allowed which prevents said board from further acting in the matter in question and the court makes no order in relation to costs, such tax payer is not entitled to recover his costs made in such action as a matter of right.

A board of education is not warranted in ordering the payment of costs of the adversary party in an injunction suit when no order therefor is made by the court.

A county auditor rightfully refuses to issue his warrant covering costs of the adverse party in an injunction suit when ordered so to do by the county board of education and when the court has made no order in relation thereto.

COLUMBUS, OHIO, September 15, 1917.

HON. C. A. WILMOT, *Prosecuting Attorney, Chardon, Ohio.*

DEAR SIR:—You request my opinion upon the following matter:

"The Geauga county board of education attempted to consolidate Thompson special district No. 2 with Thompson special district No. 1, taking what they believed to be the necessary means to bring about this consolidation.

"The board of education of Thompson special district No. 2 brought suit against the Geauga county board of education, the board of education of Thompson district No. 1 and A. A. Fowler, as auditor of Geauga county.

"Said action was brought against the county board of education to prevent consolidation of the two districts, against Thompson special district No. 1 to enjoin said district from 'interfering in any way with district No. 2, or the board of education thereof, or receiving or expending any money or funds now raised or in the process of collection by taxation in district No. 2, and against A. A. Fowler as auditor 'from transferring any funds collected or in the process of collection belonging to district No. 1.'

"The case was tried in due time and decision was made in favor of the plaintiff. The journal entry of the decision reads as follows:

"This cause came on for hearing upon the petition and answer and the evidence, and was duly argued by counsel and upon consideration thereof the court finds that the prayer of the petition should be granted and the county board of education is hereby enjoined from proceeding further under

the resolution of August 14, 1916, and the county auditor, A. A. Fowler, is enjoined from transferring the funds of said district No. 2 to said district No. 1, or from in any way interfering with the funds of said district by reason of any action of the board in relation to the transferring territory from said district No. 2 in Thompson to said district No. 1 in its said resolution of August 14, 1916.

"This action held on the ground that the notice published by the county board of education with reference to the transfer of the territory of district No. 2 to district No. 1 was not published until more than thirty days had elapsed after the filing of the map required by law in such transfers.

" 'The court further finds that the action of July 3d by the county board of education and the filing of the remonstrance to said action by the residents of district No. 2 is not a bar to further proceedings by the county board if those proceedings conformed to the law.

Defendants except. Bond in appeal fixed at $100.00.'

"The costs in the case were certified to the Geauga county board of education by the clerk of courts and the debt was acknowledged by said board and ordered paid from the funds credited to said board.

"Will you kindly give us an opinion as to which party to the suit should pay the costs in the case? Did the county board of education act within its authority in ordering the bill for costs paid and should the auditor honor their order and pay the costs in question.?"

Your inquiry involves a consideration of those statutes of Ohio which permit a party to an action in Ohio to recover of his adversary his costs made.

Section 11624 G. C. provides in part:

"When not otherwise provided by statute, costs shall be allowed, of course, to the plaintiff upon the judgment in his favor *in actions for the recovery of money only or of specific real or personal property.* * * *"

Section 11627 G. C. provides:

"Costs shall be allowed, of course, to a defendant upon a judgment in his favor in the actions mentioned in the next two preceding sections."

The two preceding sections provide: (section 11625) that if it appears that a justice of the peace has jurisdiction of an action brought in any other court and the judgment is less than $100.00, unless the recovery be reduced below the sum by counterclaim or set-off, each party shall pay his own costs; and, (section 11626) in all actions for libel, slander, malicious prosecution, assault, assault and battry, false imprisonment, criminal conversation or seduction, actions for nuisance, or against a justice of the peace for misconduct in office, when the damage assessed is under $5.00, the plaintiff shall not recover his costs.

Section 11628 G. C. provides:

"In other actions the court may award and tax costs, and apportion them between the parties, on the same or adverse sides, as it adjudges to be right and equitable."

Costs are not allowed as a matter of right in Ohio. They are only allowed as is provided by the statutes of our state. It is entirely within the power of the legislature to change, at its own will, the laws in relation to court costs or even to refuse to allow costs in a given class of cases.

It was held in State ex rel. Judson v. Coates, 11 Ohio Dec. 670, that the matter of the taxation of costs in civil actions, of requiring payments of, or of security for costs, is under legislative control. Phillips, J., on page 672, says:

> "In all times, each party to a civil action has been, both primarily and ultimately, liable for his own costs; and in early times, judgment for costs was not allowed to the prevailing party. And where the prevailing party is given judgment for costs, it is generally said to be upon the theory that he has paid his own costs and that the judgment is for his reimbursement."

In Bell v. Bates, 3 Ohio, 380, the court said:

> "There were no costs, *eo nomine*, at common law, although in actions sounding in damages, a practice prevailed of allowing to the plaintiff, in the assessment of the damages, a sufficient sum to remunerate him for his necessary expenses. But, in consequence of the hardships which a plaintiff must sustain, in expending large sums of money for the purpose of obtaining his right for which he would have no amends, the statute of Glouster (6 E, 1) was passed, allowing costs in certain cases. The subject was frequently, at subsequent periods, before the parliament of England, and such provisions made as justice and necessity seemed to demand. In this state, costs, as a general rule, have never been allowed to the party recovering judgment. The amount to be taxed, however, has been varied from time to time, the whole being regulated by statute."

In Farrier v. Cairns, 5 Ohio 45, the court says:

> "Costs are unknown to the common law. They are given only by statute and may be changed, or entirely taken away, at the will of the legislature."

It is noted, then, from the above, that unless some provision is made by law for the recovery of costs, a party to an action cannot recover the same. The action in your case does not come within the provisions of section 11624 G. C., that is, it is not an action for the recovery of money only or for specific real or personal property, and it does not come within the provisions of sections 11625 and 11626, above mentioned, but it does come within the provisions of section 11628; that is, it is such an action that the court may award the costs between the parties as it adjudges to be right and equitable.

It was held in Sloane vs. Railway Company, 7 O. C. C., 84, that in a tax payer's unsuccessful suit to enjoin the construction of a street railway, if the suit was apparently justified by irregularities, the court might apportion the costs between the parties; and in Reed v. Cincinnati, 8 O. C. C., 390, it was held that a division of costs is not an abuse of discretion where an amended petition to enjoin an assessment departs from the original and the case is decided against the plaintiff, though the defects in the assessment were cured by statute after the beginning of the suit; and in Lee vs. Dawson, 8 O. C. C., 365, it was held in an injunction against adding personalty to tax returns, part of which was properly added and part improperly added, that each party may be required to pay his own costs. And in Express Company vs. Rattemann, 21 Bulletin, 238, in a suit to enjoin a tax as unconstitutional, both parties having claimed too much, the court properly divided the cost.

So that, it being within the discretion of the court to say which party shall pay the costs, and the several parties not being entitled to recover same as matters of

right, and the court having made no order for the payment of costs, I advise you that the county board of education is without authority to order the bill for costs paid and the auditor should not honor their order and should not issue his warrant therefor.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

617.

APPROVAL—FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN CHAMPAIGN AND JEFFERSON COUNTIES.

COLUMBUS, OHIO, September 15, 1917.

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

DEAR SIR:—I have your communication of September 11, 1917, in which you enclose for my approval certain final resolutions of county commissioners, in reference to the following improvements:

"Champaign county—Section 'L' of the Urbana-Sidney road, I. C. H. No. 192.

"Champaign county—Section 'A' of the Urbana-West Jefferson road, I. C. H. No. 188.

"Champaign county—Section 'F and I', Piqua-Urbana road, I. C. H. No. 190.

"Jefferson county—Section 'N-2', Steubenville-Cambridge road, I. C. H. No. 26. (In duplicate). Type 'A.'

"Jefferson county—Section 'N-2,' Steubenville-Cambridge road, I. C. H. No. 26. (In duplicate). Type "B.' "

I have carefully examined the agreements entered into by the county commissioners in reference to the different improvements set out in your communication and find said agreements correct in form and legal, and am therefore returning the same to you with my approval endorsed thereon, in accordance with the provisions of section 1218 G. C.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

618.

OHIO NATIONAL GUARD—WHO ENTITLED TO PAY AS OFFICERS.

In order that persons may be entitled to pay as officers in the Ohio National Guard, they must have been appointed by the Governor, upon the recommendations of the commanding officers of the orginazations to which such officers are to be assigned for duty, and must have taken and subscribed to the oath of office prescribed by law.

COLUMBUS, OHIO, September 17, 1917.

HON. GEORGE H. WOOD, *Adjutant General of Ohio, Columbus, Ohio.*

DEAR SIR:—I have your communication of August 22, 1917, which reads as follows:

"Plans were undertaken in this state to expand the Ninth Battalion Ohio

National Guard to a regiment and for this purpose Colonel Charles Young, U. S. A., was detailed by the war department to the state of Ohio to assist in the work. Colonel Young reported to the adjutant general of Ohio on or about July 20 and the adjutant general stated to him that as it was the intention to have him command the regiment, the adjutant general had not recommended any commissions to the governor but intended to rely upon the recommendations made by Colonel Young.

"On or about August 1 the war department determined it would not accept the regiment of cavalry which the state of Ohio was raising, and the enlisted men were therefore furloughed to the reserve.

"Certain men were told by Colonel Young that he intended to recommend them for commissions and he had a talk with the assistant adjutant general about the matter but he never took the matter up with the adjutant general and the men in question were not commissioned at that time by the governor of Ohio.

"The men in question, having been told by Colonel Young that he would recommend them for commissions, have now made a claim for pay, as officers. I have refused to pay same under the statement made under date of August 17 to Colonel Charles Young. The men in question have requested that the matter be submitted to the attorney-general of Ohio as to their status. The papers are enclosed herewith."

To this communication you have attached certain other correspondence which has to do with the matter about which you inquire, and for the purpose of rendering this opinion to you, I desire to quote but one of the letters so attached, written by Col. Chas. Young, U. S. A., to the adjutant general of Ohio, on August 20, 1917. This letter reads as follows:

"1. Returned. As you state in the second paragraph of your communication to me, you told me to make recommendations for officers of the proposed regiment which I did and submitted to the assistant adjutant general in your absence. Further than this and the notification of the men selected to that effect I had nothing whatever to do.

I do not know and was not aware of the swearing in even as private soldiers let alone as officers of the persons mentioned in this payroll. I therefore had it returned for Captain Caldwell's signature and for your approval if it came within the law. I am perfectly aware that I could not make officers, nor did I try to do so; I merely followed strictly your instructions to me and made the recommendations as above stated, in order to allow yourself and the governor to act.

2. I heartily agree with paragraphs 4 and 5 of your letter."

I desire, however, to note one fact which I gleam from a letter written to Col. Chas. Young, U. S. A., by the adjutant general of Ohio, on August 17, 1917, namely, that the actions, which took place in reference to the matter about which you inquire, arose on and after July 17, 1917.

From the correspondence submitted to me I gather the following facts, out of which your question arises:

1. Plans were adopted by the state authorities to expand the ninth battalion, Ohio National Guard into a regiment, and the active operations to carry said plans into effect were begun on or about July 17, 1917.

2. Col. Chas. Young, U. S. A., was placed in active charge of the carrying into effect of the plans so adopted.

3. The adjutant general of Ohio referred to said Col. Young, U. S. A., the duty of making recommendations to the governor of the state, of persons who in his mind would be suitable for commissioned officers for the regiment so formed.

4. Col. Young notified certain persons that he would recommend them for commissioned officers in said regiment and submitted his recommendations to the assistant adjutant general.

5. About the 1st of August, 1917, the war department decided that it would not accept the said regiment and the men who enlisted in the same were furloughed to the reserve.

Under these facts the question is whether the persons who were informed by Col. Young, U. S. A., that he would recommend them for commissioned officers in said regiment, are entitled to pay as officers. In answering this question it will be necessary for me to note a number of sections of the General Code, as found in 107 O. L 384.

Section 5180 G. C. (107 O. L. 384) reads as follows:

> "All officers of the Ohio national guard shall be appointed by the governor upon the recommendation of the commanding officers of the organizations to which such officers are to be assigned for duty. Before being commissioned all officers shall be examined with respect to their physical and mental qualifications, according to the rules which are now in effect or may hereafter be prescribed."

Section 5181 G. C. (107 O. L. 384) reads as follows:

> "Commissioned officers of the Ohio national guard now serving under commissions regularly issued shall continue in office, as officers of the national guard, without the issuance of new commissions; provided, that said officers have taken, or shall take and subscribe to the following oath of office: 'I, ----------, do solemnly swear that I will support and defend the constitution of the United States and the constitution of the state of Ohio against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I will obey the orders of the president of the United States, and of the governor of the state of Ohio; that I make this obligation freely; without any mental reservation or purpose of evasion, and that I will well and faithfully discharge the duties of the office of---------- in the national guard of the United States, and of the state of Ohio, upon which I am about to enter, so help me God.' Any officer of the Ohio national guard who shall not have taken such oath within thirty days after the passage of this act shall be discharged from the service."

Said section 5181 does not apply to the question at hand, other than that it sets out the form of oath to be taken and subscribed to by the persons commissioned as officers.

Section 5182 reads in part as follows (107 O. L. 384):

> "Persons hereafter commissioned as officers of the national guard shall not be recognized as such unless they * * * shall have taken and subscribed to the oath of office prescribed herein: * * *."

From these sections of the General Code we gather the following legal propositions which apply to commissioned officers in the Ohio national guard:

(1.) The commanding officers of the organization to which such commissioned officers are to be assigned for duty must make recommendations of persons to the governor.

(2.) The officers of the Ohio national guard shall be appointed by the governor upon said recommendations.

(3.) Before being commissioned, all officers shall be examined with respect to their physical and mental qualifications according to the rules which are now in effect or may hereafter be prescribed.

(4.) Persons hereafter commissioned as officers of the Ohio national guard shall not be recognized as such unless they shall have taken and subscribed to the oath of office as set out in said section 5181 above quoted.

Now, when we apply the law herein set out to the facts as they are presented, it seems quite evident to me that the persons in question do not at all come within the classification of commissioned officers. In fact none of the said provisions of law have been complied with, unless it would be the one which requires recommendations to be made, and even in reference to this proposition it seems that no recommendations were made to the governor, but the recommendations were simply filed in the office of the adjutant general, with the assistant adjutant general.

At any rate, it is quite evident that these parties were never appointed by the governor of Ohio in accordance with law; neither did they ever pass an examination as to their mental and physical qualifications; nor did they take the oath prescribed by law.

From all the above it is my opinion that the persons suggested by you as claiming pay as officers of the Ohio National Guard are not officers under the law and hence would not be entitled to pay as officers.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

619.

COLLATERAL INHERITANCE TAX—BEQUESTS TO CHURCH ORGANIZATIONS LIABLE.

Bequests to church organizations are liable to the collateral inheritance tax provided for by sections 5331 *et seq. of the General Code.*

COLUMBUS, OHIO, September 17, 1917.

HON. LEWIS D. SLUSSER, *Probate Judge, Akron, Ohio.*

DEAR SIR:—Under date of August 19, 1917, you ask my opinion whether bequests to church organizations are liable to the collateral inheritance tax provided for by sections 5331 et seq. of the General Code.

The answer to your question depends upon whether such bequests are exempted by the provisions of section 5332 G. C., which so far as material to the question at hand provides as follows:

> "The provisions of the next preceding section shall not apply to property or interests in property transmitted to * * * or for the use of an institution in this state for purposes only of public charity, or other exclusively public purposes."

The phraseology of the statutory provision above quoted is slightly different from what it was before the codification of 1910. Formerly the same exempted be-

quests, etc., "to or for the use of any institution of said state for purposes of purely public charity or other exclusively public purposes." I assume under familiar rules of construction that the language above quoted from section 5332 G. C. is to receive the same construction as the statutory provisions relating to the subject matter as they stood before said codification.

I note that it was specifically held in the case of Watterson v. Halliday, 77 O. S. 150, 179, that a church organization or society is not an institution of purely public charity within the meaning of section 2732 R. S., which has been carried into the General Code as section 5353.

As recognized by the court in the case above cited, church organizations may and probably in all cases do dispense charity, but this is not the primary object or purpose of the organization. As said by the court, the church is primarily a religious institution and its charity is subordinate to its spiritual teaching, and for this reason cannot be classed as an institution of purely public charity.

With respect to the precise question at hand, I do not think, as before stated, that the present language of section 5332 G. C. is to receive any broader or more liberal interpretation and I am therefore of the opinion that bequests to church organzations are subject to the collateral inheritance tax provided for by the provisions of section 5331 G. C.

In reaching this conclusion I find myself in accord with an opinion of my predecessor, Hon. Timothy S. Hogan, addressed to Hon. Thomas L. Pogue, prosecuting attorney, Cincinnati, Ohio, under date of February 25, 1913 (Attorney-General's Report for 1913, page 1178), and also with an opinion of my predecessor, Hon. Edward C. Turner, addressed to Hon. George Thornburg, prosecuting attorney, St. Clairsville, Ohio, under date of February 14, 1916 (Opinions of the Attorney-General for 1916, volume 1, page 277).

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

620.

"IN ANY ONE YEAR"—AS USED IN SECTION 7629 G. C.—MEANS SCHOOL YEAR.

The words "in any one year" in section 7629 G. C. means in any one school year, which begins on September 1st of any calendar year and ends on August 31st of the succeeding calendar year.

COLUMBUS, OHIO, September 17, 1917.

HON. CLARE CALDWELL, *Prosecuting Attorney, Warren, Ohio.*

DEAR SIR:—Your letter of recent date reads as follows:

> "Section 7629 provides that the board of education shall not issue bonds in a greater amount in any one year than would equal the aggregate of a tax at the rate of two mills.
>
> "Does this mean the school year or the calendar year "

The calendar year begins on the first day of January and ends on the 31st day of December. The school year, as provided by section 7689 G. C., begins on the first day of September of each year and closes on the 31st day of August, of the succeeding year. Unless it is otherwise designated or clearly to be determined, a year is to be considered as the calendar year.

Section 7629 G. C., to which you refer, reads as follows:

> "The board of education of any school district may issue bonds to obtain or improve public school property, and in anticipation of income from taxes, for such purposes, levied or to be levied, from time to time, as occasion requires, may issue and sell bonds, under the restrictions and bearing a rate of interest specified in sections seventy-six hundred and twenty-six and seventy-six hundred and twenty-seven. The board shall pay such bonds and the interest thereon when due, but provide that no gretaer amount of bonds be issued *in any year* than would equal the aggregate of a tax at the rate of two mills, for the year next preceding such issue. The order to issue bonds shall be made only at a regular meeting of the board and by a vote of two-thirds of its full membership, taken by yeas and nays and entered upon its journal."

That is to say, the board of education of a school district may obtain property or may improve public school property, and to provide means for the obtaining of such property or the improvement of public school property such board of education may issue and sell bonds therefor; and the board is authorized, for the purpose of the payment of such bonds and the interest thereon, as the same become due and payable, to levy taxes upon the taxable property of such school district. Such board of education, however, is restricted in the payment of interest to the amount of six per cent per annum, payable semi-annually, and that the same shall be payable within at least forty years from the day they are issued and shall not issue *in any year* a greater amount of bonds than would equal the aggregate of a tax at the rate of two mills, which tax is calculated upon the grand duplicate of the school district for the preceding year. That is to say, if the grand duplicate of the taxing district is, for illustration, five millions of dollars, then such board might issue bonds in the amount of ten thousand dollars for said purposes during said year. There is nothing in said section, nor in any of the other sections of the chapter of which said section is a part, which would indicate that anything other than the calendar year is meant. But the history of the legislation from which said section resulted does throw some light upon the intention of the legislature in the use of the language "in any year." In 1873 there was passed an act "for the reorganization and maintenance of common schools," 70 O. L., 195. Section 56 of said act, found on page 211 of said volume, reads in part as follows:

> "Each board of education, at a regular or special meeting, held *between the third Monday in April and the first Monday in June of each year,* shall determine by estimate, as nearly as practicable, the entire amount of money necessary as a contingent fund to be expended for prolonging the several schools of the district *for th· purchase of* suitable sites for school houses; for leasing, purchasing, erecting and furnishing school houses; and for all other school expenses, not exceeding seven mills on the dollar of the taxable property of the district, as valued for taxation. And any board of education of any city district of the first class are hereby authorized to issue bonds to obtain or improve public school property, and in anticipation of income from taxes for such purposes levied or to be levied, may, from time to time, as occasion shall require, issue and sell bonds under the restrictions and bearing the rate of interest specified in section sixty three, and shall pay such bonds and the interest thereon when due, *but shall so provide that n greater amount of such bonds shall be issued in any one year than would equal the aggregate of a tax at the rate of two mills,* under this section for the year next preceding such issue. * * *."

The particular language to be observed in the above quoted section is that language which designates when the estimates shall be made, that is, "at a regular or special meeting held between the third Monday in April and the first Monday in June of each year."

The school year was defined in section 70 of said act as beginning "on the first day of September of each year and closing on the 31st day of August of the succeed ing year," so that the first day of September was designated as the time when the school work for the year should begin and for all school purposes the year, unless otherwise designated, would mean the school year; that is, the year beginning September 1st in a calendar year and ending August 31st of the succeeding calendar year; and provision was made in said section 56, above quoted, for estimates for the various purposes in connection with the schools, and it was further provided that in city districts of the first class the board of education might, for the purpose of obtaining or improving public school property, sell bonds, but that the bonds should not aggregate in any year an amount greater than two mills of the taxable property for the year next preceding the year in which said bonds were issued. Said section 56, above quoted, was amended in 1877, 74 O. L. 108, to read in part as follows:

> "Each board of education, at a regular or special meeting held *between the third Monday in April and the first Monday in June of each year* shall determine by estimate, as nearly as practicable, the entire amount of money necessary as a contingent fund, to be expended for prolonging the several schools of the district , for the purchase of suitable sites for school houses, for leasing, purchasing, erecting and furnishing school houses, and for all other school expenses, not exceeding seven mills on the dollar of the taxable property of the district, as valued for taxation; provided, however, that in cities of the first class having a population of not less than thirty thousand nor more than seventy-five thousand inhabitants, said levy shall not exceed five mills on the dollar of the taxable property. And any board of education of any city district of the first class are hereby authorized to issue bonds to obtain or improve public school property, and in anticipation of income from taxes for such purposes, levied or to be levied, may, from time to time, as occasion shall require, issue and sell bonds, under the restrictions and bearing a rate of interest specified in section sixty-three, and shall pay such bonds and the interest thereon when due, but shall so provide that no greater amount of such bonds shall be issued in any one year than would equal the aggregate of a tax at the rate of two mills under this section, for the year next preceding such issue: * * *."

The only change in the language of said section by said amendment is the maximum levy provided for cities having a population of not less than thirty thousand or more than seventy-five thousand inhabitants. Said section was again amended in 1878, 75 O. L. 526, to read in part as follows:

> "Each board of education, at a regular or special meeting held between the third Monday in April and the first Monday in June of each year, shall determine by estimate, as nearly as practicable, the entire amount of money necessary as a contingent fund, to be expended for prolonging the several schools of the district, for the purchase of suitable sites for school houses, for leasing, purchasing, erecting and furnishing school houses, and for other school expenses, not exceeding seven mills on the dollar of the taxable property of the district as valued for taxation: provided, however, that in cities of the first class having a population of not less than thirty thousand, nor more than seventy-five thousand inhabitants, said levy shall not exceed

six mills on the dollar of the taxable property, and in such cities of the first class upon settlement of the treasurer of the board of education with the county auditor, there shall be placed of such levy of six mills at the rate of not less than two mills per annum, to the credit of a sinking fund, and said treasurer shall appropriate and apply said fund in payment of school bonds and interest thereon, and to no other purpose whatever, and any board of education of any city district of the first class are hereby authorized to issue bonds to obtain or improve public school property, and in anticipation of income from taxes for such purposes levied or to be levied, may from time to time, as occasion shall require, issue and sell bonds under the restrictions and bearing a rate of interest specified in section sixty-three, and shall pay such bonds and the interest thereon when due, but shall so provide that no greater amount of such bonds shall be issued in any one year than would equal the aggregate of a tax at the rate of two mills under this section, for the year next preceding such issue. * * *."

The only change in said section is the provision for the appropriation of money for the purpose of paying school bonds and the interest thereon and that said appropriation shall be used for no other purpose. The time when the estimates for school purposes shall be made and all other provisions was in practically the same language as in the section before amendment. In the codification of the school laws in 1904, said section 36 was numbered 3994 of the Revised Statutes and read in part as follows:

"The board of education of any city district of the first class, except a district embracing a city of the first grade of the first class, may issue bonds to obtain or improve public school property, and in anticipation of income from taxes for such purpose, levied or to be levied, may, from time to time, as occasion requires, issue and sell bonds, under the restrictions and bearing a rate of interest specified in the preceding section and shall pay such bonds and the interest thereon when due, but shall so provide that no greater amount of such bonds shall be issued in any year than would equal the aggregate of a tax at the rate of two mills for the year next preceding such issue; * * *"

Provision was made in the last above quoted section that all school districts might have the same rights as districts in cities of the first class theretofore had in the issuing of bonds for the obtaining and improving of school property. In the same codification act, above mentioned, there was enacted Revised Statutes section 3958, which provided:

"Each board of education shall, annually, at a regular or special meeting held between the third Monday in April and the first Monday in June, *fix the rate of taxation necessary to be levied for all school purposes* * * *."

The provisions of said section are now found in General Code section 5649-3a, as follows:

"On or before the first Monday in June, each year, * * * each board of education * * * shall submit or cause to be submitted to the county auditor an annual budget, setting forth in itemized form an estimate stating the amount of money needed for their wants for the *incoming year*, and for each month thereof. Such annual budget shall specifically set forth:

(1) The amount to be raised for each and every purpose allowed by law for which it is desired to raise money *for the incoming year*.

(2) The balance standing to the credit or debit of the several funds *at the end of the last fiscal year.*

(3) The monthly expenditures from each fund in the twelve months and the monthly expenditures from all funds in the twelve months *of the last fiscal year.*

(4) The annual expenditures from each fund *for each year of the last five fiscal years.*

(5) The monthly average of such expenditures from each of the several funds *for the last fiscal year, and also the total monthly average of all of them for the last five fiscal years.*

(6) The amount of money received from any other source and available for any purpose in each of the last five fiscal years, together with an estimate of the probable amount that may be received *during the incoming year,* from such source or sources.

(7) The amount of the bonded indebtedness setting out each issue and the purpose for which issued, the date of issue, and the date of maturity, the original amount issued and the amount outstanding, the rate of interest, the sum necessary for interest and sinking fund purposes, and the amount required for all interest and sinking fund purposes for the incoming year.

* * * * * * * * * *

The local tax levy for all school purposes shall not exceed in any one year five mills on the dollar of valuation of taxable property in any school district. * * * "

It is stated in Rabe vs. Board of Education, 88 O. S., 403-415, that the school year which begins on the first day of September of each year and closes on the 31st day of August of the succeeding year "is recognized as the fiscal year."

So that what was provided for in the original act and in section 36 thereof, in relation to the estimates for school purposes, is now provided for in said section 5649-3a G. C., and what was originally provided for in section 36 of the original act in relation to the issuing of bonds for obtaining and improving school property is now provided for in section 7629 G. C., and in all of said sections the year that is being considered is the school year, that is, the year beginning September 1st in any calendar year and ending on the 31st of August of the succeeding calendar year. At no place is any other year than the school year mentioned except the fiscal year.

I am therefore of the opinion that the words "in any year" in section 7629 means the school year as the same is defined by section 7689, herein mentioned.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

621.

COLLATERAL INHERITANCE TAX—BEQUEST TO WOMEN'S ASSOCIATION OF CHURCH—LIABLE—WHEN PART OF FUNDS USED TO SUPPORT CHURCH.

A bequest to the women's association of a church, which is an auxiliary of the church of which every woman in the church is a member, and which performs charitable work in ministering to the needs of indigent families, etc., but which also aids in the support of the church society by helping to care for the church building, is not exempt from the collateral inheritance tax. Such association, if considered as an institution, can not be said to be an institution "for purposes only of public charity" and a bequest made in aid of its work generally is, therefore, not made "to or for the use of an institution in this state for purpose only of public charity or other exclusively public purposes."

COLUMBUS, OHIO, September 17, 1917.

HON. D. M. CUPP, *Prosecuting Attorney, Delaware, Ohio.*

DEAR SIR:—I am in receipt of a communication in which you ask my opinion upon facts stated therein as follows:

> "Sarah Moore, late of Delaware county, bequeathed to the Women's Association of the William Street Methodist Episcopal Church, Delaware, Ohio, a legacy of five thousand dollars, with which to carry on its work. Said testator made several legacies which are not involved or in any way connected with the matter presented.
>
> The Woman's Association of The William Street Methodist Episcopal Church is an auxiliary of the church and every woman of the church is considered a member of this organization.
>
> The object of this association is to work for the good of the people of Delaware and vicinity and especially for the welfare of indigent families, reporting each month those who are sick, in trouble, or in need of financial assistance, and this association keeps the pastor continually informed about these various needs.
>
> Shoes and clothing and sewing are furnished children who could not otherwise attend Sunday school and church.
>
> Recently a pastor who was in very ill health was furnished groceries and other necessaries during his long and continued illness.
>
> The association also helps to keep up the church and assists in buying coal and paying electric light bills, and much money is raised by serving dinners and banquets to the public, and working in numerous other ways for the general welfare of the city of Delaware.
>
> No one derives any profit or compensation from this association, and the association is assisted further by donations from the people.
>
> The society works continuously for the good of the cause of christianity, and of the church and the people, helping the needy ones wherever it finds them. The society is under the constant necessity of soliciting support by voluntary donations from charitably disposed persons, or is compelled to resort to work in the form of serving dinners, banquets, etc.
>
> With the above statement of facts before you I respectfully ask your opinion as to whether or not said Women's Association will be required to pay the collateral inheritance tax."

The question submitted by you has been the subject of considerable investiga-

tion and consideration in keeping with the importance of the question, but in this opinion I shall attempt to do little more than to state my conclusions in the matter. The question calls for consideration and construction of certain provisions of section 5332 G. C., which exempts certain bequests, devises, etc., from the operation of the collateral inheritance tax imposed by section 5331 G. C.

Section 5332 G. C., in so far as material to the question in hand, provides as follows:

> "The provisions of the next preceding section shall not apply to property or interests in property, transmitted to * * * * or for the use of an institutition in this state for purpose only of public charity or other exclusively public purposes."

The first question which suggests itself in the consideration of the above quoted statutory provisions in their application to the question at hand is whether or not the women's association referred to in your communication is an "institution" within the meaning of the term as used in section 5332 G. C.

This question is not free from doubt in view of the decision of the supreme court in Humphreys v. State, 70 O. S. 67. The conclusion at which I have arrived, however, makes it unnecessary for me to consider this phase of the question; and I assume for the present that the society has an existence distinct from that of the church with which it is connected, though not separate therefrom, and that it is an "institution" within the meaning of the statute. Is it "an institution in this state for purpose only of public charity or other exclusively public purposes?" The church itself with which the society is connected is not such an institution. This is the holding of this department based upon decisions like Gerke v. Purcell, 25 O. S. 229, and Watterson v. Halliday, 77 O. S. 150, construing similar language in the constitution and statutes relative to exemptions from property taxation; and based further upon the ground that the phrase "other exclusively public purposes" as used in the collateral inheritance tax law must be interpretedi n accordance with the rule of *ejusdem generis* as limited in scope to purposes of the class indicated by previous enumeration of like things. In other words, if the bequest were to the church for church purposes generally it would not be exempt from the tax.

As pointed out in Watterson v. Halliday, supra, many of the activities of a church are charitable in character; yet the institution in its preponderant aspect exists rather for the dissemination of religion than the dispensing of charity in the narrower sense in which that term must be interpreted in contexts like the one under consideration. Yet, as shown by both of the decisions cited, there may be fostered under church auspices or connections institutions which are of a charitable nature; and for the purposes of this opinion it will be assumed, though not decided, that an institution might be so broad in scope as not to exist "for purpose *only* of public charity" and yet, having within its purview some objects which are "purely" or "only" charitable, may be the competent recipient of a bequest which according to its terms is to be applied only to such charitable ends. Hence it will be assumed that the bequest about which you inquire would be a bequest to an institution "for purpose only of public charity" if the terms of the bequest limited its application to public charitable objects.

This assumption, which is as broad a one as the statute is susceptible of under any possible interpretation consistent with the previous opinions referred to, places determining stress upon the purpose of the devise or bequest rather than the general purpose of the institution. In the case you submit, however, there can be no discrimination of this sort, because the bequest is made to the society for the purpose of carrying on its work generally and is not limited to some particular branch of its work.

You state that the association is an auxiliary of the church and that among its

objects is to assist in keeping up the church by maintaining its physical plant. In other words, the association does not limit itself to the relief of the needy without discrimination as to denomination, but also works for the support of the church and assists the church to discharge its function of public worship and religious education, as well as in the performance of such acts of charity as may appropriately be performed by a church or a church auxiliary. This fact renders the bequest subject to the same rule as would be applied in the case of a bequest to a church for the purpose of its work generally, and on this ground, if for no other reason, I am of the opinion that the bequest is not one to an institution for purposes *only* of public charity, but is one to an institution for purposes, some of which constitute public charity but others of which do not constitute such charity. That being the case, the bequest mentioned in your letter is not exempt from the collateral inheritance tax.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

622.

APPROVAL—FINAL RESOLUTION FOR ROAD IMPROVEMENT IN CLERMONT COUNTY.

COLUMBUS, OHIO, September 17, 1917.

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

DEAR SIR:—I have your communication of September 12, 1917, in which you enclose a final resolution, for my approval, upon the following:

> "Clermont county—Section 'K-1' of the Cincinnati-Chillicothe road, I. C. H. No. 8."

I have carefully examined said resolution and find it correct in form and legal, and am therefore approving the same as provided in section 1218 G. C., and return it to you herewith.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

623.

APPROVAL—ABSTRACT OF TITLE—JOHN W. ZELLER TO STATE.

COLUMBUS, OHIO, September 18, 1917.

HON. J. E. SHATZEL, *Secretary Board of Trustees, State Normal School, Bowling Green, Ohio.*

DEAR SIR:—You recently submitted to this department for examination abstract of title covering the following described premises, situate in the city of Bowling Green, county of Wood, State of Ohio, and bounded and described as follows:

> "Commencing 50 feet west of the intersection of the west line of Wayne street with the curb line of the north line of Wooster street in said city, thence north along the west line of Frank L. Deffenback's lot and along said west line extended to the south line of that part of out lot No. 97 in said city, owned by the State of Ohio, thence west along said south line of said part of

said lot owned by the State of Ohio 100 feet, thence south parallel with Wayne street to the curb on the north line of Wooster street, thence east 100 feet to place of beginning, being a part of out lot No. 97 in said city.

Also all that part of said out lot No. 97 lying between the north line of said Deffenback's lot and the south line of the land owned by the State of Ohio."

You also submit deed covering the above described premises wherein John W. Zeller and Elizabeth Zeller deed said property to the State of Ohio. I note that the above described premises are incumbered as follows:

"On January 2, 1913, John W. Zeller and Elizabeth Zeller gave a mortgage on said premises to one Charles W. Butler. Said mortgage was "given to secure payment of one note of $900.00, payable at the First National Bank of Defiance, payable five years after date, with interest at 8 per cent. per annum after maturity, payable semi-annually. Said note is dated January 2, 1913, and also secures payment of ten coupon notes for interest of $27.00 each, payable every six months."

The abstract does not show that said mortgage was satisfied or released.

The taxes for the year 1917 are a lien on said premises, but as yet undetermined.

In the deed submitted John W. Zeller and Elizabeth Zeller covenant that they are lawfully seized of said premises and that said premises are free and clear of all incumbrances whatsoever. Therefore, the amount of the mortgage above set forth and the taxes for the year 1917 should be deducted from the purchase price.

I also note that the deed from Helen W. Wooster, the former owner of Out Lot No. 97, in the city of Bowling Green, Wood county, Ohio, to John W. Zeller, dated December 23, 1912, contains the following restriction:

"Said grantee, John W. Zeller, his heirs or assigns, is to build a good and substantial fence along half of the west line of the above described property, and is also to build a dwelling house on said property to cost not less than $3000.00."

The rule of law governing restrictions in deeds is that the restriction may be enforced by any one for whose benefit it was so placed in the deed. Restrictions may be made for the personal benefit of the owner or they may have been imposed for the benefit generally of the purchaser of the other lots in the vicinity, whether or not they were owned by the same grantor. In other words, the grantor owning but one lot in the neighborhood may place a binding restriction thereon for the benefit of the other owners and these latter parties may go into a court of equity and have same enforced. I call attention to this rule of law because of the fact that the lot deeded by John W. Zeller to the state of Ohio does not comprice the whole of Out Lot No. 97 and that Helen W. Wooster has sold parts of said Out Lot to other parties; and further because of the fact that Out Lot No. 97 does not comprise the whole of the block of land facing Wooster street between Thurston Avenue and Wayne street.

It will therefore be necessary, before passing positively on the question of whether or not the restriction in the deed to John W. Zeller has any force and effect, to ascertain for whose benefit this restriction was made, whether it was placed there for the particular benefit of the grantor (Helen W. Wooster), for the benefit of the other lots in said Out Lot No. 97, or whether it was placed there for the benefit of the lot owners in that neighborhood.

The intention of the grantor, Helen W. Wooster, may be ascertained from her acts and the circumstances. That is, if the deed from the grantor to other purchasers contained a like restriction, or from the records it can be ascertained that it was the general scheme in the neighborhood that all dwelling houses should not cost less than a certain sum of money, it would show that the grantor intended this restriction for the benefit of the other lot owners generally and the restriction would be binding in their favor.

However if the circumstances prove the restriction to be for the benefit of the other lots of the grantor Helen W. Wooster and as you state in your communication that she has since sold all her land to the state, then such restriction would be of no force and effect. But if you determine from your investigation that the restriction was for the personal benefit of the grantor, it would then be necessary for you to obtain from her a release; otherwise the restriction would be binding

I advise you, therefore, to investigate and determine for whose benefit this restriction was made. You will then be able to apply the rule of law, as I have pointed out to you, to the facts as found from your investigation and determine whether or not the restriction is binding. The deed submitted, with the exception above noted, will convey a clear title to the state of Ohio.

I am herewith returning said abstract and deed.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

624.

CASS HIGHWAY ACT—GOVERNS BOND AND CONTRACT FORMS IN SUBMITTING PROJECT STATEMENTS TO SECRETARY OF AGRICULTURE—FEDERAL AID.

In submitting project statements to the secretary of agriculture, the form of bond and the form of contract provided for in the Cass highway act must be used under the facts upon which this opinion is written.

COLUMBUS, OHIO, September 19, 1917.

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

DEAR SIR:—I have your communication, in which you ask my opinion as follows:

"This department has submitted and is now ready to submit to the secretary of agriculture, Washington, D. C., projects statements covering proposed construction of certain sections of inter-county highways and main market roads in the state under the provisions of the 'Federal Aid Road Act of 1916.'

"Applications for aid on these projects were received by me from county commissioners and same were approved by me and surveys ordered prior to the time at which Amended House Bill No. 300 came into full force and effect.

"The approval of the highway advisory board to the project statements was not given until after the time Amended Bill No. 300 came into full force and effect.

"The federal government is now requesting that this department submit to it copies of forms of contract and bond which we propose using in all construction work where federal aid is involved.

"With the above facts before you, I respectfully request your opinion on the following:

"Must the contracts for these improvements be let under the provisions of the Cass highway law, or under the provisions of Amended House Bill No. 300."

Your question has to do with the provisions of what is known as the Federal Aid Road Act of July 11, 1916. Section 10 of said act provides:

"That the secretary of agriculture is authorized to make rules and regulations for carrying out the provisions of this act."

In accordance with the provisions of said section, the secretary of agriculture promulgated a set of rules and regulations on September 1, 1916. In section 1 of regulation 4 of these rules and regulations there is a provision made for the submission to the secretary of agriculture of what is known as a project statement by the state highway department. In this section provision is made as follows:

"With each statement there shall be submitted for the approval of the secretary copies of the form of contract, together with all documents referred to therein or made part thereof, and of the contractor's bond which it is proposed to use on the project. No alteration of such forms shall be made until it is approved by the secretary."

From this language it is seen that you are to submit to the secretary of agriculture the form of contract and the form of the contractor's bond which you propose to use on the project submitted to the secretary of agriculture.

Of course the question then simply is as to what form of contract and what form of bond you will use when you come to let the contract for the improvement upon which the federal government will grant the aid, and you ask, therefore, whether you will use the form of bond and contract as provided for under the Cass highway law, or that provided for under amended house bill No. 300.

In answering your query, I desire to call attention to an opinion (No. 449) which I rendered you on July 16, 1917. In this opinion I discussed the question whether a road improvement would be considered a proceeding under the provisions of section 26 G. C. On page 12 of the opinion I arrived at the following conclusion:

"From all these cases it seems to me that there can be no question but that the matter of a road improvement constitutes a proceeding under the terms of section 26 G. C."

I then proceeded to advise when the first step in a road improvement is taken and on the same page stated:

"It is my opinion that the first step is taken when the state highway commissioner approves the application of the county commissioners for the improvement of the inter-county highways or main market roads of the county, or when he approves any part of said highways for which application has been made, and orders the county surveyor to prepare plans, profiles, specifications, &c., for said improvement.

"Hence, if the approval of the state highway commissioner was made and his ordering the county surveyor to make plans, specifications, &c. for an improvement occurred before June 28, 1917, then your department would proceed under the provisions of the old law. But if these steps have been taken since the 28th day of June, 1917, the provisions of the new law would control in the matter of your further proceedings."

In applying the law, as I found it to be in said opinion, to the facts as they are in your present communication, what is the answer to your question?

Before you make your project statement to the secretary of agriculture, the following steps will have been taken: Some county or counties have made application for aid in the improvement of certain highways. Your department has allowed the application either in whole or in part and has ordered plans, profiles, &c. to be made. Further, these plans, profiles, &c. have been approved by your department. Then you send to the secretary of agriculture a statement setting forth the nature of the improvement in detail.

Hence it would seem clear from all the above that the first steps of the road improvement or improvements will have been taken at the time you send your project statement to the secretary of agriculture, and that you should use the form of contract and the form of bond as provided for under the law as it was when you took the first steps in the matter of the road improvements, namely, the Cass highway act, and not the forms set forth in acts which became effective after you took the first steps.

Hence, answering you question specifically, it is my opinion that you should include in your project statement the form of contract and the form of bond provided for under the Cass highway act.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

625.

LEASE—STATE LANDS—STATE CANNOT CANCEL SAME BECAUSE OF FRAUD ON PART OF LESSEE TOWARD THIRD PARTY IN SECURING SAME.

1. *Where I. M. M. promises S. & R. to secure a lease of certain lands from the state of Ohio for the use and benefit of said S. & R., and after securing the lease refuses to turn same over to S. & R., or their assigns, the state would not be justified in law in declaring the same cancelled, due to the fraud practiced upon S. & R. by I. M. M.*

2. *The lands belonging to the public parks of the state are subject to being leased, as are the canal lands of the state, but are not subject to sale.*

COLUMBUS, OHIO, September 19, 1917.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your communication of recent date, to which you attach a copy of a certain lease to Ira M. Miller, dated October 23, 1916, and also a brief of The Summit Beach Park Company, which communication reads as follows:

> "I am enclosing a brief referring to a lease issued to Ira M. Miller in Akron, Ohio, for a strip of the bank extending along the shore of Summit Lake for a distance of 1945 feet, more or less. This lease was granted October 23, 1916.
>
> "It is set up in the brief that the said lease was obtained by fraud. Secondly, that the lease was obtained for park purposes and that the said lessee has not used the same for park purposes and has from time to time attempted to sublet the same for commercial purposes, either on a lease or royalty basis. Third, the point is made that this land being part of the state park is not subject to a lease, etc. Another ground for the revocation of the lease is that the lessee has failed to patrol said towing path and water front, as per his contract.

"I would like to know whether these are valid grounds for the cancellation of this lease, viewed in the terms of the agreement and the interests of private parties and the generdl public."

In view of the facts set forth in the brief of the said The Summit Beach Park Company, you ask my opinion whether the lease made to said Ira M. Miller is a legal and valid contract, or if the same ought to be cancelled by you for the state and held to be void and of no effect.

The facts upon which you desire this opinion and as set out in your communication and writings thereto attached are as follows:

1. On August 23, 1916, J. L. Snyder and J. A. Rampanelli of Akron, Ohio, received from Cora W. Miller, wife of said Ira M. Miller, lessee of the state, and one Lewis A. Miller, brother of Ira M. Miller, options to lease certain property owned by them, the lease to be taken for the purpose of building and constructing thereon an amusement park, and that said parties so informed said Cora W. Miller and Lewis A. Miller of their intention so to do.

2. In order that this land, upon which options were taken for leases, would be of any value as an amusement park, it would be necessary for the lessees to secure the rights of the state in and to the tow-path and lands adjoining Summit Lake, Summit county, Ohio, the lands to be leased from said Cora W. Miller and Ira M. Miller lying near said Summit lake.

3. Shortly a ter August 23, 1916, Ira M. Miller, the lessee of the state, husband of said Cora W. Miller in a conversation with said J. L. Snyder and J. A. Rampanelli, said that he had also been working upon the park proposition in connection with the lands of his wife and brother, but that he was never able to get all matters adjusted so that he could carry out his intentions. He asked said Snyder and Rampanelli if they were intending to obtain a lease from the state for the tow-path and the state rights in and to lands adjoining Summit lake. They replied that such was their intention. Said Ira M. Miller then stated to them: "I shall get them for you. I have been after them for some time and if you start you will muddle things all up;" to which proposition of said Ira M. Miller said Snyder and Rampanelli consented and agreed, with the understanding that said Ira M. Miller would turn the lease so secured from the state over to them or to the company which they were promoting.

4. On the 18th day of September, 1916, said Snyder and Rampanelli, for a valuable consideration, sold to The Summit Beach Park Company all their interest in the said option above referred to.

5. The said Ira M. Miller on the 23d day of October, 1916, secured from the state a lease of the tow-path and the rights of the state in lands adjoining Summit Lake, at an annual rental of five hundred dollars per year, taking the lease in his own name.

6. Ever since said date, the said Ira M. Miller has failed and refused to turn said lease over to the said The Summit Beach Park Company, although it has agreed to reimburse him for his services so rendered in securing the lease.

Upon these facts The Summit Beach Park Company submits that the state should cancel the lease to said Ira M. Miller and consider the same void and of no effect, for the following reasons:

(1) That the said lessee, Ira M. Miller, agreed at all times to patrol said tow path and water front and that he has utterly failed and neglected so to do.

(2) That said contract of lease was procured and obtained by fraud.

(3) That the said tow-path was leased for park purposes and that said Ira M. Miller has not used the same for park purposes but has from time to time been attempting to sublet different portions of the same for commercial purposes.

(4) That the tow-path in front of the property of The Summit Beach Park Company is now properly classed as a part of the state park and not subject to lease to any one.

In view of the facts above set forth and as shall hereinafter be noted, let us examine these propositions in the order in which they are set out.

First. As to the fact that said Ira M. Miller does not patrol the tow-path; the lease provides as follows:

> "The party of the second part, hereby agrees for himself his heirs, administrators, successors and assigns to employ a sufficient number of police patrolmen to preserve order in and around the places of amusement to be erected upon the state property herein leased."

In connection with this point it must be remembered that said Ira M. Miller has not as yet erected upon the premises so leased any places of amusement and I am of the opinion that until he does so erect and establish places of amusement, he will not be compelled to patrol the premises, for the reason that the provision for patrolling is to—

> "preserve order in and around the places of amusement to be erected upon the state property herein leased."

So that I am of the opinion that this failure upon the part of the lessee would not be sufficient to warrant a cancellation of the lease.

Second. As to the fact that the contract was procured and obtained by fraud. In so far as the rights of the state in and to this contract of lease are concerned, I am of the opinion that said Ira M. Miller did not practice fraud upon the state of Ohio. If the said Ira M. Miller should proceed to carry out his alleged agreement with said Snyder and Rampanelli, it could hardly be said that any fraud was practiced upon the state of Ohio, and the mere fact that he refuses to carry out said alleged agreement would not be sufficient to enable the state to take advantage of the matter and cancel the lease so made to said Ira M. Miller. The fraud, if any, is practiced upon the said Snyder and Rampanelli and their assigns, rather than upon the state of Ohio. For this reason I am of the opinion that the second ground set forth by The Summit Beach Park Company is not sufficient in law to warrant the cancellation of said lease by the state of Ohio.

Third. As to said tow-path not being used by Ira M. Miller, he from time to time attempting to sublet different portions of the same for commercial purposes. The lease provides, in reference to this matter:

> "It is further distinctly understood and agreed that this lease shall not be assigned, transferred or sublet without the written consent of the superintendent of public works thereto."

From this provision of the contract of lease, it is evident, in my opinion, that if the said Ira M. Miller should assign or sublet any of the premises so leased to him by the state of Ohio, the state of Ohio would be justified and warranted in cancelling the lease so made to said Ira M. Miller, but this principle could hardly be applied to the mere attempting to assign or sublet premises or any part thereof. It is my opinion that the state would have no right to act upon a mere attempt upon the part of said Ira M. Miller to sublet said premises, and that it would not be justified in acting until

the said attempts are consummated into an assigning or subletting of the premises so leased to him, or any part thereof. I further desire to say that the mere fact of non-user would not be sufficient to warrant the concellation of the contract of lease.

Fourth. As to the tow-path being a part of a state park and hence not subject to lease to any one. In order to answer this it will be necessary for us to note the provisions of our statutes in reference to state parks.

Section 469 G. C., as amended in an act found in 107 O. L. 183, provides:

> "Section 469. * * * the bodies of water and adjacent lands owned by the state consisting of the Summit county lakes and reservoirs of the Ohio canal, known as the Portage-Summit reservoirs, together with the Summit Lake * * * all situated in Summit county * * * are hereby dedicated and set apart forever for the use of the public, as public parks or pleasure resorts. The bodies of water mentioned in this section shall, in the order in which they are described be named and designated as follows: 'Buckeye Lake,' 'Indian Lake,' Lake St. Mary's,' 'The Portage Lakes,' and 'Lake Loramie'."

So that the Summit Beach Park Company is correct in its contention that the lands so leased to said Ira M. Miller are merely a part of a state park. The question now is as to whether these lands can be leased for any purpose whatever.

Section 470 G. C. provides as follows:

> "The lakes named in the preceding section shall, at all times, be open to the public as resorts for recreation and pleasure, including hunting, fishing and boating, but the privileges of hunting and fishing shall be subject to the fish and game laws of the state, and the boating privileges shall be subject to the rules and regulations prescribed by the superintendent of public works."

But section 471 G. C. reads as follows:

> "Section 471. No state lands, in or adjacent to Buckeye Lake, Indian Lake, Lake St. Marys, or Portage Lakes shall ever be sold, but the superintendent of public works may lease such lands, including marginal strips and marsh lands around said lakes, the outer slopes of artificial embankments, islands, borrow pits and state lands adjacent thereto as he deems proper under the laws governing the leasing of canal lands."

From the provisions of these sections it is my opinion that even though the lands in question do belong to a state park, yet they may be leased under the same terms and conditions as canal lands may be leased.

From all the above it is my opinion that there is no ground upon which the state of Ohio would be justified in cancelling the lease in question and holding it to be void and of no effect.

I am of the opinion that if any one has any remedy against said Ira M. Miller for his alleged false representations, it is The Summit Beach Park Company, under and by virtue of its assignment from said Snyder and Rampanelli.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

626.

TRUSTEES OF COUNTY CHILDREN'S HOME—THREE MEMBERS OF SAME POLITICAL PARTY—THIRD MEMBER DE FACTO OFFICER—ACTS ARE BINDING—HOME MAY RECEIVE SUPPORT FROM COMMISSIONERS, ALTHOUGH NOT ENDORSED BY STATE BOARD OF CHARITIES.

The board of trustees of a county children's home is composed of three members of one political party and one member of another instead of two members of each party, as the statute provides. HELD, That while the third member of one political party was ineligible for the appointment, he is nevertheless a de facto officer and his acts and the acts of the board are binding.

Also held, that the fact that the state board of charities has refused to endorse this county children's home does not prevent the county commissioners from lending financial support to this institution.

COLUMBUS, OHIO, September 19, 1917.

HON. GEO. E. BARCH, *Juvenile Judge, Waverly, Ohio.*

DEAR SIR:—I have your letter of August 28, 1917, as follows:

"The Board of State Charities in session February 6, 1917, refused to renew the endorsement of the Pike County Childrens' Home and under Section 1352-1, General Code, the juvenile court is not permitted to commit dependent or neglected children to said home. I am besieged every few days with persons desiring to obtain admission to the Home by friends of dependent and neglected children and the situation has become distressing to the court. The present Board of Trustees is composed of three members of one political party and one from the other and they are still making contracts and disbursing money just as they did when the institution was recognized by the State Board of Charities. Will you please give me your opinion on the following questions:

"(1) Is the Board of Trustees. a legal board?

"(2) If not, are the actions of the board legal and binding?

"(3) Have the county commissioners authority to make a levy for the support and maintenance of the institution?"

Sections 1352-1 and 3081 of the General Code read as follows:

"Sec. 1352-1: Such board shall annually pass upon the fitness of every benevolent and correctional institution, corporation and association, public, semi-public, or private as receives, or desires to receive and care for children or places children in private homes. Annually at such times as the board shall direct, each such institution, corporation or association, shall make a report, showing its condition, management and competency, adequately to care for such children as are, or may be committed to it or admitted therein, the system of visitation employed for children placed in private homes, and such other facts as the board requires. When the board is satisfied as to the care given such children, and that the requirements of the statutes covering the management of such institutions are being complied with, it shall issue to the association a certificate to that effect, which shall continue in force for one year, unless sooner revoked by the board. No child shall be committed

by the juvenile court to an association or institution which has not such certificate unrevoked and received within fifteen months next preceding the commitment. A list of each certified institution shall be sent by the board of state charities, at least annually, to all courts acting as juvenile courts and to all associations and institutions so approved. Any person who receives children or receives or solicits money on behalf of such an institution, corporation or association, not so certified, or whose certificate has been revoked, shall be guilty of a misdemeanor and fined not less than $5.00 nor more than $500.00.

"Sec. 3081: When the necessary site and buildings are provided by the county, the commissioner shall appoint a board of four trustees, as follows: One for one year, one for two years, one for three years, and one for four years, from the first Monday of March thereafter. Not more that two of such trustees shall be of the same political party. Annually thereafter on the first Monday of March, the county commissioners shall appoint one such trustee, who shall hold his office for the term of four years and until the successor is appointed and qualified."

It will be noted that section 3081 provides in part that "no more than two such trustees shall be of the same political party." From your statement three of the four members of the board belong to one political party and it is evident that the last of these three members appointed should not have been appointed, but that a member of some other political party should have been named. Some of the authorities hold that a provision such as is found in section 3081, to the effect that "not more than two of such trustees shall be of the same political party." is simply directory while others hold the provision to be mandatory.

In 29 Cyc, 1378, it is stated:

"The general provisions in the state constitutions prohibiting 'tests' for holding office are usually so construed as to prevent the requirement by the legislature of religious and political qualifications. But a statute which provides for a board or commission of a certain number, no more than a certain proportion of whose members shall belong to the same political party, is not regarded as providing a political qualification. It is doubtful if such a provision would be enforced by courts."

However, I do not think it is necessary to discuss this question in this opinion. The qualifications of only one member of the board of trustees are in dispute. The other three members of the board, from all that appears, have been regularly appointed and the qualifications of the fourth member, who should have been of another political party, are only important when acts of the board depending upon his vote are under consideration. Even then these acts would be held valid, since he is undoubtedly a *de facto* officer. The authorities hold that the prime requisites in constituting a *de facto* officer is the existence of a *de jure* office. In the case submitted by you this prime requisite is present, since as a matter of law there is and should be a tribunal known as the board of trustees of the children's home.

The second requisite constituting a person an officer *de facto* is actual possession of the office. In the present case no one, other than the four trustees appointed, is assuming to act as a member of the board of trustees and your letter certainly indicates that this trustee is in possession of the office. The next requisite of a *de facto* officer is found in the rule that his possession must be

under color of title. There can be no question about the existence of this requisite in the case submitted, since his appointment is sufficient color of title.

From the above will be seen that while one of the trustees of the children's home may be ineligible to the office he holds, he is nevertheless a *de facto* officer and his acts are not subject to collateral attack, and until his right to hold the office has been denied by the courts in some direct proceeding, his acts as trustee of the county children's home will undoubtedly be valid.

Answering your third question, I take it that you mean to inquire whether county commissioners may levy a tax for the maintenance of the children's home which the board of state charities has refused to endorse.

Section 3105 G. C. provides:

> "At their regular quarterly meeting at which such estimate is presented to them, the commissioners shall carefully examine the estimate, and if, in their judgment, it is reasonable and ratably within the assessment for the support of the home for the current year, or so much thereof as they deem reasonable and within such assessment, the board of commissioners shall allow and approve, and shall appropriate and set apart such amount for the use of the home. Upon the order of the trustees of the home, the county auditor shall draw his warrant upon the county treasurer, who shall pay such warrant from the fund so appropriated and set apart."

In an opinion rendered by my predecessor, Edward C. Turner, to Hon. A. C. McDougal, Prosecuting Attorney, Woodsfield, Ohio, on March 27, 1916, and found in Opinions of the Attorney General for 1916, Vol. 1, p. 573, Mr. Turner held:

> "Refusal of the board of state charities to renew its certificate to a county children's home, as provided in section 1352-1 G. C., 103 O. L., 865, does not operate to prohibit the county auditor issuing his warrants on vouchers drawn against funds appropriated for the support of such home, to pay bills incurred after the expiration of the former certificate of the state board of charities."

In that opinion Mr. Turner, after quoting section 3105 and section 1352-1 G. C., both herein quoted above, said:

> "These sections impose a limitation upon the power of the juvenile court to commit children to a children's home which does not have such certificate unrevoked and received within fifteen months next preceding the commitment, and upon the power of the trustees or superintendent of the home to receive children either by way of commitment by a court or otherwise, but do not in terms impose any limitation upon the duty of the commissioners to appropriate funds for the support of the institution, and of the auditor to issue warrants upon vouchers issued against such appropriation by the trustees as provided in section 3105 G. C., supra. Not only is there no specific inhibition against the same, but there is no provision for the disposition of children already in the home, and this strengthens the view that it was not the intention of the legislature that the refusal of the board of state charities to certify, should require that a county children's home should not be further supported by the county for the benefit of children already there.
>
> "I am therefore of the opinion that the refusal of the board of state charities to issue its certificate to the Monroe county children's home,

as provided in section 1352-1 G. C., supra, does not operate to prohibit the auditor from issuing his warrants on vouchers issued by the trustees of the children's home against the appropriation made by the commissioners for the use of such home, to pay bills contracted since the expiration of the last certificate issued to such home by the board of state charities."

I agree with the reasoning in this opinion and would therefore advise you that the fact that the board of state charities has refused to endorse the children's home of your county will not in any way affect the right of the county commissioners to levy taxes for the future maintenance of this institution.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

627.

WHEN CLERKS, ETC., HAVE RECEIVED COMPENSATION IN ADDITION TO THAT ALLOWED BY COMMISSIONERS—NOT AUTHORIZED BY COMMON PLEAS COURT—COURT CANNOT AFTERWARD AUTHORIZE SUCH PAYMENT BY NUNC PRO TUNC ENTRY.

When a county auditor has issued his warrant to clerks, assistants or deputies of county officers, covering compensation to them in addition to the amount allowed by the county commissioners to such county officers for clerk hire, etc., without such additional allowance having been authorized by the common pleas court, as provided in section 2980-1 G. C., such court cannot afterward authorize the payment of such additional compensation by a nunc pro tunc entry.

COLUMBUS, OHIO, September 19, 1917.

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

GENTLEMEN:—I have your letter of August 28, 1917, as follows:

"We desire to call your attention to an opinion of Hon. Timothy S. Hogan at page 200 of Vol. 1 of the Annual Reports of the Attorney General for 1913, as to findings to be made by the examiners of this bureau in instances of excess payments over and above the allowances made by the county commissioners for clerk hire in the offices of the officials mentioned in the county officers' salary law; also to an opinion of Hon. Edward C. Turner at page 703 of Vol. 1 of the Opinions of the Attorney General for 1915, which fully sustains Mr. Hogan's opinion in all particulars.

"The examiners of this bureau, in accordance with instructions conformable to the opinions referred to above, have been making findings for recovery of excess payments for clerk hire, but in many instances after findings have been so made, judges of courts of common pleas have caused so-called *nunc pro tunc* entries to be placed upon the journals of their courts for the purpose of nullifying the findings so made by the state examiners.

Query: Does such entry, if made in any year subsequent to the time when additional allowance should have been made by the court, as

provided by section 2980-1 G. C., even though the order directs that said entry be entered as of a date within the year when said allowance should have been made, cure the defect?"

Section 2960 and 2980-1 G. C. read:

"Sec. 2980: On the twentieth of each November such officer shall prepare and file with the county commissioners a detailed statement of the probable amount necessary to be expended for deputies, assistants, bookkeepers, clerks and other employes, except court constables, of their respective offices, showing in detail the requirements of their offices for the year beginning January 1st next thereafter with the sworn statement of amount expended by them for such assistants for the preceding year. Not later than five days after the filing of such statement, the county commissioners shall fix an aggregate sum to be expended for such period for the compensation of such deputies, assistants, bookkeepers, clerks or other employes of such officer, except court constables, which sum shall be reasonable and proper, and shall enter such finding upon their journal."

"Sec. 2980-1: The aggregate sum so fixed by the county commissioners to be expended in any year for the compensation of such deputies, assistants, bookkeepers, clerks or other employes, except court constables, shall not exceed for any county auditor's office, county treasurer's office, probate judge's office, county recorder's office, sheriff's office, or office of the clerk of the courts, an aggregate amount to be ascertained by computing thirty per cent on the first two thousand dollars or fractional part thereof, forty per cent on the next eight thousand dollars or fractional part thereof and eighty-five per cent on all over ten thousand dollars, of the fees, costs, percentages, penalties, allowances and other perquisites collected for the use of the county in any such office for official services during the year ending September thirtieth next preceding the time of fixing such aggregate sum; provided, however, that if at any time any one of such officers require additional allowances in order to carry on the business of his office, said officer may make application to a judge of the court of common pleas of the county wherein such officer was elected; and thereupon such judge shall hear said application and if, upon hearing the same said judge shall find that such necessity exists, he may allow such a sum of money as he deems necessary to pay the salary of such deputy, deputies, assistants, bookkeepers, clerks or other employes as may be required, and thereupon the board of county commissioners shall transfer from the general county fund, to such officers' fee fund, such sum of money as may be necessary to pay said salary or salaries.

"Notice in writing of such application and the time fixed by such judge for the hearing thereof shall be served by the applicant, five days before said hearing upon the board of county commissioners of such county. And said board shall file in said proceeding their approval or disapproval of the allowance asked for and shall have the right to appear at such hearing and be heard thereon; and evidence may be offered.

"When the term of an incumbent of any such office shall expire within the year for which such an aggregate sum is to be fixed, the county commissioners at the time of fixing the same shall designate the amount of such aggregate sum which may be expended by the incumbent and the amount of such aggregate sum which may be expended by his successor for the fractional parts of such year."

These statutes were considered by the court in *In Re* Application of Diemer, 17 O. N. P. (n. s.) 369; 25 O. Dec. N. P. 517: The court said at page 523:

'We think these sections when construed in the light of the entire act, and the purpose and intendment thereof, enjoin upon the county commissioners grave duties, powers and responsibilities, which they must exercise with care and deliberation to the end that the public funds be not dissipated, or the public service injured by any act of commission or omission of duty on their part.

"This construction is consistent with the intent and purposes of the salary act, and is necessary to give effect to the duty and power conferred upon the county commissioners to regulate and limit the expenditure of the public funds to the actual needs of the public service. It also harmonizes the duties and powers conferred by the enactment, and does no violence to the rights and privileges of the county officer prescribed by section 2981, to appoint and employ deputies, etc., and to fix their compensation.

"Such officer may appoint and employ deputies, etc., only when the county commissioners or the court, in a proper case for such purpose, have made an allowance therefor. The provisions of this section, that such officer may fix the compensation of such deputies, etc., means that which has been ordered and prescribed by the county commissioners, or the court.

"If we are correct in our interpretations of these statutes, then it follows that there can be no deficiency in the fund provided for compensating the deputy of the applicant.

"In any event, it is clear that there can be no deficiency in the fund allowed by the county commissioners and the former judge of this court for the month of July as claimed by the applicant, for the reason that the mandatory provisions of section 2981 require that the compensation of deputies appointed or employed by a county officer can be paid, to such deputy in equal monthly installments only upon the warrant of the county auditor.

"The county auditor is not authorized to issue a warrant for such compensation to deputies and clerks, except in conformity to the allowance made by the county commissioners or the court, if any, under the provisions of sections 2980, 2980-1 and 2981 G. C., and upon such deputy or clerk having first complied with the provisions of section 2988 G. C.

"The provisions of section 2981 G. C., that county officers may employ necessary deputies, etc., and fix their compensation, does not create a liability against the county if no allowance or compensation has been fixed by the county commissioners or the court under the provisions of the statutes. Halpin v. Cincinnati, 3 Dec. Re 58 (2 Gaz. 386); Lease, In re, 2 Circ. Dec. 386 (4 R. 3); Strawn v. Columbia Co. (Comrs.) 47 Ohio St 404, 408 (26 N. E. Rep. 635); Clark v. Lucas Co. (Comrs.) 58 Ohio St. 107 (50 N. E. Rep. 356); Butler Co. (Comrs.) v. Williver, 5 Circ. Dec. 569 (12 R. 440); Clerk v. Lucas Co. (Comrs.) 4 Dec. 318 (3 N. P. 112); Reeves v. Griffin, 4 Dec. 461 (29 Bull. 281).

"The broad discretionary and administrative or governing power conferred upon the county commissioners by the salary enactment, as we have shown, is not an arbitrary one. The county commissioners must act in reference to it with legal and not arbitrary discretion in the bestowal or refusal of the public funds to the various county officers for clerk or deputy hire. * * *

"As stated heretofore, the contention of the applicant in this proceed-

ing is that this provision clothes the judge with ministerial and discretionary duties only, and in consequence such judge may allow or not allow the sum asked in this instance at his pleasure.

"With such conclusion this court is unable to agree. Without extending this opinion with a review and citation of the numerous authorities upon this point, it is sufficient to say that, in the opinion of this court, the duties enjoined by this statute upon the court or judge are not ministerial in any sense, but that such statute confers a clear and unequivocal judicial power which must be exercised in a judicial capacity. This being true, it follows that the facts of each case must warrant an allowance, or none can be ordered.

"What facts or circumstances then should be shown to justify the court or judge in making an additional allowance under this section of the act in question?

"We have already pointed out the intent and purpose of this enactment, as well as the rule of construction to be applied in construing the same, and we think that a proper interpretation of this provision constrains us to hold, and we do hold, that an additional allowance under it should be ordered only when a necessity for the good of the public service is reasonably and clearly shown to exist, and that the county commissioners are without authority to meet the exigency. And in such cases as it is so shown, that a necessity for the good of the public service exists, and that the county commissioners have acted unreasonably and abused the power conferred upon them in the premises. Neither of these contingencies is shown to exist in the proceeding at bar. It follows that the application must be denied."

The question you now ask is, whether the court of common pleas may make a *nunc pro tunc* entry, making the county officer an additional allowance to pay the salary of deputies, assistants, clerks or other employes. In other words, can a common pleas court make an order for such allowance and date it back so as to make it appear of record that said order was made by the court prior to the payment of such compensation to such assistants, when in fact no such order was made.

In 29 Cyc., p. 1516, it is said:

"An order can be entered *nunc pro tunc* to make a record of what was previously done by the court, although not then entered; but where the court has wholly omitted to make an order, which it might or ought to have made, it cannot afterward be entered *nunc pro tunc.*"

In Torbet v. Coffin, 6 Ohio, p. 34, it was stated:

"After the close of the term, it is holden that the court can enter no order *nunc pro tunc,* unless one was actually made, and omitted to be entered. 1 Ohio 375; * * *"

In Printing Company v. Green, 52 O. S. 487, it was held:

"The province of a *nunc pro tunc* entry is to correct the record of the court in a cause so as to make it set forth an act of the court, which though actually done at a former term thereof, was not entered upon the

journal; and it cannot lawfully be employed to amend the record so as to make it show that some act was done at a former term, which might or should have been, but was not, then performed."

It will be noted that section 2980-1 G. C. provides for a hearing on the application and that a notice in writing of such application and the time fixed for the hearing shall be served by the applicant five days before said hearing upon the board of county commissioners. The statute also provides that the board of county commissioners shall file in said proceeding their approval or disapproval of the allowance asked for and shall have the right to appear at such hearing and be heard thereon; and evidence may be offered.

The *nunc pro tunc* entries which you refer to would make it appear that all these things had been done as provided by statute, when in point of fact no one of them has been done.

In the light of the above authorities it is plain that a *nunc pro tunc* entry cannot be employed to perform such function. It is therefore my opinion, in direct answer to your question, that no such *nunc pro tunc entry* in the common pleas court affects in any way the findings referred to.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

628.

THIRTY-THREE AND ONE-THIRD PER CENT ASSESSMENT LIMITATION—PROVIDED FOR IN SECTION 3819—IN DETERMINING SAME—VALUE OF LAND AND IMPROVEMENTS SHOULD BE CONSIDERED.

The actual value of a lot or parcel of land which is used in determining the assessment limitation of thirty-three and one-third per cent., as contained in section 3819 G. C., has reference to both the lot or parcel of ground proper and any improvement or buildings that are located thereon and considered, in legal contemplation, a part of the realty.

COLUMBUS, OHIO, September 19, 1917.

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

GENTLEMEN:—I have your communication in which you request my opinion upon the following matter:

Section 3819 G. C. provides:

"In no case shall there be levied upon any lot or parcel of land in the corporation any assessment or assessments for any or all purposes within a period of five years, to exceed thirty-three and one-third per cent of the actual value thereof, after improvement is made."

We also call your attention to court decision, 51 O. S. 390.

"Question: In ascertaining the limitation of thirty-three and one-third per cent, is the value of the lot only to be taken into consideration, or the value of the lot or any buildings thereon?"

Section 3819 G. C. reads, in part, as follows:

"The council shall limit all assessments to the special benefits conferred upon the property assessed, and in no case shall there be levied upon any lot or parcel of land in the corporation any assessment or assessments for any or all purposes, within a period of five years, to exceed thirty-three and one-third per cent of the actual value thereof after improvement is made. * * *"

The identical question that you submit for my opinion was presented to our Supreme Court for its consideration in the case of *Findlay v. Frey,* 51 O. S. 390, which is cited by you in your communication. The assessment limitation provision that was before our court of last resort in that case for interpretation was contained in section 2270 R. S., which read, in part, as follows:

"In municipal corporations other than cities of the first class, or in corporated villages in counties containing a city of the first grade of the first class, the tax or assessment specially levied and assessed on any lot or land for any improvement shall in no case, except as provided in section twenty-two hundred and seventy-two, amount to more than twenty-five per centum of the value of the property as assessed for taxation. * * *"

Paragraph 1 of the syllabus in *Findlay v. Frey,* supra, reads:

"Under section 2270, Revised Statutes, the value of the lot or land, with the improvements, as assessed for taxation, is to be taken in determining the limit to which it may be assessed for the improvement of a street on which it abuts, whether made by the foot front or otherwise."

And the opinion, at pages 400 and 401, the court says:

"The principal objection urged to the validity of the assessments made upon the property of the plaintiff below is, that in the aggregate, they exceed the amount that can lawfully be assessed upon her property in any period of five years. Section 2270, Revised Statutes, provides that the assessment shall in no case amount to more than twenty-five per centum of the value of the property as assessed for taxation; and section 2283 further provides that special assessments, whether by the front foot or otherwise, shall be so restricted, that the same territory shall not be assessed for making two different streets, within a period of five years in such amounts that the permitted maximum assessment will be exceeded thereby. Now, it is contended, from a construction, placed on the language of section 2264, Revised Statutes, taken in connection with the provisions of section 2790, fixing the duties of district appraisers of real estate, that the language, 'the value of the property assessed for taxation,' contained in section 2270, means the value of the land simply, without its improvements; because, by section 2264, the council, preparatory to ordering an improvement to be paid for by an assessment on the foot front or otherwise, is, by ordinance, required to set forth 'specifically the *lots* and *lands* to be assessed,' and that it appears from section 2790, that *lots* and *lands* are, for the purpose of taxation, appraised separately from the improvements upon them. We are unable to collect any such intention

from the statutes referred to. The statutes upon the subject have been in force, substantially as they are now, for a great many years, and this is the first time the question has been raised or mooted. The practice has been uniformly the other way; and, as we think, in conformity to the real intention of the legislature. Ordinarily, in legal contemplation, where a lot or tract of land is mentioned or described, it includes, without more, all the improvements upon it, constituting part of the realty; so that the description of the lots and lands to be assessed, required by section 2264, includes the improvements thereon for the same purpose; and it is one-fourth the value of the lot or land as assessed for taxation, that is to furnish the limit to the assessment that can be mabe thereon under the provisions of section 2270. The provisions of section 1790 have, as we think, no reference to, or connection whatever with the subject of assessments; nor were the statutes regulating assessments made with any reference to this section. It requires the assessor to obtain a pertinent description of each tract and lot of real property in his district, and note on his plat book separately the value of dwelling houses, mills, etc., exceeding the value of a hundred dollars which shall be carried out as a part of the value of such tract; and this is its value as assessed for taxation, and on which taxes are in fact levied. The purpose of requiring the value of the improvements to be separately stated, was, in case of their destruction by fire or other agent, to furnish a basis for the taxation of the land, until the next decennial appraisement. It will not be claimed that a street improvement is of no value to the improvements on the abutting property; indeed, its chief value is to such improvements, increasing as it does, the owner's convenience in the enjoyment of his improvements."

In so far as the question that you submit is concerned, I do not understand that the language used in Section 3819 G. C. has any different meaning than that used in old Section 2270 R. S. It is true that under the present section the limitation is based upon actual value of the property, while under the former section the maximum assessment was based on the value of the property as assessed for taxation. This difference, however, is only one of kind of value and does not have any bearing on what makes up the property that is to be valued. Even if it should be considered that the change in language had some effect, it would strengthen the conclusion reached by the court in the above mentioned case rather than weaken it, since the elimination of the words "as assessed for taxation" destroys the main premise upon which the contention of the defendant in error was based.

I therefore advise you that it is my opinion that the actual value of a lot or parcel of land which is used in determining the assessment limitation of thirty-three and one-third per cent, as contained in Section 3819 G. C., has reference to both the lot or parcel of ground proper and any improvement or buildings that are located thereon and considered, in legal contemplation, a part of the realty.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

629.

APPROVAL—CONTRACT FOR WORK TO BE DONE AT OHIO SOLDIERS' AND SAILORS' ORPHANS' HOME AT XENIA, OHIO.

COLUMBUS, OHIO, September 19, 1917.

Board of Trustees, Ohio Soldiers' and Sailors' Orphans' Home, Xenia, Ohio.

GENTLEMEN:—A member of your board of trustees has presented to us various contracts entered into by your board with various contractors for work to be done at the Ohio Soldiers' and Sailors' Orphans' Home at Xenia, Ohio, for approval.

I have carefully examined said contracts and the bonds accompanying the same and find said contracts and bonds to be in accordance with law and have approved the same. Said contracts are as follows:

1. Contract entered into on July 25, 1917, between your board and The Weinman Pump Manufacturing Company of Columbus, Ohio, for the construction, erection and furnishing of two electric pumps for the sum of $5,110.00.

2. Contract entered into on August 14, 1917, between your board and the H. W. Johns-Manville Company, Cleveland, Ohio, for the furnishing of the necessary conduit shell, filling, roll frames, pipe rollers, and 4-inch open joints underdrain in connection with the J-M Sysetm of Underground Steam Pipe Insulation, in the sum of $5,502.98.

3. Contract entered into on August 16, 1917, between your board and The Alberger Heater Company of Cincinnati, Ohio, for the furnishing of two Alberger Heaters, in the sum of $6,670.00.

4. Contract entered into on August 14, 1917, between your board and The Keasbey & Mattison Company, of Ambler, Pa., for the erection and complete installation of steam pipe coverings, in the sum of $6,734.00.

5. Contract entered into on August 4, 1917, between The Graves & Marshall Company, doing business as The Moffat Feed Water Heater & Purifier Company, of Dayton, Ohio, for the furnishing of two Moffat Feed Water Heater, Purifier and Oil Extractors, in the sum of $4,800.00.

The Auditor of State has certified that the money necessary for the payment of the price stipulated in the various contracts is available for the purposes of said contracts. I have this day filed said contracts with the Auditor of State.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

630.

OFFICES INCOMPATIBLE—SECRETARY SINKING FUND TRUSTEES AND DEPUTY CITY AUDITOR.

When council has authorized the trustees of the sinking fund of a city to elect a secretary, the person who holds the position of deputy auditor in said city may not be elected secretary of the board of trustees of the sinking fund of said city, qualify as such and receive separate compensation therefor and at the same time continue to act as deputy auditor since it would be incompatible with the latter position to do so.

COLUMBUS, OHIO, September 19, 1917.

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

GENTLEMEN:—I have your communication in which you submit for my opinion the following request:

> "May a deputy city auditor act as secretary of the sinking fund trustees and receive compensation as secretary of the sinking fund trustees?"

Section 4276-1 G. C. provides:

> "The auditor of any city may, when authorized by council ordinance, appoint a deputy who, in the absence or disability of the auditor, shall perform the duties of the auditor."

A "deputy" is defined in Bouvier's Law Dictionary as

> "one authorized by an officer to exercise the office or right which the officer possesses, for and in place of the latter."

The foregoing section of the General Code authorizes and requires a deputy city auditor to perform the duties of the city auditor in the event of the absence or disability of the latter. In other words, under certain conditions the deputy acts for and in the place of the auditor. It is probable that the contingency upon the happening of which the occupant of the subordinate position exercises the functions of his superior will arise at various times and the possibility of its occurrence was the cause no doubt for the enactment of the above provision. The situation then, is that the deputy must hold himself in readiness at all times to act for and in the stead of the principal officer and must be qualified in the same way and to the same extent as the latter. Hence, if the person who fills the office of city auditor is disqualified by reason thereof from holding some other office or position, it would seem to follow clearly that the one who acts as his deputy would be likewise prohibited from doing so.

Such a premise having been established it becomes necessary to consider the right of a person holding the office of city auditor to act at the same time as secretary of the sinking fund trustees and draw compensation therefor.

Section 4509 G. C. provides.

> "The trustees of the sinking fund, immediately after their appointment and qualification, shall elect one of their number as president and another as vice-president, who, in the absence or disability of the president, shall

perform his duties and exercise his powers, and such secretary, clerks or employes as council may provide by an ordinance which shall fix their duties, bonds and compensation. Where no clerks or secretary is authorized, the auditor of the city or clerk of the village shall act as secretary of the board."

In connection with section 4509, supra, one of my predecessors, Hon. Timothy S. Hogan, had under consideration the question of the right of the occupant of the city auditor's office to fill the position of secretary of the sinking fund trustees and draw separate compensation therefor in an opinion rendered under date of March 16, 1912, to Hon. G. T. Thomas, City Solicitor, Troy, Ohio, found in the Annual Report of the Attorney General for the year 1912, Vol. II, page 1651. At page 1652 it was said:

"The legislature has provided that under certain conditions the same person may be city auditor and secretary to the trustees of the sinking fund, at the same time. In such case the legislature has determined that the positions are not incompatible.

"The case of Commonwealth vs. Tate, 3 Leigh's Rep. 802, (30 Va.) is an authority that incompatibility at common law may be removed by legislative enactment.

"The syllabus reads:

" 'The office of deputy sheriff is incompatible with the office of justice of the peace, though by the statute law of Virginia the office of high sheriff is not so, and the acceptance of the office of deputy sheriff vacates the office of justice.'

"The opinion was rendered by a divided court, ten favoring and eight against the opinion rendered. All agreed, however, that the incompatibility existing at common law as to the positions of justice of the peace and high sheriff had been removed by the legislative act. The difference in opinion arose as to whether the removal of incompatibility between the high sheriff and justice of the peace, extended by implication to the deputy sheriff. The majority of the court held that it did not.

"The trustees of the sinking fund serve without compensation, and the detail work is performed by its secretary or clerk.

"Section 4284, General Code, prescribes certain duties for the city auditor as follows:

" '*At the end of each fiscal year, or oftener if required by council, the auditor shall examine and audit the accounts of all officers and departments.* He shall prescribe the form of accounts and reports to be rendered to his department, and the form and method of keeping accounts by all other departments, and, subject to the powers and duties of the state bureau of inspection and supervision of public office, shall have the inspection and revision thereof. Upon the death, resignation, removal or expiration of the term of any officer, the auditor shall audit the accounts of such officer, and if such officer be found indebted to the city, he shall immediately give notice thereof to council and to the solicitor, and the latter shall proceed forthwith to collect the indebtedness.'

"By virtue of this section the city auditor is required to audit the accounts of the trustees of the sinking fund and of their clerk or secretary.

"The rule of incompatibility of office is laid down in the case of State ex rel. v. Gebert, 12 Cir. Ct. N. S. 273, by Dustin J., when he says on page 275 of the opinion:

"'Offices are considered incompatible when one is subordinate to, or in any way a check upon the other; or when it is physically impossible for one person to discharge the duties of both.'

"The city auditor is required to audit the accounts of the secretary of the sinking fund commission. He therefore acts as a check upon that position. The two positions, unless the statutes otherwise provide, are incompatible.

'The statute does not authorize the trustees to appoint the city auditor as their clerk or secretary. The statute authorizes the city auditor to act as such secretary only when council has not authorized a clerk or secretary for the sinking fund commission. The authority to act as such secretary should be limited to the conditions prescribed in the statute and should not be extended to permit the city auditor to be appointed as such secretary or clerk where council had authorized a clerk or secretary."

My immediate predecessor, Hon. Edward C. Turner, reached a similar conclusion in an opinion rendered to your Bureau under date of March 23, 1916, found in the Opinions of the Attorney General for the year 1916, Vol. I, page 509.

I concur in the reasons contained in the above quotation and in the conclusions reached in said opinions.

In view of all the foregoing I advise you it is my opinion that when council has authorized the trustees of the sinking fund of a city to elect a secretary the person who holds the position of deputy auditor in said city may not be elected secretary of the board of trustees of the sinking fund of said city, qualify as such and receive separate compensation therefor and at the same time continue to act as deputy auditor since it would be incompatible with the latter position to do so.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

631.

COUNTY COMISSIONERS—MAY HIRE SURVEYOR'S AUTOMOBILE FOR HIS OWN USE ON OFFICIAL BUSINESS.

This opinion only passes upon the power of County Commissioners to hire surveyor's machine for his own use upon official business.

County commissioners may enter into a contract to hire a machine owned by the county surveyor, for the use of said surveyor and his assistants in the performance of their official duties.

COLUMBUS, OHIO, September 19, 1917.

HON. HARRY S. CORE, *Prosecuting Attorney, Ottowa, Ohio.*

DEAR SIR:—I am in receipt of your communication of September 6, 1917, wherein you request my opinion on the following statement of facts:

"* * * The question is, (referring to section 7200 G. C., 107 O. L. 115) whether or not the county commissioners may hire a machine owned by the county surveyor, for the use of said surveyor and his assistants,

making an agreement with him at so much per mile, the county surveyor to furnish said machine and pay all expenses of running and upkeep of the same while used by the said county surveyor and his assistants in the performance of his duties for the county.

"If such an arrangement cannot be made with the county surveyor to pay him for the use of his own machine for the services above referred to at a fixed price per mile, may the commissioners make any contract with him for the use of his automobile whereby he may be paid for the expense of running and upkeep of the machine while in such service? * * *"

You call my attention to Opinion No. 1161, rendered by my predecessor Hon. Edward C. Turner on January 11, 1916, found in Vol. I of the Opinions of the Attorney General for 1916, p. 11. Mr. Turner then had before him practically the same question you submit in your inquiry—that is, whether or not a highway superintendent could be compensated for the use of his automobile in the performance of his official duties. At the time this opinion was rendered, there was no express authority under the statutes, giving the county commissioners, the right to purchase or hire an automobile or other conveyance for the use of a highway superintendent. This opinion was based on section 7181 G. C., which at that time provided in part as follows:

"Sec. 7181. * * * Such compensation shall be paid out of the county treasury in the same manner as the salary of county officials is paid. In addition thereto, the county highway superintendent and his assistants, when on official business, shall be paid out of the county treasury, their actual necessary traveling expenses, including livery, board and lodging. * * *"

Under the above quoted section the county commissioners had absolutely nothing to do with the making of the contract for the conveyance of said highway superintendent when engaged on his official business, but it was necessary for the superintendent to make such contract himself.

Mr. Turner, in the opinion above referred to, held as follows (p. 12):

"In other words, while the county commissioners or county highway superintendent may not, under the law, purchase an automobile for the use of the county highway superintendent, and pay for the same from public funds, and while the county highway superintendent, being charged with the duty of providing himself with transportation when engaged on official business, may not deal with himself and include in his expense accounts compensation for the use of his own automobile, yet if the county highway superintendent is the owner of an automobile and uses the same in traveling about the county on official business, he may include in his expense accounts and the county commissioners may allow to him the actual and necessary expenses incident to the maintenance and operation of the automobile during the time the same is used in the public business of the county."

The opinion was based on the ground that the principles of public policy prohibit a public official, charged with the duty of making an expenditure on behalf of the public, from dealing with himself.

You will note, therefore, that although practically the same question was put to Mr. Turner in the above opinion, as you raise by your inquiry, there is a distinction between the two cases, arising from the fact that section 7200 G. C. has been amended (107 O. L. 115) since the above opinion was rendered, giving the

commissioners authority to hire or purchase automobiles or other conveyances for the use of the county surveyor; whereas, in the former case it was necessary for the highway superintendent himself to make the contract for conveyance. Said section 7200 reads in part as follows:

> "Sec. 7200. * * * The county commissioners may also at their discretion purchase, hire or lease automobiles, motorcycles or other conveyances and maintain the same for the use of the county surveyor and his assistants when on official business. * * *"

This same distinction applies to the question decided by Mr. Turner in Opinion No. 618 under date of July 17, 1915, and found in Vol. II, Opinions of the Attorney General for 1915, p. 1260, which is referred to in your communication.

Mr. Turner simply had before him, in the two opinions above noted, the question of whether or not a public official could enter into a contract, for the expenditure of public funds, with himself; whereas, the question to be decided here is whether or not the commissioners may enter into a contract with the county surveyor for the hire of his machine for his own use upon official business.

There is no statutory prohibition against the county commissioners entering into such a contract with the county surveyor. Therefore, the only ground upon which such a contract would be prohibited would be the one that such contract was against public policy. On this question, my predecessor, Mr. Turner, having before him the question of whether or not a person, employed as janitor at the court house by the commissioner, could be paid for auto livery conveying the sheriff or surveyor in the discharge of their respective official duties, and also the question of whether or not a person regularly employed as deputy sealer of weights and measures could be paid for like service, held, after deciding that there was no statutory prohibition against such contracts, in Opinion No. 625, found in Vol. II, Opinions of the Attorney General for 1915, p. 1276, as follows, said opinion bearing date July 20, 1915:

> "The general assembly of the state has recognized the danger involved in transactions of this same general character by the enactment of sections 12910 to 12914, inclusive, of the General Code, but has not seen fit to include this particular kind of a transaction. This danger was also recognized in an opinion by this department under date of June 13, 1914, being opinion No. 978, in which it was held solely on the grounds of public policy that the sheriff could not pay his deputy livery hire for the use of an automobile owned by the deputy. However, the close relationship which exists between a sheriff and his deputy does not exist between a sheriff or county surveyor and a janitor or a deputy sealer of weights and measures.
>
> "I am, therefore, of the opinion that, while such an arrangement as you describe should not be encouraged, it is not illegal or prohibited either by statute or on the grounds of public policy, provided of course that the rendition of such service by the janitor or deputy sealer of weights and measures does not interfere with the regular duties of such persons."

In another opinion rendered by Mr. Turner on November 17, 1916, No. 2049, found in Vol. 2, Opinions of Attorney General for 1916, p. 1800, he held as follows:

> "I see no legal objection to the commissioners entering into a contract

with the superintendent for the use of his automobile for the infirmary. It is recited in the resolution that the commissioners have been feeding a horse which they did not own in consideration of its use for the infirmary, and I can see no objection to this as a method of providing proper and necessary conveyance for the infirmary. I know of no statute, rule or policy of law which operates as an inhibition against the county commissioners hiring a horse or automobile or other conveyance from the superintendent of the county infirmary at a fair and reasonable price therefor. There is no relationship between them that would prevent them from dealing with each other at arm's length.

"A contract for the use of an automobile for the county infirmary is not a contract for the purchase of property, or supplies for the use of the county within the meaning of sections 12910 and 12911 G. C., which make it a criminal offense for any person holding an office of trust or profit or as agent, servant and employe of such office or board of such officers to be interested in a contract for the purchase of property, supplies or fire insurance for the use of the county, township, etc."

I agree with the above opinion of my predecessor and see no reason why the county commissioners could not enter into a contract with the county surveyor, under authority of section 7200 supra, for the use of the surveyor's automobile in the discharge of his official duties.

There can be no objection to this arrangement on the ground that it is against public policy, as there is no more connection between the county commissioners and the county surveyor than there is between the commissioners and any other party with whom they might contract for the use of an automobile, and there is no reason why a contract between the commissioners and the county surveyor should not be as beneficial to the county as any other contract the commissioners might make.

Therefore, I advise you, in answer to your first question, that the county commissioners may enter into a contract for the hire of a machine owned by the county surveyor for the use of said surveyor and his assistants in the performance of their official duties.

It will be unnecessary to answer your second question, because of the answer I have made to your first question.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

632.

ROAD IMPROVEMENT PLANS, ETC.—CANNOT BE CHANGED AFTER CONTRACT LET—DIFFICULTY IN OBTAINING MATERIALS WILL NOT RELEASE CONTRACTOR FROM THE PERFORMANCE OF HIS CONTRACT.

1. *There is no provision of law whereby the plans, specifications and estimates may be changed after the advertising for bids and the letting of the contract to the successful bidder.*

2. *In order that a contractor might be released from the performance of his contract, due to the fact that he can not secure the material necessary for the same, it requires more than a mere difficulty in getting the material or the mere fact that the material is much higher in price when the work is being done than it was when the contract was entered into.*

COLUMBUS, OHIO, September 19, 1917.

HON. HENRY W. CHERRINGTON, *Prosecuting Attorney, Gallipolis, Ohio.*

DEAR SIR: I have your communication of September 3, 1917, which reads as follows:

"During the summer of 1916, W. H. Martt was awarded a contract for the construction of a section of inter-county highway No. 7, in Gallia County, by the state highway commissioner. Mr. Martt was permitted to begin work and proceeded far enough, before bad weather, so that when the work had to be abandoned on account of the said weather conditions, it was absolutely impassable. The road shut off from Gallipolis, the only available market, a very considerable number of people throughout the entire winter. When spring came, it was thought that the road would be rushed to completion, but now winter is impending again, and this section of road, only a mile, is still in a condition which will make is impassable when the fall rains set in. The contract calls for slag. This is a statement of fact. The state highway department is now constructing a section of state road in another part of the county and cannot get slag to complete the work. Mr. Martt's contract on number seven has been rendered literally impossible of performance. I use this term advisedly and after a comprehensive investigation of the facts.

"The contract calls for slag, and there is no slag obtainable. The commissioners of this county desire that the specifications be altered so that the contract may be completed by the use of water bound gravel which makes a great deal better road than slag. Gravel is available. The contractor is willing and anxious to complete his contract with gravel. It has been said that the contract can not be completed with gravel because the specifications call for slag. It is evident that no slag can be had to complete the work this year, and it is altogether possible that next year conditions will be the same. It is entirely possible that slag can never be procured, and if it be true that the specifications can not be changed now, they can never be changed, and the result will be that the road will never be built. When a contract has been rendered impossible of performance by conditions over which the contractor has no

control, there ought to be some way out of it for the highway department and for the long suffering public, who pay the bills and get no results. I am well aware that the state highway department can complete the contract by force account, or by contract for the unfinished work. But they can not complete the contract with slag. Isn't there some reasonable solution?"

In reference to modifying the plans and specifications as they were adopted in the matter of this improvement, I do not desire to enter into a lengthy discussion. In an opinion rendered by me to Hon. Clinton Cowen, State Highway Commissioner, under date of June 16, 1917 (No. 369), I went into this matter very fully and am of the opinion that the law set out in said opinion would apply to the facts stated by yourself. I am therefore enclosing herewith copy of said opinion to Mr. Cowen.

There is no provision of law whereby the plans and specifications may be changed after the contract is let at competitive bidding, due to the fact that competitive bidding is one of the essential requisites of letting of contracts for the improvement of highways.

So that if Mr. Martt could be relieved from the contract which he has entered into for the improvement of said highway, the only steps that could be taken in the further improvement of the highway would be to begin over again and let the contract under advertisement and based upon new plans, specifications, estimates, etc.

However, we come to the question as to whether the facts would warrant the release of Mr. Martt from the fulfillment of the contract which he has entered into. The law is generally laid down by the courts that where a contract is entered into to furnish a certain article or to do a work in which a certain article is to be used, and before the article is furnished or the work is completed the article in question is destroyed and thus can not be secured, the one agreeing to furnish the article or to use the same in the fulfillment of the contract may be released from the contract, providing it was due to no fault or act of his that the securing of the article was rendered impossible.

For instance, in Ward v. Vance 93 Pa. 499, A agreed with B, the owner of a hotel, to furnish the same with water by and through the same pipes then used for said purposes. B afterwards leased the hotel to C and covenanted that the hotel should be supplied with spring water in the same manner as them supplied under the agreement with A. B was to keep certain pipes in repair and C others, and B was to see that covenants made by A should be kept.

In a suit by C against B for breach of covenant, the lower court instructed the jury that B was bound to supply water, whether the spring from which it was drawn kept up or not. *Held,* That this was error; that although the water of the spring had always been the source of supply of the hotel, yet if it failed from drought or other natural cause, it was no breach of any covenant, express or implied, to fail to furnish the supply.

In Powell v. Railway Co., 12 Ore. 488, the court held in the syllabus as follows:

"In every contract for the conveyance of property there is an implied condition that the subject matter of the contract shall be in existence when the time for the performance arrives. If it has then ceased to exist, each party is discharged from the contract."

Many cases could be cited along the same line. But in looking into the matter of the contract about which you write, I find that the facts do not come

within the principles of law set out by our courts. For instance, in the plans and specifications under which the contract of Mr. Martt was entered into, there is a provision under the item which provides for a top course of water-bound macadam, as follows:

> "A course of number one (1) stone or slag (unless otherwise specified) shall be spread on the foundation or bottom course prepared as elsewhere described, to such thickness as will produce the complete depth indicated on the plans."

We find under this provision of the plans, specifications, etc., an alternative proposition; that is, the contractor can use either limestone or slag. Even though it would be held that it is impossible to secure slag, yet the contractor would be warranted in using limestone instead of slag, and from the facts which I have gleaned by inquiry, I find that it is not an exceedingly difficult proposition to get limestone, although it costs a little more than slag.

Upon a careful investigation through the state highway department, I also find that it is possible to get slag and that they are getting slag, but it is difficult to do so owing to the conditions existing on account of the war. But the mere fact that it is hard to get slag, or that it costs more now than it did when the contract was let, is not sufficient. In order that the state highway department might be justified in releasing Mr. Martt from his contract, it would have to be impossible to get either slag or limestone anywhere at any price within reason.

I felt that I had better call your attention to the provision found in the contract, to the effect that either limestone or slag might be used, in order that you might be able to govern yourself intelligently in reference to the matter. To be sure, if Mr. Martt uses limestone, he will have to use stone that is up to the standard required by the state highway department under the contract entered into with him by the department.

Hence, answering your question specifically, I am of the opinion that there is nothing connected with the contract of Mr. Martt that would warrant the state highway department in releasing him from the further performance of his contract.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

633.

DISAPPROVAL—TRANSCRIPT OF PROCEDINGS FOR BOND ISSUE BY BOARD OF EDUCATION OF EDEN TOWNSHIP RURAL SCHOOL DISTRICT, WYANDOT COUNTY.

COLUMBUS, OHIO, September 22, 1917.

Indutrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:

"RE:—Bonds of the Board of Education of Eden Township Rural School District, Wyandot County, Ohio----------$35,000.00."

In accordance with your request I have examined the transcript of the proceedings of the Board of Education of Eden Township Rural School District,

Wyandot County, Ohio, concerning the issuance of the bonds of said district in the amount of $35,000.00 for the purpose of making certain improvements in the schools in said district.

I find certain irregularities in the proceedings of the board, such as informality in the method of calling the meetings, which, however, in my opinion, do not affect the validity of the bonds inasmuch as all the essential proceedings relative to the issue thereof were had at the meetings at which all the members of the board were present, as shown by the transcript.

The journal of the board has not been properly kept, in that the proceedings relative to the passage of the resolution providing for the issuance of the bonds are on a separate page of said journal and not included in the proceedings of any recorded meeting. There is attached, however, a letter from the Clerk of the Board certifying that the resolution was passed on July 16, 1917. This letter shows that certain changes in the resolution as originally passed may have been made. If so, the regular way in which the Board should have acted would have been to amend the resolution, taking the ayes and nays thereon.

The record, as explained, seems to be fair on its face, and I am of the opinion that whatever may lie behind it is a mere irregularity.

All the other proceedings of the Board being in proper form, I am of the opinion and hereby certify that the proceedings for the issuance of the above described bonds were in accordance with the provisions of law, and that they constitute good and valid legal obligations against Eden Township Rural School District, to be paid in accordance with the terms specified in said resolution.

It will be observed that I have not passed on the form of the bonds, and I am retaining the transcript so that I may compare the bonds when submitted to me with the resolution providing for their issuance. I have done this because, as I understand it, the bonds are not yet printed, and because the Board of Education is anxious to let the contract at the earliest possible date. This the Board may do, although the bonds are not printed by virtue of the provisions of Section 5660 General Code. When the bonds are submitted to me I will supplement this opinion with a certificate in reference to the bonds themselves and will then re-return the transcript.

Very truly yours,
JOSEPH McGHEE,
Attorney-General.

634.

APPROVAL—FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN ALLEN, ASHLAND, CLERMONT, HURON AND MAHONING COUNTIES.

COLUMBUS, OHIO, September 22, 1917.

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

DEAR SIR:—I have your communication of September 17, 1917, in which you enclose certain final resolutions for my approval, as follows:

"Allen County—Sec. 'D,' Lima-Sandusky road, I. C. H. No. 22.

"Ashland County—Sec. 'A' of the Ashland-Wooster road, I. C. H. No. 141.

"Ashland County—Sec. 'A' of the Columbus-Wooster road, I. C. H. No. 24.

"Clermont County—Sec. 'C' of the Milford-Hillsboro road, I. C. H. No. 9.

"Huron County—Sec. 'L' of the Bellevue-Norwalk road, I. C. H. No. 289.

"Mahoning County—Sec. 'P' of the Akron-Youngstown road, I. C. H. No. 18."

I have carefully examined these resolutions, entered into by the county commissioners of the various counties, and find them correct in form and legal in all respects and am therefore returning the same to you with my approval endorsed thereon.

I should like, however, to call your attention to a matter connected with the final resolution for the improvement in Huron County. The county commissioners agreed to assume $29,700.00 of the total estimated cost of this improvement, leaving $15,000.00 for the state to assume. Your department appropriated and set aside only $11,314.18, being a sum less than that assumed by the state. While this is not a matter upon which I am required to pass under section 1218 G. C., I am calling your attention to it in order that you may make the necessary correction on your records.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

635.

APPROVAL—FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN HURON AND KNOX COUNTIES.

COLUMBUS, OHIO, September 22, 1917.

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

DEAR SIR:—I am in receipt of your communication of September 19, 1917, in which you enclose, for my approval, final resolutions as follows:

"Huron County—Sec. 'A' of the Savannah-Vermilion road, I. C. H. No. 149.

"Knox County—Sec. 'K' of the Columbus-Wooster road, I. C. H. No. 24."

I have carefully examined said final resolutions, find the same correct in form and legal, and am therefore returning them to you with my approval endorsed thereon, in accordance with the provisions of section 1218 G. C.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

636.

APPROVAL—CONTRACT BETWEEN STATE OF OHIO AND SCHERGER BROTHERS OF DELPHOS, OHIO.

COLUMBUS, OHIO, September 22, 1917.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your communication of September 17, 1917, in which you enclose contract in triplicate between the State of Ohio and Scherger Brothers of Delphos, Ohio, and ask that I approve the same.

I have carefully examined this contract and find the same correct in form and legal and am therefore approving the contract and forwarding it to Hon. James M. Cox, Governor, for his consideration.

Very truly yours,
JOSEPH McGHEE,
Attorney-General.

637.

APPROVAL—TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE BY THE BOARD OF EDUCATION OF GREENVILLE CITY SCHOOL DISTRICT.

COLUMBUS, OHIO, September 22, 1917.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:

"IN RE: Bonds of the Board of Education of Greenville City School District, in the sum of $9,000.00, for the purpose of furnishing, repairing and equipping *East School Building in said city.*

I have carefully examined the transcript of the proceedings of the Board of Education and other officers of Greenville City School District relating to the above bond issue, and find said proceedings to be in conformity to the provisions of the General Code relative to bond issues of this kind.

I am of the opinion that bonds properly prepared according to the bond form submitted will, when signed by the proper officers of said school district, constitute valid and binding obligations of said school district.

Very truly yours,
JOSEPH McGHEE,
Attorney-General.

638.

APPROVAL—TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE BY CITY COUNCIL OF CITY OF MARIETTA.

COLUMBUS, OHIO, September 22, 1917.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:

"IN RE: Bond of the City of Marietta, Ohio, in the sum of $45,000.00, for the purpose of extending the time of payment of certain indebtedness which from its limits of taxation the said city is unable to pay at maturity."

I have carefully examined the transcript of the proceedings of the city council and other officers of the City of Marietta relating to the above bond issue, and find said proceedings to be in conformity to the provisions of the General Code relative to bond issues of this kind.

I am of the opinion that bonds properly prepared according to the bond form submitted will, when signed by the proper officers of the City of Marietta, constitute valid and binding obligations of said city.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

639.

INTERURBAN RAILROAD COMPANY—ARTICLES OF INCORPORATION—CAN NOT BE AMENDED TO AUTHORIZE OPERATION OF COMMERCIAL RAILROAD—MOTIVE POWER.

The articles of incorporation of an interurban railroad company may not by amendment be so changed as to authorize the construction and operation of a commercial railroad; but the use of steam as a motive power of an interurban railroad company may be authorized.

COLUMBUS, OHIO, September 22, 1917.

HON. WILLIAM D. FULTON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I acknowledge receipt of your letter of September 10th, requesting my opinion upon a question submitted to you by Mr. H. H. Hostetler, Attorney at Law, Dover, Ohio. Mr. Hostetler inquires in his letter whether it is competent for a corporation organized for the purpose of constructing and operating an interurban railroad by amendment to its articles of incorporation to acquire the power to construct and operate a railroad.

The section relating to amendment to articles of incorporation forbids the making of such amendments as shall "substantially change" the purpose of the original organization. The question of law therefore becomes an inquiry as to whether or not the proposed amendment to the articles of incorporation of an interurban railroad company would substantially change the purpose of the original organization of such company.

Our courts have frequently held that there are substantial differences between "railroad companies" and "interurban railroad companies." The distinction does not lie in the motive power to be employed, as is perhaps popularly supposed; for a company organized under the general railroad laws may use electricity as a motive power in the propulsion of its cars (Section 8758, General Code), and is not limited by any statute to the precise motive power which it shall use, whether steam, gas, or for that matter even muscular power.

On the other hand, the statutes relative to street and interurban railroad companies authorize the use by such companies not merely of electricity, (which is, to be sure, expressly mentioned), but also of any other power than animal power upon the highways in the state outside of municipalities (Section 9117, General Code); whereas if the right of eminent domain is to be exercised steam power may not be used (Section 9119, General Code). No statute, however, restricts the motive power which may be used by an interurban railroad operating on rights of way privately owned and acquired without the exercise of eminent domain.

The distinction, nevertheless, exists, but the line may be drawn at one place for a given purpose and at another for another purpose. Thus, because a company originally organized as a railroad company has a right to use electricity as motive power, and is not prohibited from withdrawing from commercial service in the absence of objection by the inhabitants of the territory served thereby and entering upon an interurban service by the use of such electric motive power and cars adapted thereto, it follows and has been held that a commercial railroad, originally organized as such, may reform its service and by the manner of conducting its operation become, for excise tax purposes, an interurban railroad. (Railroad Co. v. Poland, 10 N. P., n. s. 617.)

It has also been held that a railroad, without changing its entire character as such, may enter the interurban field without violating its corporate franchise and, having entered, be compelled to perform the service required in such field so long as the public necessity served thereby may require the continuation of such service. (Hocking Valley Railway Company v. Public Utilities Commission, 92 O. S. 9.)

But to hold, as in the one case, that the character of a road has become changed for taxation purposes by the making of lawful changes in the manner of conducting its business is not equivalent to holding that such a change will convert the company into an interurban railroad company for all purposes. For example, a company organized as an interurban railroad company may construct its road along the public highways, proper consents being granted, and in and of itself such construction and operation do not constitute an additional burden upon such highways. (Railway Co. v. Cumminsville, 14 O. S. 523); though the manner of construction and operation may be such as to interfere with the easements of an owner of abutting lands and, if so, an additional burden is imposed thereon. (Schaaf v. Railway, 66 O. S. 215.)

In the case of steam railroads, however, there is no authority at all for their construction along or upon a public road or highway.

This difference between the two classes of companies is merely illustrative. Suffice it to say that while the two classes of companies have much in common, and perhaps many of the statutes relating to one by construction would be held to extend to the other, their powers are distinct and they do form two separate classes of corporations. I know of no authority for consolidating a railroad company and an interurban railroad company.

Moreover, while it is true that a railroad company may convert itself substantially into an interurban railroad company, I do not think that this process of conversion can operate in the other direction. Broadly speaking, it is, I think,

obvious that the franchise to be a steam railroad is, so to speak, a more extensive grant of power than the franchise to be an interurban railroad. To demonstrate this to a certainty would require the citation of too many statutes to make it profitable. However, it is broadly true that when a railroad company changes its method of operation so as to afford interurban service it is, as it were, exercising less power than that which was granted to it.

Putting it in still another way, the power to operate a steam railroad includes the power to operate what, for some purposes at least, is an interurban railroad; though the power to construct a steam railroad does not include the power to construct an interurban railroad, because that would imply the right to construct the line of road along the public highway.

On the other hand, the power to construct and operate an interurban railroad does not include the power to construct and operate a commercial railroad. On the whole, though conscious of the inadequacy of my statement of the reasons which lead me to such conclusion, I am of the opinion that a change in the articles of incorporation of an interurban railroad company authorizing the construction and operation of a steam railroad or a commercial railroad would be a substantial one. Such amendment may, therefore, not lawfully be made.

It occurs to me that Mr. Hostetler may wish to know whether or not the company may amend its articles of incorporation so as to authorize the use of steam as a motive power in the operation of an interurban service. Of course, under section 9117 this may be done; but the operations thereunder must be interurban in character, and if steam is used therefor the right of eminent domain must, by virtue of section 9119 G. C., be forfeited, as to such part of the road as is to be so operated.

Yours very truly,
JOSEPH MCGHEE,
Attorney-General.

640.

SCHOOL BUILDING—REPAIRS ORDERED BY STATE PLUMBING INSPECTOR—FUNDS MAY BE RAISED UNDER SECTION 7629 G. C.

Where the state inspector of plumbing makes an order that certain repairs shall be made in a school building, and there is no money in the hands of the board with which to make said repairs, funds may be raised under and by the provisions of section 7629 G. C.

COLUMBUS, OHIO, September 22, 1917.

The State Department of Health, Columbus, Ohio.

GENTLEMEN:—In your letter of recent date you submit for my opinion the following:

> "In December, 1916, the attention of the State Inspector of Plumbing were directed to the unsanitary condition of the Cadiz Central School Building at Cadiz, Ohio. An inspection of the building was made and under date of December 22, 1916, the following order was sent by the State Inspector of Plumbing to the Board of Education of the village of Cadiz.
>
> "Under date of December 4, 1916, our Mr. E. J. Wellman, Deputy

State Inspector of Plumbing, made an inspection of the school building at Cadiz, Ohio, and reports that the plumbing and drainage is unsanitary and defective and installed under conditions favorable to the origin and development of disease. Therefore, in conformity with sections 1261-3 and 1261-13, General Code of Ohio, you are hereby notified that this system of plumbing and drainage is condemned and that the present intolerable condition be immediately remedied as follows:

"'That the 8-inch hard tile house drain be taken up and re-laid with pipe of the proper size in perfect alignment and with proper grade to insure a scouring action and avoid stoppage; this pipe to be tested and inspected before it is concealed or enclosed and have the necessary clean outs installed in the change of direction at the base of soil pipe stacks and at the foundation wall;

"'That all floor drains be provided with traps and back pressure valves;

"'That all fixtures be properly trapped and the trap seals protected from siphonage or back pressure by a vent or back vent pipe;

"'That the latrine closets and urinals be removed and replaced with closets and urinals of approved design and sufficient in number, i. e., at the ratio of one closet to every 15 females, one closet to every 25 males and one urinal to every 15 males;

"'That one sink and drinking fountain be installed in each main toilet room;

"'That the two 4-inch soil stacks serving two closets and three lavatories be tested by smoke or air and all defects repaired or replaced;

"'That the toilet room adjoining the rest room and office respectively be ventilated with openings cut in partitions leading to outside windows;

"That a slop sink and drinking fountains be installed in hall on first and second floors;

"'That the disposal of sewage be made according to advice and supervision of the division of sanitary engineering of the State Board of Health;

"'That all conditions and changes herein recommended be installed in accordance with Part 4, Sanitation, Ohio State Building Code, Sections 12600-137 to 12600-273, tested and approved by a representative of this department before it is concealed or enclosed and a certificate of approval issued before any part of the same is put in use.'

"This order to be complied with and made returnable not later than August 1, 1917.

"You will note that the order directs that the improvements and changes shall be made not later than August 1, 1917. A recent investigation shows that nothing has been done by the Board of Education to comply with the orders of State Inspector of Plumbing and the reason is given that the Board of Education is without funds to make the improvements and that when the question of a bond issue for the improvement was submitted to a vote of the electors, the bond issue failed to carry.

"I shall be glad to have your opinion as to whether the Board of Education under the authority of section 7629 G. C. and subject to the limitations contained in section 7630 G. C. can sell bonds to make an improvement found necessary and ordered by the State Inspector of Plumbing."

It is provided by General Code section 1261-2, as amended in 107 O. L. 608, that it shall be the duty of the State Board of Health, within ninety days after the passage and approval of the act of which said section is a part, to appoint an elector of this state to fill the offiice of *State Inspector of Plumbing.*

Senate Bill No. 101, passed by the eighty-second general assembly, March 21, 1917, in which bill was created the state department of health, provided that the state department of health "shall exercise all the powers and perform all the duties now conferred and imposed by law upon the state board of health."

Section 1261-3 G. C., as amended, 107 O. L. 609, provides:

> "It shall be the duty of said inspector of plumbing, as often as instructed by the state board of health, to inspect any and all public or private institutions, sanitariums, hospitals, schools, prisons, factories, workshops or places where men, women or children are or might be employed, and to condemn any and all unsanitary or defective plumbing that may be found in connection therewith, and to order such changes in the method of construction of the drainage and ventilation, as well as the arrangement of the plumbing appliances, as may be necessary to insure the safety of the public health.
>
> "Such inspector shall not exercise any authority in municipalities or other political subdivisions wherein ordinances or resolutions have been adopted and are being enforced by the proper authorities regulating plumbing or prescribing the character thereof."

So that it must be considered that the provisions of the act which provided that the state board of health should appoint the state plumbing inspector now apply to the state department of health as much as if section 1261-2 should say the state department of health instead of saying, as it does, the state board of health, and the state plumbing inspector, who is provided for in the section as being appointed by the state board of health, shall perform his duties as though he had been appointed by the state department of health.

General Code section 7620 provides that the board of education of a school district may repair the necessary school houses and make all other necessary provisions for schools under its control and may make all necessary provisions for the convenience and prosperity of the schools within the subdistricts, and such board of education may issue and sell bonds, the proceeds of which may be used in the improvement of public school property, as provided by section 7629, which reads as follows:

> "The board of education of any school district may issue bonds to obtain or improve public school property, and in anticipation of income from taxes, for such purposes, levied or to be levied, from time to time as occasion requires, may issue and sell bonds, under the restrictions and bearing a rate of interest specified in sections seventy-six hundred and twenty-six and seventy-six hundred and twenty-seven. The board shall pay such bonds and the interest thereon when due, but provide that no greater amount of bonds be issued in any year than would equal the aggregate of a tax at the rate of two mills, for the year next preceding such issue. The order to issue bonds shall be made only at a regular meeting of the board and by a vote of two-thirds of its full membership, taken by yeas and nays and entered upon its journal."

When the use of school property has been prohibited on account of the defective condition of the building by orders of the chief inspector of workshops and factories, and funds were needed with which to pay for such improvements or repairs, covering said orders, it has been held that section 7629 G. C. provided authority for the raising of sufficient funds for said purposes.

I call your attention to Opinion No. A-407, Annual Report of the Attorney General for 1911-1912, Vol. 2, p. 1384, wherein it is held:

> "When it becomes necessary for a board of education to *improve school buildings* by reason of an order from the inspector of workshops and factories and such improvements cannot be made within the ordinary limitations of the Smith tax law, and when furthermore the electors have repeatedly refused to authorize bonds issues under sections 7625 and 7628 General Code, the board of education may have recourse to section 7629 * * * G. C."

Also in Opinion No. 395, Annual Report of the Attorney General for 1913, Vol. 2, p. 1317, it was held:

> "In order to obtain or improve school property, a board of education may issue and sell bonds. No greater amount of bonds can be issued in one year than would equal the aggregate of a tax at the rate of two mills for the year next preceding such issue."

I agree with the above opinions and hold that if the chief inspector of workshops and factories prohibits by any order the use of a school house for its intended purpose, and if funds are needed to pay for the improvements or repairs ordered by such chief inspector of workshops and factories, such funds may be raised under the provisions of said section 7629 G. C.

In this case, instead of the chief inspector of workshops and factories making an order which prohibits the use of the school buildings, the order here under consideration is made by the state inspector of plumbing, and your question is, has the board of education the authority to act under section 7629 when the order is made by the state inspector of plumbing? Neither the order of the chief inspector of workshops and factories, nor the order of the state plumbing inspector, have any controlling effect as far as section 7629 G. C. is concerned, except, perhaps, that such order calls to the attention of the board of education what improvements or repairs are necessary in order that the school building may be made to conform to the provisions of the state building code and to the provisions of the state plumbing code. All that is necessary for the board of education to find is that public school property shall be improved and whether the improvement is determined by the board to be necessary from an order of the state plumbing inspector, or from an order of the chief inspector of workshops and factories, or from both, or neither, can make no difference because the board may act whenever such conditions arise which make the improvement necessary and no matter what causes said conditions to arise.

You refer to section 7630 G. C., but it was held in Rabe v. Board of Education, 88 O. S. 429, that:

> "The provisions of sections 5649-2 et seq. in reference to the rate that may be levied in any taxing district, are so clearly in conflict with the provisions with sections 7591 and 7592, General Code, that these sections are necessarily repealed by implication. That being true, section 7630, General Code, must fall with them, for that section provides only for the application of the limitation in these repealed sections to the issue of bonds under section 7629, General Code. It is suggested in the brief of counsel for defendant in error that section 7630, General Code, is not necessarily repealed, but that, on the contrary, the provisions of this later legislation,

limiting the rate of taxes that may be levied in any taxing district, should be read into this section, instead of the specific sections named, to-wit, sections No. 7591 and 7592, General Code. In answer to this it is only necessary to suggest that a law cannot be amended in this way. If sections 7591 and 7592, General Code, are no longer the law of Ohio, it necessarily follows that section 7630, General Code, furnishes no rule for determining the rate of taxes levied or to be levied which may be anticipated by an issue of bonds under the provisions of section 7629, General Code."

Answering then your question specifically, I advise you that a board of education may improve school property as ordered by the state plumbing inspector and may raise funds for such improvement under the provisions of section 7629 G. C.

Very truly yours,
JOSEPH McGHEE,
Attorney-General.

641.

CHILD LABOR—BOY UNDER FIFTEEN YEARS PROHIBITED FROM WORKING IN CERTAIN ESTABLISHMENTS.

Under section 12993 G. C., a boy under fifteen years of age is prohibited from working in establishments or vocations therein named.

COLUMBUS, OHIO, September 22, 1917.

HON. CHARLES L. BERMONT, *Prosecuting Attorney, Mt. Vernon, Ohio.*

DEAR SIR:—I am in receipt of communication from Patrick Purcell, Chief Probation Officer of your county, and yourself, in reference to boys under fifteen years of age doing light work during school vacations and evenings, and, as stated in your letter, "employed in such a way as not to interfere with their school attendance, and in such light employment as would not be objectionable from a physical or moral standpoint." Instances are cited where the poverty of the family seems to render necessary the help from boys under the legal age, and observations are made on the dangers of such boys growing up in idleness, and it is argued that proper light employment should be encouraged, and further urged that a common sense construction of the statute would be wiser than drawing lines too close.

There is much in the communication that is commendable and with which, as general propositions, I would have no hesitancy in agreeing; but, as you well know, the province of this departmnt is the interpretation and construing of statutes as we find them. The arguments adanced in the communication might be very appropriate in an appeal to the legislature, but a court or other person construing the statute before it could give such arguments little if any consideration.

The section referred to is section 12993 G. C., which provides that no male child under fifteen years or female child under sixteen years shall be employed, permitted or suffered to work in, about or in connection with any named establishment. Here follows a list of about twenty-two different kinds of establishments; and the further provision is made that such children shall not be employed

in the construction or repair of buildings, in the distribution, transmission or sale of merchandise, nor any boy under fifteen or female under twenty-one years in the transmission of messages.

The language of this section is plain, contains no exceptions and there is no possible ambiguity, and consequently there is no need of construction or interpretation. It is a well settled principle of law that the rules of construction of statutes cannot be invoked when the language is so plain as to not require interpretation.

The language of our Supreme Court in Barker v. State, 69 O. S. 74, is binding upon all officials called upon to construe a statute. Spear, J., in rendering the opinion says (p. 74):

> "We are quite aware that the rule of law and of this court is that a statute defining an offense is not to be extended by construction to persons not within its descriptive terms, yet it is just as well settled that penal provisions are to be fairly construed according to the expressed legislative intent, and mere verbal nicety, or forced construction, is not to be resorted to in order to exonerate persons plainly within the terms of the statute."

As an official you know that we have no law, however good, that is not harsh in some particular case, and no matter what our individual opinions may be, the rule laid down by the general assembly must be followed.

In consequence of the foregoing it is my opinion that no exceptions can be read into the plain term of section 12993 G. C.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

642.

APPROVAL—LEASE BY STATE TO O. S. COX OF McARTHUR, OHIO.

COLUMBUS, OHIO, September 22, 1917.

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

DEAR SIR:—On July 30, 1917, you submitted for my approval a contract with the following communication:

> "We enclose herewith oil and gas lease in triplicate to O. S. Cox of McArthur, Ohio, for school lands in section 16, Elk township, Vinton County, Ohio.
>
> "It appears that this tract was leased to a man by the name of Warren in 1916 and that subsequently Dr. Cox, representing himself and other citizens of that portion of the state, who were engaged in prospecting and operating for oil, purchased one-half interest in the lease intending to develop it. We have a copy of the assignment on file.
>
> "In March of this year we received a letter from Mr. Warren asking us to cancel the lease and enclosing the original lease. Acting upon this letter we canceled same. Subsequently Dr. Cox called on us saying that he

had been unable to locate Mr. Warren and desired to know the situation and to have a copy of the original lease. It developed that he knew nothing about the cancellation of the lease.

"Upon the application of Dr. Cox we decided to re-execute the lease directly to him in the form in which we transmit the same to you for your approval."

In reference thereto and sometime thereafter certain suggestions were made by me with reference thereto and you have now modified said contract in accordance with said suggestions, and I find the contract to be sufficient and correct, and accordingly hereby approve it.

Very truly yours,
JOSEPH McGHEE,
Attorney-General.

643.

APPROVAL—TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE BY BOARD OF COUNTY COMMISSIONERS OF MADISON COUNTY.

COLUMBUS, OHIO, September 24, 1917.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:

IN RE: Bonds of Madison county, Ohio, in the sum of $4,500.00, for the purpose of creating a fund for the payment of compensation, costs and expenses of the improvement of a certain highway situated in Range township, said county, and known as the 'Prairie Pike Improvement,' under the provisions of sections 6906 to 6956, inclusive, of the General Code.

I have carefully examined the transcripts of the proceedings of the Board of County Commissioners and other officers of Madison county relating to the above bond issue, and find the same to be in accordance with the provisions of the General Code relative to bond issues of this kind.

I am, therefore, of the opinion that properly prepared bonds covering said issue will, when signed by the proper officers, constitute valid and binding obligations of said county.

No bond form was submitted as a part of the transcript of the proceedings relating to said bond issue, but I am this day by letter instructing the officials of the county to submit the bond form with respect to said issue to this department for examination before the bonds are printed.

Very truly yours,
JOSEPH McGHEE,
Attorney-General.

644.

APPROVAL—TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE BY BOARD OF COUNTY COMMISSIONERS OF MADISON COUNTY.

COLUMBUS, OHIO, September 24, 1917.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:

IN RE: Bonds of Madison county, Ohio, in the sum of $55,000.00, for the purpose of creating a fund for the payment of compensation, costs and expenses of the improvement of a certain highway situated in Jefferson, Canaan and Darby Townships, in said county, and known as the 'Middle Pike Improvement,' under the provisions of sections 6906 to 6956, inclusive, of the General Code.

I have carefully examined the transcript of the proceedings of the Board of County Commissioners and other officers of Madison county relating to the above bond issue, and find the same to be in accordance with the provisions of the General Code relative to bond issues of this kind.

I am, therefore, of the opinion that properly prepared bonds covering said issue will, when signed by the proper officers, constitute valid and binding obligations of said county.

No bond form was submitted as a part of the transcript of the proceedings relating to said bond issue, but I am this day by letter instructing the officials of the county to submit the bond form with respect to said issue to this department for examination before the bonds are printed.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

645.

APPROVAL—LEASE BY STATE TO THE EBERSBACH COAL COMPANY.

COLUMBUS, OHIO, September 24, 1917.

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

DEAR SIR:—On September 14, 1917, you submitted for my examination and approval a lease to the Ebersbach Coal Company, with the following communication:

"We herewith transmit to you a copy of a proposed lease and sale of coal of The Ebersbach Coal Company. This coal lies on fractional section 29 abutting upon the Ohio River near Racine in Meigs County, It seems that The Thomas Coal Company, which operates a mine to the north of this fractional section, has entered upon and taken some coal from under section 29. It also appears that a part of the shaft of The Thomas Coal Company is upon this section 29, In order that no injustice may be done by the state we propose to protect Thomas in the use of this shaft, especially in view of the fact that Thomas is the lessee of the

surface of this part of the fractional section. We also desire to not only protect Thomas, but Mr. Willard and other owners of coal lands abutting upon this fractional section against danger from flooding. Hence, the special provisions we have inserted in the contract. These provisions are satisfactory to the Ebersbach company.

"The consideration has not yet been inserted for the reason that there is a question as to the amount growing out of the fact that the Thomas people have mined some of the coal. We will have a survey completed by Tuesday of next week which will give the exact quantity and we will then insert the consideration, which will be on the basis of $105.00 per acre of coal.

"We are transmitting the proposed contract to you before it is executed so that when it comes to you for final approval you will already have approved it as to form.

"The matter is somewhat urgent as the sale was affected a long time ago, and the Ebersbach people have been running entries and have desired the consummation of the deal, but we have been compelled to hold it up now because of the trouble with the Thomas people."

Upon examination of said lease there appears to be no time limit, but the same is perpetual, and will be in effect until the lessee has removed all of the coal under said land. This may be in accordance with the prevailing custom and in accordance with your intention, and if so I find the lease to be sufficient and correct, and hereby accordingly approve the same.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

646.

APPROVAL—FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN PICKAWAY COUNTY.

COLUMBUS, OHIO, September 24, 1917.

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

DEAR SIR:—I am in receipt of your communication of September 18, 1917, in which you enclose final resolution, for my approval, as follows:

"Pickaway County—Sec. 'L-1' of the Lancaster-Circleville-Northern road, I. C. H. No. 463."

I have carefully examined said resolution and find the same correct in form and legal. I therefore return the same to you with my approval endorsed thereon, in accordance with the provisions of section 1218 G. C.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

647.

APPROVAL—TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE BY COUNCIL OF VILLAGE OF BURTON, GEAUGA COUNTY .

COLUMBUS, OHIO, September 24, 1917.

Industrial Commission of Ohio, Columbus, Ohio.
GENTLEMEN:

IN RE: Bonds of the village of Burton, Geauga county, Ohio, in the sum of $4,650.00, in anticipation of the collection of special assessments for the improvement of East Park avenue and South Cheshire street, in said village, from the intersection of said East Park avenue with the east terminus of Kirtland street in said village, and thence in a southerly direction along said street to the intersection of South Cheshire street a distance of 1,100 feet, and thence southerly and along said South Cheshire street to the intersection of Carlton street in said village, a distance of 1,100 feet, by grading, draining, curbing and paving the same.

I have carefully examined the transcript of the proceedings of the village council and other officers of the village of Burton, Geauga county, Ohio, relating to the above bond issue, and find said proceedings to be in conformity to the provisions of General Code relative to bond issues of this kind.

I am of the opinion that bonds properly prepared according to the bond form submitted will, when signed by the proper officers of the village of Burton, constitute valid and binding obligations of said village.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

648.

APPROVAL—TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE BY COUNCIL OF VILLAGE OF BURTON, GEAUGA COUNTY.

COLUMBUS, OHIO, September 24, 1917.

Industrial Commission of Ohio, Columbus, Ohio.
GENTLEMEN:

IN RE: Bonds of the village of Burton, Geauga county, Ohio, in the sum of $6,600.00, to pay the corporation's share of the cost and expense of improving East Park avenue, South Cheshire street, East Center street, West Park avenue and West Center street, in said village.

I have carefully examined the transcript of the proceedings of the village council and other officers of the village of Burton, Geauga county, Ohio, relating to the above bond issue, and find said proceedings to be in conformity to the provisions of the General Code relative to bond issues of this kind.

I am of the opinion that bonds properly prepared according to the bond form submitted will, when signed by the proper officers of the village of Burton, constitute valid and binding obligations of said village.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

649.

APPROVAL—TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE BY COUNCIL OF VILLAGE OF BURTON, GEAUGA COUNTY.

COLUMBUS, OHIO, September 24, 1917.

Industrial Commission of Ohio, Columbus, Ohio.
GENTLEMEN:

IN RE:—Bonds of the village of Burton, Geauga county, Ohio, in the sum of $5,270.00, in anticipation of the collection of special assessments for the improvement of East Center street from the intersection of said East Center street with East Park avenue; thence in an easterly direction along said East Center street to the east corporation line of said village a distance of 2,292 feet, by grading, draining, curbing and paving the same.

I have carefully examined the transcript of the proceedings of the village council and other officers of the village of Burton, Geauga county, Ohio, relating to the above bond issue, and find said proceedings to be in conformity to the provisions of the General Code relative to bond issues of this kind.

I am of the opinion that bonds properly prepared according to the bond form submitted will, when signed by the proper officers of the village of Burton, constitute valid and binding obligations of said village.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

650.

APPROVAL—TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE BY COUNCIL OF VILLAGE OF BURTON, GEAUGA COUNTY.

COLUMBUS, OHIO, September 24, 1917.

Industrial Commission of Ohio, Columbus, Ohio.
GENTLEMEN:

IN RE:—Bonds of the village of Burton, Geauga county, Ohio, in the sum of $6,220.00, issued by said village in anticipation of the collection of special assessments for the improvement of West Park avenue and West Center street in said village from the intersection of West Park avenue in said village with South Cheshire street and thence in a northwesterly direction along said West Park avenue a distance of 350 feet to the intersection of said West Park avenue with Center street, and thence west along said West Center street from the intersecion of said West Park avenue a distance of 2,298 feet to the west corporation line of said village, by grading, draining, curbing and paving the same.

I have carefully examined the transcript of the proceedings of the village council and other officers of the village of Burton, Geauga county, Ohio, relative

to the above bond issue, and find said proceedings to be in conformity to the provisions of the General Code relating to bond issues of this kind.

I am of the opinion that bonds properly prepared according to the bond form submitted will, when signed by the proper officers of the village of Burton, constitute valid and binding obligations of said village.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

651.

VOCATIONAL EDUCATION — FEDERAL AID — APPROPRIATION — EXPENSES—DIRECTOR OF AGRICULTURAL EDUCATION—SALARY.

The moneys appropriated by the general assembly of Ohio for co-operation with the federal government in vocational education may not lawfully be expended for the salary of a director of vocational education, including industrial training and home economics.

Th actual and necessary expenses of the members of the state board of education and the expenses of the board itself, other than for clerical services, are a proper charge against said appropriation.

No present authority exists in the state board of education to employ a director of agricultural education. The state superintendent of public instruction under existing laws has supervisory power respecting the teaching of agriculture. He has authority to employ assistants, with the approval of the governor, but even if an assistant employed in his department for the purpose of attending to the supervision of agricultural teaching might be regarded as a supervisor of agricultural education within the meaning of the federal legislation, the moneys appropriated to the state board of education for co-operation with the federal government could not lawfully be used to pay any part of the salary of such assistant.

COLUMBUS, OHIO, September 25, 1917.

PROF. ALFRED VIVIAN, *President State Board of Education, Ohio State University, Columbus, Ohio.*

DEAR SIR:—I acknowledge receipt of your letter of August 25th, calling my attention to Senate Bill No. 139 (107 Ohio Laws, page 579) and the Act of Congress referred to therein, and requesting my opinion upon the following questions:

> "First: Under the provisions of this bill, would it be possible to use any of the moneys appropriated by the state of Ohio for the purpose of the administration of the act, viz: for the expenses of members of the board, or for the salary of the director of vocational education (including industrial training and home economics)?
>
> "Second: Is there anything in the act to prevent the use of a part of the state funds for the payment of the salary of a director of agricultural education?"

I also acknowledge receipt of your letter of August 30 enclosing copy of a letter received from the federal board for vocational education.

Section 1 of the state law referred to by you accepts the provisions of a certain act of congress. That act is senate bill No. 703, sixty-fourth congress, approved February 23, 1917. Among its provisions are the following:

"Sec. 1. There is hereby annually appropriated, * * * the sums provided in sections two, three and four of this act, to be paid to the respective states for the purpose of co-operating with the states in paying the salaries of teachers, supervisors and directors of agricultural subjects, and teachers of trade, home economics and industrial subjects, and in the preparation of teachers of agricultural, trade, industrial and home economics subjects; * * *

"Sec. 2. That for the purpose of co-operating with the states in paying the salaries of teachers, *supervisors or directors* of *agricultural subjects,* there is hereby appropriated for the use of the states, subject to the provisions of this act, * * *(certain named sums for future years).

"Sec. 3. That for the purpose of co-operating with the states in paying the salaries of *teachers* of *trade, home economics and industrial subjects,* there is hereby appropriated for the use of the states, * * * (certain named sums for certain future years).

"Sec. 4. That for the purpose of co-operating with the states in preparing teachers, *supervisors and directors* of agricultural subjects and teachers of trade and industrial and home economics subjects, there is hereby appropriated for the use of the states, * * * (certain named sums for designated future years).

"Sec. 5. That in order to secure the benefits of the appropriations provided for in sections two, three and four of this act, any state shall, through the legislative authority thereof, accept the provisions of this act and designate or create a state board, consisting of not less than three members, and having all necessary power to co-operate, as herein provided, with the federal board for vocational education in the administration of the provisions of this act. * * *

"Any state may accept the benefits of any one or more of the respective funds herein appropriated, * * * and shall be required to meet only the conditions relative to the fund or funds, the benefits of which it has accepted. * * *

"Sec. 6. That a federal board for vocational education is hereby created, * * *

"The board shall have power to co-operate with state boards in carrying out the provisions of this act. * * *

"Sec. 8. That an order to secure the benefits of the appropriation for any purpose specified in this act, the state board shall prepare plans, showing the kinds of vocational education for which it is proposed that the appropriation shall be used, the kinds of schools and equipment; courses of study; methods of instruction; qualifications of teachers; and, *in the case of agricultural subjects the qualifications of supervisors or directors; plans for the training of teachers;* and, *in the case of agricultural subjects, plans for the supervision of agricultural education,* as provided for in section ten. Such plans shall be submitted by the state board to the federal board for vocational education, and if the federal board finds the same to be in conformity with the provisions and purposes of this act, the same shall be approved. * * *

"Sec. 9. * * * The moneys expended under the provisions of this act, in co-operation with the states, for the salaries of teachers, supervisors,

or directors of agricultural subjects, or for the salaries of teachers of trade, home economics and industrial subjects, shall be conditioned that for each dollar of federal money expended for such salaries the state or local community, or both, shall expend an equal amount for such salaries; and that appropriations for the training of teachers of vocational subjects, as herein provided, shall be conditioned that such money be expended for maintenance of such training and that for each dollar of federal money so expended for maintenance, the state or local community, or both, shall expend an equal amount for the maintenance of such training.

"Sec. 10. That any state may use the appropriation for agricultural purposes, or any part thereof allotted to it, under the provisions of this act, for the salaries of teachers, supervisors, or directors of agricultural subjects, either for the salaries of teachers of such subjects in schools or classes *or for the salaries of supervisors or directors* of such subjects under a plan of supervision for the state to be set up by the state board, with the approval of the federal board for vocational education. * * *

"Sec. 11. That in order to receive the benefits of the appropriation for the salaries of teachers of trade, home economics and industrial subjects, the state board of any state shall provide in its plan for trade, home economics and industrial education that such education shall be given in schools or classes under public supervision or control; * * *

"Sec. 12. That in order for any state to receive the benefits of the appropriation in this act for the training of teachers, supervisors, or directors of agricultural subjects, or of teachers of trade, industrial or home economics subjects, the state board of such state shall provide in its plan for such training that the same shall be carried out under the supervision of the state board; * * *

"Sec. 13. That in order to secure the benefits of the appropriations for the salaries of teachers, supervisors, or directors of agricultural subjects, or for the salaries of teachers of trade, home economics and industrial subjects, or for the training of teachers as herein provided, any state shall, through the legislative authority thereof, appoint as custodian for said appropriations its state treasurer, who shall receive and provide for the proper custody and disbursements of all money paid to the state from said appropriations."

Returning now to the state act, the general acceptance declared in the first section is supplemented by section 2 of the act, as follows:

"The benefits of all funds appropriated under the provisions of said act are hereby accepted as to:

"(a) Appropriations for the salaries of teachers, supervisors and directors of agricultural subjects.

"(b) Appropriations for salaries of teachers of trade and industrial subjects.

"(c) Appropriations for the preparation of teachers of agricultural, trade, and industrial, and home economics subjects."

The conditions of the federal act are met by the following sections of the State Law:

"Sec. 3. In order to carry out the provisions of this act, there is hereby created the state board of education, which shall consist of the

superintendent of public instruction and six appointive members, who shall be persons of recognized standing and ability in business, the professions, industry or the trades, to be appointed by the governor. * * *

"Sec. 4. The superintendent of public instruction shall serve as secretary of the board and shall designate some employe of the department of public instruction to act as clerk, who shall take charge of all papers and perform all clerical work in connection with the meetings of the board. Regular meetings of the board shall be held at the office of the superintendent of public instruction and special meetings may be held at any place within the state, upon the call of the president or of a majority of the board. No compensation shall be paid to any member of the board, but each shall receive his necessary and actual expenses incurred in attending meetings and while engaged in performing the duties imposed by this act. All such expenses and any other expenses incurred by the board in the official conduct of its business as authorized in this act shall be paid upon receipt of itemized bills authorized by the board and approved by the president. Vouchers for said bills shall be drawn by the auditor of state, payable from appropriations made by the general assembly.

"Sec. 5. The state board of education shall have all necessary authority to co-operate with the federal board for vocational education in the administration of said act of congress and of any legislation pursuant thereto enacted by the state of Ohio, and in the administration of the funds provided by federal government and the state of Ohio under the provisions of this act, for the promotion of vocational education in agriculture, commercial, industrial, trade and home economics subjects. They shall have full authority to formulate plans for the promotion of vocational education in such subjects as an essential and integral part of the public school system of education in Ohio; and to provide for the preparation of teachers of such subjects. They shall have authority to make studies and investigations relating to prevocational and vocational education in such subjects; to promote and aid in the establishment by local communities of schools, departments and classes, giving training in such subjects; to co-operate with local communities in the maintenance of such schools, departments and classes; to establish standards for the teachers, supervisors and directors of such subjects; and to co-operate in the maintenance of schools, departments, or classes supported and controlled by the public for the preparation of teachers, supervisors and directors of such subjects.

"Sec. 6. Any school, department or class giving instruction in agricultural, commercial, industrial, trade and home economics subjects approved by the state board of education in (and) any school or college so approved, training teachers of such subjects, which receives the benefit of federal moneys as herein provided, shall be entitled also to receive for the salaries of teachers of said subjects an allotment of state money equal in amount to the amount of federal money which it receives, as herein provided, for the same year. The state board of education shall recommend to each session of the general assembly the amount of money which will need to be appropriated by the state for such allotments during the succeeding biennial period.

"Sec. 7. The state treasurer is hereby designated as the custodian of all funds received from the United States treasury for vocational education under the terms of this act. All money so received or appropriated by the state of Ohio for the purposes contemplated in the act of congress

and in this act, or in the acts supplementary thereto, shall be disbursed in accordance with law, upon the order of the state board of education."

The first noteworthy fact to be mentioned in connection with your first question is the clear distinction that is drawn in both of the laws above quoted between agricultural education, on the one hand, and trade, industrial and home economics education, on the other hand, as affecting the application of federal moneys to the payment of any part of the salary of a supervisor or director. Without again quoting the section, permit me to point out that the state is permitted to expend the first federal appropriation for agricultural education partly in the payment of the salary of a director or directors or supervisors. This is clear enough from the general provisions of the federal law, but is made quite explicit in that part of section 10 thereof which has been quoted. It is therein provided that the state board may set up a plan of supervision for agricultural education, and, if the same is approved by the federal board, may use the moneys allotted to the state under the first federal appropriation for the payment of salaries of supervisors or directors. This is broad enough to include the payment of the salary of a state supervisor or director as well as that of a local supervisor or director, if the federal board assents to such plan. In this connection it is to be noted that section 5 of the state law expressly authorizes the state board of education thereby created to set up the plan of supervision which would be necessary in order to comply with the federal act in this respect.

But while these things are true as to agricultural supervisors, they are not true as to supervisors of trade, industrial and home economics education. Congress has been very careful to make this distinction, and it is very clear, therefore, that the federal moneys are not to be used in the payment of the salaries of supervisors of these last named subjects nor in training such supervisors.

It is very clear to me, therefore, that, granting that some authority exists for the employment of a director of vocational education, including industrial training and home economics, by some agency of the state or under authority of its laws, the federal moneys could not be used to contribute to the salary of such a director.

Your question, however, does not relate to federal moneys, but to state moneys. Nevertheless, the conclusion at which I have arrived furnishes a partial answer to your question; for the state law (Sec. 6) provides that the state money shall be allotted to schools and colleges dollar for dollar with the federal money; that is to say, the money of the state which the state board of education is to disburse must be disbursed in exact and equal co-operation with the federal funds. To the extent, therefore, that the state money might be needed to match the application of the federal money, there would be no authority to withhold any part of it and expend it for some purpose to which federal money could not be applied. Unless, therefore, the appropriation made by the state and subject to the control of the state board of education were sufficient in amount to leave a surplus after the contributions required by section 6 had been made, no part of that money could be used to employ a state supervisor.

But this is not all; for unless the appropriation to the state board of education, which is not found in the act cited, but in the general budget bill, is broad enough to authorize the expenditure of the moneys appropriated for this purpose, such expenditure could not be made even if there were a surplus. The budget bill provides (107 Ohio Laws, page 208) an appropriation of $78,400.00 "for the purpose of co-operating with the United States in vocational education." It is clear that the moneys appropriated for this purpose can not be expended for any purpose not strictly co-operative with the United States. Inasmuch as the United

States withholds co-operation in the payment of the salary of any supervisor excepting one whose duties relate strictly to agricultural education, it is clear that regardless of the question of amount the appropriation to the state board of education may not be used for this purpose.

Your first question also relates to the payment of expenses of the members of the board, which are expressly authorized by section 4 of the act to be paid "from appropriations made by the general assembly." If the appropriation referred to were the only one bearing upon the subject, and if its entire expenditure is not necessitated by the requirements of section 6, I would be of the opinion that the expenses of members of the state board would be properly chargeable against the appropriation, even though the legislature did not make a specific appropriation for the expenses of the board or its members. This part of your first question is, however, thrown into some confusion by the fact that some of the expense of carrying on the work of the state board of education is provided for by appropriation made to the department of public instruction. For example, at page 223 of 107 Ohio Laws is found, under the heading of "Department of Public Instruction," an appropriation of $1,000.00 for "Extra help in vocational work." This is consistent with the first sentence of section 4, which provides that an employe of the department of public instruction shall be designated to act as clerk and perform all clerical work in connection with the meetings of the board. The last two sentences of the same section, however, seem to contemplate the incurring of additional expenses by the board, as well as the reimbursement of the members of the board for their actual and necessary expenses. So that the mere fact that an appropriation is made to the department of public instruction for extra help in vocational work does not establish the conclusion that the other expenses of the board are properly chargeable against the appropriations made to the department of public instruction.

On the whole then, I conclude that the actual and necessary expenses for which under the provisions of section 4 of the state law the members of the state board of education are entitled to reimbursement are a proper charge against the state appropriation for co-operation with the federal government. The legislature has made no other appropriation to meet a fixed charge authorized by law; in the broad sense the work of the state board in the performance of which its members incur personal expenses is all co-operation with the federal government; the federal act itself requires the establishment of a state board and the doing of work by its members; and the provisions of section 6 of the law as applied to the appropriation made must be read in connection with those of section 4.

In a word, then, while section 6 of the act, as above stated, requires that state money be expended dollar for dollar with federal money, yet this requirement does not bind the legislature to make a separate and distinct appropriation for this purpose, though it would be more convenient so to appropriate. Therefore, section 6 of the law does not necessarily control the expenditure of all of the moneys appropriated if there is some other proper charge against the appropriation under the law. The expenses of the board and its members, other than clerical help which is to be furnished by the department of public instruction, are a proper charge against this appropriation because the legislature has made no other appropriation for such purpose, and because such expenses are in the broad sense incurred for the purpose of co-operating with the United States in vocational education.

I answer your first question, therefore, by saying that it would not be possible to use any of the moneys appropriated by the state of Ohio to pay any part of the salary of a director of vocational education, including industrial training and home economics; but that it would be possible and entirely proper to use the

appropriation to the state board of education for the payment of the actual and necessary expenses of the members of the board and the incidental expenses of the board itself other than for clerk hire.

Your second question, apparently assuming the impossibility of using the state moneys for the purpose of contributing to the salary of a director of vocational education whose functions would be as broad as those referred to in the first question, asks whether it would be possible to use any part of such moneys for the payment of the salary of a director of agricultural education.

As we have seen, the federal moneys may be used for such a purpose; and so far as the mere use of moneys is concerned it would follow, on the principles above outlined, that the state moneys could be likewise expended. At this point, however, another question intrudes—one that might properly have been mentioned as a further consideration in connection with your first question; and that is as to the authority to employ a state director or supervisor of agricultural education.

The State Board is given no authority to employ anybody. Its connection with the educational system of the state may be summed up as follows:

The State Board is to deal with the Federal Board for the purposes of the federal act; it is to formulate plans for the promotion of vocational education as a part of the public school system of education in Ohio; it is to provide for the preparation of teachers; to make studies and investigations; to promote and aid in the establishment of local schools, departments and classes; to co-operate with local communities; to establish standards; and to co-operate in the maintenance of schools for the preparation of teachers, supervisors and directors. The State Board is a continuing body, but it is not a part of the regular educational system of the state except to the extent specified. It disburses the state and federal funds; but if it has any authority to make employments it must be such authority only as is incidental to one of its expressly conferred powers. I find no express power from which such a power would flow by implication, unless it be the authority to make studies and investigations and that to promote and aid in the establishment of local schools. The accomplishment of these objects might require the board to employ investigators and field men, but, in my opinion, they would not justify the board in establishing the the position of state supervisor of agriculture.

But aside from all question as to the implications arising from Section 5 of the act creating the State Board of Education there are other considerations tending in the same direction. The supervision of the educational activities of the state is the subject of other laws on the statute books. These laws, dealing as they do comprehensively with the whole system of public education in the state, provide for local supervision by district superintendents and county superintendents and for state-wide supervision through the Department of Public Instruction. Consistently with this scheme of things, it would appear that if there is to be a state supervisor of any branch of education conducted by the state such office would belong in the educational system of the state as it is and always has been constituted.

Such indeed must have been the view of the General Assembly which enacted this law; for in its appropriations for the Department of Public Instruction it provided the sum of $1,600.00 for the salary of a "vocational supervisor". Here is authority to the Superintendent of Public Instruction to appoint, for the period covered by the appropriation at least, a vocational supervisor.

In my opinion, the legislature acted consistently with the scheme of the general laws in making this appropriation, and it is my opinion, under the

general laws and the appropriation, that whatever authority exists for the appointment or employment of a supervisor is reposed in the Superintendent of Public Instruction.

I do not mean to say that the State Board of Education is without any authority in the premises at all. It must set up a plan of co-operation; it is given complete authority and control over the scheme of co-operation in vocational education; so that it is my opinion that in so far as state supervision is a part of the plan "for the promotion of vocational education in such subjects as an essential and integral part of the public school system of education in Ohio," the power to authorize the appointment is reposed in the State Board of Education. That is to say, the State Board of Education has the authority, in my opinion, to determine whether or not there shall be state supervision of education in such subjects; it has the power to create the position in so far as the existence of such power is compatible with the separation of powers under the Constitution, which is a question not necessary to be considered at this time. But when it comes to the actual appointment or employment of the person who is to fill the position, the power to do these things is committed to the Superintendent of Public Instruction, who has control over the appropriation made for such purpose.

It being established, then, that the authority to appoint a state supervisor is reposed in the Superintendent of Public Instructiion, acting with respect to the creation of the position, but not otherwise, with the advice and consent of the State Board of Education, your question still requires me to consider whether the state moneys may be used to supplement the salary of the person referred to in the budget bill as the "vocational supervisor."

This question may be broadly answered in the negative on the simple ground that the legislature has made a specific appropriation for this object and has determined in the first instance the salary which shall be payable. The necessary inference is that the legislature did not intend that this salary should be supplemented by the use of any other funds which it had appropriated.

An additional reason for the same conclusion, however, is furnished by considerations referred to in answering your first question. The $1,600.00 appropriated for the Department of Public Instruction is for the salary of a vocational supervisor. I find no warrant for the use of this appropriation or the employing authority derived from it for the payment of the salary or the employment of a supervisor whose functions are limited to the teaching of agriculture only. If a supervisor is employed at all, therefore, he must be paid the sum of $1,600.00, and no more, as salary, and he must supervise the entire work of vocational education in the state.

But, being so employed, he is not such a supervisor whose salary may be supplemented by the federal appropriation which is available to supplement the salary of a supervisor of agriculture only. In other words, if such a supervisor is employed such employment is not co-operative, but is an independent activity of the state. Therefore, the general appropriation which is made for the purpose of co-operating with the federal government and payable only for such purposes as constitute co-operation with the federal government could not be used to pay any part of his salary.

I therefore conclude that no part of the moneys appropriated to the State Board of Education for co-operation with the United States, nor any part of the federal moneys subject to the disbursements of the State Board may be paid in supplementing the salary of the vocational supervisor whom the Superintendent of Public Instruction is authorized to employ.

One more question must be considered before your second query is fully answered, viz:

> May the State Board of Education or the Superintendent of Public Instruction employ, independently of the authority to employ a vocational supervisor, a supervisor or director of agricultural education, and use the state appropriation for co-operation to pay his salary or to pay part of it, the remainder to be paid by the use of federal moneys?

As I have stated, I do not believe that the State Board of Education has implied power to make an employment of this character. Certainly it has no such express power. If the power were present I would have no difficulty in advising that the fund might be appropriately applied to pay the salary upon the same principles upon which I have held that the expenses of the members of the board are properly chargeable against the co-operation appropriation. But, as stated, the only power of employment which the State Board of Education possesses, if any, is that of employing persons to assist it. If its work amounts to "supervision," in the sense in which the Federal Board for Vocational Education interprets the federal law, then there would be warrant for holding that as a part of the co-operative scheme of things to be worked out between the two boards a position subordinate to the State Board of Education might be created by that board, and the salary of the incumbent thereof paid partly by the use of state funds and partly by the use of federal funds, if the state funds appropriated are sufficient to pay the state's portion of such salary in the face of the duties of the board under Section 6 of the state law. As stated, this question has a federal aspect and I do not desire to foreclose its consideration by the proper authorities. I am bound to say, however, that without knowing exactly what is meant by state supervision, I am impressed with the thought that the functions of the State Board of Education do not extend that far. This is because, as I have pointed out, what limited functions of this sort exist under the statutes of this state seem to be reposed, primarily at least, in the department of public instruction. The state board's authority to set up a plan of organization does not include the power to supervise, no matter how that power be defined; and the State Board's authority to co-operate with local communities and to establish standards is too vaguely put in the law to enable me with assurance to state that the legislature intended to encroach upon the functions of the Department of Public Instruction.

On the whole, therefore, I do not feel able to advise that the State Board has the power as a matter of state law to supervise agricultural education in the state-wide sense, without at least examining into the statutes relative to the powers and duties of the Superintendent of Public Instruction; and if it should appear upon such examination that power approximating the supervision of agriculture as a teaching subject in the common schools of the state is reposed in the Superintendent of Public Instruction, and hence in all likelihood not vested as a matter of legislative intent in the State Board of Education, it would follow that an assistant to or employe of the State Board of Education, who could not have authority broader than the board itself, could not with propriety be called a supervisor of agricultural teaching.

Coming now to the question relative to the powers and duties of the Superintendent of Public Instruction, let me observe that two questions appear to be involved, and may be phrased as follows:

> (1) Has the superintendent of public instruction any supervisory power over the teaching of agriculture in the schools, as such; and
>
> (2) If it should appear that he has such power, may he delegate it to, or rather execute it through, an assistant, and has he the power to employ such assistant?

The first of these questions is answered by the following statutes: Section 7761-1, General Code:

> "Agriculture shall hereafter be taught in all the common schools of all village and rural school districts of the state of Ohio, which are supported in whole or in part by the state, and may be taught in city school districts at the option of the board of education. Such agricultural instruction in each county district shall be under the general supervision of the county superintendent of schools."

This statute makes it reasonably clear that supervision of agricultural teaching in the common schools is divided between the county superintendent and the superintendents of the city and other exempt districts which offer such instruction. What general supervision over this local supervision is reposed in the Superintendent of Public Instruction? In the first place, I note that Section 7706-4 of the General Code, which relates to the duties of the county superintendent, provides that he shall make all reports required by law to be made to the superintendent of public instruction and "make such other reports as the superintendent of public instruction may require." This statute makes it clear that the county superintendent must at least report to the superintendent of public instruction upon such subjects as the superintendent of public instruction may require.

Section 7645 of the General Code gives to the superintendent of public instruction the power to approve the graded courses of study which the section provides shall be prescribed by the local boards of education in the subjects named in section 7648. Section 7648 defines an elementary school and prescribes the subjects in which instruction shall be given therein. This section in and of itself makes the teaching of agriculture optional, but, as we have seen, section 7761-1 requires the teaching of agriculture and in effect modifies section 7648 to this extent. On the whole I am of the opinion that the concurrent effect of the three sections named is to make the course of study in elementary schools, which now includes agriculture, subject to the approval of the superintendent of public instruction.

Turning now to colleges and normal schools and the work done by them in training teachers and supervisors of agriculture, which is within the purview of the third federal appropriation referred to above, I observe that section 7807-5, General Code, gives to the superintendent of public instruction the authority to approve institutions affording training in special subjects, including agriculture, and to issue provisional special certificates in such subjects to teachers or supervisors thereof.

Still dealing with the matter of preparation of teachers, I find that the superintendent of public instruction is by section 7654-1 and succeeding sections given certain supervisory authority over locally established and maintained normal schools.

Under section 7819, General Code, the superintendent of public instruction is given authority to prepare and charged with the duty of preparing the questions for all county teachers' examinations.

These special sections show that the superintendent of public instruction has rather wide supervisory powers with respect to the conduct of the schools in the state at large, in so far as such supervision is compatible with the local supervisory powers given to the county and district superintendents. There are also some general sections found in the chapter specifically relating to the superintendent of public instruction. Section 354 of the General Code authorizes

him "to visit and inspect schools." Section 355 gives him such supervision of the school funds of the state as is necessary to secure their safety and distribution as provided by law, with authority to acquire information from almost any source. Section 357 authorizes him to formulate "instructions for the organization and government of schools." and to transmit them to the local school officers, "who shall be governed thereby in the performance of their duties." This power is very broad.

On the whole, then, I find that whereas some power which might be deemed supervisory could by inference and implication be ascribed to the state board of education under the law creating it, powers which are clearly supervisory are by express provision of law vested in the superintendent of public instruction, as well respecting vocational training and the teaching of agriculture as with respect to the so-called common branches.

It is a well understood principle of statutory interpretation that a subsequent statute repeals or modifies a prior one to the extent only that they may be found to be irreconcilably inconsistent. Another way of putting the same thing is that where the legislature sees fit in the enactment of a new law to leave other laws apparently in force and unmodified by express repeal or amendment, the courts will hold that all the statutes which appear on the statute books of the state are in force and unmodified unless by clear expression in the later act a provision inconsistent with those of the former acts is made.

In this case there is nothing expressed in the act creating the state board of education which is inconsistent with the powers and duties of the superintendent of public instruction. On the other hand, the superintendent of public instruction is a member of the board, his office is to perform all clerical work which the board requires, and it is rather clear that the board acts on the whole in an advisory capacity to him, or perhaps in such capacity respecting the matters within the scope of its powers, viz:co-operation in vocational education, in the same way as the local board of education acts with respect to its superintendent. There is, for example, a county board of education and a district board of education. These boards have their superintendents whom they may control upon all questions of policy, yet it is well understood that the actual supervision of the schools is a function of the superintendent and not of the board.

So also the state board of education with respect to the subject-matter of vocational education may, under its power to set up plans and the like, control the discretion of the superintendent of public instruction in the exercise of his supervisory powers; but the supervision itself is his function and not that of the board.

This interpretation of the law does no violence to anything in the recent act, preserves the integrity of the statutes relating to the superintendent of public instruction which are not repealed, and avoids all conflict. I am of the opinion that it is the one to be adopted, because any other construction would make a mere implication or inference derivable from a subsequent act repeal an express provision of an earlier act, which is violative of every canon of statutory interpretation.

In short, then, the actual function of supervision, in so far as the same exists under the statutes of this state now in force, and in so far as it is to be exercised with respect to the teaching of agriculture and the preparation of teachers of agriculture, is vested in the superintendent of public instruction. In the broad sense he is the supervisor of agricultural education the same as he is the supervisor of all other public education.

The second question involved in the general inquiry under investigation now arises. Has the superintendent of public instruction power to appoint an assis-

tant or other subordinate through whom he may perform the function of supervision that the statutes repose in him? This question is answered by section 353-1 of the General Code, which provides as follows:

> "The superintendent of public instruction may employ such clerks, stenographers and assistants as will enable him to properly care for the duties of his office. The compensation of such appointees shall be fixed by the superintendent of public instruction with the approval of the governor."

Here is the power to employ assistants, which carries with it by necessary implication the power to prescribe the duties of such assistants and to limit them within appropriate fields. I have no doubt that there is enough power here for the superintendent of public instruction to employ an assistant and to limit the activity of such an assistant to the supervision of agricultural subjects. Of course, the assistant has no independent powers of his own, he acts merely as the representative of the superintendent of public instruction, in whose name and by whose authority everything must be done.

Ordinarily, even an express power to make employments in the statutes of the state will not be practically effective without an appropriation to pay the compensation of the employe. The state is, to be sure, bound by the employment, but the actual money is not forthcoming without the appropriation.

The legislature has made appropriations for the department of public instruction, particular items of which have been referred to heretofore.

The "personal service" appropriations to the department are itemized in such manner as that it is clear that none of the moneys so appropriated could be used to pay all or any part of the salary of an assistant whose activities would be limited to agricultural education. The question which now arises is as to whether, in view of the specific appropriations which the legislature has made to the department of public instruction for personal service, the appropriation for co-operation with the federal government made to the state board of education could lawfully be used to pay all or any part of the salary of an assistant in his office.

This is purely a question of the legislative intent embodied in the appropriation bill; for, as we have seen the power to employ exists independently of that bill. It might be strongly argued that the legislature could not have intended that any part of the moneys appropriated to the state board of education should be used to pay all or any part of the salary of an assistant in the department of public instruction, because full provision has been made for such assistants by the legislature in the appropriations to that particular department, and because, moreover, one of the assistants in that department for which appropriations has been made is one whose functions, viz: vocational education, are of a character related to the work of the state board of education. In fact I believe this to have been the legislative intention and that the legislature did not mean to provide by its appropriation for the state board of education in co-operation with the federal government any money which should be available to pay all or any part of the salary of a subordinate in the department of public instruction. The question is not free from doubt, to be sure. The state board has authority to set up a plan which shall contemplate the creation of a subordinate position in the department of public instruction, which might be appropriately called a director or supervisor of agricultural education, subject to the approval of the federal board on the point as to whether such a subordinate would satisfy the federal requirements. The superintendent of public instruction has ample

authority, with the approval of the Governor, to employ such a person as an assistant and to fix his compensation. If the federal board is satisfied with this feature of the plan it could advance federal moneys which could be applied to the salary of such assistant. The state moneys appropriated for co-operation might meet these federal moneys, always keeping strictly within the purpose and intent of the federal law which is accepted by the state law and virtually made a part of the latter by reference. So that the devotion of part of the money appropriated by the state to the state board of education in the payment of a part of the salary of such an assistant would be, broadly speaking at least, co-operation with the federal government.

It will be seen, therefore, that reasons exist on both sides of the question as to whether or not any part of the moneys appropriated for the state board of education may be applied to the salary of a special assistant in the department of public instruction. This question may not even arise, however, if the entire amount appropriated for co-operation is needed to meet the requirements of section 6 of the act and the incidental expense of the board, etc. If such should be the case, and the federal board should insist as a condition of co-operation with the state that a position of the kind named be created, and be satisfied with such position as a subordinate one in the department of public instruction, then the situation would be substantially as follows:

Not enough money being available—regardless of the question of power—to provide for the state's part of the salary of such an assistant, and the federal board making the creation of such position a prerequisite to co-operation, and the power to create the position existing, the furnishing of the funds would seem to be a matter for the consideration of the emergency board.

I understand an application has been made to the emergency board upon this theory. Whether the facts require the board to act upon either hypothesis respecting the applicability of the appropriation made to the board of education, I can not say. Clearly, the power of the emergency board is invoked if the appropriation could not legally be expended for this purpose at all; in all likelihood the power of the emergency board is likewise invoked if the appropriation, though legally available, is not sufficient in amount to justify its expenditure for this purpose.

On the whole, then, I conclude that even though the payment of a part of the salary of an assisant in the office of the superintendent of public instruction whose functions would be limited to the supervision of agricultural education might be regarded as co-operation with the federal government, within the purview of the state and federal acts respecting vocational education, the manner in which the legislature of the state has made its appropriation indicates a legislative intention that the co-operation appropriation shall not be used for this purpose, but that whatever moneys are expended for all or a part of the salary of assistants in the department of public instruction shall be taken from funds appropriated to that department.

It goes without saying, I think, that if a plan of supervision which contemplates the selection of a subordinate in the department of public instruction as a state supervisor, carrying with it the necessary implication that such supervisor shall really act as the representative of the superintendent of public instruction and in his name, is approved by the federal board, the state may have aid from the federal appropriation under section 10 of the federal law in payment of part of the salary of such an assistant.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

652.

LICENSES—UNDER LLOYD LOAN ACT—REMAIN IN FORCE UNTIL EXPIRATION OF THE YEAR FOR WHICH ISSUED.

The act of the legislature passed March 27, 1917 (107 O. L. 509), repealing and re-enacting certain sections of the so-called Lloyd law, does not require licensees under said law, holding licenses issued prior to said date, to surrender such licenses and take out new ones. Such licenses remain in force until the expiration of the year for which they were issued.

COLUMBUS, OHIO, September 25, 1917.

HON. P. E. BERRY, *Commissioner of Securities, Columbus, Ohio.*

DEAR SIR:—Under date of September 15, 1917, you make an inquiry of this office which is partly but not fully shown in the following communications accompanied by letters hereinafter given:

> "Please advise us relative to the questions submitted to our department in the letters which we herewith enclose.
>
> "The Lloyd loan law. Sections 6346-1-2-3-4-8-9 and 10, passed *May* 7, 1915, O. L., Vol. 106, page 281, and requiring a license from the *superintendent of banks,* are repealed. The present law, *passed March* 21, 1917, makes it unlawful to make a charge in excess of 8 per cent. per annum without first obtaining a license from the *commissioner of securities,* and otherwise complying with the provisions of the law, Ohio Laws, Vol. 107, page 509, 510 and 511.
>
> "The Lloyd loan law, I understand, was repealed and a new law has taken its place. I represent the Ideal Finance Co. who have complied with the law and have a license from the superintendent of banks. Do they now have to take out a new license?"

These documents do not fully show your inquiry, but you have personally supplemented them with the statement that following the passage of the act of March 21, 1917, creating the securities department, found in 107 O. L., pages 509 to 511, which act amends certain sections of the law formerly governing the banking department only, by substituting the name "commissioner of securities" for that of "superintendent of banks;" that the letter from an attorney, copied above, has been circulated to all the licensed money lenders under the jurisdiction of your office and has created great confusion and practically a panic, and has created the impression that all persons engaged in the chattel loan business are required to surrender their licenses issued just before the amendment of the law and take out new licenses. Such is the inquiry and the circumstances giving rise to it.

It is unnecessary to quote the sections of the law referred to in these communications in view of the fact that they are in the same words as they stood before the amendment, except in the respects above indicated, and that they were merely amended to transfer the authority given in them from the superintendent of banks to the commissioner of securities. The amendment plainly and on its face was intended to have no effect in disturbing the business of the department, but was merely made for the purpose of such transfer of authority.

Licenses were taken out and paid for on the first of March; this amendment was enacted on the 21st of that month and went into effect on the first day of July. The impression that it has such effect seems to be founded upon the fact that a section in the old law, no longer necessary in the amendment, was inadvertently carried therein, which is as follows (Sec. 6346-10, 107 O. L. 511.):

"Any licensee, or licensees, who hold a license under the provisions of sections 6346-1, 6346-2, 6346-3, 6346-4, 6346-5, 6346-6, 6346-7 of the General Code, inclusive, which has not yet expired, and who shall present his license for cancellation to the commissioner of securities shall receive therefor a credit in the amount of ten dollars, and the commissioner of securities shall credit the same upon such license."

This section is transferred word for word from the old law to the new; it, therefore, has no effect whatever as an amendment. It was in the former act a practical provision with which compliance was necessary, but it is no longer necessary, nor can have any effect or application as of the time of going into effect of the new law, and is simply an example of what the supreme court in a recent decision speaks of as "the scissors and paste method of legislation." The whole subject of the effect of amendments in the form of codification or re-enactment is discussed in a case in which the above expression is used:

State ex rel Nimberger v. Bushnell, 95 O. S. 177.

The first section of the syllabus is as follows:

"On the re-enactment of a statute in a code the revision does not change its meaning, construction or effect unless the language of the statute as revised clearly manifests the intention of the legislature to make such change."

A fortiori would this be true where there is no revision of the language, but a section recopied in the amendment.

This same subject is further discussed in a still more recent case:

State ex rel. Taylor v. Cowen, 95 O. S.

This case went off upon an amendment of the highway law, an amendment containing such sweeping changes that the opinion was generally entertained that it had abolished the former highway department. Jones, J., in the opinion speaks as follows:

"In the construction of legislation of this character the legal principle has been well established that when the amendatory or re-enactment law substantially re-enacts the existing law, the latter is held to be in effect, continuous and undisturbed, and in contemplation of law is not a repeal, but merely a reaffirmance of the former law. Re Harry Allen, 91 O. S. 315; Re Hesse, 93 O. S. 230."

The present legislation is not different in character from that discussed by the court in the Cowen case, but is a much stronger case for the doctrine above stated as the amendments in this case were less radical and sweeping and seem to leave no doubt whatever that there is no change in the law and no interruption in its enforcement.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

653.

OFFICES COMPATIBLE—CLERK OF COUNCIL, DEPUTY CLERK OF COUNCIL, OR ASSISTANT CLERK OF COUNCIL AND SERCETARY OF SINKING FUND TRUSTEES.

A person may occupy the position of clerk of council, deputy clerk of council, or assistant clerk of council and also hold the position of secretary of the sinking fund trustees, if it is physically possible to do so, and draw separate compensation for each position.

COLUMBUS, OHIO, September 25, 1917.

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

GENTLEMEN:—In your communication of recent date you submit for my opinion the following:

> "May the clerk of council, deputy clerk of council, or assistant clerk of council, also hold the position of secretary of the sinking fund trustees and draw separate compensation for each position?"

An examination of the provisions of the General Code does not disclose any statutory inhibition against the same person acting as clerk of council, deputy clerk of council, or assistant clerk of council, and holding the position of secretary of the sinking fund trustees.

There remains then for consideration the question as to whether the positions are incompatible within the meaning of the common law.

The common law rule of incompatibility in office is stated in the case of State ex rel. v. Gebert, 12 O. C. C., n. s. 274, by Dustin, J., at page 275, as follows:

> "Offices are considered incompatible when one is subordinate to, or in any way a check upon, the other; or when it is physically impossible for one person to discharge the duties of both."

As far as I have been able to ascertain there is nothing in the duties pertaining to the positions of clerk of council, deputy clerk of council, or assistant clerk of council that would make them subordinate to or a check upon the position of secretary of the sinking fund trustees.

Therefore, I advise you that it is my opinion that the same person may occupy the position of clerk of council, deputy clerk of council, or assistant clerk of council and also hold the position of secretary of the sinking fund trustees, if it is physically possible to do so, and draw separate compensation for each position.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

654.

APPROVAL—CONTRACT BETWEEN BOARD OF TRUSTEES, OHIO SOLDIERS' AND SAILORS' ORPHANS' HOME, AND THE WEINMAN PUMP MANUFACTURING COMPANY OF COLUMBUS, OHIO.

COLUMBUS, OHIO, September 25, 1917.

Board of Trustees, Ohio Soldiers' and Sailors' Orphans' Home, Xenia, Ohio.

GENTLEMEN:—Mr. Howard Mannington, a member of your board, has submitted to this department a contract entered into between your board and the Weinman Pump Manufacturing Company, of Columbus, Ohio, for furnishing one steam turbine driven and one electrically driven hot water circulating pumps for the sum of $2,250.00, together with the bond securing said contract.

I have examined the contract and bond and find the same to be in compliance with law. The auditor of state having furnished a certificate that the money necessary for such contract is available, I have this day filed the said contract and bond in the office of the auditor of state.

Very truly yours.
JOSEPH MCGHEE,
Attorney-General.

655.

APPROVAL—CONTRACT BETWEEN THE STATE OF OHIO AND THE M. E. MURPHY COMPANY, OF COLUMBUS, OHIO.

COLUMBUS, OHIO, September 25, 1917.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your communication of September 20, 1917, in which you enclose two contracts, in triplicate, both entered into by the state of Ohio with the M. E. Murphy Company of Columbus, Ohio, the one for the driving of fifty piling each forty feet long, to protect the bank of the Ohio canal at Paper Mill south of Cleveland, Ohio, and the other for the driving of approximately seventy-three piling each forty feet long, to protect the bank of the Ohio canal about four miles south of Cleveland, Ohio.

I have carefully examined these contracts and find them correct in form and legal.

Upon an oral statement received from your department, I also find that you have complied with the provisions of section 2314 et seq. G. C. as amended and found in 107 O. L. 453.

I, therefore, approve said contracts and return the same to your department.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

656.

APPROVAL—FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN ASHLAND, LUCAS AND MAHONING COUNTIES.

COLUMBUS, OHIO, September 25, 1917.

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

DEAR SIR:—I have your communication of September 21, 1917, in which you enclose a number of final resolutions, for my approval, as follows:

"Ashland County—Sec. 'A' of the Ashland-Norwalk road, I. C. H. No. 142.

"Ashland County—Sec. 'G' of the Savannah-Vermilion road, I. C. H. No. 149.

"Lucas County—Sec. 'K' of the Toledo-Napoleon road, I. C. H. No. 51.

"Lucas County—Sec. 'J' of the Toledo-Napoleon road, I. C. H. No. 51.

"Mahoning County—Sec. 'Y' of the Canfield-Poland road, I. C. H. No. 486.

I have carefully examined these final resolutions and find them correct in form and legal and am, therefore, returning the same to you with my approval endorsed thereon, in accordance with the provisions of section 1218 G. C.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

657.

RESIDENCE—FEEBLE-MINDED YOUTH BROUGHT INTO THE STATE BY PERSONS CARING FOR HIM DOES NOT ACQUIRE LEGAL SETTLEMENT—RETAINS SAME LEGAL SETTLEMENT AS PARENTS.

A man and his wife moved from the state of Indiana into a county in Ohio, bringing with them a feeble-minded youth whom they were caring for as one of their family. After residing in such county in Ohio for fifteen months, the husband died, and the wife, being unable to longer care for this youth, has requested the county authorities to admit him to the infirmary. The youth in question has not supported himself since coming to Ohio, but has been dependent upon his friends. The boy's mother lives in another state.

Held: This feeble-minded youth did not gain a legal settlement in Ohio, but that this settlement is in the county and state where his mother resides. As soon as the mother is located this boy should be taken to the county and state in which she has a residence by the superintendent of the county infirmary. In the meantime the boy should be cared for in the county infirmary.

COLUMBUS, OHIO, September 26, 1917.

HON. J. H. MUSSER, *Prosecuting Attorney, Wapakoneta, Ohio.*

DEAR SIR:—I have your letter of August 11, 1917, as follows:

"About fifteen months ago a man and his wife came to this county from Indiana, bringing with them a young man who is mentally deficient

and who had, some time prior to the time they moved here from Indiana, been an inmate of an infirmary there. The man who brought this young man from Indiana has died and his widow is unable to any longer care for him because of her financial condition, and a request has been made that the county take charge of him and make him an infirmary charge under the poor laws.

"This young man has not supported himself since he came to Ohio, but has been dependent upon the persons who brought him here for his support.

"I would like to have your opinion as to what disposition should be made of the matter as our county commissioners feel that this young man should not be a county charge and would request that you give this your earliest attention as some persons interested are insistent that the county take charge of the young man at once."

Under date of September 18, 1917, you advise me:

"Replying to your letter of September 5th, relative to my inquiry in regard to a certain dependent who had at one time been in an infirmary in Indiana, and whom some people would now have Auglaize county take care of, will say regarding the questions asked by you that this young man is twenty-six or twenty-seven years old. He was an inmate of the infirmary in Tippecanoe county, Indiana, from which infirmary he ran away and went to Benton county, Indiana, where he was taken in by the husband of Mrs. Jennie Meiser. Mrs. Meiser and her husband came to Ohio in April, 1916, bringing this young man with them. Last winter Mrs. Meiser's husband died, and she is unable to care for this young man any longer herself. He has never supported himself at any time since he left the Tippecanoe county, Indiana, infirmary, and he was never adopted by Mrs. Meiser and her husband. I understand that his mother is living, but I have been unable to locate her place of residence.

"Section 3477 G. C. provides that before a person shall be considered to have obtained a legal settlement in any county in this state that he or she shall have continuously provided for and supported himself or herself for twelve consecutive months, subject to certain exceptions.

"I have taken the position that this young man does not come within the law regarding the care for poor by the county, and I believe he ought to be returned to Indiana. If you are of the same opinion I wish you would please give me your ideas as to the manner in which he should be returned and by whom."

Section 3476 G. C. provides:

"Subject to the conditions, provisions and limitations herein, the trustees of each township or the proper officers of each municipal corporation therein, respectively, shall afford at the expense of such township or municipal corporation public support or relief to all persons therein who are in condition requiring it."

Section 3477 G. C. reads in part as follows:

"Each person shall be considered to have obtained a legal settlement

in any county in this state in which he or she has continuously resided and supported himself or herself for twelve consecutive months, without relief under the provisions of law for the relief of the poor. * * *"

Section 3478 G. C. provides:

"In an action to compel the support or relief of a pauper, or in an action based upon the refusal of such officers to afford support or relief to any person, it shall be a sufficient defense for the township trustees, or proper municipal officers to show that such person, during the period necessary to obtain a legal settlement therein has been supported in whole or in part by others with the intention to thereby make such person a charge upon such township or municipal corporation. The fact that such person, during the period necessary to obtain a legal settlement therein, has been supported in whole or in part by others shall be prima facie evidence of such intention."

Section 3480 General Code provides:

"When a person in a township or municipal corporation requires public relief, or the services of a physician or surgeon, complaint thereof shall be forthwith made by a person having knowledge of the fact to the township trustees, or proper municipal officer. If medical services are required, and no physician or surgeon is regularly employed by contract to furnish medical attendance to such poor, the physician called or attending shall immediately notify such trustees or officer, in writing, that he is attending such person, and thereupon the township or municipal corporation shall be liable for relief and services thereafter rendered such person, in such amount as such trustees or proper officers determine to be just and reasonable. If such notice be not given within three days after such relief is afforded or services begin, the township or municipal corporation shall be liable only for relief or services rendered after notice has been given. Such trustees or officer, at any time may order the discontinuance of such services, and shall not be liable for services or relief thereafter rendered."

Section 3481 General Code reads:

"When complaint is made to the township trustees or to the proper officers of a municipal corporation that a person therein requires public relief or support, one or more of such officers, or some other duly authorized person, shall visit the person needing relief, forthwith, to ascertain his name, age, sex, color, nativity, length of residence in the county, previous habits and present condition and in what township and county in this state he is legally settled. The information so ascertained shall be transmitted to the township clerk, or proper officer of the municipal corporation, and recorded on the proper records. No relief or support shall be given to a person without such visitation and investigation, except that in cities, where there is maintained a public charity organization, or other benevolent association, which investigates and keeps a record of the facts relating to persons who receive or apply for relief, the infirmary directors, trusteees, or officers of such city shall accept such investigation and information and may grant relief upon the approval and recommendation of such organization."

Section 2540 G. C. reads:

> "The superintendent of the infirmary may remove any person becoming a charge upon the county who has no legal settlement in the state, to the county and state where such person has a legal settlement."

Section 2544 provides:

> "In any county having an infirmary, when the trustee of a township, after making the inquiry provided by law, are of the opinion that the person complained of is entitled to admission to the county infirmary, they shall forthwith transmit a statement of the facts to the superintendent of the infirmary and if it appears that such person is legally settled in the township or has no legal settlement in this state, or that such settlement is unknown, and the superintendent of the infirmary is satisfied that he should become a county charge, they shall forthwith receive and provide for him in such institution, or otherwise, and thereupon the liability of the township shall cease. The superintendent of the infirmary shall not be liable for any relief furnished, or expenses incurred by the township trustees."

Section 3476 G. C. thrusts upon the township trustees the duty of affording relief to paupers, subject to certain provisions and limitations in the sections immediately following.

Section 3477 G. C. provides:

> "Each person shall be considered to have obtained a legal settlement in any county in this state in which he or she has continuously resided and supported himself or herself for twelve consecutive months, without relief under the provisions of law for the relief of the poor. * * *"

Section 3479 G. C. provides that a person having a legal settlement in any county shall be considered to have a legal settlement "in the township or municipal corporation therein, in which he has last resided continuously and supported himself for three consecutive months without relief."

The question here is, has the pauper referred to a legal settlement in the township and county in which he has resided for the past fifteen months?

It was held in Henrietta Township v. Oxford Township, 2 O. S. 32, that:

> "In order to obtain a settlement in a township, under our poor laws, the fact of residence is not sufficient, unless attended with the intention, on the part of the resident, of making such township his place of abode."

This being so, a feeble-minded person cannot acquire settlement in Ohio in his own right, for, as stated in 30 Cyc. 1083:

> "An insane person or idiot cannot acquire a settlement in any place by virtue of acts requiring his own volition."

In the case of Payne v. The Town of Dunham, 29 Ill. 125, it was held:

> "An idiot cannot acquire residence or settlement in any place, by virtue of his own acts. The residence or settlement of such person is fixed either by the father or those having paramount control over him."

The court at page 128 said:

"An idiot can acquire no residence or settlement in any place, by virtue of his or her own acts, for an idiot is incapable of exercising a will or doing an act binding on himself or others. His residence or settlement must be derived from his father or those having the paramount right to control him."

This applies as well to adult idiots as minor idiots.

Inhabitants of Gardiner v. Inhabitants of Garmingdale, 45 Me. 537; 30 Cyc. 1083.

In the case submitted the pauper, when he came to Ohio, was not in the custody of his father or mother or neither was he in the custody of a legally appointed guardian. He was brought to this state by a friend. Your letter states that the mother of this young man is still living and he, not being able to acquire a legal settlement in his own right, according to the authorities above quoted, derives his settlement from his mother. This being the case, I must conclude that this young man has never gained any settlement in Ohio, but that he has a settlement in whatever county and state his mother has established a residence.

Under section 2540, above quoted, the superintendent of a county infirmary may remove any person becoming a charge upon the county, who has no legal settlement in this state, to the county and state where such person has a legal settlement.

I would, therefore, advise you to ascertain the residence of this boy's mother and then have the superintendent of the county infirmary remove him to that county and state.

Until this boy's mother is located and his legal settlement determined, he should be cared for in the county infirmary, since under section 2544 G. C. provision is made for the care of pauper's in the infirmary when it appears that they have no legal settlement in the state or that their legal settlement is unknown.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

658.

BOARD OF EDUCATION—WHEN OBLIGED TO PAY TUITION OF GRADUATE OF THIRD GRADE HIGH SCHOOL TO HIGHER GRADE HIGH SCHOOL.

The board of education of a village school district which maintains a third grade high school is obliged to pay the tuition of the graduates of said high school to some other high school of higher grade after their graduation, unless the maximum levy permitted by law has been reached and all the funds so raised are necessary for the support of the schools of such district.

COLUMBUS, OHIO, September 26, 1917.

HON. FRANK N. SWEITZER, *Prosecuting Attorney, Canton, Ohio.*

DEAR SIR:—You ask my opinion upon the following question:

"Is the board of education of a village school district maintaining a

third grade high school obliged to pay the tuition of the graduates of this high school to some other high school of higher grade after their graduation?"

General Code section 7748 reads as follows:

*"A board of education providing a third grade high school as defined by law shall be required to pay the tuition of graduates from such school residing in the district at any first grade high school for two years, or at a second grade high school for one year. Should pupils residing in the district prefer not to attend such third grade high school the board of education of such district shall be required to pay the tuition of such pupils at any first grade high school for four years, or at any second grade high school for three years and a first grade high school for one year. * * * except that, a board maintaining a * * * third grade high school is not required to pay such tuition when the maximum levy permitted by law for such district has been reached and all the funds so raised are necessary for the support of the schools of such district.* No board of education is required to pay the tuition of any pupil for more than four school years; except that it must pay the tuition of all successful applicants, who have complied with the further provisions hereof, residing more than four miles by the most direct route of public travel, from the high school provided by the board, when such applicants attend a nearer high school or in lieu of paying such tuition the board of education maintaining a high school may pay for the transportation of the pupils living more than four miles from the said high school maintained by the said board of education to said high school. Where more than one high school is maintained, by agreement of the board and parent or guardian, pupils may attend either and their transportation shall be so paid. A pupil living in a village or city district who has completed the elementary school course and whose legal residence has been transferred to a rural district in this state before he begins or completes a high school course, shall be entitled to all the rights and privileges of a resident pupil of such district."

If the school district about which you inquire were a rural school district, your question would be perfectly clear, for this department held in Opinion No. 260, rendered May 12, 1917, that:

"If a board of education of a district provides only a third grade high school and instead of attending such third grade high school such pupils, resident thereof, desire the schooling provided in the advanced high schools, to-wit, a second or first grade high school, then the board of education which maintained only a third grade high school shall be required to pay the tuition of pupils who attended the first grade high school for a period of two years, or was required to pay the tuition of such pupils at a second grade high school for one year and a first grade high school for one year,"

and,

"when the maximum levy permitted by law has been reached and all of the funds so raised are necessary for the support of the schools of the district, the law provides that the board is not required to pay such tuition. That is, a particular tuition, the tuition to the first grade high school for two years or the first grade high school for one year and the second grade high school for one year."

The above quoted section (7748) was considered along with other sections in the chapter in which the above section is found.

In the case of State ex rel Nimberger, et al. vs. Bushnell, et al., 95 O. S. 177, decided January 23, 1917, the question presented by the record was as to whether or not a board of education of a *village* district, wherein no high school is maintained, is required by law to pay the tuition of pupils who have completed the elementary work of such district and are attending a high school in another district. In that case the court held that a village district could not be so compelled to pay such tuition because section 7747, as it then read, provided only for the payment of tuition of pupils who are eligible for admission to high school and who reside in rural districts in which no high school is maintained. Matthias, J., on page 181, uses the following language which seems to indicate that sections 7748, 7749, 7750 and 7751 apply only to rural districts, the same as 7747:

> "In 1910 the codifying commission * * * subdivided section 4029-3, Revised Statutes, making therefrom sections 7747 to 7751 General Code.
>
> "No change whatever was made in the substance, meaning or application of these provisions at that time except to eliminate joint subdistricts, and that undoubtedly was done because of the fact that in 1904 joint subdistricts had been abolished.
>
> "A comparison of the codification of 1910 with the former sections of the Revised Statutes discloses no change of language which would in any wise affect the operation of any of the provisions to which we have heretofore referred, and *it is quite obvious that village boards of education were not affected in any wise by the provisions of any of these sections, either before or after the codification.*
>
> "A dissection of the original sections, making several sections of each for the purpose of convenience merely, does not effect any change in the substance or operative effect thereof, and, under the well known and frequently applied rule, does not alter the meaning of the language used.
>
> "The presumption is that although the language has been changed in the revision or codification of the statute it has the same meaning and application as before the revision or codification, and the court is warranted in changing the construction thereof only when that is plainly required in order to conform to the manifest intent of the legislature. Ash v. Ash et al., 9 Ohio St. 383, 387; State ex rel Clough & Co. v. Commissioners, 36 Ohio St. 326; Heck v. State, 44 Ohio St. 536; State ex rel Baumgardner v. Stockley, 45 Ohio St. 304, 308; Conger et al. v. Barker's Admr., 11 Ohio St. 1; German American Ins. Co. v. McBee et al., 85 Ohio St. 173, and Myers, Treas., v. Rose, Institute, 92 Ohio St. 238, 247.
>
> "'A board of education' meant just the same after as it did before the action of the codifying commission. Village boards of education were entirely outside the scope of those statutes before the codification, *and there was no change which could possibly serve to include them.*
>
> "Section 7740 was amended April 13, 1910, extending the privilege of taking the examination to pupils of village districts as well as to those of township and special district. However, there was no change in the provisions relative to the payment of tuition. The question thereupon arises whether this amendment, which affords to the pupils of village districts the privilege to take such examination, serves to impose upon the board of education of such district the obligation to pay tuition for any such pupils passing the examination who thereafter attend high school in some other district. It is to be borne in mind that the right and privilege of pupils to attend high school in districts other than those wherein they reside was

conferred long prior to the passage of any law requiring boards of education to pay tuition for such attendance. It is, therefore, manifest that the right to take the examination, and, if successful, the privilege of attending a high school in another district, did not imply any obligation whatever upon the local board of education to pay tuition. The right of the pupil to attend a high school elsewhere and the obligation of the board to pay tuition have at all times been treated in legislation as two entirely separate and distinct matters, the privilege of the pupil being broader than the obligation of the board.

"It is to be observed that very shortly after the last amendment to which we have above referred, the legislature, on May 10, 1910, *amended section* 7748 *so as to extend the rights and privileges of a Boxwell-Patterson graduate to a pupil living in a village or city district who had there completed the elementary school course and thereafter transferred his residence to a township or special district. The fact seems significant that the legislature, by the terms of this amendment, limited the tuition privileges to a village pupil who had become a resident of a township or special district, and did not extend the same privilege to the pupil who continued a resident of the village district after completing the elementary course."*

It is to be observed, then, that had there been no amendment of any of the sections above referred to, the conclusion that a village district was not permitted to pay the tuition of its high school pupils at other schools would be irresistible, but it is to be further observed that at the time said decision was rendered General Code section 7747 read in part as follows:

"The tuition of pupils who are eligible for admission to high school and who reside in *rural districts,* in which no high school is maintained, shall be paid by the board of education of the school district in which they have legal school residence. * * *"

But on March 21, 1917, said section was amended as it is now found in 107 O. L. 625, to read as follows:

"The tuition of pupils who are eligible for admission to high school and who reside in *village* or rural districts, in which no high school is maintained, shall be paid by the board of education of the school district in which they have legal school residence, such tuition to be computed by the month. An attendance any part of the month shall create a liability for the entire month. No more shall be charged per capita than the amount ascertained by dividing the total expenses of conducting the high school of the district attended, which may include charges not exceeding five per cent per annum and depreciation charges not exceeding five per cent per annum, based upon the actual value of all property used in conducting such high school by the average monthly enrollment in the high school of the district. The district superintendent shall certify to the county superintendent each year the names of all pupils in his supervision district who have completed the elementary school work, and are eligible for admission to high school. The county superintendent shall thereupon issue to each pupil so certified a certificate of promotion which shall entitle the holder to admission to any high school. Such certificates shall be furnished by the superintendent of public instruction."

The effect of this amendment is to make the board of education of a village school district, maintaining no high school, liable for the tuition of the pupils who are residents thereof and who attend high schools in other districts.

Sections 7748, 7749, 7750 and 7751 G. C., which were also considered in the case of State ex rel. v. Bushnell, supra, were not amended so that the question is, what, if any, effect does the amendment of section 7747, as above quoted, have upon the following sections of said chapter which refer to the same subject. I am confident from a careful consideration of the language used by the learned court in State ex rel. Bushnell, supra, that a different conclusion would have been reached in that case if section 7747 had read then as it now reads and if the question had been on the payment of the tuition provided for in section 7748 by the board of education which maintains a third grade high school, for it must be remembered that sections 7747, 7748, 7749, 7750 and 7751 were formerly all embodied in Revised Statutes 4029-3, and in separating said section last mentioned the codifying commission made no change whatever in the substance thereof. But if the substance of section 7747 had been changed just as was the substance of section 7748 changed by the amendment of May 10, 1910, then the following sections being read in connection therewith would have not only been sufficient to warrant the conclusion that section 7748 applied to *all* school districts instead of just to rural school districts, but would have made such construction irresistible. That is to say, the only reason which the court finds that section 7748 does not apply to village districts is that language which says:

> "A pupil living in a village or city district who has completed the elementary school course and whose legal residence has been transferred to a *rural* district in this state before he begins or completes a high school course shall be entitled to all the rights and privileges of a resident pupil of such district."

If, then, the rights and privileges of pupils of village districts and rural districts had been the same, as they are now, then said language would either have been unnecessary or without effect, and the court would have necessarily been compelled to arrive at a different conclusion, viz., that on account of the clear language used in section 7748 that said section would necessarily apply to all schools alike instead of only to the class of schools to which section 7747 was formerly limited.

Holding these views, then, I advise you that the board of education of a village school district which maintains a third grade high school is obliged to pay the tuition of the graduates of said high school to some other high school of higher grade after their graduation, unless the maximum levy permitted by law has been reached and all the funds so raised are necessary for the support of the schools of such district.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

659.

DUPLICATE AMENDMENTS—LEGISLATIVE INTENT GOVERNS.

The determination of the question as to which of duplicate amendments of the same section of the General Code, passed by the legislature on the same day, is governed by the intention of the legislature.

COLUMBUS, OHIO, September 27, 1917.

The Board of Agriculture, Fish and Game Division, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your communication of August 31, 1917, wherein you request my opinion on the following statement of facts:

> "There seems to be some confusion in regard to section 1453 of the General Code.
>
> "On March 21, 1917, the legislature provided by amendment to section 1453 for the catching of carp and mullett in the bays, rivers, marshes, etc., and then seeks to define the limitation in certain rivers and creeks. This law was approved March 29th and filed in the office of the secretary of state on March 30, 1917.
>
> "It seems as though this section was re-enacted on the same day, approved on March 29th and filed in the office of the secretary of state on March 31st. This is found in volume 107, page 489.
>
> "You will note this section does not include mullett and does not attempt to define the parts of the river and creeks in which carp fishing is permitted, neither does it include the word rivers.
>
> "The question now would be which is the law. Will you kindly render me an opinion as soon as possible as a conflict of this kind might be a source of some unpleasant litigation?"

House Bill No. 163, 107 O. L. 172, amending section 1453, was passed March 21, 1917, approved by the governor March 29, 1917, and filed in the office of the secretary of state March 30, 1917, and provides as follows:

> "Section 1. That section 1453 of the General Code be amended to read as follows:
>
> "Sec. 1453. German carp and mullett may be taken or caught at any time in the bays, rivers, marshes, estuaries or inlets bordering upon, flowing into or in any manner connected with Lake Erie, with any seine, having meshes not less than four inches, stretched mesh factory measure. Provided, however, that german carp and mullett shall not be taken or caught under the provisions of this act in the following streams except as hereinafter designated. In the Ottawa river no farther than the Ann Arbor bridge; in the Maumee river no farther than the Toledo Country Club; in the Portage river no farther than one-half mile past poor house flats; in Sandusky river no farther than the mouth of Bar creek; and no farther up the La Carp creek, Little Portage river, Tousaint river, Turtle creek, and Ward's canal than the water level of Lake Erie extends in these streams.
>
> "Sec. 2. That said original section 1453 of the General Code as amended by the 82nd General Assembly by an act passed on the 10th day of March, 1917, known as house bill No. 115, be, and the same is hereby repealed."

Amended house bill No. 115 (107 O. L., p. 489), amending the same section (1453), was passed March 21, 1917, approved by the governor March 29, 1917, and filed in the office of the secretary of state March 31, 1917, and provided as follows:

* * * * * * * * * * * * * *

"Section 1453. German carp may be taken or caught at any time in the bays, marshes, estuaries or inlets bordering upon, flowing into or in any manner connected with Lake Erie, with any seine, having meshes not less than four inches, stretched mesh. Other nets or devices may be used if authorized by the secretary of agriculture. Written permission to catch carp in such waters shall be granted to any person making application to the secretary for such privileges who satisfies the secretary that he will not violate a law for the protection of fish. Such permission may be revoked by the secretary upon conviction of the holder thereof for taking fish contrary to law."

* * * * * * * * * * * * * *

These two bills were passed on the same day, approved by the governor on the same day, but amended house bill No. 115 was filed in the office of the secretary of state one day later than house bill No. 163.

In the case of State of Ohio v. Lathrop, 93 O. S. 79, the court held:

"We are constrained to hold that the act last actually signed did not operate to repeal the act last passed. We are persuaded that the manifest purpose of the law-making power should not be defeated by means wholly beyond its control. It is the plain duty of the court to give effect, if at all possible, to the latest expression of the legislature on a given subject, and rather than vest the executive with the power of selection, which the constitution neither impliedly nor expressly grants to him—and, indeed, which the constitution in terms, by formal exclusion, denies to him—we hold that the act of April 17, as the later expression of the general assembly, must prevail; and we do this the more readily because thereby the clear intention of both the general assembly and the executive is given effect.

"Authority in support of this holding may be found in the case of Southwark Bank v. Commonwealth, 26 Pa. St. 446, wherein it was held:

"'1. The general rule is that where two statutes contain repugnant provisions, the one last signed by the governor is a repeal of the one previously signed.

"'2. This is so merely because it is presumed to be so intended by the law-making power; but where the intention is otherwise, and that intention is apparent from the face of either enactment, the plain meaning of the legislative power thus manifested is the paramount rule of construction.'"

The court in the above cited case further holds:

"Section 1 of article II of the constitution of Ohio provides that the legislative power of the state shall be vested in a general assembly. * * * If the governor, by mere order of the time of approval of measures passed by the general assembly, can make or unmake laws, then, contrary to the express terms of the constitution, he becomes the law-making power and his intention, rather than that of the legislature, governs."

Let us, therefore, look into the history of the passage of these two acts to ascertain, if possible, the intention of the legislature relative to these two bills.

House bill No. 115, as introduced, was amended by the senate and returned to the house, where it was again brought up on the tenth day of March, 1917, on the question of whether or not the senate amendment should be concurred in, and was voted upon and passed by the house as amended. The bill, however, was not enrolled and signed until March 21, 1917.

House bill No. 163 was passed March 20, 1917, enrolled and signed on March 21, 1917.

This brief history of these two bills shows that while they were both enrolled and signed on the same day—March 21, 1917—which would be considered the date of their passage, one bill, house bill No. 163, was not voted on until ten days after the other. While, as a matter of law, these two bills must be considered as having passed on the same day, in reality house bill No. 163 is the last expression of the legislature, and we cannot but decide that the intention of the legislature was to enact into a law the bill last voted on.

This view is strengthened by the fact that in the repealing clause of house bill No. 163, is found the following language:

> "Sec. 2. That said original section 1453 of the General Code as amended by the 82nd general assembly by an act passed on the 10th day of March, 1917, known as house bill No. 115, be, and the same is hereby repealed."

It might be well, in view of the language used in the above repealing clause, to state in this connection that house bill No. 115 and amended house bill No. 115 are one and the same bill. The legislature, then, by the repealing clause of house bill No. 163 intended and attempted to specifically repeal section 1453 as amended by amended house bill No. 115. The language used by the legislature in the repealing clause of house bill No. 163 mentions house bill No. 115 as having passed March 10, 1917. This seeming inconsistency is explained by reason of the fact that this bill was voted on March 10th, as before pointed out, and not passed until March 21. There is no doubt that the legislature was referring to section 1453 as now found in amended house bill No. 115, 107 O. L. 489.

On authority of the above cited case we must hold that, although section 1453, as amended by house bill No. 115, was filed by the governor in the office of the secretary of state one day later than house bill No. 163, and by reason of said fact went into effect one day later, the legislative intent, and not the order in which these bills were filed by the governor in the office of the secretary of state, must govern in the determination of the question of which bill is in force.

Therefore, answering your question specifically, I am of the opinion that section 1453 as amended by house bill No. 163 is in force and effect and repeals section 1453 as amended by amended house bill No. 115.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

660.

APPROVAL—FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN HANCOCK, JEFFERSON AND SUMMIT COUNTIES.

COLUMBUS, OHIO, September 27, 1917.

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

DEAR SIR:—I have your communication of September 25, 1917, in which you enclose three final resolutions, for my approval, as follows:

"Hancock County—Sec. 'A-1' of the Ottawa-Findlay road, I. C. H. No. 223. Type 'B.'

"Jefferson County—Sec. 'J' of the Ohio river road, I. C. H. No. 7.

"Summit County—Sec. 'N-1' of the Cleveland-Massillon road, I. C. H. No. 17."

I have carefully examined these final resolutions and find them correct in form and legal and am, therefore, returning the same to you with my approval endorsed thereon, under the provisions of section 1218 G. C.

While it is not a matter that has to do with the final resolution of the board of commissioners of Hancock county, yet I desire to call your attention to the fact that the chief clerk has not signed the appropriation made from the inter-county highway fund. This oversight can be corrected when you receive said resolution.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

661.

APPROVAL—FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN COSHOCTON, COLUMBIANA, FAIRFIELD, LAKE, MAHONING, TRUMBULL AND WAYNE COUNTIES.

COLUMBUS, OHIO, September 27, 1917.

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

DEAR SIR:—I have your two communications under date of September 25, 1917, in which you enclose the following final resolutions for my approval:

"Coshocton County—Sec. 'D' of the Newcomerstown-Coshocton road, I. C. H. No. 407.

"Columbiana County—Sec. 'A' of the Lisbon-Canton Southern road, I. C. H. No. 368.

"Fairfield County—Sec. 'A-1' of the Baltimore-Reynoldsburg road, I. C. H. No. 461.

"Lake County—Sec. 'Q' of the Cleveland-Buffalo road, I. C. H. No. 2.

"Lake County—Sec. 'J' of the Cleveland-Buffalo road, I. C. H. No. 2.

"Mahoning County—Sec. 'B' of the Youngstown-Lowellville road, I. C. H. No. 14.

"Trumbull County—Sec. 'A-1' of the Canfield-Niles road, I. C. H. No. 328.

"Wayne County—Sec. 'A' of the Millersburg-Wooster road, I. C. H. No. 342.

"Wayne County—Sec. 'Q' of the Wooster-Canal Dover road, I. C. H. No. 414.

"Wayne County—Sec. 'A' of the Orrville-Southern road, I. C. H. No. 465. Types 'A,' 'B' and 'C.'

I have carefully examined said final resolutions and find them correct in form and legal and am, therefore, returning the same to you with my approval endorsed thereon, under the provisions of section 1218 G. C.

Very truly yours,
JOSEPH McGHEE,
Attorney-General.

662.

LIQUOR LICENSE LAW—HOLDER OF LICENSE THEREUNDER IS PERMITTED TO CONTINUE IN BUSINESS UNDER MANAGER—WHEN CALLED INTO FEDERAL SERVICE UNDER DRAFT LAW.

The holder of a liquor license under our liquor license law, who has been called into the federal service under the provisions of the federal selective draft act, is permitted to continue the conduct of his business with a fit manager or agent in charge of his place of business, and a going away from his place of business under such circumstances would not jeopardize his license.

COLUMBUS, OHIO, September 28, 1917.

State Liquor Licensing Board, Columbus, Ohio.

GENTLEMEN:—Under date of September 4, 1917, you write me that you are in receipt of a letter containing the following:

"We have a client who has been called to the service of the U. S. army. He has been examined by the board and has passed examination. He is not claiming any exemptions.

"He is also operating a saloon under a properly issued license. The question arises as to whether or not under the law he is bound of necessity to sell or dispose of his business, surrender his license, or whether or not there is authority for authorizing his continuing the business by an agent.

"We would appreciate an answer, determining what the ruling of the board is upon this question."

You further state that you are in receipt of a number of inquiries of like kind from different parts of the state, towit, as to whether licensees who have been called to the colors may continue their business. You also state that the license law does not seem to contemplate a manager for any licensee except for

a corporation, and that it would seem a hardship for men who are called to the service of their country, temporarily, to be compelled to dispose of their business, and that you are desirous of having an opinion upon the subject.

Under the so-called liquor licensing act, county liquor licensing boards are authorized to grant saloon and wholesale licenses, permitting the holders thereof to engage in the business of trafficking in intoxicating liquors.

Section 1261-34 G. C. determines to whom licenses shall not be granted. It will be noted that this language is wholly in the negative and follows the constitutional amendment, Sec. 9 of Art. XIV. This constitutional section, while it provides generally that license to traffic in intoxicating liquors shall be granted in this state, and license laws operative throughout the state shall be passed with such restrictions and regulations as may be provided by law, speaks negatively under its further provisions, with the exception of the provision for revoking a license if the holder thereof is interested in the business at another place, and also for the revocation of a license where the licensee has been more than once convicted for a violation of the laws in force to regulate the traffic in intoxicating liquors, and the further provision that no license shall thereafter be granted to him.

The constitution provides for the two cases for revocation as above stated. The statute, section 1261-34 G. C., provides for the revocation of a license where the licensee is in any way interested in the business conducted at any other place. This section also provides that no saloon license shall be issued to any person who has not been a resident of Ohio for more than one year preceding the date of his application.

Under section 1261-49 G. C. there is further provision for both the suspension and revocation of a license. This suspension or revocation is for violation of laws and ordinances by the licensee after having once been convicted of offenses under laws or ordinances concerning the sale of intoxicating liquors.

Section 1261-51 G. C. prohibits the licensee from removing his place of business to a place other than that set forth in his application, unless with the consent of the county board.

In the granting of a license, the county board is prohibited by law from granting same to certain persons. It therefore devolves upon such board to find that the person to whom license is to be granted does not come within the inhibition, and in this conclusion they necessarily make a finding that he possesses certain qualifications.

Since the license cannot be granted to a person who is not a citizen of the United States, or who is not of good moral character, or who is a minor or who is of unsound mind, and, in the case of saloon licenses, who has not been a resident of Ohio for more than one year preceding the date of his application, there must necessarily be a finding that the person is a citizen of the United States, of good moral character, legal age and sound mind, and has been a resident of Ohio, in the case of a saloon license, for more than one year preceding the date of his application.

When a license has once been granted, under the constitution and under our license law, it shall be deemed revoked when a licensee is more than once convicted for a violation of the laws in force to regulate the traffic of intoxicating liquors, or when it shall appear that either the licensee is interested in the business conducted in some other place, or that other persons than the licensee are pecuniarily interested in the business for which the license is held.

Under the statute (Sec. 1261-49 G. C.), the right is given the county board in the first instance to suspend a license if said board, after due notice to the licensee and a full hearing, finds that the licensee has, during the license year, been once convicted of an offense under laws or ordinances concerning the sale of

intoxicating liquors, and after said conviction has violated said laws or ordinances. This section further provides that if after such conviction and suspension the offenses are, during said license year, again repeated, the said board may, after due notice, as therein provided, and a hearing, revoke said license.

A liquor license under our license law is merely a permit granted to the applicant to carry on the business of trafficking in intoxicating liquors, and it has been held that it has been granted to the recipient of it because of his personal fitness to receive it and act thereunder. Being a personal trust, it would not be transferable, were it not for our specific statutory provision therefor. The licensee takes the license with the understanding and full knowledge that the matter is at all times within the control and sovereign power of the state, and is deemed to have consented to all proper conditions and restrictions, not only which have already been imposed by the legislature, but which may in the future be imposed by it, subject of course to such constitutional limitations as exist.

The right to revoke a license can only be given for the cause and in the manner prescribed by statute. This has been the holding of the New York courts.

Lyman v. Malcom Brewing Co., 160 N. Y. 96.
People v. Woodmen, 15 Daly 136.

I think it is well settled by the authorities that when a license has once issued under the provisions of a license law, and in that same law provisions are made for the revocation of such license, such provisions are exclusive. Any inherent right that a body authorized to issue licenses generally might have to revoke same, in the absence of express provisions regarding revocation, is taken away by the legislature in making such express provisions for said revocation.

In the cases of the licensees concerning whom you inquire, the county liquor licensing board which has issued to them a license has under the law found that at the time of the granting thereof they were citizens of the United States, of good moral character, and had been residents of Ohio for one year preceding the date of their application. Under the federal selective draft act these licensees were drawn for service in defense of their country. Their departure from the county of their place of business while willing, as becomes their patriotic duty, was by the very terms of the draft law legally the result of the demand of the federal government. It is my opinion, therefore, that there is nothing in our liquor licensing act or in the constitution of Ohio which would either permit or authorize a forfeiture or a revocation of these licenses merely because such licensees were called to the colors.

It may be, although the language of the act is susceptible of a different construction, that the provision requiring residence in Ohio for more than one year preceding the date of the application for license is a continuing qualification. Yet I am satisfied that no court would hold that the selective call to the federal service and the temporary absence of a licensee on that account would work a loss of residence in this state. I am satisfied that under the election law such temporary absence would not prevent an elector under said circumstances from having his vote received, if he returned to his voting place after having been thus away, and I am more strongly of the opinion that such a person would not lose his vote since the Ohio election law now expressly provides for the voting of absent electors, and this statute was passed in view of the fact that many of the electors of the state by being called to the service of their country would be without the confines of the state on election day.

In your communication you suggest that the license law contemplates a manager for a corporation, but there is no mention of any manager for a licensee

other than a corporation. While it is true that section 1261-34 G. C. provides a manager or managers of the place of business belonging to a corporation or other associations of persons applying for license, and prescribes the qualifications of such manager or managers, still there is nothing in the law declaring that a natural person could *not* designate a manager or managers.

It is well known that the matter of granting licenses to corporations and associations of persons was recognized as a peculiar grant, and that this grant was particularly taken care of by the provision for a particular kind of manager. The law, however, while it does not specifically grant to an individual licensee the authority to appoint agents or managers to conduct his business, does certainly assume that such licensee would have such employes.

Section 1261-71 G. C. provides that:

> "No licensee, *agent* or employe of a licensee shall be held to answer for an offense under any laws or ordinances regulating the sale or traffic in intoxicating liquors before any probate court * * *."

Section 1261-65 G. C. prohibits a licensee from knowingly employing or keeping in his employ a person who has been a licensee and whose license has been revoked, or a person who has been a licensee and has been refused a renewal thereof because he was not of good moral character.

Under a similar liquor license act in Indiana it has been repeatedly held that a licensed retailer of intoxicating liquors may employ an agent to conduct and carry on the business, and that such an agent would not be liable to prosecution for selling without a license.

Pickens v. State, 20 Ind. 116.
Runyon v. State, 52 Ind. 320.
Keiser v. State, 58 Ind. 379.
Heath v. State, 105 Ind. 342.

In Pelley v. Wills, 141 Ind. 688, it was said:

> "A liquor dealer is responsible for actionable injuries caused by sales of liquors made by his agent or servant, and it is no defense that such sale was made without his knowledge or against his express orders."

In 1895 the Indiana liquor licensing act was further amended as follows:

> "No more than one license shall be granted or issued to any one person, and in no case to any person other than the actual owner and proprietor of said business, who must apply in his own name and *be a continuous resident of the township,* in which the application for license is made, at least ninety days prior to the time of application."

Prior to that time the law did not require the applicant to be a resident either of the county in which he made his application or of any other subdivision of the state. It was sufficient, as to the matter of residence, if he was an inhabitant of the state. In this it was similar to our law, which requires that the applicant be a resident of the state.

In Welsh v. State, 126 Ind. 71, it was contended that this required a person to whom the license issued to be a citizen of the state, but the supreme court held that the only requirement was that he be a mere inhabitant. That this provision did not require the licensee to remain within the confines of the county for

which the license was issued, is apparent, for the Indiana general assembly deemed it necessary by the act of 1895 to make provision that the applicant should be a *continuous resident of the township.*

In Krant v. State, 47 Ind. 519, the court had under consideration a liquor statute which provided that the applicant must be a resident voter of such county and a citizen of the state of Indiana. The court said the legislature evidently intended to provide that the person who received the permit should, during the existence of such permit, remain a resident voter of the county and a citizen of the state of Indiana, but that a *voluntary* removal from the state of the person having a permit would work a forfeiture of the rights and privileges under it. In that case they assumed the right of the licensee to have an agent who would have charge of his business, for they further found that when the authority of the principal was determined by his voluntary and permanent removal from the state, the authority of the agent who was conducting the business necessarily ceased.

Even in those jurisdictions where a license is not transferable, it is held that the licensee may carry on business by an agent at the place designated in the license, and that the agent will not be responsible criminally for selling without a license.

A servant may carry on his master's business at a place and have sole charge thereof, and will not be guilty of selling without a license if his master holds a license for that place.

Runyon v. State, 52 Ind. 320.

Of course such sale by the agent or servant is a sale by the principal or the licensee.

In view of the similarity of the Indiana liquor license law, and in consideration of what is provided in our statutes, I am constrained to hold that a licensee who has been drafted into the federal army, necessitating his absence from the place where he is engaged in trafficking in intoxicating liquors, does not of necessity have to sell or dispose of his business and surrender his license. He may put a fit person in charge of his business, who would stand in the shoes of the licensee and render such licensee liable for his every act. Any cause for forfeiture or revocation occurring by act of such agent or manager in the absence of the licensee would be cause for forfeiture or revocation of the license, the same as if such acts had been committed by the licensee.

I do not think it makes any difference whether a person so placed in charge is called a manager, agent or head bartender, but there should be some person who would occupy a managerial capacity, and if such a one were placed in charge, I could see no reason why a business would not go on just as legally as if the licensee were in charge.

Of course it must not be understood that there is any holding in this opinion that a licensee can leave his place of business for an indefinite time, and that such a voluntary going away would not subject such license to be attacked. My holding is that a temporary going away from the place of business would not affect in any way the rights of the licensee, especially under the circumstances set forth in your communication.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

663.

DEPUTY SHERIFF—MAY SERVE AS CHIEF PROBATION OFFICER WITHOUT SALARY—OFFICES COMPATIBLE.

Deputy sheriff of a county may legally serve as chief probation officer where he is appointed without salary and receives only his expenses, such as livery hire, etc.

COLUMBUS, OHIO, September 28, 1917.

HON. PERRY POORMAN, *Probate Judge, Paulding, Ohio.*

DEAR SIR:—I have your letter of August 17, 1917, as follows:

> "Can the deputy sheriff of a county legally serve as chief probation officer and if so can he be appointed without any salary and receive only his expenses, such as livery hire, etc."

On November 15, 1913, my predecessor, Hon. Timothy S. Hogan, rendered an opinion as found in Annual Report of the Attorney-General, 1913, Vol. 2, p. 1439, in which he held:

> "Where a deputy sheriff is paid for such services as he performs during the year, and his time is only partially taken up with his work as deputy sheriff, such an officer is eligible to appointment as probation officer, where the duties of both will not require all the time of the appointee, and there will be no conflict between the two positions. This does not apply to deputy sheriffs under a regular salary whose entire time is covered by his compensation."

My attention has been called to the fact that the duties of deputy sheriffs in some of the smaller counties of the state, including those deputies serving on a regular salary, are such as to allow them sufficient time to also act as probation officer, and where this can be done without conflicting with the services of the deputy as such deputy sheriff, and such deputy will act without salary, I can see no reason why the same should not be allowed and the actual expense of such deputy, when acting as such probation officer, paid as in other cases.

I, therefore, advise you that the arrangement which you contemplate may be legally effected.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

664.

EMBALMER'S LICENSE—APPLICANT WHO HAS FAILED IN EXAMINATION—MAY SECURE SAME BY AFFIDAVIT—IF ELIGIBLE.

An applicant for an embalmer's license who has failed in the examination may, if he is eligible notwithstanding such failure, secure a license by affidavit under section 1343 *G. C.*

COLUMBUS, OHIO, September 28, 1917.

HON. B. G. JONES, *Secretary-Treasurer, State Board of Embalming Examiners, Columbus, Ohio.*

DEAR SIR:—You request my opinion upon the following proposition:

"If an applicant for an embalmer's license has taken an examination and failed, can this applicant secure a license by affidavit, assuming that the said applicant comes in under section 1343 G. C.?"

Section 1342 of the General Code provides that every person who desires to engage in the practice of embalming or the preparation of the dead for burial, cremation or transportation, in the state of Ohio, shall make a written application to the state board of embalming examiners, to be registered by said board, and in said application shall give to the board such information as it may require for such applicant to be registered, but the fees mentioned in said section must accompany the application and also certificates of three reputable citizens, one of which shall be a licensed embalmer, that the proposed applicant is of good moral character and stating his age and general education, which general education shall be at least such as will entitle the applicant to admission to a high school in this state. If the board finds the facts set forth in the application to be true, it shall issue to the applicant a certificate of registration and the registered applicant can then be admitted to an examination in the branches or subjects provided for in section 1341 G. C., which subjects are as follows:

(a) Visceral anatomy and vascular system of the human body.
(b) The action and comparative value of germicides.
(c) The methods of embalming and of preparing bodies for transportation.
(d) The meaning of "contagion," "infection," the dangers they beget, and the best methods of their restriction and arrest, and bacteriology in relation to contagion and infection.
(e) The signs of death and the manner in which they are determined.
(f) Practical demonstrations on a cadaver.

By section 1343 it is provided that if the state board of embalming examiners finds that the applicant possesses all of the necessary qualifications, as prescribed in the preceding section, and has passed a satisfactory examination in the above mentioned subjects, then such board shall register the applicant as a duly licensed embalmer. It is further provided, however, in section 1343 G. C. that the provisions of said section, and of the preceding sections, shall not apply to any person who is now holding a valid license issued by the state board of embalming examiners of Ohio and which license is in force on July 1, 1917, nor shall it apply to any person who was engaged in the practice of embalming or preparation of the dead for burial, cremation or transportation, prior to January 1, 1903, if such person who has so engaged prior to January 1, 1903, has had at least three years' practical experience and if such person further, prior to January 1, 1918, makes an application to the state board of embalming examiners for a license to practice embalming in this state.

There is nothing in any of said sections which provides that a person who makes an application to take an examination and fails at such examination shall be barred from filing the application mentioned in section 1343 G. C., and secure an application through experience and service.

It is stated as a fact in your letter, and I am assuming the same to be true for the purposes of this opinion, that such applicant does have the experience required by said section; that is, he had had at least three years' practical experience and that he was engaged in the practice of embalming or the preparation of the dead for burial, cremation or transportation prior to January 1, 1903. This being true, and there being no inhibition against any such person being registered after he has

once taken an examination and failed, I must advise you that that fact alone—that is, the fact that he has failed in an examination—will not prohibit him from securing a license under the provisions of section 1343, above mentioned.

Therefore, answering your question specifically, I advise you that an applicant who has taken an examination and has failed, can secure a license by and through the provisions of section 1343 G. C.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

665.

TRACTION ENGINE—OPERATION UPON CITY STREETS—WHEN EQUIPPED WITH CLEATS.

Under the provisions of section 13421-12 *G. C.* (107 *O. L.* 652), *it is lawful to operate a traction engine or tractor over the paved streets of a municipality where the said traction engine or tractor is equipped with cleats to prevent the same from slipping.*

COLUMBUS, OHIO, September 28, 1917.

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

GENTLEMEN:—I am rendering this opinion through your department, in reference to a matter submitted to me by Hon. T. P. Cadle, solicitor of Mentor village, as I deem the matter of sufficient importance to warrant my rendering an opinion thereon. The letter addressed to me by the solicitor of Mentor village reads as follows:

> "Will you kindly advise me whether section 13421-12 of the General Code, as amended in 1917, allows the operation of traction engines upon paved streets, with the tires of such engines equipped as has been the custom in the past—with iron strips about one-half inch in width running diagonally across the tire and placed six to eight inches apart? * * *"

Said communication calls for a construction of section 13421-12 G. C. (107 O. L. 652), which reads as follows:

> "Whoever drives over the improved highways of the state, or any political subdivision thereof, a traction engine or tractor with tires or wheels equipped with ice picks, spuds, spikes, chains or other projections of any kind extending beyond the cleats shall be fined for each offense not less than ten dollars nor more than one hundred dollars. The terms 'traction engine' or 'tractor' as used in this act, shall apply to all self-propelling engines equipped with metal-tired wheels operated or propelled by any form of engine, motor or mechanical power, used for agricultural purposes. No city, county, village or township shall adopt, enforce or maintain any ordinance, rule or regulation contrary to or inconsistent with the terms of this act; or require of any person any license tax upon or registration fee for any traction engine, tractor, or trailer, or any permit or license to operate. Operators of traction engines or tractors shall have the

same rights, upon the public streets and highways as the drivers of any other vehicles unless some other safe and convenient way is provided, and no public road open to traffic shall be closed to traction engines or tractors."

The question directly in issue is whether the owners of traction engines may run the same over the paved streets of a village when the tires of such engine are equipped with iron strips about one-half inch in width, running diagonally across the tire and placed six to eight inches apart.

It will be noted that the section to which reference is made reads as follows:

"Whoever drives over the improved highways of the state, *or any political subdivision thereof,* a traction engine or tractor with tires or wheels equipped with ice picks, spuds, spikes, chains or other projections of any kind *extending beyond the cleats* shall be fined for each offense not less than ten dollars nor more than one hundred dollars. * * *"

It will be noted that this provision does not state that the traction engine shall not be equipped with ice picks, spuds, spikes, chains or other projections of any kind extending beyond the tires or wheels of the engine, but it provides that the tires or wheels shall not be equipped with ice picks, spuds, spikes, chains or other projections of any kind extending beyond the cleats.

From this language it is quite evident that the legislature intended that it would be lawful to equip the tires or wheels of a traction engine or tractor with cleats, but that it would be unlawful to equip the tires or wheels with a projection of any kind that would extend beyond the cleats.

The question immediately arises as to whether the strips placed diagonally across the wheels of the traction engine as set forth in the communication, are cleats.

The Standard Dictionary defines cleat as follows:

"A strip of wood or iron fastened across other material, as a board or boards, to strengthen, keep in place, *prevent slipping,* etc."

The Century Dictionary defines the same word as follows:

"A piece of wood nailed down to secure something from slipping."

From these definitions of the word cleat and from what is commonly and generally understood to be the meaning of said word, it would seem to me that the strips placed upon the traction engines as suggested in the communication would come within the meaning of the word cleat. Evidently this was the meaning which the legislature attached to the word cleat as used in the statute; that is, the legislature contemplated that it would be necessary to place something upon the wheels of a traction engine, in order to prevent its slipping, and in using a term to apply to these strips it used the word cleat.

I might say in passing that it seems to me that a strip of iron one-half inch in width is unreasonably narrow, when one takes into consideration the damage to which the roads would be subjected, from the use of a strip so narrow. However, this is a matter of fact to be determined by the legislature and not one of law to be passed upon by this department or the courts. The legislature has not seen fit to limit the width of the strip or cleat used on traction engines, nor the distance apart at which these strips or cleats must be placed upon the wheels, and until the legislature sees fit to speak in reference to this matter, this department and the courts are without authority to pass upon same.

Hence answering your question specifically, it is my opinion that under the provisions of section 13421-12 G. C. (107 O. L. 652), it is lawful to equip a traction engine or tractor with cleats or iron strips, and that the owner of an engine so equipped has the right to operate the same upon the paved streets of a village.

Of course it will be noted in the latter part of the section that some other safe and convenient way of travel may be provided. If this should be done, then the owners of said traction engines could be prohibited from using the improved public streets and highways of the state.

In passing I might call attention to section 7246 G. C. (107 O. L. 139). This section provides that no traction engine weighing in excess of twelve tons shall be operated over and upon the improved public streets, highways, bridges or culverts within the state.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

666.

BOARD OF EMBALMING EXAMINERS—THREE MEMBERS—OFFICERS OF DEPARTMENT OF HEALTH CANNOT SIT AS ADVISORY MEMBERS.

The state board of embalming examiners consists of only three members, one to be appointed each year for a term of three years and as the terms of the present members expire.

The laws creating the state board of health having been repealed and the state department of health being a new and a different body, its executive and clerical officers cannot sit as advisory members of the state board of embalming examiners.

COLUMBUS, OHIO, September 28, 1917.

HON. B. G. JONES, *Secretary State Board of Embalming Examiners, Columbus, Ohio.*

DEAR SIR:—You request my opinion upon the following proposition:

> "The new law regulating the practice of embalming in this state designates the president and the secretary of the Ohio state board of health as members of the state board of embalming examiners.
>
> "As the new law creating a state department of health of Ohio does not designate who shall be members of our board, I respectfully ask for your opinion in order that I may get out such printing matter at as early a date as possible."

General Code section 1335 provides that there shall be a state board of embalming examiners consisting of five members and that the president and secretary of the state board of health shall be *ex officio* advisory members and that the other three members of the state board of embalming examiners shall be residents of the state of Ohio and shall have had not less than five consecutive years' experience previous to their appointment in the practice of embalming and be regularly licensed embalmers by the state board of embalming examiners of Ohio.

Section 1336 G. C. provides that the members of the state board of embalming examiners who were such members at the time said section became effective, which was July 2, 1917, shall continue in office until the terms for which they were

originally appointed shall expire, and that the governor shall, each year, appoint one member of such board who shall serve for a term of three years from the first day of July of said appointment.

Section 1338 G. C. provides that two members shall constitute a quorum at all meetings of said board.

Section 1232 G. C., prior to the time of its amendment in 107 O. L. 522, read as follows:

> "There shall be a state board of health, consisting of eight members, seven of whom shall be appointed by the governor. Each year the governor, with the advice and consent of the senate, shall appoint a member of the board, who shall serve for a term of seven years from the thirteenth day of December. The attorney-general shall be ex-officio a member of the board."

Section 1233, which was in force at the same time, provided for the organization of the board of health, as follows:

> "The state board of health shall meet in Columbus during the month of January of each year and at such other times as it may direct. A majority of its members shall constitute a quorum. The board shall choose one of its members as president, and, subject to the provisions of this chapter, may adopt rules and by-laws for its government."

Section 1234, in force at the same time, provided that the state board of health shall elect a secretary who shall perform the duties prescribed by the board. Section 1237 contained the general powers of the board and read as follows:

> "The state board of health shall have supervision of all matters relating to the preservation of the life and health of the people and have supreme authority in matters of quarantine, which it may declare and enforce, when none exists, and modify, relax or abolish, when it has been established. It may make special or standing orders or regulations for preventing the spread of contagious and infectious diseases, for governing the receipt and conveyance of remains of deceased persons and for such other sanitary matters as it deems best to control by a general rule. It may make and enforce orders in local matters when emergency exists, or when the local board of health has neglected or refused to act with sufficient promptness or efficiency, or when such board has not been established as provided by law. In such cases the necessary expense incurred shall be paid by the city, village or township for which the services are rendered."

Sections 1239 and 1239-1 contain special powers of the board and read as follows:

> "Sec. 1239. The state board of health shall make careful inquiry as to the cause of disease, especially when contagious, infectious, epidemic or endemic, and take prompt action to control and suppress it. The reports of births and deaths, the sanitary conditions and effects of localities and employments, the personal and business habits of the people and the relation of the diseases of man and beast, shall be subjects of careful study by the board. It may make and execute orders necessary to protect the people against diseases of lower animals, and shall collect and preserve in-

formation in respect to such matters and kindred subjects as may be useful in the discharge of its duties and for dissemination among the people. When called upon by the state or local governments, or municipal or township boards of health, it shall promptly investigate and report upon the water supply, sewerage, disposal of excreta of any locality and the heating, plumbing and ventilation of a public building.

"Sec. 1239-1. The state board of health shall make necessary arrangements for the production and distribution of diphtheria antitoxin, provided that such antitoxin shall in all respects be equal in purity and potency to the standard of requirements of the United States public health service for antitoxin for interstate commerce. Diphtheria antitoxin shall be distributed in accordance with such rules and regulations as may be adopted by the state board of health."

Sections 1232, 1233 and 1234, above mentioned, were amended in senate bill No. 101, passed March 21, 1917, approved by the governor March 30, 1917, and filed in the office of the secretary of state March 31, 1917, and are found in 107 O. L. 522, as follows:

"*Sec.* 1232. There is hereby created a state department of health, which shall exercise all the powers and perform all the duties now conferred and imposed by law upon the state board of health and all such powers, duties, procedure and penalties for violation of its sanitary regulations shall be construed to have been transferred to the state department of health by this act. The state department of health shall exercise such further powers and perform such other duties as are herein conferred. The state department of health shall consist of a commissioner of health and a public health council.

"*Sec.* 1233. There shall be a commissioner of health, who shall be the administrative and executive head of the state department of health. The public health council, hereinafter provided for, shall, with the approval of the governor, appoint a commissioner of health, who shall be a physician, skilled in sanitary science, who shall serve for a term of five years and until his successor is appointed and qualified. The commissioner of health shall perform all executive duties now required by law of the state board of health and the secretary of the state board of health and such other duties as are incident to his position as chief executive officer. He shall administer the laws relating to health and sanitation and the regulations of the state department of health. He shall prepare sanitary regulations for consideration by the public health council and shall submit to said council recommendations for new legislation. During his term of office, the commissioner of health shall devote his entire time to the duties of his office. The salary of the commissioner of health shall be fixed by the public health council, subject to approval by the governor.

"*Sec.* 1234. There shall be a public health council, to consist of the commissioner of health, and four members hereinafter called the appointive members, to be appointed by the governor. Of the appointive members, at least two shall be physicians, who shall have had training or experience in sanitary science. Of the appointive members first appointed, one shall hold office until July 1, 1918, one until July 1, 1919, one until July 1, 1920, and one until July 1, 1921, and the term of office of members thereafter appointed, except to fill vacancies, shall be four years. Vacancies shall be filled by appointment by the governor for the unexpired term. The

public health council shall meet four times each year and may meet at such other times as the business of the council may require. The time and place for holding regular meetings shall be fixed in the by-laws of the council. Special meetings may be called upon request of any three members of the council or upon request of the commissioner of health and may be held at any place deemed advisable by the council or commissioner. Two members of the public health council and the commissioner of health shall constitute a quorum for the transaction of business. The governor shall, on or before July 1st designate the member of the public health council who shall act as its chairman for the ensuing fiscal year. The commissioner of health shall, upon the request of the public health council, detail an officer or employe of the state department of health to act as secretary of the public health council, and shall detail from time to time such other employes as the public health council may require. The appointive member of the public health council shall receive ten dollars a day while in conference and shall be reimbursed their necessary and reasonable traveling and other expenses incurred in the performance of their official duties."

So that, instead of having a state board of health, as was provided by our laws at the time the embalming board sections were amended, we had at the time said amendments became effective a state department of health and a public health council. Instead of the body consisting of eight members, as provided by the old section 1232, the public health council now consists of five members. Instead of electing a president and secretary, the governor now designates one member as chairman and the commissioner of health shall, upon request of the public health council, detail an officer or employe of the state department of health to act as secretary of the public health council.

In other words, the entire system is now changed. The commissioner of health is the executive head of the state department of health and the board of four act very much in an advisory capacity only. It cannot, therefore, be considered that any of the members of the present state department of health perform the same duties or occupy the same positions as did the president and secretary of the state board of health. In other words, there is no president and secretary of the state board of health at this time and there was no president and secretary of the state board of health on July 2, 1917, when said embalming board sections went into effect, for the amended sections 1232, 1233 and 1234, above quoted, were in effect prior to that time.

I, therefore, advise you that the present state board of embalming examiners consist of three members only, two of which, as provided by section 1338, shall constitute a quorum to do business.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

667.

APPROVAL—ABSTRACT OF TITLE—CHARLES M. LUDMAN AND WIFE TO STATE OF OHIO.

COLUMBUS, OHIO, September 28, 1917.

HON. CARL E. STEEB, *Secretary of Board of Trustees, Ohio State University, Columbus, Ohio.*

DEAR SIR:—You recently submitted to this department an abstract of title covering the following described premises:

> Situate in the city of Columbus, county of Franklin and state of Ohio, and bounded and described as follows:
>
> Beginning at a point in the north line of King avenue at the southwest corner of Elizabeth J. McMillen's homestead addition, being the southwest corner of lot 129 in said addition; thence northwardly with the west line of said addition 158 feet to a point in the north line of an alley in the rear of said lot 129, and being the southwest corner of a tract marked "Reserve" on the plat of said homestead addition; thence eastwardly with the north line of said alley and the south line of said Reserve 92 feet to the southeast corner of said Reserve, and the west line of the first alley west of Perry street; thence northwardly with the east line of said Reserve and the west line of said alley 483.65 feet to a point 140 feet south of the north line of said addition; thence west 20 feet to a point; thence north 140 feet to a point in the north line of said addition being 20 feet west of the northeast corner of said Reserve; thence eastwardly along the north line of an alley on the north side of said addition to a point 100 feet west of an iron pin in the west line of Perry street; thence with a line parallel with the west line of Perry street produced northwardly north 3° 14′ east and 100 feet distant from the west line of Perry street 617 feet to a point in the north line of said McMillen's land, and being the south line of lands of The Ohio State University; thence westwardly along the south line of lands of The Ohio State University 252.76 feet; thence southwardly and parallel with the west line of Perry street produced northwardly and with the west line of Perry street 1400-15/100 feet to north line of King avenue distant 102.76 feet westwardly from beginning; thence eastwardly with the north line of King avenue 102.76 feet more or less to beginning; being a parcel off of the east side of tract 'C' set off in partition to Wm. N. King in case of Elizabeth King v. Wm. N. King, Court of Common Pleas of Franklin County, Ohio.

With the abstract you also sent a deed covering the same piece of property, wherein Charles M. Ludman and Anna B. Ludman, his wife, deeded said property to the state of Ohio.

I have carefully examined said abstract, dated September 14, 1917, and note several lapses and defects in the title. These defects, however, are immaterial, as they all occurred prior to the year 1853 and are, therefore, cured by lapse of time.

I find that the title to the premises described is in the name of Charles M. Ludman and that the deed submitted will convey a clear title to the state of Ohio, save and except for the taxes for 1917, which are now a lien on said premises, and special taxes for the improvement of Perry street, against three hundred and forty-two feet, balance unpaid, $1,193.10, of which the second installment, amount-

ing to $132.57, and one year's interest at four and one-half per cent, will be due in June, 1918. Balance unpaid against fifty-seven feet, for improvement of Perry street, $198.88, of which the second installment, amounting to $22.10, and one year's interest at four and one-half per cent, will be due in June, 1918.

The deed submitted, if accepted, will fully convey the title to the state of Ohio, but in the form submitted the said Charles M. Ludman covenants that he is lawfully seized of the premises and that said premises are free and clear of all incumbrances. The amount of taxes for the year 1917 and the special taxes above noted should be deducted from the purchase price.

I am, herewith returning to you the abstract and deed submitted.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

668.

BRIDGES AND CULVERTS—FOOT BRIDGES—WHO HAS AUTHORITY TO BUILD AND REPAIR THE SAME ON STATE, COUNTY AND TOWNSHIP ROADS.

1. *In the matter of building foot bridges, the statutes seem to give no power or authority to any board excepting to the township trustees.* (*Sec.* 7562-1 *G. C.*)

2. *There is no provision of law by virtue of which the jurisdiction of the township trustees and the county commissioners in the building of bridges and culverts on the highways of the county is determined by the cost of the construction of the same.* (*Sec.* 7562 *G. C., now repealed.*)

3. *In the construction, improvement, maintenance and repair of bridges and culverts on state roads, the state highway commissioner has jurisdiction, under section* 1224 *G. C.* (107 *O. L.* 133.)

4. *In the construction of bridges and culverts located on county and township roads, as well as the maintenance and repair of bridges so located, the county commissioners have jurisdiction.*

5. *In the maintenance and repair of culverts located on county and township roads, both the county commissioners and township trustees have jurisdiction, in their respective townships and counties.*

COLUMBUS, OHIO, September 28, 1917.

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

DEAR SIR:—I have your communication of July 27, 1917, in which you ask my opinion upon the following questions:

"1. Has a board of county commissioners authority under the road laws of this state to construct and maintain a bridge, either wagon or foot, on a township road?

"2. Have the township trustees authority to construct such a bridge?

"3. Has the board of county commissioners, jointly with the township trustees, the authority to build such a bridge?

"4. Does the jurisdiction of either of these boards depend upon the amount to be expended on such a bridge?"

The fundamental principle underlying the propositions submitted to me for my

opinion is one of considerable importance to the counties and townships of the state and I must admit at the outset of this opinion that I find it extremely difficult to give a satisfactory answer to one or two of the propositions contained in your communication.

The statutes have been so modified and are now in such a condition that it is not easy to arrive at an understanding as to which political subdivision, the county or the townships, is to build or construct the bridges and culverts located on a township road.

There are two matters suggested in your communication about which there is possibly not so much difficulty and I will first dispose of them.

Your fourth question is as to whether the jurisdiction of either the board of county commissioners or the board of township trustees depends upon the amount to be expended on such a bridge. It is my opinion that the amount to be expended on the construction of a bridge has nothing whatever to do with the matter of determining which board has the jurisdiction.

Formerly, section 7562 G. C. provided as follows:

> "The township trustees shall cause to be built and kept in repair all bridges and culverts, except upon improved and free turnpike roads, when the cost of construction does not exceed fifty dollars, and shall keep in repair all bridges constructed by the commissioners. Such repair by said trustees of a bridge in any year shall not exceed ten dollars and they may levy a tax for the payment thereof."

Under the provisions of this section the dividing line between the jurisdiction of the county commissioners and that of the township trustees, in the building and repairing of bridges and culverts, was fixed at fifty dollars, but this section has been repealed and nothing embodying the same idea has been enacted to take its place. Hence, I am of the opinion as above stated.

You also ask who has authority to construct a foot bridge located on a township road. I have made a careful examination of our statutes and find but one section which relates to the construction and maintenance of foot bridges, namely, section 7562-1 G. C., which reads as follows:

> "That the trustees of any township are authorized and empowered to construct, rebuild and repair foot-bridges across the rivers and streams in their respective townships when they may deem it necessary so to do in order to provide convenient means of access to the public schools of their said township by the pupils residing in the school district, wherein a public school house is located; but in no case shall the cost of the aforesaid construction, rebuilding or repair of any said foot-bridge exceed the sum of one thousand dollars."

Under the provisions of this section it is my opinion that only the township trustees have authority and are empowered to construct and keep in repair foot bridges across the rivers and streams in their respective townships, under the limitations and conditions set out in said section 7562-1 G. C.

We come now to the question which causes the main difficulty in giving a satisfactory answer, viz., the jurisdiction of the county commissioners and the township trustees in the matter of constructing and maintaining bridges and culverts on the highways of the state, and I must admit in the beginning that I am not able to give a very satisfactory answer to this question, owing to the uncertainty of the provisions of our statutes as they now exist in reference to this matter.

I note your question is limited to the construction and maintenance of bridges

upon the township roads of the state, but this raises the general question as to the jurisdiction of the state, the county and the township in the construction and maintenance of bridges and culverts. In order to have a correct starting point for the consideration of this question, it is well that we keep in mind the provisions of section 7464 G. C. This section classifies the roads of the state upon a different basis than they were classified before the enactment of said section. The section divides the roads of the state into state, county and township roads and defines specifically the roads which shall come within each one of the classes so named. For the purposes of this opinion it is not necessary for me to define the different kinds of roads.

For the purpose of making the matter as clear as possible, let us first eliminate from consideration the bridges and culverts which are located upon state roads.

Section 1224 G. C. provides that:

> "The state highway commissioner shall maintain and repair to the required standard, all inter-county highways, main market roads and *bridges and culverts* constructed by the state, by the aid of state money or taken over by the state after being constructed."

Further along in this section we find the following provision:

> "When a bridge or culvert on a state highway shall require renewing, it shall be constructed and the cost apportioned as herein provided for the construction and improvement of bridges and culverts on intercounty highways."

Section 1197 G. C. sets forth the method of payment.

From these provisions it is quite evident that the state must maintain the bridges and culverts, under the conditions set out in section 1224 G. C., on state highways, and when a bridge or culvert on a state highway must be renewed or constructed, the state and the county each pays half of the cost thereof.

With the bridges and culverts on state highways eliminated, I will now turn to the construction, improvement, maintenance and repair of bridges and culverts located on county and township roads, with a view to ascertaining which subdivision, the county or the township, has jurisdiction therein. This question causes the main difficulty in giving a satisfactory answer.

Section 7464 G. C. classifies the roads of the state upon a different basis than they had been classified prior to the enactment of the Cass highway law. While they are still denominated state, county and township roads, yet they are classified upon an entirely different basis. It will be well to keep this in mind in the further consideration of this question.

With the above in mind, I will turn to the provisions of a number of sections which throw considerable light upon your question, although they do not appear to answer the same as specifically and definitely as one might desire. We are compelled to draw our conclusions by way of inference, rather than from any direct provision of the statutes relative to the construction, improvement, maintenance and repair of bridges and culverts located on roads other than state roads.

Section 7182 G. C. (107 O. L. 110) provides:

> "The county surveyor shall have charge of all highways, bridges and culverts within his county under control of the state, unless another engineer be appointed for that purpose by the state highway commissioner. * * *"

This provision simply strengthens the provisions of section 1224 G. C., above quoted and commented upon, in reference to bridges and culverts located upon state roads.

In section 7184 G. C. (107 O. L. 111), we find the following provisions:

> "(1) The county surveyor shall have general charge of the construction, reconstruction, improvement, maintenance and repair of all *bridges and highways* within his county under the jurisdiction of the county commissioners.
>
> "(2) The county surveyor shall also have general charge of the construction, reconstruction, resurfacing or improvement of *roads* by township trustees under the provisions of sections 3298-1 to 3298-15n inclusive of the General Code.
>
> "(3) The county surveyor shall have general charge of the construction, reconstruction, resurfacing or improvement of *the roads* of a road district under the provisions of sections 3298-25 to 3298-53 inclusive of the General Code. * * *"

The matter to which I desire to call attention in the above quotations is, that the county surveyor is given charge of *"all highways, bridges and culverts* within his county under the control of the state." He is also given charge of *"all bridges and highways* within his county under the jurisdiction of the county commissioners." But when it comes to the matter of the township trustees, he is merely given charge of the construction and improvement of *"roads."*

It seems to me this section clearly implies that the township trustees have no jurisdiction or authority in the construction of bridges and culverts and that the jurisdiction over bridges and culverts is divided between the county commissioners and the state highway commissioner; that is, the state is to build all bridges and culverts located on state roads, under the conditions set out in section 1224 G. C., while the county commissioners are to build all bridges and culverts located on the highways of the county, namely, on county and township roads, and not only would they be compelled to construct all bridges and culverts so located, but also to *maintain* all bridges. I will touch upon the maintenance of culverts later in the opinion.

I also desire to call attention to the provisions of section 7192 G. C. (107 O. L. 115). This section deals with supervision and is as follows:

> "(1) The county surveyor shall supervise the construction, reconstruction, improvement, maintenance and repair of *the highways, bridges and culverts* under the jurisdiction of the county commissioners;
>
> "(2) And shall also supervise the construction, reconstruction, resurfacing and improvement of *public roads* by township trustees under the provisions of sections 3298-1 to 3298-15n inclusive of the General Code, and sections 3298-25 to 3298-53 inclusive of the General Code.
>
> "(3) When the county surveyor has charge of the highways, bridges and culverts within his county, and under the control of the state, he shall also supervise the construction, reconstruction, improvement and repair of the same."

Thus again when it comes to the question of supervision, the county surveyor supervises the construction of *the highways, bridges and culverts* under the jurisdiction of the county commissioners, and the construction and improvement of *the highways, bridges and culverts* in his county under the control of the

state. But when it comes to the supervision of matters under the jurisdiction of the township trustees, it is limited to *public roads.*

Here again it seems to me the conclusion is fairly inferable that the township trustees have no jurisdiction over the matter of building bridges and culverts, for if they had, bridges and culverts would have been included along with the words "public roads," just the same as they are when speaking of county and state roads. In reference to this point I desire to call attention to the provisions of section 7187 G. C. (107 O. L. 112). This section in part has to do with the approval of estimates and is as follows:

> "Sec. 7187. * * *
>
> "(1) The county surveyor shall approve all estimates which are paid from county funds for the construction, improvement, maintenance and repair of *roads and bridges* by the county. * * *"
>
> "(2) When the county surveyor has charge of the *highways, bridges and culverts* within his county, under control of the state, he shall approve all estimates which are paid by the state for the construction, improvement, maintenance and repair of the same.
>
> "(3) He shall also approve all estimates which are paid from township funds for the construction, reconstruction, resurfacing or improvement of *roads* under the provisions of sections 3298-1 to 3298-15, inclusive, under the General Code.
>
> "(4) He shall also approve all estimates which are paid from the funds of a road district for the construction, reconstruction, resurfacing or improvement of *the roads thereof* under the provisions of sections 3298-25 to 3298-53 inclusive of the General Code."

The same observation that was made in reference to the other sections from which quotations were made along the same line can be made in reference to the provisions of this section. If the township trustees had been given authority to build and construct bridges and culverts, the county surveyor certainly would have been given the power to approve estimates in reference to the same.

I desire to make but one further quotation to the same effect and that provision is also found in section 7187 G. C., supra, being as follows:

> "* * * No contract for the construction of a bridge, the entire cost of which exceeds ten thousand dollars shall be binding upon the *county* unless the plans are first approved by the state highway commissioner. * * *; and upon notification by the state highway commissioner to the *county commissioners* and county surveyor that such plans must be submitted for approval no contract for such bridges or culverts shall be entered into by the *county* until such plans have been approved by the state highway commissioner."

Here again we find that the township trustees are entirely ignored, in reference to the matter of getting the approval of the state highway commissioner on a contract for the construction of bridges and culverts. From this I think it can reasonably be inferred that the legislature did not intend to give the township trustees jurisdiction over the matter of building bridges and culverts.

There are other provisions of the statutes which might be cited on the same point, but I simply desire to note two other sections.

Section 7198 G. C. (107 O. L. 115) reads as follows:

> "The county surveyor may when authorized by the county commis-

sioners employ such laborers and teams, lease such implements and tools and purchase such material as may be necessary in the construction, reconstruction, improvement, maintenance or repair of roads, bridges and culverts by force account."

This section shows pretty clearly that the county commissioners have authority not only to construct bridges and culverts in the county, but also to maintain and repair bridges and culverts located on county and township roads. I shall note later that the township trustees also seem to have authority to maintain and repair culverts.

Section 7200 G. C. (107 O. L. 115) reads in part as follows:

"The county commissioners may purchase such machinery, tools or other equipment for the construction, improvement, maintenance or repair of the highway, bridges and culverts under their jurisdiction as they may deem necessary, which shall be paid for out of the road funds of the county. * * *"

The provisions of this section are to the same effect as those of section 7198, supra; that is, that the county commissioners have the authority not only to construct bridges and culverts upon the county and township roads, but also to maintain the same.

When we compare the provisions of sections 3298-18 G. C. (107 O. L. 82) and 6956-1 G. C., we are compelled to arrive at the same conclusion, for section 3298-18 provides for the levying of a tax by the township trustees for the maintenance and repair of *roads* only, while section 6956-1 provides for the levying of a tax by the county commissioners for the repair and maintenance of *bridges and county highways.*

I desire also to call attention to section 3298-15d G. C. (107 O. L. 79). This section provides in part as follows:

"Sec. 3298-15d. * * * For the purpose of providing by taxation a fund for the payment of the township's proportion of the compensation, damages, costs and expenses of constructing, reconstructing, resurfacing or improving roads under the provisions of section 3298-1 to 3298-15n inclusive of the General Code and for the purpose of maintaining, repairing or dragging *any public road, or roads, or part thereof,* under their jurisdiction in the manner provided in sections 3370 to 3376 inclusive of the General Code, the board of trustees of any township is hereby authorized to levy annually a tax not exceeding three mills upon each dollar of the taxable property of said township.* * *"

Here again we find the same general theory that seems to pervade the entire highway act, namely, that the township trustees have no authority to levy a tax to take care of the construction and repair of bridges and culverts, but merely for the purpose of constructing, improving, maintaining and dragging roads as set out in sections 3370 to 3376 inclusive G. C. (107 O. L. 93).

Sections 5627 and 5630 G. C. also provides for levying a tax by county commissioners for bridge purposes, and there is no such provision as to township trustees.

From all the above it seems fairly clear that the following propositions are correct:

1. The state must construct, maintain and repair all bridges and culverts lo-

cated upon state roads, under the provisions and conditions set out in section 1224 G. C.

2. The county commissioners must construct and maintain all bridges located upon county and township roads within their respective counties.

3. The county commissioners must construct all culverts located upon the county and township roads within their respective counties, and they also have full power and authority given them to repair and maintain culverts.

With these propositions out of the road, I desire to note the question as to whether the township trustees have not also authority to maintain and repair culverts.

Section 3373 G. C. (107 O. L. 93) makes the following provision:

> "* * * Township trustees are hereby authorized to purchase or lease such machinery and tools as may be deemed necessary for use in maintaining and repairing roads *and culverts* within the township. * * *"

As above quoted, under the provisions of section 3298-15d, supra, they also have authority to levy a tax for the purpose of carrying into effect the provisions of section 3373, supra.

So that under section 3373, supra, it is my opinion that the township trustees also have jurisdiction to maintain and repair culverts within their respective townships, irrespective of the fact whether they are located on county or township roads. This seems to be borne out also by the provisions of section 7214 G. C., which reads in part as follows:

> "Sec. 7214. The county commissioners or township trustees may contract for and purchase such material as is necessary for the purpose of constructing, improving, maintaining or repairing any highways, bridges or culverts within the county, and also appropriate additional land necessary for cuts and fills together with a right of way to or from the same for the removal of material. * * *"

I am aware that this section is broad enough to authorize the township trustees to construct, improve, maintain and repair bridges and culverts within the county; but in view of the provisions of the sections hereinbefore considered and which were enacted later than section 7214, supra, I am of the opinion that said section 7214 should be limited, in so far as it applies to the jurisdiction of township trustees, to the maintenance and repair of culverts as above set out.

Hence, it is my opinion, in addition to what I find above, that the township trustees also have jurisdiction in the maintenance and repair of culverts within the township.

In arriving at the above conclusions, I am not unmindful of a number of sections of the General Code which might in some respects lead to different conclusions than those herein reached; for example, sections 1197 and 7188-2 (107 O. L. 113) would seem to indicate that it was the intention of the legislature that the township trustees should have authority to construct, improve, maintain and repair bridges and culverts within the township, but as said above, this authority seems nowhere to have been given.

Also in rendering this opinion, I am not unmindful of the provisions of section 2421 G. C., which is in part as follows:

> "The commissioners shall construct and keep in repair necessary bridges over streams and public canals on state and county roads, free

turnpikes, improved roads, abandoned turnpikes and plank roads in common public use."

This section provides that the commissioners shall construct and keep in repair necessary bridges on state roads. As shown by section 1224 (107 O. L. 133), this provision is no longer in effect. Section 2421 also provides that the commissioners shall construct and keep in repair necessary bridges on improved roads, but owing to the general scheme and plan of the road laws of the state this provision can no longer be in full force and effect. Many of the improved roads are state roads and, as said before, the commissioners are not compelled to construct and maintain bridges on state roads excepting as provided in section 1224, supra; that is, they must provide one-half the cost of the expense of reconstructing a bridge located upon a state road. So that a part of the provisions of section 2421, supra, are necessarily impliedly repealed by the provisions of the later acts having to do with the highways of the state.

I am not unmindful of opinion rendered by my predecessor, Hon. Edward C. Turner, on February 16, 1916, and found in Vol. I of the Opinions of the Attorney-General for 1916, p. 298, to the effect that township trustees have authority to repair both bridges and culverts on township roads. But the law in reference to this matter has been radically amended since said date.

I am enclosing copy of Opinion No. 320, rendered by me on May 31, 1917, as per request in your communication.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

669.

MEMBERS OF SCHOOL BOARD—WHEN AND HOW ELECTED—HOW LONG MEMBERS HOLD OVER.

Where under the Jung-Small school board law it was provided that members should hold over until the end of their terms and three members in a city district held until the day preceding the first Monday in January, 1916, *their successors were properly elected for the term of four years.*

Section 4702 *provides if the number of members of boards of education be odd, one-half of the remainder, after diminishing the number by one, shall be elected in the year preceding and the remaining number shall be elected in the year following the calendar year, divisible by four. Said provision is directory only.*

COLUMBUS, OHIO, September 28, 1917.

HON. FRANK B. PEARSON, *Superintendent of Public Instruction, Columbus, Ohio.*

DEAR SIR:—A letter is received by this department from the city solicitor of Bucyrus, Ohio, which contains a matter of such general importance that I am directing my answer thereto to you and will send the inquirer a copy. The request reads as follows:

"On August 1, 1913, the board (city board of education of Bucyrus) in pursuance to section 4698 et seq., adopted a resolution providing that the board should consist of five members, that their terms shall be for four

years, that two members shall be elected at the regular November election in 1913, for the term of four years each, that three members shall be elected at the regular election in November, 1915, one of which shall be for the term of two years and two of which for the terms of four years and thereafter two members shall be elected in the year preceding and three shall be elected in the year following the calendar year divisible by four as provided by section 4702, and that all terms shall begin and expire on the day fixed by the statutes of Ohio.

"At the regular election in 1913, M. and McC. were elected for the terms of four years each. At the election in 1915, at which time one member was to be elected for a term of two years and two members for four-year terms, on account of the tickets not designating the long and short terms, I held the election invalid on authority of the O'Donnell v. Shaffner case, and advised that the retiring members held over.

"Messrs. R., L. and W. were the hold over members and R., McF. and S. received the highest number of votes at the election, R., the hold over, being also a candidate for re-election.

"On January 3, 1916, at a meeting of the board, L., the hold over member, resigned and his resignation was accepted. The old board adjourned sine die, and on same day the new board organized and the minutes show as follows: 'The vacancy on the board was filled by the appointment of McF., who qualified by taking the oath of office.'

"On January 21, 1916, at a regular meeting of the board, their minutes show that W.'s resignation was received and accepted and on motion S. was appointed to fill the vacancy.

"The appointees, McF. and S., were the same parties who had received the highest number of votes.

"There is no question about the two members to be elected to fill the expired terms of M. and McC. The uncertainty arises as to the length of the term of R., the hold over member, and McF. and S., the appointees.

"Will you kindly advise the number and terms of members of the board to be elected this fall?"

The information called for requires a consideration of what is commonly known as the Jung-Small school board law, Senate bill No. 95, which amended sections 4698, et seq., G. C., and which was passed April 28, 1913. Said section 4698 provides that in city school districts which contain, according to the federal census, a population of less than 50,000 persons (which was the situation in your case), the board of education shall consist of not less than three members nor more than five members, elected at large by the qualified electors of such district.

Section 4699 provides that within thirty days after the act of which said section is a part took effect, the board of education of each and every school district, in which the number of members does not conform to the provisions of section 4698, shall, by resolution, determine within the limits prescribed by said sections the number of members of said board of education. Said resolution shall provide for the classification of the terms of members so that they conform to the provisions of section 4702 G. C., taking into consideration the terms of office of the existing members whose terms do not expire or terminate on the day preceding the first Monday in January, 1914. In your case such a resolution was passed, which fixed the number of members of the board of education at five and provided that two of such members should be elected at the regular November election in 1913 for the term of four years, which term would begin or did begin on the first Monday in January of 1914.

Section 4701 G. C. provides that whenever the number of members of the board of education of a city school district, as fixed by the resolution provided for in section 4699, shall be more than the number of members whose terms will not expire or terminate on the day preceding the first Monday in January, 1914, *the additional members of such board shall be elected at the general school election in* 1913 *for such terms of two or four years as may be necessary to comply with the two provisions of sections* 4698 *and* 4702. That is, in your case the resolution fixed the number of members of the board of education at five and the number of members whose terms expire on the day preceding the first Monday in January, 1914, was two, and those two were elected in 1913 for the term of four years beginning on the first Monday in January, 1914.

Section 4702 provides that *all members* in office at the *time this act takes effect shall serve the unexpired portions of the terms for which they were respectively elected* and until their successors are elected and qualified, unless their terms shall expire or shall have been terminated as provided by sections 4698 and 4702.

Accordingly, then, the three members whose terms would not, or did not, expire until the day preceding the first Monday in January, 1916, served the unexpired portions of the terms for which they had been elected—that is, until the day preceding said first Monday in January, 1916.

Section 4702 G. C. further provides that if the number of members of the board of education be *odd,* one-half of the remainder, after diminishing the number by one, shall be elected in the year preceding and the remaining number shall be elected in the year following the calendar year, divisible by four. The number, therefore, in your case being odd, to-wit, five, two should be elected in the year preceding the calendar year divisible by four, or in the year 1915, and three should be elected in the year following the calendar year divisible by four, or the year 1917. This provision of the statute your board attempted to carry out by providing that at the election in 1915 two members should be elected for terms of four years and one member should be elected for the term of two years. The board, as will be hereinafter noted, had no authority to call an election for a short term in 1915, because such short term election could only be held in the year 1913.

A question very similar to the one contained in the inquiry, and which involves the construction of the same statutes, was decided by our supreme court, July 3, 1917, in the case of State vs. Strawsburg, 96 O. S. ——, wherein the court held:

> "The board of education of Springfield consisted of seven members, the terms of four of whom were to expire in January, 1914, and the terms of the other three in January, 1916. The portions of that law pertinent to the consideration of this case are now sections 4698 to 4702 General Code. The Springfield city school district comes within the class, which, under the provisions of section 4698 General Code, is required to have a board of education consisting of not less than three nor more than five members.
>
> By a resolution passed July 14, 1913, said board of education attempted to meet the requirements and comply with the provisions of that act. It was therein determined that the number of members of said board should be five, who should be elected at large; that the three members whose terms did not expire until January, 1916, should hold their positions until that date; that at the general election in November, 1913, there should be elected two members to serve the full term of four years; and that at the election in November, 1915, two members should be elected for the full term of four years and one for the fractional term of two years. Two members were elected for the full term of four years at the election of November, 1913.

In the election of November, 1915, the defendants and five others were candidates for the office of members of the board of education of such district. The ballots on which their names appeared were headed:

'For Members of Board of Education'

'Vote for not more than three.'

No designation of or reference to the term, or length thereof, of any candidate was made on any ballot, nor had there been any such designation upon the ballots in the primary election whereat said candidates were nominated. The defendants, Schaefer, Strawsburg and Kitchen, in the order stated, received the highest number of votes at said election. They were declared elected as members of said board of education, certificates of election for a term of four years each were issued, and in pursuance of that authority they assumed to qualify and enter upon, and ever since have discharged, the duties of such position—more than fifteen months—the validity of their election not having been challenged until the bringing of this suit in *quo warranto,* April 14, 1917.

It is now contended that because of such want of designation of terms, whether for four years or two years, on the ballot or elsewhere, it is impossible to ascertain which of said candidates were elected for the four-year term and which one for the two-year term, and that, therefore, there was no valid election for either term and the certificates of election issued were unauthorized.

An examination of the sections of the General Code, above cited, discloses that as applying to the city of Springfield their several provisions were not in accord, and, therefore, could not be observed and applied. Under their provisions no existing term should be disturbed. If necessary to accomplish the reduction in numbers required by law, two-year terms could be provided by resolution; but an election to such two-year terms was limited to the year 1913. It was expressly provided in above sections that all elections thereafter should be for four-year terms; thenceforward one-half of the remainder, after diminishing the total number of members of the board by one, should be elected in the year preceding the calendar year divisible by four, and the remaining number the year following such calender year. Under that provision, directory in its nature, two members would be elected in 1915, three in 1917, and so on. There was no provision whatever for a two-year-term member to be elected in 1915, and if only two members should be elected the board would consist of but four instead of five members, as had been determined by the board under authority conferred by law.

These provisions are inconsistent; they cannot all be enforced; therefore, the rational solution of the situation seems to lie in such construction and application of the law as to make it feasible and practicable and capable of accomplishing the obvious design and purpose of its enactment, which was to create boards of education, the terms of the members of which should be four years, and, presumably to bring about that condition and situation at the earliest possible time. The mere order in which members are elected seems quite immaterial, and that provision might well have been regarded by the board as only directory. In the theory that all three of the defendants were in fact elected for four-year terms that is the only provision disregarded; and, as we have seen, it is a provision in direct conflict with other and more important and essential provisions of the law.

Although the resolution provided for the election of a short-term member in 1915, such was not authorized by law, and thereafter all matters

concerning the election, including notice, proclamation, form of ballots and certificates of election, proceeded in a manner consistent only with the theory that three members for the full term of four years were being elected. Therefore, for the reasons we have indicated, the tenure of those members should not now be disturbed."

But in your case, after the election had been held, and as the court in State ex rel v. Strawsburg, supra, says, was held in the proper form, it was considered as an invalid election and no certificates of election were issued to the three members who received the highest number of votes at said election. Instead thereof it was determined that the members whose terms would expire on the day preceding the first Monday in January, 1916, should resign and the board would fill the vacancies by appointing those members who had received the highest number of votes at the election. Accordingly, on the third day of January, 1916, L. resigned and his resignation was accepted. A vacancy caused by said resignation was filled by the remaining members of the board by electing McF. thereto, who qualified and who, under the provisions of section 4748 G. C., was elected for the unexpired term of L. and until his successor would be elected and qualified. On the 21st day of January, 1916, W. resigned and his resignation was accepted and on motion S. was appointed to fill the vacancy caused by the resignation of W. McF. and S. were the same members who had received the highest number of votes at the preceding election and who failed to qualify or receive their certificates of election. R., the third highest man at said election, held over. If said three members had received their certificates of election and had qualifed, just as the three members did in the case of State ex rel v. Strawsburg, supra, then this case would stand on all fours with that case and their election would be held following said decision to have been a valid election. Inasmuch as all failed to qualify or receive their certificates of election, those persons who were in office would, under the provisions of section 4748 G. C., hold over until their successors were duly elected and qualified. The successors of L. and W. were duly elected and qualified and they will hold for and during the remainder of the four-year term, which will end the day preceding the first day in January, 1920. R., the hold over member, never resigned and will continue to hold over for and during the term of four years, which will end the day preceding the first Monday in January, 1920.

So that, answering your question specifically, I advise you that the number of members to be elected to your board of education this fall is two and that their terms shall be for the length of four years from and after the first Monday in January, 1918.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

670.

APPROVAL—FORM OF BONDS OF EDEN TOWNSHIP RURAL SCHOOL DISTRICT.

COLUMBUS, OHIO, October 1, 1917.

Industrial Commission of Ohio, Columbus, Ohio.

IN RE: Bonds of Eden township rural school district.

GENTLEMEN:—Supplementing my opinion of recent date in reference to the above described bonds, I beg to advise that a form of bond prepared for use in connection therewith has been submitted to me; that I have examined the same and find that it is in all respects regular. When the bonds are duly signed they will, in my opinion, constitute a valid and binding obligation of said school district, payable as therein provided.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

671.

COSTS—INCURRED WHERE MINOR UNDER EIGHTEEN IS BOUND OVER FROM MAGISTRATE'S COURT TO COMMON PLEAS—IN CASE WHERE MINORITY IS CONCEALED—PAID UNDER SECTION 3019 G. C.

"A" is under eighteen years of age and is charged with a felony and arrested and taken before a magistrate. He conceals his minority and after examination is had is bound over to the common pleas court. While in custody his minority is revealed. The case and the prisoner are transferred to the juvenile court. Hearing is had in the juvenile court and "A" is sent to Lancaster.

HELD: That the costs incurred in the magistrate's court and in the court of common pleas are to be paid as provided in section 3019 *G. C. for state failures in felony cases, and that the same are not to be included in the costs of the case in the juvenile court.*

COLUMBUS, OHIO, October 1, 1917.

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

GENTLEMEN:—I have your letter of August 21, 1917, as follows:

> "A. is a minor and is charged with a felony, and arrested and taken before a magistrate. He conceals his minority and after examination is had is bound over to the common pleas court. While in custody his minority is revealed. The case and the prisoner are transferred to the juvenile court. Hearing is had in the juvenile court and A. is sent to Lancaster.
>
> *Query*: May the costs contained in the magistrate's cost bill and in the certificate of transfer of the clerk of the court of common pleas, be made a part of the costs in the case before the juvenile court and be by him certified to the county auditor for payment?"

Sections 1659, 1681 and 1682 of the General Code read:

"*Sec.* 1659. When a child under the age of eighteen years is arrested, such child, instead of being taken before a justice of the peace or police judge, shall be taken directly before such juvenile judge; or, if the child is taken before a justice of the peace or a judge of the police court, it shall be the duty of such justice of the peace or such judge of the police court, to transfer the case to the judge exercising the jurisdiction herein provided. The officers having such child in charge shall take it before such judge, who shall proceed to hear and dispose of the case in the same manner as if the child had been brought before the judge in the first instance.

"*Sec.* 1681. When any information or complaint shall be filed against a delinquent child under these provisions, charging him with a felony, the judge may order such child to enter into a recognizance, with good and sufficient surety, in such amount as he deems reasonable, for his appearance before the court of common pleas at the next term thereof. The same proceedings shall be had thereafter upon such complaint as now authorized by law for the indictment, trial, judgment and sentence of any other person charged with a felony.

"*Sec.* 1682. Fees and costs in all such cases with such sums as are necessary for the incidental expenses of the court and its officers, and the costs of transportation of children to places to which they have been committed, shall be paid from the county treasury upon itemized vouchers, certified to by the judge of the court."

This department has frequently held that in cases other than felony cases involving minors under eighteen years the juvenile court has exclusive jurisdiction. It will be noted that section 1659 provides that it "shall be the duty of such justice of the peace or such judge of the police court to transfer the case to the judge exercising the jurisdiction herein provided." However, in this case the statute was not followed and the case was not "transferred" from the justice of the peace to the juvenile court. Instead, the justice of the peace bound the defendant over to the common please court and the latter court finding later that it had no jurisdiction to hear the same, attempted to "transfer" the case to the juvenile court by certifying it to said court. To my mind this was not a transfer but acted rather as a dismissal or at least abandonment of the prosecution by the state in the felony case. The juvenile court had no authority to accept any case from the common pleas court and the attempted transfer could be held to be nothing more, in so far as the juvenile court is concerned, than the filing of a complaint against the minor child. The proceedings in the justice court and in the common pleas court, in the case you submit, had no connection whatever with the case in the juvenile court.

In Opinion No. 98, rendered by this department March 10, 1917, to Hon. C. M. Caldwell, prosecuting attorney, Waverly, Ohio, it was stated:

"The words 'in felonies wherein the state fails,' I think, mean when a prosecution for a felony has been begun and the state has either abandoned the same or has been defeated in its contention. In other words, I think the statute refers to all cases wherein the state has started a prosecution for a felony and has not concluded the same successfully."

In conclusion it was said:

"Taking this view of the law, I am of the opinion that prosecution for felony has been instituted as soon as the affidavit charging the crime has been presented to and filed by the magistrate and if any time thereafter the prosecution is terminated by any means other than conviction, the state has 'failed' within the meaning of section 3019 G. C. and county commissioners may make an allowance to officers in place of fees under such section."

It is my opinion that in the case you refer to in your communication the prosecution for felony instituted in the justice of the peace court and carried into the common pleas court should be treated as a "state failure" and costs paid accordingly. The costs certified by the juvenile court should not include any costs incurred prior to the time the juvenile court assumed jurisdiction.

The conclusion here reached might have been different had the justice of the peace transferred this case to the juvenile court as the statute contemplates.

I have assumed in this opinion that in using the word "minor" in your request you mean to refer to a boy under eighteen years of age.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

672.

APPROVAL—FINAL RESOLUTION FOR ROAD IMPROVEMENT IN WARREN COUNTY.

COLUMBUS, OHIO, October 1, 1917.

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

DEAR SIR:—I am in receipt of your communication of September 27, 1917, enclosing, for my approval, final resolution on the following improvement:

Warren County—Sec. "A" of the Dayton-Lebanon road, I. C. H. No. 64.

I have carefully examined said final resolution, find the same correct in form and legal, and am therefore returning the same to you with my approval endorsed thereon in accordance with the provisions of section 1218 G. C.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

673.

APPROVAL—FINAL RESOLUTIONS FOR ROAD IMPROVEMENTS IN CLERMONT, DARKE AND GREENE COUNTIES.

COLUMBUS, OHIO, October 1, 1917.

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

DEAR SIR:—I am in receipt of your communication of September 26, 1917, enclosing, for my approval, final resolutions on the following improvements:

Clermont County—Sec. "N-1" fr the Milford-Hillsboro road, I. C. H. No. 9.

Darke County—Sec. "A-1" of the Dayton-Greenville road, I. C. H. No. 62.

Greene County—Sec. "I-1" of the Wilmington-Xenia road, I. C. H. No. 248.

I have carefully examined said final resolutions, find the same correct in form and legal, and am therefore returning the same to you with my approval endorsed thereon, in accordance with the provisions of section 1218 G. C.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

674.

NOTICE—TO BIDDERS FOR IMPROVEMENT OF HIGHWAY—CONSTRUCTION OF SECTION 1206 RELATIVE TO ADVERTISEMENT FOR TWO CONSECUTIVE WEEKS IN NEWSPAPERS OF THE TWO DOMINANT POLITICAL PARTIES.

The publishing of a notice to bidders on the 8th and 15th days of the month, that sealed bids for the improvement of a certain highway will be received up until noon of said 15th day of said month, and this notice being published in two Republican newspapers where a Democratic newspaper is published in the same county and of general circulation therein, is not a compliance with the provisions of section 1206 G. C.

COLUMBUS, OHIO, October 1, 1917.

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

DEAR SIR:—I have your communication of August 30, 1917, in which you ask me to place a construction upon a certain contract therein set out. Your communication reads as follows:

> "I am attaching hereto copy of letter received by me from Mr. C. H. Duncan, representing Mrs. Jennie Warnick, administratrix of the estate of J. P. Warnick, deceased, in which he states that our agreement with J. P. Warnick for the improvement of section 'M' of the Cadiz-Carrollton road, I. C. H. No. 371, Harrison county, is void. Mr. Duncan sets forth various reasons for his contention in his letter, and I am transmitting his letter with the request that you advise me as to the proper proceedure to be pursued by me."

Your inquiry goes to the question as to whether the contract entered into by and between yourself, for and on behalf of the state of Ohio, and J. P. Warnick, for the improvement of section "M" of the Cadiz-Carrollton road, I. C. H. No. 371, is void, or if the same is legal and can be enforced as against said J. P. Warnick or his legal representative.

The statement is made that this contract is void, because of certain irregularities occurring prior to the letting of the contract to said J. P. Warnick. One

of these irregularities it is claimed relates to the matter of the advertising for bids preparatory to letting the contract. Another irregularity is in connection with the certificate of the county auditor, provided for in section 5660 G. C.

The particular section of the statute in reference to the advertising for bids is section 1206 G. C., which reads as follows:

> "Sec. 1206. Upon the receipt of a certified copy of the resolution of the county commissioners or township trustees, that such improvement be constructed under the provisions of this chapter (G. C. Secs. 1178 to 1231-3), the state highway commissioner shall advertise for bids for two consecutive weeks in two newspapers of general circulation and of the two dominant political parties published in the county or counties in which the improvement, or some part thereof is located, if there be any such papers published in said counties, but if there be no such papers published in said counties then in two newspapers having general circulation in said counties, and such commissioner shall also have authority to advertise for bids in such other publications as he may deem advisable. Such notices shall state that plans and specifications for the improvement are on file in the offices of the state highway commissioner and the county highway superintendent, and the time within which bids therefor will be received.
>
> The state highway commissioner shall award the contract to the lowest and best bidder."

It will be noticed, in considering this section, that there are two distinct requisites therein set out in reference to the advertisement for bids, namely:

1. The state highway commissioner shall advertise for bids for two consecutive weeks.

2. This advertisement shall be placed in two newspapers of general circulation and of the two dominant political parties published in the county, if there be any such papers published in the county.

In making an investigation of the facts in reference to the advertising, I find the following to be true: This particular contract was let on June 15, 1916. The advertisement for bids preparatory to the letting of the contract was placed in The Cadiz Republican and The Harrison News, two newspapers of general circulation in the county of Harrison. The first publication was inserted in each of these newspapers on June 8, 1916, and the second was inserted on June 15, 1916.

I further find that both the said newspapers above mentioned are classed as Republican in politics, and that there is published in the county of Harrison a paper called The Democrat Sentinel, which is classed as Democratic in politics.

With these facts before us, what can be said as to the validity of the contract which was let on June 15, 1916? Our courts, as well as the courts of other states, generally place a pretty strict construction upon statutes providing for giving notice to the public in reference to the letting of contracts by public officials. The courts as a rule hold that the provisions of the statute in reference to advertising for bids must be strictly followed, and that the question as to whether a variation from the terms of the statute in the matter of advertising would work a loss or hardship upon the public, can not be inquired into.

In McCloud and Geigle v. City of Columbus, 54 O. S. 439, the court held in the syllabus as follows:

> "Where a municipal corporation, acting under chapter 4, division 7, of title XII, Revised Statutes, improves a public street, the provisions of section 2303, prescribing the mode and time of advertising for bids, are

mandatory, the compliance with which is a condition precedent to the power of the municipality to enter into a valid agreement in respect thereof."

In this case the contractor was attempting to recover from the city of Columbus a balance due upon a contract, the terms of which he had fully carried out. The court held that he could not recover for the services rendered, because of the fact that the contract, under and by virtue of which the work was done, was void for the reason that the officials of the city of Columbus had not advertised for bids in accordance with the provisions of the statute relative to the improvement in question.

In the opinion at page 450 the court uses the following language:

"The owners of the abutting property were relieved of any obligation to pay the contractors, plaintiffs in error, any sums excepting the actual cost of the improvement, because of the omission of the city council to cause the notice to bidders to be advertised according to the requirements of section 2303, Revised Statutes. That section requires such notice to be published for four weeks in two newspaper published and of general circulation in the city, where the estimated cost of the improvement exceeds five thousand dollars. The estimated cost of the improvements in this cause exceeded that sum. A notice calling for bids was published, but the mode or length of time does not definitely appear, the record merely showing that it was for less than the statutory period. The duty of publication belongs to the city council."

On page 451 the court further says:

"In the present case the city of Columbus entered into a contract to pay for any balance not collectible from the abutting proprietors, and thereafter if the contract was valid it was bound to perform what the statutes required it to do to charge those abutting proprietors, and therefore if by reason of an omission of anything it was subsequently required to do, those abutting proprietors, who, as we have seen, were primarily liable, were discharged, the city should make good the loss. The question, however, is, was the contract in this case valid. The duty which the council omitted was one which preceded the making of the contract, and was preliminary thereto. The notice which it omitted to publish in the prescribed manner and for the prescribed time was provided by the legislature as a safeguard to the taxpayer, whether local or general, against private rapacity and official indifference. This beneficial provision has no value it it can be disregarded by a city council, and yet a contract entered into binding upon the city and consequently imposing a burden upon the whole body of its taxpayers. The evils that imperatively demand these restrictive statutes are of common notoriety. They can be held in check only by regarding as mandatory statutory provisions designed to circumvent them."

As said before, the court in this case held that the contract was not valid, but void because of the fact that notice had not been given for four weeks, but for some period of time less than four weeks.

In Miller et al. v. Pearce et al., 13 O. D. Rep. 758, the court held in the sylllabus:

"* * * that the requisition of the statute that 'said trustees, before entering into any contract for work to be done, the estimated cost of which shall exceed five hundred dollars, shall cause at least two weeks' notice to be given in one or more daily newspapers of general circulation in the corporation,' is a condition precedent to contracting, and that the contract could not be made until at least two weeks after the first publication. * * *"

The section of the statute upon which the court was placing a construction was section 346 R. S., which read as follows:

"Said trustees, before entering into any contract for work to be done, the estimated cost of which shall exceed five hundred dollars, shall cause at least two weeks' notice to be given, in one or more daily newspapers of general circulation in the corporation, that proposals will be received by said trustees for the performing of the work specified in said notice; and the trustees shall contract with the lowest bidder, if, in their opinion, said lowest bidder can be depended on to do the work with ability, promptness, and fidelity, and if such be not the case, said trustees may give the contract to the next lowest bidder, or decline to contract, and advertise again."

Taft, J., in rendering the opinion in this case, said: (p. 761.)

"The fair interpretation of the language of this section requires 'at least two weeks' advertisement,' as a condition precedent to contracting. The words, 'the trustees, before entering into any contract for work to be done,' standing as they do, at the head of the section, imply a prohibition. The plain sense of the section is, that the board shall not enter into any such contract until they have caused 'at least two weeks' notice to be given.'"

In this case the contract was awarded on the tenth day after the first publication.

On page 762 the following language is used:

"It was claimed, in argument, that the notice was a 'two weeks' notice,' within the meaning of the statute, because it was inserted in the daily newspapers in two successive weeks, although the contract was awarded on the tenth day after the first publication. But it is clear to my mind that 'two weeks' notice' cannot be considered as having been given in the daily papers before the expiration of two weeks from the first publication."

It will not be necessary to quote further from decisions because the above decisions are in line with the holding of courts in general, which is to the effect that a strict construction is to be placed upon statutes providing for notice to the public in reference to the letting of contracts. With this principle in mind, let us note the facts in this case. The notice was published on June 8 and 15, 1916, and bids were opened on June 15, 1916, the day upon which the last publication was made. The notices were published in two Republican newspapers, rather than in two newspapers of opposite political parties, as provided in section 1206 G. C. Does this comply with the provisions of the statute to such an extent that courts would hold the said contract to be valid? I am of the opinion that it does not.

Take for example the fact that the notice was published in two Republican newspapers, when there was published at the time a Democratic newspaper in the county of general circulation therein. It is my opinion that this would no more be a compliance with the law than if notice had been published in but one paper.

The question as to whether advertisement for bids was published for two consecutive weeks is somewhat more difficult. It will be noted that section 1206 G. C. does not provide that two weeks' notice must be given. If it did, the courts are unanimous in holding that the first notice would have to be published at least two weeks before the letting of the contract, and in computing this two-week period the day upon which publication is first made would be included and the day upon which the bids are opened would be excluded.

Said section 1206 G. C. provides:

> "* * * the state highway commissioner shall advertise for bids for two consecutive weeks * * *."

This he did. He advertised on the 8th and on the 15th of June, 1916, two consecutive weeks. While I am not prepared to say that this provision requires a two weeks' notice to be given, namely, that the first notice must be published at least two weeks before the bids are opened, yet it is my opinion that the publication of the notice on the 8th and 15th is, to say the least, not sufficient. The notice published on the 15th, so far as its being of any effect in the way of notifying the prospective bidders is concerned, might as well never have been made, because the public had no opportunity to read this notice when it was published on the very day that the bids were opened.

Hence I am of the opinion that the advertisement for bids prior to the letting of the contract in question was not in harmony with the provisions of section 1206 G. C., and therefore that the contract entered into by and between the state of Ohio and said J. P. Warnick is void. Of course, if the contract is void, Mr. Warnick or his legal representative can take advantage of this fact and refuse to proceed, if he so elects, just as well as the state of Ohio or the county of Harrison could take advantage of the defect herein mentioned.

This being the finding in reference to this proposition, it is not necessary for me to go into the matter as to whether the provisions of section 5660 G. C. have been complied with. In connection with this matter, my attention has been called to an opinion rendered by me on May 11, 1917, No. 258. I will simply suggest that the facts, upon which the former opinion was rendered, are vastly different from those presented in this case, although, as said before, I am not passing upon the latter question in this opinion.

Hence, answering your question specifically, it is my opinion that under the facts as they exist, relative to the letting of this contract, J. P. Warnick or his legal representative can elect not to proceed under the contract, and that you would have no course to follow other than to cancel same as to Mr. Warnick or his legal representative.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

675.

MUNICIPAL TICKET—WHEN POLITICAL PARTY ENTITLED TO HAVE SAME PLACED UPON OFFICIAL BALLOT—WHEN ENTITLED TO HAVE PARTY EMBLEM PLACED ON BALLOT.

1. *Where a nomination paper nominating a municipal ticket in a village containing twenty-seven hundred population is signed by twenty-five per cent of the qualified legal voters of said village, and filed within the proper time with the deputy state supervisors of elections, the election officers must place such municipal ticket upon the official ballot.*

2. *Inasmuch as the Socialist party had not cast at the last preceding election a sufficient number of votes for governor to qualify it for recognition as a political party under section* 4949 *G. C., it is not entitled to the use of an emblem under section* 5014 *G. C.*

3. *When a petition signed by twenty-five per cent of the electors of a municipality having a population of twenty-seven hundred, seeking to nominate a municipal ticket, is filed, the petitioners in said petition are entitled, under section* 5003 *G. C., to designate a party or political principle which the petitioners represent, expressed in not more than three words.*

COLUMBUS, OHIO, October 2, 1917.

HON. DAVID A. WEBSTER, *Prosecuting Attorney, Bryan, Ohio.*

DEAR SIR:—In a recent communication you state that a situation has arisen in the village of Montpelier concerning which you desire an opinion. The following facts appear:

> The village of Montpelier has a population of about twenty-seven hundred. The Socialist party has never had a county, township or municipal ticket in the county and has now filed a petition, with a complete municipal ticket thereon, with the election board, signed by twenty-five per cent of the qualified legal voters of the village, requesting that a Socialist party ticket be placed upon the official ballot under the Socialist emblem.

The determination of whether or not these petitioners are entitled to what they ask depends upon a consideration of the following sections of the General Code:

Section 4949 G. C., being found in the primary elections law, provides how candidates for public offices shall be nominated, and the succeeding section, 4950, reads as follows:

> "Sec. 4950. Nothing in this chapter shall repeal the provisions of law relating to the nomination of candidates for office by petition, and no elector shall be disqualified from signing a petition for such nomination of candidates for office by petition, because such elector voted at a primary provided for herein to nominate candidates to be voted for at the same election or because such elector signed nomination papers for such primary."

Section 4963 G. C. (107 O. L. 400) provides the time for holding primaries for municipal candidates.

Section 4996 G. C. reads as follows:

> "Nominations of candidates for any elective office in any township or

in any municipality which at the last preceding federal census had a population of less than two thousand may be made by petitions, signed in the aggregate for each candidate by not less than twenty-five qualified electors of such township or village."

This section (4996) before its amendment in 103 O. L. 844 read as follows:

"Sec. 4996. Nominations of candidates for any county, township, municipal or ward office may be made by nomination papers, signed in the aggregate for each candidate by not less than three hundred qualified electors of the county or fifty electors of the city or twenty-five qualified electors of the township, ward or village, respectively. In counties containing annual registration cities, such nomination papers shall be signed by petitioners not less in number than one for each fifty persons who voted at the next preceding general election in such county."

It will be noted that prior to the amendment in 103 O. L. 844, there was provision for nomination by petition of candidates for any county, township, municipal or ward office. Amended section 4996 G. C. provides for nominations of candidates for any office of any township and in any municipality which at the last preceding federal census had a population of less than two thousand.

As the village of Montpelier had a population at the last census of over two thousand, this section, as amended, would have no application.

Section 4999 G. C., prior to the amendment in 103 O. L. 844, read as follows:

"Sec. 4999. Nominations of candidates for United States senator, or for other offices, may be made by nomination papers, signed for each candidate by qualified electors of the state or the district, or division, for which such candidates are nominated, not less in number than one for each one hundred persons who voted at the next preceding general election in the state, district or division."

As amended, section 4999 G. C. now reads:

"Section 4999. Nominations of candidates for other offices may be made by petitions, signed for each candidate by qualified electors of the state or the district, or county for which such candidates are nominated, not less in number than one for each one hundred persons who voted at the next preceding general election in the state, district or county."

A comparison shows that section 4999 prior to the amendment provided for the nomination papers in the state, the district or division for which the candidates were nominated. As the section now stands it provides for nomination of candidates of the state or the district or county for which the candidates are nominated.

The case you cite seems to be an omitted case. There does not appear to be any specific statute which applies to municipalities over two thousand in population. But it is my view, taking into consideration the former provisions of section 4999, supra, that the legislature intended by the word "district," in amended section 4999, to include all subdivisions, other than state and county, which were not included in a township or in municipalities with a population of less than two thousand. It is certainly evident that there was no intention on the part of the legislature to make no provision for municipalities having a population of over two thousand,

nor would it be seriously argued that the legislature intended to provide that a petition signed by twenty-five qualified electors of any city would be a sufficient number of signatures for the larger cities.

I understand that the construction placed upon section 4999 G. C. by the election officers over the state has been that in municipalities of over two thousand population candidates nominated by petition must have petitions signed by not less in number than one for each hundred persons who voted at the next preceding general election in such municipality.

But under the facts in the case here submitted, whether amended section 4999 G. C. is construed to include municipalities over two thousand in population, or whether the provisions of section 4996 G. C. are construed to include, as it did prior to amendment, all municipalities, the petition containing twenty-five per cent of the qualified legal voters of Montpelier would comply with either or both of said sections. I cannot believe that it is an entirely omitted case and that these petitioners should be denied a right to place a ticket upon the official ballot.

So it is my view that the petition in question is a valid nominating petition for the officers therein nominated and that it is entitled to a place upon the official ballot at the coming municipal election. However, I hold that under the law these petitioners are not entitled to any emblem above their ticket, as held in State ex rel. Lewis v. Kinney, 57 O. S. 221, construing section 12 of the Australian ballot law, which is now section 5014 G. C. The syllabus in said case reads as follows:

> "The state supervisor of elections is not required by section 12 of the Australian ballot law (Bates' Revised Statutes, section 2966-25), to cause to be printed on the ballots to be used at an election, a device selected and certified by a state convention which did not represent a political party that at the next preceding election polled at least one per cent of the entire vote cast in the state; nor a device certified in nomination papers for a ticket nominated by that method."

In 1897, when the above case was decided, the law provided for state conventions as representing a political party which at the next preceding general election polled at least one per cent of the entire vote cast in the state. Under our primary election act, state conventions, as then known, have passed into "innocuous desuetude," and the only provision we have now for a state convention is found in section 4991-1 G. C.

Under section 4949 G. C. the voluntary political parties and associations recognized by the primary act are such as poll for their candidates for governor, in the state or any district, county or subdivision thereof, or municipality, at least ten per cent of the entire vote cast therein for governor, and the officers of such political party must nominate their candidates for public office in the manner provided by our primary act found in section 4948 et seq. G. C.

So the Socialist party not having cast ten per cent of the total vote for governor in the municipality of Montpelier at the last election, and not having qualified as a party under the compulsory primary act, is not entitled to have a separate ticket as a party and to have its emblem above any ticket. While such petitioners are not entitled to the emblem, they are, under section 5003 G. C., entitled to designate the party or political principle which it represents, expressed in not more than three words.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

676.

OLEOMARGARINE—WHEN SAME USED EXCLUSIVELY FOR COOKING PURPOSES—WHERE NOTICE MUST BE PLACED.

Under section 12732 G. C., where oleomargarine is being used exclusively for cooking purposes, a posting of the notice provided by said section in the kitchen, where the cooking is done, is not sufficient. The notice must be posted in some conspicuous place in the hotel, boarding house, restaurant, eating house, lunch room, lunch counter, boat, railroad car, or other place of business.

COLUMBUS, OHIO, October 3, 1917.

HON. THOMAS C. GAULT, *Chief Dairy and Food Division, The Board of Agriculture, Columbus, Ohio.*

DEAR SIR:—I have your letter of September 11, 1917, as follows:

"I am enclosing an inquiry from the Capital City Dairy Company for a ruling on section 12732 General Code, as there has been quite a variance of opinions on this section as to whether it is meant that cards shall be used in dining rooms where meals are served when oleomargarine is used only in cooking.

If there has been no court decision or ruling relative to this matter, I would like an opinion from your office so that I may direct my inspectors intelligently."

The Capital City Dairy Company's letter, to which you refer, reads as follows:

"The Capital City Dairy Company of this city respectfully asks your department for a definite ruling on the meaning of section 12732 General Code, in reference to exhibiting the card in a place where oleomargarine is used exclusively for cooking purposes. Does the expression 'in a conspicuous place therein,' mean the place where the product is used, i. e., the kitchen place, if it is used exclusively in cooking?

This company is desirous of advising its agents along the line of your department's ruling and your opinion on this subject will help it in this matter."

Section 12732 G. C. reads:

"Whoever, being a proprietor, keeper, manager, or person in charge of a hotel, boarding house, restaurant, eating house, lunch counter, lunch room, boat, railroad car or other place, therein sells, uses, disposes of, furnishes, serves, or uses in cooking, a substance which appears to be, resembles, or is made in, or as an imitation of, or a substitute for butter or cheese which is not wholly made from pure milk or cream, salt, and harmless coloring matter, without keeping a card in a conspicuous place therein, which shall be white and not less than ten by fourteen inches in size, upon which shall be printed in plain, black Roman letters, not less than twelve line pica, the words 'oleomargine sold and used here,' or 'imitation cheese sold and used here,' and no other words, or sells, furnishes or disposes of such substance as and for butter or cheese made from pure milk or cream, salt and harmless coloring matter when butter or cheese is asked for, shall be fined not less than fifty dollars nor more than two hundred dollars, and

for each subsequent offense shall be fined not less than one hundred dollars nor more than five hundred dollars and imprisoned not less than ten days nor more than ninety days."

In the above statute the only "places" referred to are "hotel, boarding house, restaurant, eating house, lunch counter, lunch room, boat, railroad car or other place" and the word "therein," as used twice in this section, can, therefore, refer to no other place than a "hotel, etc.," of which the accused is in charge or of which the accused is the proprietor, keeper or manager. In the case you refer to the "kitchen," or place where the cooking is done, is only a part of the hotel or restaurant, and cannot be considered as the place of which the accused has charge or of which he is the proprietor, keeper or manager within the meaning of the statute.

The "place" the statute is concerned with is the entire establishment, including both where the meals are cooked and where they are served, and it is the duty of the owner, keeper, manager or person in charge of such establishment to keep a card "in a conspicuous place therein"—"therein" referring to the entire establishment or place of business. From this it will be seen that the card must be posted in a conspicuous place in the establishment and whether or not the place where the card is posted is really a conspicuous one will, of course, depend upon the facts of each individual case. However, I think it can be stated as a general rule that the posting of such card in the kitchen or place where the meals are cooked would not suffice, since this could hardly, under any circumstances, be held to be a posting in a conspicuous place, since it is a matter of common knowledge that but very few if any of the patrons of hotels, restaurants, lunch rooms, etc., have access to the kitchen.

Answering your questions specifically I am of the opinion that under section 12732 G. C. it is necessary to post the card in a conspicuous place in a hotel, boarding house, restaurant, eating house, lunch counter, lunch room, etc., or other place of business, where the public will be most likely to see it and that the posting of such card in the kitchen or room where the cooking is done and away from the room in which the meals are served would not be sufficient. This rule obtains even though the oleomargarine is being used exclusively for cooking purposes.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

677.

LIGHT STATIONS—TO DIRECT FEDERAL AVIATORS—COUNTY COMMISSIONERS HAVE NO AUTHORITY TO ERECT SAME.

The erection of light stations to direct federal aviators on their journeys across a county cannot be brought within the object "for ordinary county purposes," as provided in sections 5627 and 5630 G. C., and, therefore, there is no provision of law authorizing the county commissioners to erect said light stations and to pay for the same from the funds of the county raised by taxation.

COLUMBUS, OHIO, October 3, 1917.

HON. P. A. SAYLOR, *Prosecuting Attorney, Eaton, Ohio.*

DEAR SIR:—I have your communication of September 24, 1917, in which you ask my opinion as follows:

> "The county commissioners called on me this morning for an opinion as to the right of the county commissioners to spend the money of the county in erecting a light station to light the federal aviators on their way from Fairfield, Ohio, to Ft. Benjamin Harrison, Indiana.
>
> Their route is through Preble county, over Eaton, and a village east of here. The Business Men's club of Eaton wants the county commissioners to put a light station on the court house here. This will probably cost two hundred dollars.
>
> If this is done, other communities will want the county commissioners to build and pay for the light stations, and light the same, at other points of landing in the county.
>
> I can find no authority in law for such an expenditure of money. The county commissioners are under the impression that this is being done elsewhere by county commissioners in this state."

In order to arrive at a solution of the problem which you submit to me, it will be necessary for us to consider two sections of the General Code which give authority to the county commissioners to levy taxes and the purposes for which they have authority to levy them.

Section 5627 G. C. reads as follows:

> "The county commissioners, at their March or June session, annually, shall determine the amount to be raised for ordinary county purposes, public buildings, the support of the poor, interest and principal of the public debt, and for road and bridge purposes. They shall specifically set forth in the record of their proceedings the amount to be raised for each of such purposes."

When we consider the different objects in reference to which the county commissioners must determine the amount of money to be raised, it is quite evident that there is nothing mentioned in said section that would include the object mentioned in your communication, other than the provision "for ordinary county purposes."

Section 5630 G. C. reads as follows:

> "The commissioners of any county, at their June session, annually, may levy not to exceed three mills on each dollar valuation of taxable property

within the county, for county purposes other than for roads, bridges, county buildings, sites therefor, and the purchase of lands for infirmary purposes. For the purpose of building county buildings, purchasing sites therefor, and lands for infirmary purposes, they may levy not to exceed two mills on such valuation."

This section gives the county commissioners authority to levy taxes and the purposes for which they may be levied. The only object, as set out in said section, for which taxes may be levied by the county commissioners, that would include the one mentioned in your communication, is "for county purposes."

The question then which we have to consider is, could the erection of a light station upon the court house at Eaton, for the purpose of lighting the federal aviators on their way from Fairfield, Ohio, to Fort Benjamin Harrison, Indiana, be brought within the phrase used in the statutes, "for ordinary county purposes?"

Section 5627 G. C. was originally section 2822 R. S. This section was construed by the circuit court of Ohio along the very lines which we now have under consideration, in the case of State ex rel. Long v, Brinkman, et al., 7 C. C. 165. The question in that case was whether the county commissioners could furnish an armory and maintain the same for the state militia or any company thereof, and bring the expense of the same under the phrase "for ordinary county purposes," as originally found in section 2822 R. S. and now in section 5627 G. C. In the opinion on p. 170 the court reasoned as follows:

"It cannot be controverted but that the militia of the state and every part and branch thereof, is a state institution, subjected to the powers of the state, controlled by the state, and with which the respective counties of the state, even to the remotest degree, have nothing whatever to do.

* * *

How can it be said that the furnishing of an armory and its maintenance, for the sole purpose of the state, viz: to protect the arms of the state, to furnish an abiding place for the militia of the state, which are subjected to no authority or control other than state authority, is an expense created either for 'ordinary county purposes or for county buildings?'

The purpose of an armory for drill and the care of state arms, is nothing more or less than one of the essential elements entering into and forming a part of a complete and perfect state militia, in order that the militia may the more be able to do the service of the state (not the county), when the commander-in-chief shall so require.

* * *

Personally each member of the court would desire that Captain Long and his company might be furnished with a suitable armory, but as judges of the court we have an official duty to perform, by declaring the law as we understand it."

If we apply the reasoning of the court in this case to the matter we now have under consideration, it is quite evident that the object which the county commissioners of your county have under consideration cannot be brought within the phrase "for ordinary county purposes." It cannot be controverted but that the federal aviators belong to the federal army, are subjected to the powers of the federal government and are controlled by the United States, and with which the county of Preble, even to the remotest degree, has nothing whatever to do.

The flying of the federal aviators from Fairfield, Ohio, to Fort Benjamin Harrison, Indiana, is one of the essential elements entering into and forming a part

of a complete and perfect training of the men, in order that they may be more able to do the service of the federal government in the war between this country and Germany, whenever the commander-in-chief of the armies of the United States shall so require.

As stated by the court in the case above quoted, however much I might desire that the federal aviators be furnished with lighting stations along their route from Fairfield, Ohio, to Fort Benjamin Harrison, Indiana, yet, as the legal adviser of the state, it becomes my duty to declare the law as I understand it. In the performance of that duty I am constrained to hold that the object set out in your communication could not be brought within the phrase "for ordinary county purposes."

In connection with this same matter, I desire to call attention to an opinion rendered by my predecessor Hon. Timothy S. Hogan to Hon. Cyrus Locher, prosecuting attorney, Cleveland, on September 30, 1913, and found in Vol. II of the Annual Report of the Attorney-General for 1913, p. 1396. In this opinion he was deciding the question as to whether the expenses for maintaining social and civic centers could at that time be brought within the object, "for ordinary county purposes." Mr. Hogan argues as follows on p. 1398 of said opinion:

> "It will not be disputed that the only fund out of which the expenses of maintaining social and civic centers could, at the present time, possibly be paid would be the fund raised for ordinary county purposes. At the time, however, such fund was provided for, the county commissioners did not and could not take into consideration the establishment of the civic centers. Expenditures for this purpose were not in contemplation of the commissioners, nor was the organization of such centers a proper function of county government at the time the levy for ordinary county purposes was made. This would clearly indicate that the legislature did not contemplate the expense of the maintenance of these centers as one that should be paid from the levy or appropriation for ordinary county purposes. When the commissioners made such levy and appropriation they took into consideration the ordinary and necessary county expenses as they existed and were in contemplation at the time of the levy and appropriation. New objects, so foreign to usual county expenditures as are those provided for by the act in question, were not thought of, and consequently to say now that such expenditures should be made would be to infringe upon the necessary contemplated expenses which the commissioners had in view when they levied and appropriated, as we cannot assume that the commissioners extravagantly and carelessly required the tax payers to pay for county purposes a greater amount than was necessary."

It seems to me that the argument used by Mr. Hogan in said opinion would directly apply to the matter now under consideration, in that the commissioners of Preble county, when they were determining the amount to be raised "for ordinary county purposes," last March or June, could not have taken into consideration the erection of light stations such as are set out in your communication.

Hence in view of all the above I feel constrained to hold that the county commissioners would not be authorized in law to erect light stations for the purpose of directing federal aviators, and pay for the same out of the funds from taxation.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

678.

FINES—MAYORS AND JUSTICES OF THE PEACE—MAY NOT REMIT —IN CASES BROUGHT FOR VIOLATION OF STATUTES.

Mayors of municipalities and justices of the peace may not remit fines in cases brought for violation of the statutes.

COLUMBUS, OHIO, October 3, 1917.

The State Department of Health, Columbus, Ohio.

I have your letter of September 1, 1917, as follows:

"On May 22, 1917, a representative of this department filed with Mr. George W. Chamberlain, justice of the peace, Lorain county, an affidavit charging Dr. B., of Elyria, with failure to report a case of inflammation of the eyes of the new born (section 1248-2 G. C.). Full information in regard to this case was filed with G. B. Findley, prosecuting attorney of Lorain county. Under date of August 31, 1917, I received the following information from Mr. Findley:

'In re Dr. B. The defendant pleaded guilty and was sentenced to pay the fine of $50.00 and costs. However, for good cause shown $40.00 of this amount was remitted. It was evident that defendant had no knowledge of the new law.'

I shall be glad to have your opinion as to whether the trial court in a prosecution for failure or refusal to report a case of inflammation of the eyes of the new born, or to use a prophylactic at birth when such birth occurs in the practice of a midwife, or in a maternity home, hospital, public or charitable institution has the authority to remit all or any part of the fine or other penalty assessed against the defendant. A number of such cases have occurred."

On October 24, 1907, Hon. Wade H. Ellis, former Attorney-General, rendered an opinion to the Bureau of Inspection and Supervision of Public Offices, in which he held that a mayor may not remit a fine imposed in prosecution for violation of state law or of municipal ordinance. In this opinion Mr. Ellis said:

"There is no express authority conferred by the statutes of this state upon such officers to remit any fines due the state of Ohio. The duties of such officers in regard to fines adjudged for violations of the statute law and the ordinances of municipal corporations, are included in the following provisions of the Revised Statutes:

Section 7327 R. S. provides:

'When a fine is the whole or part of a sentence, the court or magistrate may order that the person sentenced shall remain confined in the county jail until the fine and costs are paid, or secured to be paid, or the offender is otherwise legally discharged.'

Section 7328 R. S. provides:

'When a magistrate or court renders judgment for a fine an execution

may issue for the same, and the costs of prosecution to be levied on the property, or, in default thereof, upon the body of the defendant; * * *'

Section 6802 R. S. provides:

'An officer who collects any fine shall, unless otherwise required by law, within twenty days after the receipt thereof, pay the same into the treasury of the county in which such fine was assessed, to the credit of the county general fund. * * *'

Fines imposed by mayors for violation of city ordinances when collected are to be paid into the city treasury as distinguished from those which, under section 6802, are to be paid into the county treasury. (Section 1864.)

By section 1866 R. S. it is provided:

'When a fine is imposed for the violation of an ordinance of a corporation, and the same is not paid, the party convicted shall, by order of the mayor, or other proper authority, or on process issued for that purpose, be committed until such fine and the costs of prosecution are paid, or the party is discharged by due process of law.'

By section 1028 R. S. the auditor of the county may discharge from imprisonment any person who is confined in the county jail for the non-payment of any fine or amercement due the county, except fines for contempt of court or some officers of the law, when it is made clearly to appear to him that such fine or imercement cannot be collected by such imprisonment. In the proceeding brought pursuant to such provision the circuit court of the third circuit, in the case of In re Moore, habeas corpus (14 C. C. 237), held that a fine imposed by a court on a defendant in a state case, although payable into the county treasury to the credit of the general county fund, is not a debt due the county, and is not a subject for compounding or releasing by the county commissioners.

As the county commissioners could not, in such case, compound, release or remit any fine made payable to the state of Ohio, neither could the mayor after rendering judgment against the accused in a state case, remit, release or compound the same because the same becomes a claim due the state of Ohio, although when collected paid into the county treasury.

With regard to fines imposed for the violation of municipal ordinances such officer has no authority to discharge the same except by full payment thereof.

As the mayor of a city is not entitled to fees in prosecutions for a violation of penal ordinances, he would have no authority to even remit the costs taxed for his services, in such cases, but he should pay the same into the treasury of the corporation.

Smallwood v. Cambridge, 75 O. S. 339.

Section 126 M. C.

Section 200 M. C.

In re William Mullee, 7 Blatchf (U. S.) 23.

Luckey v. State, 14 Texas 400.

It follows that mayors have no authority to remit fines or costs payable either into the county or municipal treasuries, in state cases or cases brought for the violation of municipal ordinances.

In the foregoing, no question is made as to the authority of a mayor

to revise or modify his judgment, in any such cases, by proper proceedings for such purpose."

On April 10, 1915, Hon. Edward C. Turner rendered an opinion to the Industrial Commission of Ohio in which he held:

"Mayors of municipalities and justices of the peace may not remit fines in cases brought for violation of the statutes, except in proper proceedings for such purpose."

In this opinion Mr. Turner, referring to the opinion of Hon. Wade H. Ellis, above quoted, said:

"I approve this opinion, found on page 161 of the attorney-general's reports for the year 1907, and herewith enclose copy thereof."

On May 8, 1915, Hon. Edward C. Turner rendered another opinion to the Industrial Commission of Ohio, in which he held:

"Mayors of municipalities and justices of the peace may not remit a part of fine or part of cost when once assessed for violation of statutes."

In this opinion, Mr. Turner, referring to the power of the magistrate or mayor, said:

"In no case can he remit a fine due to the state of Ohio. Neither can the magistrate, or mayor, impose or collect a fine less in amount than the minimum fine fixed by statute. The magistrate or mayor has no authority to disregard the express provisions of the statutes as to the amount of the fines he shall impose. * * * It is the duty of the magistrate or mayor to administer the law as he finds it and not to make unauthorized substitution therefor."

While this question could be considered more fully, I do not believe such further consideration necessary and upon the position taken by this department, as outlined above, I would advise you that a justice of the peace, or mayor, in such prosecutions as you refer to, has no authority to remit all or any part of a fine or other penalty assessed against the defendant.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

679.

ABSTRACT OF TITLE—SUPPLEMENTAL TO OPINION NO. 623—JOHN W. ZELLER PROPERTY.

COLUMBUS, OHIO, October 3, 1917.

HON. J. E. SHATZEL, *Secretary of Board of Trustees, State Normal College, Bowling Green, Ohio.*

DEAR SIR:—I am in receipt of your communication of September 25, 1917, in re sale by John W. Zeller of certain lots in the city of Bowling Green to the state of Ohio, which reads as follows:

"Your opinion (No. 623) under date of September 18, 1917, has been received and carefully noted.

The incumbrances, to wit, mortgage held by C. W. Butler and the taxes, will be deducted from the amount to be paid Mr. Zeller, of course.

The restriction clause, to wit, that Zeller, his heirs or assigns, shall build a fence and a dwelling house to cost not less than three thousand dollars on these lots, was inserted in the deed for the personal and exclusive benefit of the grantor, Helen W. Wooster. At the time of this sale Mrs. Wooster owned the property immediately adjacent on the west and sought to benefit her own property by this requirement. Her property was the only one which could be benefited by this provision, as she knew. Shortly after the sale to Zeller, however, she sold her property to the state and removed to Albuquerque, New Mexico, and has her permanent home there. She does not own any part of lot No. 97 in Bowling Green.

Helen W. Wooster did not, I am reliably informed and absolutely believe, have any other person or persons in view as beneficiaries when she had the above restriction placed in her deed but had only her personal interest and benefit in view. After she sold to the state she had no further interest and that clause became, now is and ever will be wholly inoperative and of no effect.

The state of Ohio owns all of the property on the east, north and west of the Zeller lots, and Wooster street is on the south of them. There is no one to force the restriction excepting the state.

I believe this title to be absolutely good and I am as familiar with it as any one here.

I left the abstract with Mr. Follett last Saturday, but brought the deed home with me. When title is approved by you I shall have the deed recorded and send it to you to be attached to the abstract for filing with the auditor of state.

Shall send you also the cancelled mortgage and tax receipt if you desire them."

Under your statement of facts relative to the restriction in the deed from Helen W. Wooster to John W. Zeller, I am of opinion that said restriction will not be binding upon the state of Ohio, and that the deed previously submitted by you will convey a clear title to the state, with the exception of the taxes and mortgage noted in your communication.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

680.

APPROVAL—CONTRACT BETWEEN CITY OF MANSFIELD AND OHIO BOARD OF ADMINISTRATION.

COLUMBUS, OHIO, October 3, 1917.

The Ohio Board of Administration, Columbus, Ohio.

GENTLEMEN:—I have your communication of September 26, 1917, in which you enclose, for my approval, a contract in duplicate between the city of Mansfield and your board, having to do with the sewerage of the Ohio state reformatory.

I have carefully examined this contract and find it correct in form and legal. I am assuming that the resolution of the council of the city of Mansfield was duly and legally passed as set forth on the margin of the contract.

I am therefore sending this contract to the governor, with my approval endorsed thereon, for his consideration.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

681.

APPROVAL—CONTRACTS BETWEEN BOARD OF TRUSTEES OF OHIO STATE UNIVERSITY AND THE BROWN HOISTING MACHINERY COMPANY—H. R. HEINICKE, INC.—M.P. STREET.

COLUMBUS, OHIO, October 4, 1917.

HON. CARL E. STEEB, *Secretary Board of Trustees, Ohio State University, Columbus, Ohio.*

DEAR SIR:—I acknowledge receipt of the several contracts hereinafter mentioned, which I have carefully examined, together with the bonds securing the same.

> "1. Contract between the board of trustees of Ohio state university and the Brown Hoisting Machinery Company, a Delaware corporation, located at Cleveland, Ohio, for the construction and completion of a coal bunker in the new power house on the Ohio state university campus, for the sum of $11,025.00
>
> 2. Contract entered into between the board of trustees of Ohio state university and H. R. Heinicke, Inc., a corporation organized under the laws of the state of New York, for the construction and completion of a radial brick chimney for the new power house on the Ohio state university campus, for the sum of $9,730.00.
>
> "3. Contract entered into between the board of trustees of Ohio state university and M. P. Street, of Columbus, Ohio, for the construction and completion of a new power house tunnel on the Ohio state university campus, for the sum of $11,513.00."

Relative to the last mentioned contract, I note that the bond given is a personal bond, and further note your letter of September 28th wherein you state that in the judgment of the board of trustees of Ohio state university the bond is sufficient and recommend the acceptance thereof.

I have found the contracts and accompanying bonds to be in compliance with law and have therefore approved the same and delivered the same to the auditor of state.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

682.

APPROVAL—INSTRUCTIONS FORMULATED BY TAX COMMISSION—RESPECTING ADMINISTRATION OF THE DELINQUENT LAND TAX.

Approval of certain instructions formulated by the tax commission of Ohio respecting the administration of the delinquent land tax act of 1917 (107 *O. L.* 735).

COLUMBUS, OHIO, October 4, 1917.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Some days ago you submitted to me for my approval certain instructions which the commission has prepared for county auditors concerning the uniform operation of the act of April 4, 1917, 107 O. L. 735, relating to delinquent lands. The instructions in full follow:

"1. Although this act repeals sections 5704 to 5743 inclusive, under which certificates of sale have been issued and many of them are now outstanding unredeemed, the same may be redeemed in accordance with the repealed sections and with the penalties and interest therein provided. This by reason of the provisions of section 26 of the General Code.

2. If the whole or any part of the taxes upon a tract of land or lot for the year 1916 due in December, 1916, and June, 1917, are not paid and are carried to the duplicate of 1917 as provided by section 5678 G. C. and the same are not paid before the time fixed for advertising, the tract or lot shall be advertised in accordance with sections one, two and three of the act.

3. The penalties provided by sections 5678 and 5679 G. C. shall be added on the duplicate the same as has been done in the past.

4. The delinquent list should be made up in accordance with the provisions of section 2601 G. C. and all tracts upon which the taxes have been paid before the first insertion of the advertisement, should be eliminated as provided by section 5 of the act, before advertising.

5. The amount advertised should be the amount of the taxes, assessments and penalties of the preceding year and for the current year, including amount due June 20th following the time of advertising.

6. If a tract or lot is certified delinquent and continues to be delinquent from year to year, it should not be again advertised and certified delinquent until it is redeemed or sold on foreclosure.

7. The 8 per cent interest should be calculated on the total amount certified delinquent from the date of certification and upon future taxes, assessments and penalties, not included in the certification, from the date upon which they are due, to the time of redemption or sale on foreclosure.

8. One certificate containing each tract and lot certified is required by section 9 of the act, and not a separate certificate for each. Five copies of the certificate should be made in order to comply with the provisions of section 9 of the act, and section 13 as to posting lists.

9. Under section 15 of the act the county auditor is required to make separate certificates to the auditor of state containing taxes, assessments, penalties and interest on all tracts and lots which have been cer-

tified delinquent and which have not been redeemed at the end of four years from the date of their certification. A copy of this certificate is to be filed with the county treasurer. The first certificate under this section will be made in February, 1922.

10. The county auditor should enter on the margin of the tax list and duplicate the words 'certified delinquent' and the date, opposite each entry so certified. This entry should be carried forward to each succeeding tax list and duplicate until such time as a tract is redeemed or sold. When redeemed the word 'redeemed' and the date should be entered on the margin. When sold on foreclosure the words 'sold for taxes' and the date should be entered.

11. Persons desiring to redeem tracts certified delinquent should make application to the county auditor who will ascertain the amount due including taxes, assessments, penalties, interest and fees for certificate and advertising, and give to the treasurer an addition order for the amount of the interest and a pay-in order to the general fund for the amount of the advertising fee. The fee for the certificate will be paid into the auditor's fee fund with his other fees.

12. The proceedings for the collection of real estate taxes provided for by sections 2656 and 2667 to 2673 are in no way affected by this act.

13. After consultation with the bureau of inspection and supervision of public offices concerning its circular letter No. 338, it has been determined that no change in the form of tax list and duplicate will be required on account of this act."

Without going into detail I may say that I approve the instructions generally. The act referred to is too long to quote in full here. Many of the points about which you have expressed an opinion are very doubtful. The law is ambiguous in many respects. I believe, however, that the commission's instructions embody an interpretation of it in the particulars to which they relate which is consistent with the more probable legislative intent and which has the outstanding merit of practicability.

I mention only those features of the commission's instruction that have given me considerable trouble:

The sixth instruction is inconsistent with an implication arising from section 15 of the act, designated as section 5718 G. C., which seems to contemplate the recovery in the action therein provided for of the "amount of eighty-five cents due from the defendants" for each year of delinquency "for advertising and issuance of certificates." This arises from the phrase "for the delinquency of each year." On the other hand, however, there is the statement in section 11 to the effect that land which has once been certified delinquent shall be so carried on the duplicate until it is redeemed. There are practical difficulties in the way of readvertising the land as delinquent during each of the three years intervening between the first advertisement and the foreclosure of the lien. Thus by sections 5678 and 5679 of the General Code, which are unrepealed, it is declared that when the taxes have not been paid on an entry of real estate at the December or June collections, such taxes with the penalties therein authorized shall be due and payable in December following with the entire taxes for the current year. This makes two years' taxes due at once, and the amount of such two years' taxes would have to be the amount set forth in the preliminary certificate authorized by section 9 of the act, section 5712 G. C. If, then, another similar certification would have to be made for such tract in the succeeding year, the amount thereof

would include all that had been theretofore certified. In other words, if there were annual certifications under said section 9, they would be cumulative in amount and therefore misleading. I do not think the legislature intended this to be done, but required the preliminary certificate referred to in section 9 as a means of establishing the status of the land as delinquent, which status should continue until redemption. Therefore I agree with the sixth instruction, though entertaining considerable doubt thereon.

The seventh instruction is based upon the essential appropriateness of things rather than upon any express language in the law. Interest is referred to twice therein, once in section 9 referred to above, and once in section 10, designated as section 5713 of the General Code. The first allows "interest at the rate of eight per cent per annum," and directs that it be charged on the duplicate without designating the date from which it shall be computed. The second specifies the date from which the interest shall be computed as "the date of delinquency." You have interpreted these two provisions as separate and not as referring to the same thing. In this I think you are correct. The first provision for interest relates to the amount originally certified and must be taken as allowing interest from the time of certification. The second is an additional provision relating to taxes subsequently becoming delinquent and in such case its provision governs. Your interpretation reconciles the two provisions and makes the two sections consistent with one another.

The eleventh instruction seems to be correct, although section 20 of the act, section 5723 G. C., which deals with redemptions, does not mention the advertising fees. That this was a mere oversight appears likely, and at all events the real operative section relating to redemptions is section 21 of the act, section 5724 G. C., which provides that redemption may be made by "tendering to the county treasurer the amount then due and unpaid." Inasmuch as in such amount is included the certificate fees and advertising costs, your eleventh instruction would seem to be justified.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

683.

BOARD OF EDUCATION—BOND ISSUE—BOARD SHOULD NOT PROVIDE FOR SUCH ISSUE UNTIL VOTES CAST AT ELECTION HAVE BEEN CANVASSED—DISSAPPROVAL—BOND ISSUE—NEW CONCORD VILLAGE SCHOOL DISTRICT.

Sections 7626 and 7627, relating to the authority of the board of education to issue bonds for school purposes voted by the electors of the school district under section 7625 General Code should be read in connection with the provisions of section 5120 General Code providing for the canvass by the board of education of the votes of the electors on the proposition of such bond issue, and the board of education should not provide for the issue of said bonds until such vote has been canvassed and the board has thereby determined that a majority of the electors voting on the proposition voted in favor thereof.

COLUMBUS, OHIO, October 4, 1917.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

RE:—Bonds of New Concord village school district in the sum of $10,000.00 for the purpose of repairing and furnishing the school building in said district.

I am herewith returning without approval the transcript of proceedings of the board of education and other officers of New Concord village school district relating to said bond issue.

The transcript shows that the board of education at a regular meeting thereof, under date of July 9, 1917, adopted a resolution in proper form submitting to the electors of said school district the proposition of said bond issue at an election to be held on August 2, 1917. Further, on August 2, 1917, the board of education, at a called meeting thereof, adopted a resolution reciting that inasmuch as the board of elections had failed to prepare election supplies for the bond issue election to be held on said date, the date of August 17, 1917, was by the board fixed as the date of said election. The transcript does not set out sufficient facts in order to enable me to pass upon the question of whether the called or special meeting of the board of education under date of August 2, 1917, was called in such manner as to make said meeting a legal meeting within the meaning of sections 4750 and 4751 of the General Code, but inasmuch as the transcript does show that all the members of the board were present at this meeting any defect with respect to the legal character of the meeting was probably cured by that fact, and without further discussion of this point I pass to the consideration which leads to my disapproval of this bond issue.

The transcript shows that an election was had on the question of the bond issue under date of August 17, 1917—the date fixed by the board in its resolution under date of August 2, 1917. It further appears that on August 27, 1917, said date being the second Monday after said election, the board of education met and canvassed the votes, and that as a result of said canvass it appeared that ninety-three electors voted in favor of said bond issue and forty-six electors voted against the same. The transcript shows, however, that on August 20, 1917, one week before the canvass of the votes of the election was made, the board of

education met at a meeting called by the president, all members thereof being present, and adopted the resolution providing for the issue of the bonds.

My objection to this bond issue is that the issue was provided for before the vote at said election was canvassed in the manner and at the time required by the statute. There may be some question as to whether or not the provisions of section 5120 General Code, providing for the canvass of the votes at an election of this kind, are mandatory or merely directory with respect to the time when such canvass shall be made, but I am inclined to the view, giving effect to the manifest purpose of said section 5120 General Code, that the board of education has no right to take official action with respect to the issuance of said bonds until the canvass of the vote of said election has been made and the result thereof officially known, and for the defect in the proceedings here noted said bond issue is disapproved.

It will be noted from what has been said above that the vote at said election has been properly canvassed by the board according to the provisions of section 5120 General Code, and all that the board of education would have to do in order to obviate the defects in the proceedings above noted would be to now adopt a proper resolution at a legal meeting of the board providing for the issue of said bonds.

I note some other defects in the transcript submitted for my examination, such as a failure to state whether said school district now has any outstanding bond issue or issues, and the amount thereof; whether the school district has any board of sinking fund commissioners, as required by the provisions of section 7614 General Code in cases where a school district has outstanding bonded indebtedness; no statement is made in said transcript with respect to the tax duplicate valuation of the taxable real and personal property in said school district, nor of the tax rate for all purposes on the taxable property within the district.

These defects might possibly be cured by further information, but feeling as I do that in order to make said bond issue legal, the board of education should now adopt another resolution providing for the issue of said bonds, the present issue as before noted herein is disapproved for the reason hereinbefore noted.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

684.

TRANSFER OF FUNDS—FROM GENERAL TOWNSHIP FUND TO TOWNSHIP ROAD FUND—HOW SAME CAN BE MADE.

Money cannot be transferred from the general township fund to the township road fund excepting under and by virtue of the provisions of sections 2296 et seq. of the General Code.

COLUMBUS, OHIO, October 4, 1917.

HON. J. W. WATTS, *Prosecuting Attorney, Hillsboro, Ohio.*

DEAR SIR:—I have your communication of August 4, 1917, which reads as follows:

> "Hon. Edward C. Turner, in opinion No. 1279, rendered to Hon. E. E. Lindsay, prosecuting attorney, New Philadelphia, Ohio, on February 16, 1916, holds that under provision of sections 3370 and 7464 G. C. it is the

duty of township trustees to maintain and to keep in repair bridges and culverts on township roads.

In one of the townships of this, Highland county, the township trustees are desirous of repairing and rebuilding certain bridges and culverts on township roads but have no money in the bridge fund. They have plenty of money in the general fund as that fund has lately been replenished by the collection of certain sums paid in as collateral inheritance taxes.

What these trustees are anxious to know is as to whether there is any authority of law by which they can make repairs to and rebuild culverts and bridges and pay for the same from the general fund without going to the expense of applying to the common pleas court, under section 2296 G. C., for authority to transfer the necessary funds from the general fund to the bridge fund?"

The question you ask in your communication is as to whether the township trustees may transfer money from the general township fund to the bridge fund without the necessity of following the provisions of sections 2296 et seq. of the General Code.

Section 2296 G. C. reads as follows:

"The county commissioners, township trustees, the board of education of a school district, or the council, or other board having the legislative power of a municipality, may transfer public funds, except the proceeds or balances of special levies, loans or bond issues, under their supervision, from one fund to another, or to a new fund created under their respective supervision, in the manner hereafter provided, which shall be in addition to all other procedure now provided by law."

It will be noted that this section provides that the method therein set out shall be in addition to all other methods provided by law. In answering your question it will be necessary for us to notice the provisions of a number of sections of the White-Mulcahy act, which became effective on June 28, 1917.

Section 3373 G. C., as found in said act, provides, among other things:

"Township trustees are hereby authorized to purchase or lease such machinery and tools as may be deemed necessary for use in maintaining and repairing roads and culverts within the township. They shall have the power to purchase such material and to employ such labor and teams as may be necessary for said purpose, or they may authorize the purchase or employment of the same by one of their number or by the township highway superintendent at a price to be fixed by the township trustees. All payments on account of machinery, tools, material, labor and teams shall be made from the township road fund as provided by law."

It will be noted under the above provisions that the township trustees have authority to maintain and repair the township roads, together with culverts of the township; but there is nothing whatever said as to bridges.

It is further to be noted in this provision that the expense of maintaining and repairing the roads and *culverts* of the township is to be paid out of the township road fund. With this in mind, let us determine what provisions are made for a township road fund.

Section 3298-15d G. C. (107 O. L. 79), in the same act, provides among other things as follows:

> "For the purpose of providing by taxation a fund for the payment of the township's proportion of the compensation, damages, costs and expenses of constructing, reconstructing, resurfacing or improving roads under the provisions of section 3298-1 to 3298-15n inclusive of the General Code and for the purpose of maintaining, repairing or dragging any public road, or roads, or part thereof, under their jurisdiction in the manner provided in sections 3370 to 3376 inclusive of the General Code, the board of trustees of any township is hereby authorized to levy annually a tax not exceeding three mills upon each dollar of the taxable property of said township."

To the same effect are the provisions of section 3298-18 G. C. (107 O. L. 82).

From the provisions of these sections it is evident that it was the intention of the legislature that the funds necessary for the maintenance and repair of the township roads and culverts should be provided by the levy of a tax each year. From your request it is apparent that the taxes levied by the township trustees was not sufficient to take care of the matter of constructing and improving the roads of the township and also the maintenance and repair of the roads therein. But there is no other provision made to provide the funds to take care of the maintenance and repair of the roads coming under the jurisdiction of the township trustees; hence there is only one remedy left and that is, to resort to the provisions of sections 2296 et seq. G. C., viz., to transfer money from the general township fund to the township road fund. You suggest in your communication the township bridge fund, but under the above act provision is made for a township road fund from which the necessary cost and expense of the repair and maintenance of the roads of the township must be paid, as well as the cost and expense of the maintenance and repair of the culverts within the township.

Therefore, answering your question specifically, it is my opinion that if the levy made under the provisions of section 3298-15d G. C. does not provide sufficient funds to enable the township trustees to repair and maintain the culverts and highways of the township, as well as to construct and improve township roads, the only remedy is to transfer money from some other fund to the township road fund under the provisions of sections 2296 et seq. G. C.

I have discussed at some length, in another opinion rendered by me recently to Hon. Joseph T. Micklethwait, prosecuting attorney, Portsmouth, Ohio (No. 668), the question as to the jurisdiction of the county commissioners and township trustees in the construction and repairing of bridges located on township and county roads, and am enclosing a copy of same for your consideration.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

685.

RIGHT OF WAY—FROM STATE TO HOCKING POWER COMPANY.

COLUMBUS, OHIO, October 4, 1917.

Ohio Board of Administration, Columbus, Ohio.

GENTLEMEN:—Under date of September 28th Hon. James P. Wood, Jr., of Athens, Ohio, presented to me the enclosed grant of right of way from the state to the Hocking Power Company, which is submitted in lieu of the one which was submitted to me on August 1, 1917, and which was commented upon in opinion No. 561, dated August 27, 1917, addressed to your board.

The grant in its present form has complied with all the suggestions and seems to be in all respects sufficient and in compliance with the act of the legislature referred to in the former opinion, and is therefore accordingly approved as to form.

In its present form, however, there is no consideration set out for said land, nor is there any execution thereof by your board.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

686.

SINKING FUND TRUSTEES—WHEN SAID OFFICIALS MAY ACCEPT SURRENDER OF COUPON BONDS AND ISSUE REGISTERED BONDS THEREFOR.

Sections 3928, 3929 and 3930 General Code, authorizing the trustees of the sinking fund of the municipality under certain conditions to accept a surrender of the coupon bonds, issued by it, made by the holder thereof and issue to the to the holder thereof registered bond or bonds of the municipality properly signed and sealed in place thereof, do not authorize such sinking fund trustees to accept a surrender of such registered bond or bonds upon the sale and transfer thereof and issue to the holder of such registered bond or bonds so sold and transferred new registered bond or bonds in place of the registered bond or bonds so sold and transferred.

COLUMBUS, OHIO, October 4, 1917.

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

GENTLEMEN:—I am in receipt of a letter from you with which you enclose a communication addressed to you by Mr. F. R. Hogue, city solicitor of Ashtabula, Ohio, and with respect to which you ask my opinion. Mr. Hogue's communication is as follows:

> "March 19, 1910, A., being the owner and holder of coupon bonds, numbers 891, 892, 893, 894 and 895 in the sum of $1,000.00, each maturing October 1, 1920, theretofore duly issued by the city of Ashtabula for the improvement of Ashtabula creek, made application to have said bonds

cancelled and a registered bond in the sum of $5,000.00 issued in place thereof, under the provisions of section 3928 et seq. of the General Code, and a registered bond No. 1 in the sum of $5,000.00 was duly issued and the coupon bonds cancelled. A has sold said registered bond No. 1 to B, and B now makes application to have said registered bond No. 1 cancelled and a new registered bond with a new number issued in the name of B.

QUERY—Is there any authority in the sinking fund commission or any other officer or officers of the city to cancel said registered bond No. 1 and issue a new registered bond in place thereof, or should bond No. 1 be simply transferred on the bond register to the name of B?

The city is willing to accommodate to B if it can be done legally. An early reply is desired as I have instructed the auditor to hold up this transfer until I hear from you."

I have been unable to find any statutory provisions reflecting upon the question made by Mr. Hogue other than those noted by him, to wit: Sections 3928, 3929 and 3930 of the General Code, which sections read as follows:

"Sec. 3928. On demand of the owner or holder of any of its coupon bonds, a municipal corporation may issue instead thereof a registered bond, or bonds, of the corporation not exceeding in amount the coupon bonds offered in exchange. The registered bond or bonds shall be signed and sealed as other municipal bonds are signed and sealed, and bear the same rate of interest, be payable both principal and interest at the same time and place, as the coupon bonds for which the exchange is made, and shall be of such denomination as the holder of the coupon bonds may elect."

"Sec. 3929. When due, the interest and principal of such registered bonds shall be paid only to the person, corporation or firm, appearing by the records of the municipal corporation to be the owner thereof, or order. Such registered bonds may be transferred on such record by the owner in person or by a person authorized so to do by power of attorney duly executed. The exchange and registration here required shall be transacted by the trustees of the sinking fund at their business office where a registry shall be kept for that purpose which shall show the date, series, denomination and owner of such registered bonds, and the number and series of the coupon bond for which they were exchanged."

"3930. No registered bonds shall be issued by a municipal corporation until the bonds and coupons offered in exchange shall have been cancelled or destroyed. The trustees of the sinking fund may demand of the holder of the coupon bonds a reasonable fee as compensation for the expense of making such exchange."

Briefly stated these sections, so far as concerns the question at hand, authorize a municipal corporation to accept a surrender of its coupon bonds and upon cancellation and destruction thereof issue to the holder of the same a registered bond or bonds of the corporation not exceeding in amount the coupon bonds offered in exchange; and with respect to the authentication and record of the sale and transfer of such registered bonds it is provided that the municipality shall keep a record or registry of such registered bonds that the same may be transferred on such record by the owner in person or by a person authorized to do so by power of attorney duly executed, and it is further provided that when due the interest and principal of such registered bonds shall be paid only to the

person, corporation or firm appearing by the record of the municipality to be the owner thereof, or order.

The method prescribed by these sections with reference to the authentication and record on the sale and transfer of registered bonds seems to be in accordance with the procedure generally recognized as appropriate in the commercial world so far as such procedure has been the subject of judicial consideration.

In the case of Benwell v. Newark, 55 N. J. Equity, 262, Vice-Chancellor Pitney, speaking of the essential qualities of the different kinds of municipal bonds, defines the characteristics of a registered bond as follows:

> "A registered bond is one which is a simple certificate of indebtedness, in favor of a particular individual, payable at a day named, with interest at days named. The name of the payee is entered on the books of the corporation debtor—municipal or private—as the registered owner, or, if it be a government bond, on the register of the government. On the days when, by the terms of the bond or certificate of indebtedness, the interest falls due, it is paid directly to the registered creditor, without presentation of the bond, usually by check drawn to his order and sent by mail, or, if he so demands, by cash in hand, but by long-settled course of practise the payment is made by check to the order of the creditor.
>
> These bonds or certificates of indebtedness are not negotiable, and can be transferred only by an entry on the books of the debtor corporation, with a proper endorsement on the bond itself, or by the issue of a new certificate if it be a government indebtedness. The peculiar value of this class of securities lies in the fact that it is not necessary to produce them to the debtor at each time that the interest is due, and the danger of loss by robbery or fire is entirely removed. As they are usually made to run for a long term of years, so that, as in the present instance, the amount of interest in the aggregate is really greater than the principal, this peculiarity is of great importance."

The question made in the communication of Mr. Hogue, above quoted, is with respect to the right of a purchaser of a registered bond of a municipality in this state to surrender to the municipality the registered bond purchased by him and receive in exchange therefor a new registered bond of the same denomination, interest and maturity, made out in his own name, or more accurately, the question is with respect to the power of the municipality to accept a surrender of a registered bond so purchased and issue a new bond to the purchaser in his own name.

In the consideration of this question, which is one essentially involving a consideration of the powers of a municipal corporation, we are required to recognize the principal that the municipal corporation has only such legislative power as is expressly granted or clearly implied.

> Bloom v. Xenia, 32 O. S. 461.
> Townsend v. Circleville, 78 O. S. 133.
> Ohio Electric Ry. v. Ottawa, 85 O. S. 229, 239.

Or, as has been more accurately stated, perhaps,

> "Municipal corporations, in their public capacity, possess such powers and such only, as are expressly granted by statute, and such as may be implied as essential to carry into effect those which are expressly granted."
> (Ravenna v. Pennsylvania Co., 45 O. S. 118.)

It is hardly necessary to say that this principle applies in its integrity with respect to the power of municipal corporations to issue bonds.

> Cincinnati National Bank v. City of Cincinnati, 13 C. C. N. S. 14, 15.
> Commissioners v. State, 78 O. S. 287, 302.

With respect to the question at hand, it cannot be said that the power of a municipal corporation to issue a new registered bond in exchange for a previous one covering the same issue is a power to be implied as one necessary to carry out and make effective the express power with respect to transfers and the registration thereof of such bonds provided for in the section above quoted. If the power of a municipal corporation to issue a new registered bond in exchange for a registered bond issued by it under the provisions of the above quoted section exists at all it must be by virtue of some implied power independent of the express statutory provision above noted.

Beach, in his work on "Public Corporations," in Vol. II, at section 928, says:

> "When the municipality has the power to issue bonds and they have been issued, it may substitute other bonds of the same nature in their stead —may change the form though not the substance of its liability."

No authorities are cited by Mr. Beach in support of this particular proposition. Some support in favor of the contention of implied authority in municipal corporations in matters of this kind is afforded by the case of Rogan v. Watertown, 30 Wis. 259, which was an action upon certain interest coupons. One of the counts in the action was on a coupon on a bond which was a re-issue in substitution for a prior bond of the same number and amount and corresponding in all particulars with the original bond, the original having been surrendered and cancelled under authority of the resolution of the common council authorizing the mayor and city clerk to cancel any of the bonds of the issue and to execute in lieu of such cancelled bonds duplicates of the same number and amount, and payable at the same time. It was objected to this bond that the power of the mayor and council were exhausted when the bonds were issued, and that the proceedings for cancellation and re-issue were without authority. As to this the court said:

> "By the issue and delivery of the bonds a debt had been created by the city, and with respect to such debt and the securities given, it was competent for the city, as for any other debtor, to enter into negotiations and to cancel or exchange its bonds without special legislative authority."

In the case of Hyde v. Ewert, 16 S. Dakota 133,the court says:

> "Where a municipal corporation has created a valid debt against itself, it has power, like any other debtor, to enter into negotiations concerning such debt and to reduce its amount by the payment or exchange of other bonds without any special grant of legislative authority."

In view of the strict rule obtaining in this state with respect to the construction of the powers of municipal corporations, I am not disposed to extend the doctrine recognized in the authority just cited to the question here presented; and moreover I am constrained to the view that if under any circumstance it can be said that a municipal corporation in this state has the implied power to issue

registered bonds in exchange for previous registered bonds issued by it, such implied power is one that can be exercised only by somebody representing the corporation as a whole, such as the council or other corresponding body of the municipality.

Looking to the statutory provisions here under consideration, it appears that they authorize the municipal corporation acting through its trustees of the sinking fund to issue a registered bond or bonds, signed and sealed by the proper officers of the municipality in exchange for coupon bonds previously issued by it. After such registered bond or bonds are issued the only authority granted to any officer or officers of the municipality is that granted by the sections above noted to the trustees of the sinking fund, who are required to keep a record or registry of such registered bonds, and to note thereon all subsequent transfers of such bonds on the sale or transfer thereof.

I am inclined to the view that the power of a municipality to issue to the purchaser of a registered bond a new bond of this character cannot be sustained without reading into the statutory provisions above noted provisions that are not there, either in terms or by necessary implication. I am therefore of the opinion that the question presented in the communication of Mr. Hogue to you should be answered in the negative.

In reaching the above conclusion I assume that the municipality has not attempted to confer any additional authority upon the trustees of the sinking fund with respect to the question at hand under the provisions of section 4519 General Code, and for this reason I do not here consider the possible force and effect of the provisions of this section.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

687.

BONDS—ISSUED UNDER SECTION 1223 G. C. TO MATURE IN TEN YEARS—BY RESOLUTION DATED MAY 18, 1917—NOT BINDING OBLIGATIONS AGAINST COUNTY—DISAPPROVAL—BOND ISSUE—SANDUSKY COUNTY.

Bonds issued under section 1223 *G. C. and under a resolution of the county commissioners dated May* 18, 1917, *to mature in ten years, would not be a legal and binding obligation against the county, for the reason that section* 1223 *G. C., as it stood at the time the resolution was adopted, provided that bonds issued thereunder must mature in five years.*

COLUMBUS, OHIO, October 4, 1917.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

IN RE: Bond issue of $32,000.00 *by the county commissioners of Sandusky county, Ohio, for the improvement of intercounty highway No.* 281, *section "O."*

I have carefully examined the transcript of the proceedings of the county commissioners leading up to the above bond issue, and find that all the steps taken

by the county commissioners are regular. Therefore, so far as the different proceedings had in reference to this bond issue are concerned, I am of the opinion that the county commissioners would have full authority in law to issue said bonds and that they would be a legal and binding obligation against the said county.

Further, the transcript shows that the total amount of such bonds now outstanding does not exceed one per cent of the tax duplicate of the county.

However, there is one matter to which I desire to call attention, namely, that the resolution, in which the county commissioners resolved it was necessary and advisable to issue said bonds, was adopted on May 18, 1917. Said resolution provides that the bonds shall be issued in denominations of five hundred dollars each, shall be dated September 15, 1917, and the last of said bonds shall mature on September 15, 1927, thus making the said issue to mature in ten years from the date of their issue. The question arises here as to whether this is in accordance with law.

Section 1223 of the Cass highway act provided that the bonds should be issued:

> "In such amounts as to mature in not more than five years after their issue, as the county commissioners shall determine."

This section was amended in the White-Mulcahy act to read as follows:

> Such bonds shall be issued "in such amounts, and to mature in not more than ten years after their issue, as the county commissioners shall determine."

The White-Mulcahy act was filed in the office of the secretary of state on March 29, 1917, and in accordance with the provisions of the constitution in reference to the referendum this law was not effective until ninety days after its being filed in the office of the secretary of state, which date was June 28, 1917.

The question is, which one of these provisions should control in the matter of this bond issue? If the provisions found in the Cass highway act should control, the resolution of the county commissioners relative to this bond issue is not in accordance with law. If the provisions of the White-Mulcahy act control, then the resolution is in accordance with law.

The resolution, as before stated, was adopted on May 18, 1917, but it provides that the bonds shall be dated and issued as of the date September 15, 1917; that is, of a date after the time at which the said White-Mulcahy act became effective. At the time the resolution setting forth the necessity for the issuing of bonds and providing for the issuing thereof was adopted, the White-Mulcahy act had been passed by the general assembly, signed by the governor and filed with the secretary of state, but it was not yet effective.

While the resolution provides that the bonds shall be issued as of date September 15, 1917, yet it is my opinion that the validity of these bonds rests entirely upon the question as to whether at the time the resolution was adopted there was any provision of law which warranted the county commissioners in adopting a resolution to the effect that bonds should be issued, all of which were not to mature short of ten years.

Section 3 of the resolution itself provides that:

> "Said bonds shall be signed and executed as required by law to be signed and executed, they shall state therein the purpose for which they are issued, that they are issued under authority of the laws of Ohio and

especially under Section 1223 of the General Code of Ohio *and of this resolution.* * * *"

At the time the resolution was adopted, there was no provision of law authorizing the county commissioners to issue bonds, the maturity of which should extend beyond a period of five years. For this reason it is my opinion that the resolution of the county commissioners that bonds should be issued, the maturity of which should extend beyond the period of five years, would have no force or effect in law, because there was no warrant in law for the adoption of such a resolution.

If the resolution so adopted by the county commissioners was not legal, it is my opinion that the bonds issued under and by virtue of the resolution so adopted would not be a legal and binding obligation against the county, even though at the time the bonds were dated and issued there would be authority in law for issuing them to cover a period of ten years.

For the reasons hereinabove set forth, I am of the opinion that you would not be authorized in purchasing the said bonds so issued, but inasmuch as there is no disposition upon my part to interfere with the sale of these bonds by the said county, it might be well for your department to rescind the resolution to purchase generally, without giving any particular reason therefor.

Very truly yours,
JOSEPH McGHEE,
Attorney-General.

688.

APPROVAL—CONTRACT BETWEEN BOARD OF TRUSTEES, OHIO SOLDIERS' AND SAILORS' ORPHANS' HOME, XENIA, OHIO.

COLUMBUS, OHIO, October 4, 1917.

Board of Trustees, Ohio Soldiers' and Sailors' Orphans' Home, Xenia, Ohio.

GENTLEMEN:—Hon. Howard Mannington, a member of your board of trustees, has presented to me for approval the contract entered into between your board and The Scioto Valley Supply Company, of Columbus, Ohio, on the 21st day of August, 1917, for furnishing black steel pipe, for the sum of $6,300.00, together with the bond securing the same.

I have examined said contract and bond and find the same to be in compliance with law, and have this day approved the same and filed the same, in the office of the auditor of state, said auditor having certified that there is money available to cover the amount of said contract.

Very truly yours,
JOSEPH McGHEE,
Attorney-General.

689.

ABSTRACT OF TITLE—SUPPLEMENTAL TO OPINION NO. 667—CHARLES M. LUDMAN PROPERTY.

COLUMBUS, OHIO, October 4, 1917.

HON. CARL E. STEEB, *Secretary of Board of Trustees, Ohio State University, Columbus, Ohio.*

DEAR SIR:—Since rendering you Opinion No. 667, under date of September 28, 1917, relative to the abstract of title covering the land in the city of Columbus deeded by Charles M. Ludman and Anna B. Ludman, his wife, to the state of Ohio, I have received information that the abstract submitted was incorrect, in this, to wit: That the special assessments noted therein were not proper charges against the land in question.

The abstract has been resubmitted by the attorney for the grantors in a corrected form, showing no special assessments against said property. Therefore, I am of the opinion that the deed formerly submitted will convey a clear title to the state of Ohio, with the exception of the taxes for the year 1917.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

690.

ELECTION—UPON BOND ISSUE—TO FUND EXISTING DEFICIENCIES OF CORPORATIONS AND SCHOOL DISTRICTS—HOW NOTICE THEREOF SHOULD BE GIVEN.

The notice of elections provided for in section 3 of the so-called Terrell act (107 O. L. 575-578), authorizing municipal corporations and school districts to fund existing deficiencies by the issue and sale of bonds on a vote of the electors, should be given by the municipal corporation or school district calling the election rather than by the deputy state supervisors and inspectors of elections.

COLUMBUS, OHIO, October 5, 1917.

HON. WILLIAM D. FULTON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I am in receipt of a communication from you under date of September 24, 1917, in which you ask my opinion as to whether it is the duty of the political subdivisions or that of the deputy state supervisors and inspectors of elections to give the notices of elections provided in the Terrell act (107 O. L. 575-578), authorizing municipal corporations and school districts to fund its existing deficiencies by the issue and sale of bonds on a vote of the electors of such political subdivision.

Section 1 of this act authorizes the council or other legislative body of a municipal corporation and the board of education of any school district to submit to a vote of the electors of such municipal corporation or school district at the regular election of municipal and school officers in the year 1917 the question of issuing bonds for the purpose of funding the existing deficiency of the municipality or of the school district, as such deficiency is therein defined.

This section further provides that such council, other body or board of edu-

cation by resolution passed not later than the second Monday in July, 1917, may direct the city auditor, village clerk, or other municipal accounting officer and the board of sinking fund trustees or other municipal sinking fund authorities, or the clerk of the board of education and the board of commissioners of the sinking fund of the school district, if there be such board, to make up a financial statement of such municipality or school district as of the first day of July, 1917. The officers so directed shall immediately examine the records, books and accounts of their respective offices, and shall make up a financial statement as therein provided and file the same in the office of the clerk of the council or other similar municipal officer or with the clerk of the board of education not later than the second Monday of August, 1917. If they find that a deficiency exists, as defined in the act, in any funds under their respective supervision, they shall certify the amount thereof, together with the various funds affected, and the deficiency in cash, under oath, on such statement.

Sections 2 and 3 of said act provide as follows:

> "Section 2. Thereupon, such council, other body or board of education, by resolution passed by an affirmative vote of a majority of all the members elected or appointed thereto not later than the first Monday in October, 1917, may declare it necessary to issue and sell bonds of the corporation or school district for the purpose of funding the existing deficiency of such corporation or school district in the amount certified as the same is hereinafter defined. Such resolution shall go into immediate effect, without publication and without being subject to a referendum of the electors.
>
> Section 3. A copy of such resolution shall be certified to the deputy state supervisors of elections of the county or counties in which the corporation or district is situated. The deputy state supervisors shall prepare the ballots and make the necessary arrangements for the submission of such question to the electors of such corporation or district at said election. The result of the election shall be certified and canvassed in like manner as regular elections in such municipal corporations and school districts for the election of officers thereof. Twenty days' notice of the election shall be given in one or more newspapers printed in the municipality or district once a week for four consecutive weeks prior thereto, stating the purpose for which the bonds are to be issued, the amount of such bonds, and the time and place of holding the election. If no newspaper is printed therein, the notice shall be posted in five conspicuous places at least twenty days prior to the election and published once a week for four consecutive weeks prior thereto in a newspaper of general circulation in the municipal corporation or school district. The ballots used at said election shall state briefly the proposition to be voted on, indicating the name of the municipal corporation or school district, the amount of bonds to be issued, and further shall be in form as follows:
>
> 'For the issue of deficiency bonds. Yes.
> 'For the issue of deficiency bonds. No.'"

Looking to the provisions of section 3 of the act above quoted it will be noted that the section does not specifically provide who is to give the notice of election therein provided for, and this circumstance gives rise to the question made in your communication.

It may be stated as a general principle that the calling of an election contemplates the giving of the notices thereof in some manner, and it is the usual prac-

tice to direct by statutory provision both the manner and the time of giving notice of all elections, regular as well as special elections, upon a particular question or proposition. The authorities, however, recognize a distinction in the necessity for notices in the two classes of elections and this distinction has been reflected in the attitude of courts in passing upon questions arising from a failure to comply substantially with statutory provisions with respect to notices of the two kinds of elections herein. As to general elections it seems to be established that the fixing of the time for the election by statutory provisions is in itself notice to which all electors must heed, and that as a consequence where an officer is charged with the duty of giving notice of such election or with the duty of issuing proclamations thereof, his failure to perform his duty will not invalidate the election. Where, however, the time for holding an election is not prescribed by law, but is fixed by the officer vested with authority to call it, the voters cannot be expected to have or take notice thereof unless notice of such election be given, and therefore a statutory provision for such notice is to be considered as mandatory and its substantial performance essential to the validity of the elections and this is probably the rule applying when the special election is held at the same time as a general election, although this proposition it seems is not entirely settled. However, it seems that if notice of special elections issue from a proper source provided by law and affords the requisite intelligence, and has been posted in public places or has been published in newspapers for the designated time, it is immaterial who posted such notice or procured the newspaper publication of the same.

See *State v. Sengstacken,* 61 Oregon, 455.

And it has been likewise held that where notice of an election is actually published or posted in the manner specified by law for that purpose an election will not be held invalid because the direction to publish did not emanate from the proper authority, it appearing in such cases to be the actual giving of the notice which is the essential requirement.

Demaree v. Johnson, 150 Ind. 420, 427;
Hart v. Scott, 50 N. J. L. 585;
Ruling Case Law, Vol. 9, page 993.

Applying the foregoing principles to the question submitted by you, it is probable that inasmuch as the statutes do not specifically state who is to give the notice of election provided for in this act, the same might conceivably be given by either the political subdivision calling the election or by the deputy supervisors and inspectors of elections without impairing the validity of the election held pursuant to such notice.

I am inclined to the view, however, that it was the intention of the legislature in the enactment of section 3 of this act to impose the duty to give such notices upon the political subdivision calling the election pursuant to the provisions of the act. The provisions of section 3 above quoted, with respect to the manner in which such election should be conducted and notice thereof given to the electors, were obviously taken from the provisions of section 5649-5a General Code, the same being a section of the Smith one per cent law so-called, authorizing the electors of the political subdivision to vote on a maximum tax rate in excess of those otherwise provided for by said law. It is likewise quite apparent that the provisions in section 5649-5a General Code with respect to the conduct of elections therein provided for and with respect to the manner in which notice thereof should be given were in turn borrowed from the provisions of the Longworth act, so-called (sec-

tions 3944, 3945 and 3946 General Code), authorizing municipal corporations to issue bonds on a vote of the electors in excess of the limitations otherwise prescribed by said law.

In each of the three cases above noted the statutes specifically provide that notice of election shall be given and directs the manner thereof, but in neither case designates the authority who is to give such notice.

The above noted provisions of the Longworth act have been a part of the statutory law of this state for many years, while the provisions of the Smith one per cent law have been in the statutes for about seven years. As far as I have been able to ascertain it has been the uniform practice under both the Smith and the Longworth laws for the political subdivisions calling the election to give notice of such election by the proper officers. This practical construction of the provisions of the Smith law and of the Longworth law with respect to the notice of elections provided for in said respective laws, while not absolutely controlling, is deserving of great consideration and should be regarded as decisive with respect to the question as to who is to give the notices of the elections provided for in the Smith and Longworth laws, inasmuch as in both cases the duty enjoined is not plain and specific.

State v. Smith, 71 O. S. 13, 40.
State of Ohio ex rel. v. Hirstius et al. 177, 181.

It is obvious that the provisions of section 3 of the Terrell act should receive the same construction with respect to the question as to who is to give the notice of election therein provided for, and I am, therefore, of the opinion that such notice should be given by the municipality or the board of education calling the election rather than by the deputy state supervisors and inspectors of elections.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

691.

TOWNSHIP TRUSTEES—NO AUTHORITY TO LIMIT WEIGHT OF LOADED TRUCK USED IN ROAD BUILDING IN SPECIFICATIONS FOR HIGHWAY CONSRUCTION—NOR REJECT BID BECAUSE BIDDER WILL NOT AGREE TO LIMIT WEIGHT OF SAID TRUCK.

1. *Township trustees have no authority to include in their specifications for the construction of highways a limitation upon the weight of the loaded truck which the contractor might use in constructing the highway, other than those limitations set out in section 7246, 7247 and 7248 G. C.* (107 *O. L.* 139).

2. *Township trustees would not be authorized in rejecting a bid for the construction of a public highway, simply for the reason that the bidder would not voluntarily agree to limit his loaded trucks, used in the construction of the highway, to a weight less than that set out in said sections.*

COLUMBUS, OHIO, October 5, 1917.

HON. CHESTER PENDLETON, *Prosecuting Attorney, Findlay, Ohio.*

DEAR SIR:—I have your communication in which you request my opinion relative to a matter therein set out, as follows:

"My attention has been called to an opinion from your office, No. 382,

under date of June 16, 1917, in which you hold that it would not be legal for the county commissioners to insert, either in their plans and specifications or in the contracts for improvement of county roads, alternative provisions, one providing that the material for the construction of the road should be hauled by teams, and the other providing that it be hauled by trucks.

Several of the boards of township trustees have made objections to me because of the excessive heavy trucks, weighing about twelve tons when loaded and engaged in the building of public roads, for the reason that it is their opinion that these heavy trucks destroy two roads while they are building one. In many cases the loaded trucks are heavier than the road rollers with which the roads are constructed. The situation suggests the following questions:

First. Would it be legal for the township trustees to include in their specifications a limitation upon the weight of the loaded truck that the road builder is permitted to use on the work?

Second. Would it be legal for the township trustees, acting under section 6945 G. C., to reject a bid as not being the lowest and best bid (1) when the lowest bidder refuses to voluntarily agree to limit his loaded trucks to a reasonable weight; (2) when they have reason to believe that the lowest bidder will use a truck of such excessive weight as to have a destructive effect upon the highways?"

I note you are familiar with Opinion No. 382, rendered by me under date of June 16, 1917; hence, I shall not consider the reasoning and conclusions of said opinion, nor shall I enclose a copy for your consideration. But I will go directly to the statutes which relate to the matter that has been presented to you by a number of your township trustees.

Section 7246 G. C. (107 O. L. 139) provides:

"No traction engine, trailer, wagon, truck, steam roller, automobile truck or other power vehicle, whether propelled by muscular or motor power, weighing in excess of twelve tons, including weight of vehicle, object or contrivance and load, shall be operated over and upon the improved public streets, highways, bridges or culverts within the state, except as hereinafter provided. * * * No object shall be moved over or upon such streets, highways, bridges or culverts upon wheels, rollers or otherwise, except as hereinafter provided, in excess of a total weight of twelve tons including weight of vehicle, object or contrivance and load."

This section limits generally the weight of a truck, automoblie truck or other power vehicle to twelve tons, including the weight of the vehicle, which may be operated over or upon the improved public streets, highways, bridges or culverts within the state.

Section 7247 G. C. (107 O. L. 140) gives the county surveyor the authority to grant permission to move vehicles mentioned in section 7246, supra, over the improved public highways, of a heavier weight than twelve tons, under such conditions and restrictions as he deems necessary.

Section 7248 G. C. (107 O. L. 140) makes provision to the effect that the weight which a vehicle may carry over the improved public highways of the state shall be in proportion to the width of the tire used on the wheels of said vehicles.

Section 7249 G. C. (107 O. L. 140) limits the speed at which different vehicles

may travel over the improved public highways of the state, the speed to depend upon the weight of the vehicle and the load which it carries.

With these four sections in mind, we will note the provisions of the section which I feel gives an answer to the question proposed by you.

Section 7250 G. C. (107 O. L. 140) reads as follows:

> "The weights of loads prescribed and the rates of speed mentioned in sections 7246 to 7249 inclusive of the General Code shall not be decreased or prohibited by any ordinance, resolution, rule or regulation of a municipal corporation, board of county commissioners, board of township trustees or other public authority."

It will be noted in this section that the weights of loads prescribed in sections 7246, 7247 and 7248, supra, shall not be decreased or prohibited by any ordinance, resolution, *rule or regulation* of a *board of township trustees* or any other public authority.

Your question is as to whether the township trustees would be authorized in including in their specifications for the improvement of public highways a limitation upon the weight of a loaded truck, which the road builder might use in the construction of the highway, and whether the township trustees could reject a bid as not being the lowest and best bid, provided the bidder would not consent to limit his loaded trucks to a reasonable weight.

While the object sought to be accomplished in such a rule or regulation is a most worthy one, namely, the prevention of destruction of the improved public highways, yet it is my opinion that such a provision cannot be made in the specifications for the construction of a public highway; neither would the township trustees be authorized in compelling a bidder to agree to limit his loaded trucks to some weight that the township trustees might decide to be reasonable. There is nothing in the law that makes provision for such a condition; hence, the only way it could be done would be for the township trustees to adopt a rule or regulation to the effect that they would not let a contract to any one who would not voluntarily agree to limit the loads hauled by him to a reasonable weight. But it is to be noted that section 7250 G. C., supra, provides that the township trustees, among other public officials, shall not adopt any rule or regulation which will in any way decrease the weights of loads prescribed in the above noted sections. To be sure, the contractor would be compelled to obey the provisions set out in these sections, just as well as any one else, and he could not travel over the improved public highways of the state with a heavier load than that therein designated. It is my opinion that further than this the township trustees could not go.

Hence, answering you specifically, it is my opinion that:

1. Township trustees cannot include in their specifications a limitation upon the weight of the loaded truck that a contractor will use in the construction of a highway, further than that which is provided in sections 7246, 7247 and 7248, supra.

2. Township trustees would not be authorized in refusing to let a contract, upon the ground that the bidder would not agree to limit loads which he would haul to a weight less than that prescribed in said sections 7246, 7247 and 7248 G. C.

In passing I might suggest that in your request you inadvertently mention section 6945 G. C., which relates to the letting of contracts by county commissioners, instead of section 3298-15f G. C. (107 O. L. 80) which covers the letting of contracts by township trustees.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

692

BONDS—MAY BE ISSUED UNDER SECTION 6929 G. C. ONLY FOR PURPOSE OF PAYING COST AND EXPENSE OF ROAD IMPROVEMENTS BY COUNTY COMMISSIONERS—DISAPPROVAL—BOND ISSUE—CUYAHOGA COUNTY.

Bonds may be legally issued under authority of section 6929 General Code only for the purpose of paying the cost and expense of road improvements conducted by the board of county commissioners, and, therefore, bonds may not be issued under the authority of this section for the purpose of paying the cost and expense of an intercounty highway improvement conducted by the state highway commissioner.

COLUMBUS, OHIO, October 10, 1917.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

RE: Bonds of Cuyahoga county, Ohio, in the sums of $14,500 and $50,845, to cover the shares of abutting property owners and of said county respectively in the improvement of Som Center road No. 6, improvement. (Chagrin Falls—Cuyahoga Falls intercounty highway No. 91.)

I am herewith returning without approval transcript of proceedings of the board of county commissioners of Cuyahoga county, Ohio, and of the other officers therein designated relating to the above bond issues. This improvement was initiated by the filing of a petition signed by 51 per cent of the property owners to be assessed for the cost and expense of the improvement, and for the most part said transcript indicates proceedings by the board of county commissioners of said county for the improvement of the road in question, under the provisions of chapter 6 of the Cass highway law relating to the matter of road construction and improvements by the county commissioners, and the bond forms covering said proposed issues, which are made a part of the transcript, specifically recite that said bonds are issued under the provisions of section 6929 General Code, enacted as part of chapter 6 of the Cass highway law.

In a resolution of the board of county commissioners under date of August 2, 1916, the cost and expense of said improvement is apportioned in the manner indicated by the following language:

"Be it further resolved, that the county of Cuyahoga shall assume and pay $74,844.58, as its portion of the cost and expense of said improvement, of which amount the state has agreed to pay $24,000. That the trustees of Solon township shall pay $10,836 as its portion of the cost and expense of said improvement, and that the property fronting and abutting thereon shall pay $14,450, as their portion of the cost and expense of said improvement."

Aside from the amount which, according to this resolution, is to be contributed by the state toward the cost and expense of the improvement, the cost and expense thereof is apportioned according to the provisions of paragraph 3 of section 6919 General Code, it appearing from the transcript that the sum of $10,836.00 apportioned to Solon township was agreed upon by the trustees of said township and

the board of county commissioners as the amount to be paid by said township toward the cost and expense of the improvement.

In answer to a communication from me with respect to the purpose and authority of the contemplated action of the state in contributing $24,000.00 towards the cost and expense of this improvement I was advised by the board of county commissioners of said county by letter written on their behalf by one of the assistants of the prosecuting attorney of said county, that it was the intention of the board of county commissioners to cover the amount of said bond issue—and I assume the amount to be paid by Solon township as well—into the county treasury there to be at the command of the state highway commissioner who, I am advised, is to conduct said improvement. The reason for the unusual procedure here adopted is stated in said communication above referred to as follows:

> "In explanation as to why provisions of the state highway law with reference to assessments were not followed from the inception of this improvement, it may be stated that in the opinion of the commissioners, benefits conferred upon the abutting property by this improvement are considerably in excess of the ten per cent which the state highway law permits to be assessed against abutting property, and in order that the proportion assessed upon the real estate abutting upon this improvement may be equitable in comparison with the assessment in this county on real estate abutting upon other similar improvements, the board in this improvement has proceeded to levy the assessment under the provisions of the county law."

Section 1214 General Code, the same being part of chapter 8 of the Cass law relating to the construction and improvement of roads by the state highway department, provides for the proportion of the cost and expense of constructing intercounty highways improved by the state highway commissioner under said chapter, and with respect to the amount to be assessed upon the owners of property benefited by said assessment, provides as follows:

> "Ten per cent of the cost and expense of the improvement, excepting therefrom the cost and expense of bridges and culverts, shall be a charge upon the property abutting on the improvement, provided the total amount assessed against any owner of abutting property shall not exceed thirty-three per cent of the valuation of such abutting property for the purposes of taxation."

The township trustees shall apportion the amount to be paid by the owners of abutting property according to the benefits accruing to the owners of land so located.

Assuming both bond issues to be under the authority of section 6929 General Code, I am quite clearly of the opinion that bonds may be issued under the authority of this section for the purpose of paying the cost and expense only of the road improvements conducted by the board of county commissioners, and that for this reason the board of county commissioners of Cuyahoga county was without authority to issue bonds under the authority of this section to pay any part of the cost and expense of an improvement to be conducted by the state highway commissioner; it appearing that with respect to improvements of intercounty highways conducted by the state highway commissioner special authority is granted to the board of county commissioners to issue bonds covering the shares of the cost and expense of such improvements to be paid by the county, township, and property

owners assessed, respectively. This authority is granted by the provisions of section 1223 General Code.

Taking the proceedings as a whole, I do not think it can be fairly said that this was an issue of bonds under section 1223 General Code, and if they were to be so considered it is clear that the $14,500.00 bond issue would have to be considered defective from that view-point for the reason that the assessments in anticipation of which said bonds are issued are illegal as being in excess of the amount permitted by statute, and being laid and certified by the board of county commissioners instead of township trustees, as required by the provisions of section 1214 General Code as said section read at the time said assessments were made and certified.

As before indicated, however, there is not enough in this transcript to support either of these issues as issued under authority of section 1223 General Code. Outside of the recitals contained in certain proceedings of the board of county commissioners there is nothing to show any application for state aid on the part of the county commissioners for the improvement of this road, nor any approval of such application by the state highway commissioner. Moreover, there is nothing in the transcript which indicates any right on the part of the county commissioners to issue bonds in the aggregate for a sum to exceed fifty per cent of the estimated cost of the improvement. In other words, there is nothing in the transcript to show that as to this improvement the state is not obliged on the approval of the application for state aid to pay fifty per cent of the cost of the improvement. The transcript leaves us in the dark on these questions.

However, I am considering these bond issues as the same evidently were considered by the board of county commissioners, to wit: As issues under the authority of section 6929 General Code, and I am disapproving said bond issues for the reasons above indicated, that I am of the opinion that the board of county commissioners has no authority to issue bonds under these sections for any other purpose than to pay for improvements conducted by it.

However, I would concede that lawyers might honestly disagree as to the legality of these bond issues, and for this reason I suggest that you rescind your previous resolution generally, providing for the purchase of these bonds, rather than upon the particular grounds of the illegality of the issues as found by this department, this to the end that county officials may not be embarrassed in offering said issue to other persons who may desire to purchase the same.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

694.

COUNTY SURVEYOR—MONEY PAID TO SAID OFFICIAL—FOR USE OF HIS OWN AUTOMOBILE—UPON VOUCHERS REPRESENTING THAT MACHINE HAD BEEN HIRED—MAY BE RECOVERED.

The county surveyor presented expense accounts to the county commissioners representing that he had paid certain sums daily for automobile hire to a certain garage owner when in fact he had not paid such garage owners anything for such hire, but had used his own machine and that of his daughter in his official work. HELD: That the money paid on such vouchers be recovered by the county in an action by the prosecuting attorney.

COLUMBUS, OHIO, October 15, 1917.

HON. JOHN L. CABLE, *Prosecuting Attorney, Lima, Ohio.*

DEAR SIR:—I have your letter of September 19, 1917, as follows:

"For more than a year last past, the former county surveyor or highway superintendent has been presenting his expense account as such for payment, a portion of one being as follows:

July 12—To auto hire (A. Bros.) Bucyrus, Elida and the Spencerville roads, with grading outfits $4 00

July 13—To auto hire (A. Bros.) Spencerville and the Delphos and the Bucyrus roads, 3½ hours 3 50

July 14—To auto hire (A. Bros.) St. Johns, Lima-Lafayette and the Bucyrus roads with grading outfits 4 00

July 16—To auto hire (A. Bros.) Spencerville and to the Star Iron Works 3 50

These expense accounts represent that the former surveyor had paid A. Bros. one dollar per hour for the use of A.'s machine, and it was so represented to the county commissioners and county auditor. No record was made in any statement presented to the county auditor that the surveyor had used his own car or the car of his daughter.

The real facts, however, are as follows: The above A. Bros. own a garage in this city. The former surveyor purchased a Cadillac automobile for himself and had one of the A. Brothers apply and obtain a state license for this car in Armstrong's name. The former county surveyor also kept another car in this garage, owned by his daughter.

His Cadillac automobile was used exclusively for county business. The A. Bros. made out two statements of expenses, one to the surveyor, representing that they had furnished their own automobile to the surveyor at one dollar per hour and the second, also to the county surveyor, for gasoline, oil, repairs and the expenses of a driver per hour. The surveyor would then charge the county one dollar per hour for the use of the machine and pay A. Bros. only for gasoline, oil, repairs, tires and time for the driver and the like, and keep the difference.

The surveyor would also use his daughter's machine and charge the county one dollar per hour for its use and he himself would drive it. For example, on the 12th, as above shown, the surveyor's car was used three hours and the daughter's car was used one hour; on the 13th the surveyor's

car was used two and one-half hours and the daughter's car one hour; the 14th the surveyor's car was used three hours and the daughter's car one hour; on the 16th, the same way. When a driver was furnished by A. Bros. he was used by the surveyor for field work when on the trip.

The former surveyor claims he has saved the county from fifty cents to one dollar by using his own car or that of his daughter.

I did not discover the above facts until a week ago and completed the investigation today. Neither the auditor nor the county commissioners knew that the surveyor was using his own car or that of his daughter, but had supposed, as shown by the bills, that the surveyor was renting the automobile from A. Bros.

I have instructed the auditor not to pay any pending expense accounts of the surveyor until hearing from you.

The total amount of charges during the last year has amounted to more than $600.00.

I call your attention to the fact that the Cass highway law, section 7181 General Code, provides:

'In addition thereto the county highway superintendent and his assistants when on official business shall be paid out of the county treasury their actual necessary traveling expenses, including livery, board and lodging.'

I also call your attention to the fact that the same section, as amended, under the White-Mulcahy law, specifically excludes the payment by the county of the traveling expenses, including livery, board and lodging of the county highway superintendent.

Section 7200 General Code, however, provides:

'The county commissioners may also at their discretion, purchase, hire or lease automobiles, motorcycle, or other conveyances and maintain the same for the use of the county surveyor and his assistants when on official business.'

"I am familiar with the opinion of your predecessor found on page eleven, volume 1, 1916, Attorney-General's Reports and also with the opinions found in volume II, 1915, Attorney-General's Reports, pages 1276 and 1592, respectively, and 1913 Reports, page 1155."

After stating the above facts you inquire:

"Kindly advise if a county surveyor had the right under the Cass highway law, and has the right under the present law, to use his own automobile for county business and charge the county for its use on time or mileage basis, also, under the above state of facts, if the former surveyor may retain the money he has so drawn, or any part of it; also if he is entitled to be paid for the balance of his expense accounts."

Section 7181 of the General Code, as found in the Cass highway law, read in part:

"The county surveyor shall be the county highway superintendent. The county surveyor shall give his entire time and attention to the duties of his

office and shall receive an annual salary to be computed as follows: * * In addition thereto, the county highway superintendent and his assistants, when on official business, shall be paid out of the county treasury, their actual, necessary traveling expenses, including livery, board and lodging. * * * *"

Interpreting this section of the General Code, former Attorney-General Turner, in an opinion found in the Opinions of the Attorney-General, 1916, Vol. I, page 11, held:

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

Mr. Turner said in part:

"In other words, while the county commissioners or county highway superintendent may not, under the law, purchase an automobile for the use of the county highway superintendent, and pay for the same from public funds, and while the county highway superintendent, being charged with the duty of providing himself with transportation when engaged on official business may not deal with himself and include in his expense accounts compensation for the use of his own automobile, yet if the county highway superintendent is the owner of an automobile and uses the same in traveling about the county on official business, he may include in his expense accounts and the county commissioners may allow to him the actual and necessary expenses incident to the maintenance and operation of the automobile during the time the same is used in the public business of the county."

I agree with my predecessor that under the Cass highway law the county highway superintendent could include in his expense account his actual and necessary expenses incident to the maintenance and operation of his own automobile used in his official duties but could not include in such expense account any item of compensation for the use of such automobile. Under the present law the power to contract for auto service has been taken from the county surveyor and is now lodged in the county commissioners, as provided by section 7200 G. C., 107 O. L. 115, which reads in part:

"* * * The county commissioners may also at their discretion purchase, hire or lease automobiles, motorcycles or other conveyances and maintain the same for the use of the county surveyor and his assistants when on official business. * * *"

On September 19, 1917, this department rendered an opinion, No. 631, in which it was held:

"The county commissioners may enter into a contract for the hire of a machine owned by the county surveyor for the use of said surveyor and his assistants in the performance of their official duties."

However, as I view the case you present, an answer to these questions will not assist in determining whether the payment of the voucher referred to is authorized.

It will be noted that these vouchers purport to cover expenses incurred by the county surveyor or county highway superintendent in hiring automobiles from a certain garage. Your statement of facts shows that no such expense was ever incurred by such county surveyor. Therefore, the vouchers presented were fraudulent and now that payment has been made the only question remaining is, can this money be recovered by the county.

In 11 Cyc, page 597, it is stated:

"A county may recover back money paid on claims audited and allowed by the board if the allowance was made through fraud or mistake of fact."

Section 2921 General Code reads as follows:

"Upon being satisfied that funds of the county, or public moneys in the hands of the county treasurer, or belonging to the county, are about to be or have been, misapplied, or that any such public money have been illegally drawn, or withheld from, the county treasury, or that a contract in contravention of law has been, or is about to be entered into, or has been or is being executed, or that a contract was procured by fraud or corruption, or that any property, real or personal, belonging to the county is being illegally used or occupied, or is being used or occupied in violation of contract, or that the terms of a contract made by or on behalf of the county are being or have been violated, or that money is due the county, the prosecuting attorneys of the several counties of the state may apply, by civil action in the name of the state, to a court of competent jurisdiction, to restrain such contemplated misapplication of funds, or the completion of such illegal contract not fully completed, or to recover, for the use of the county all public moneys so misapplied or illegally drawn or withheld from the county treasury, or to recover, for the benefit of the county, damages resulting from the execution of such illegal contract, or to recover, for the benefit of the county, such real or personal property so used or occupied, or to recover, for the benefit of the county, damages resulting from the non-performance of the terms of such contract, or to otherwise enforce it, or to recover such money due the county."

This section clothes the prosecuting attorney with power to recover back money illegally drawn from the county treasury.

Vindicator Printing Company v. State, 68 O. S., p. 362.

In view of the foregoing, I would advise you that the money heretofore paid out of the county treasury to the surveyor in question covering vouchers such as you set out herein, can be recovered in an action brought by the prosecuting attorney for that purpose and that no such vouchers should in the future be paid.

If the county commissioners should contract with the county surveyor under the present law for the use of the surveyor's machine, such contract would, as above stated, be legal, and payment to the surveyor for the use of such machine would be authorized thereunder.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

695.

LEGAL SETTLEMENT—GAINED BY PERSON WHO HAS RESIDED IN COUNTY MORE THAN TWELVE MONTHS WITHOUT SECURING RELIEF UNDER LAW FOR RELIEF OF POOR.

A young man, crippled and deaf, was brought into Ohio by two friends, a man and his wife, and cared for as one of their own children. Because of his unfortunate condition this young man lacked the knowledge of human affairs possessed by ordinary people, but is not feeble minded or insane. Held: That inasmuch as the facts showed this young man capable of making a choice of residence and, inasmuch as he was brought to Ohio by his friends in perfect good faith, he gained a legal settlement in the township and county in which he lived with these people for fifteen consecutive months. This even though he did not support himself but was supported by his friends.

COLUMBUS, OHIO, October 15, 1917.

HON. J. H. MUSSER, *Prosecuting Attorney, Wapakoneta, Ohio.*

DEAR SIR:—I have your letter of September 27, 1917, as follows:

> "I have your opinion No. 657, in reply to my letters of August 11 and September 18, 1917, and after reading the opinion I see that all of the facts have not properly been placed before you. While this young man is mentally deficient to some extent, he is not an idiot, neither is he insane. I have a statement from a reputable physician, who knows the young man, to the effect that he could not be classed either as an idiot or an insane person.
>
> The young man is deaf and is also a cripple, and because of these infirmitives he lacks the knowledge of human affairs that ordinary people have, but his knowledge and understanding is such that he could not be classed as an idiot. For this reason I think that that part of your opinion in which you say that his place of residence would be that of his mother would not be correct, and as he was an inmate of the Tippecanoe county, Indiana, infirmary after he arrived at the age of twenty-one years, and being neither an idiot or an insane person, my view of the matter is that his proper place of residence would be Tippecanoe county, Indiana.
>
> With the additional facts set forth herein I wish you would give me your further opinion as to the place to which this young man ought to be transported. The last that ever was heard of his mother was that she was some place in Ohio."

In the opinion you refer to I held that the young man in question could not gain a legal settlement in Ohio in his own right, but that his settlement was de-

rived from his mother and that she must be located before his place of settlement could be determined. This on the ground that an idiot cannot gain a settlement in Ohio in his own right, since in order to gain a settlement in a township, under our poor laws, the fact of residence is not sufficient, unless attended with the intention, on the part of the resident, of making such township his place of abode. Henrietta Twp. v. Oxford Twp., 2 O. S. 32.

I also advised that under section 2544 G. C. this young man could be cared for in the county infirmary of your county until his mother can be located. This because of the fact that section 2544 G. C. provides for admission into the infirmary of not only those persons who have a legal settlement in the county, but also those persons whose settlement is unknown, or who have no legal settlement in the state.

You now advise me that this young man is not insane and is not an idiot. You say:

> "While this young man is mentally deficient to some extent, he is not an idiot, neither is he insane. I have a statement from a reputable physician who knows the young man, to the effect that he could not be classed either as an idiot or an insane person. The young man is deaf and is also a cripple, and because of these infirmities he lacks the knowledge of human affairs that ordinary people have, but his knowledge and understanding is such that he could not be classed as an idiot."

Section 3477 G. C. reads:

> "Each person shall be considered to have obtained a legal settlement in any county in this state in which he or she has continuously resided and supported himself or herself for twelve consecutive months, without relief under the provisions of law for the relief of the poor, subject to the following exceptions:
>
> First. An indentured servant or apprentice legally brought into this state shall be deemed to have obtained a legal settlement in the township or municipal corporation in which such servant or apprentice has served his or her master or mistress for one year continuously.
>
> Second. The wife or widow of a person whose last legal settlement was in a township or municipal corporation in this state, shall be considered to be legally settled in the same township or municipal corporation. If she has not obtained a legal settlement in this state, she shall be deemed to be legally settled in the place where her last legal settlement was previous to her marriage."

In 30 Cyc., page 1083, it is stated:

> "An insane person or idiot cannot acquire a settlement in any place by virtue of acts requiring his own volition. * * * If the mind is diseased to such an extent as to deprive the person of volition, free-will, and power of choice, or deprive him of self control as to matters involved in a choice of settlement, this is sufficient."

In Westmore v. Sheffield, 56 Vt. 239, the court, in passing upon the question of legal settlement of Daniel Leland, said:

> "If Daniel was an idiot he could acquire no settlement by residence,

because he was incapable of forming an intent to live anywhere. But the defendant's evidence tended to show he was above an idiot, and had sufficient mental capacity or power to form an intention and to have a choice and desire as to his place of abode. We think if he had that degree of mind and went to Westmore to live voluntarily, as a matter of choice, and without compulsion, and so resided there for the required period without assistance from any town, he thereby acquired a settlement in Westmore. If he fell short of this degree of mental capacity, his residence there availed nothing towards a settlement. Being a person of weak intellect he would naturally rely upon and be influenced and controlled in making a choice of residence by his friends, but this fact, as stated by Pierpoint, Ch. J., in Ludlow v. Landgrove, 42 Vt. 137, would constitute, of itself, no sufficient reason why his residence for the required time should not give him a legal settlement. If he was there under compulsion or restraint and against his wishes, then the essential quality of intent to live there was wanting. He was not there *animo manendi.* His being there was only the stay of a transient person analogous to an imprisonment without choice or purpose, as in the case of Brownington v. Charleston, 32 Vt. 411. The plaintiff's evidence tends to show that Daniel was taken by his brother to the latter's home in Westmore, and there supported until his sister and her husband took and supported him in the same way; but this does not necessarily impart the idea of compulsion or exclude the idea of choice on Daniel's part. The case as presented does not show conclusively that while he resided in Westmore he did not do so freely, and of his own choice."

In Inhabitants of Fayette v. Inhabitants of Chesterville 77 Maine, page 28, the court approved the following charge to the jury:

"To find that a person has capacity to acquire a settlement, within the meaning of the statute, you must find in the first place, that he had intelligence enough to form and retain an intention with respect to his dwelling place; that he had a mind sound enough to give him will and volition of his own, and such power and control over his mind and his action as to enable him to choose a home for himself; that he must have mental capacity sufficient to act with some degree of intelligent understanding with respect to the choice of his dwelling place, and to form some rational judgment in relation to it."

It is suggested, however, that because the youth in question has been supported by his friends, he has not "supported himself * * * for twelve consecutive months, without relief under the provisions of law for the relief of the poor;" as provided in section 3477, above quoted. The authorities, however, lead to an opposite conclusion.

In the case of Ridgefield v. Fairfield, 73 Conn. 47, it was held that:

"A person 'maintains' himself without becoming 'chargeable' to the town within section 3288 of the general statutes, provided the town is put to no actual expense for his support. It is immaterial in such case that the person was supported in whole or in part by charity."

The court said at page 51:

"The court charged, in substance, that if during her four years' residence in Fairfield, Janes Coe was supported by herself or by her friends with-

out aid from Fairfield, she had maintained herself without becoming chargeable to that town, within the meaning of the statute. The defendant objects to this charge. It claims that if she was wholly or in part supported by friends she did not 'maintain' herself within the meaning of the statute. This claim overlooks or disregards the controlling words of the statute 'without becoming chargeable to such town.' These words mean 'without subjecting the town to actual expense' for her support during the four years. Beacon Falls v. Seymour, 44 Conn. 210, 217; Norwich v. Saybrook, 5 id. 384, 387. The fact that others may have gratuitously or otherwise contributed, wholly or in part, to her support, is of no consequence. Lebanon v. Hebron, 6 Conn. 45, 47; Colchester v. Lyme, 13 Conn. 274; Plymouth v. Waterbury, 31 Conn. 515. Under the circumstances of this case, where no claim was made or apparently could be made, that the parties who contributed to Jane Coe's support in Fairfield were not acting in so doing in good faith, the charge in question was correct."

From the facts submitted in this case it appears that this youth was brought into your county by his two friends in good faith, and with the sole intention of taking up a residence in such county.

In view of the above authorities, and in the light of the information contained in your letter of September 27th, above quoted, I am of the opinion that the youth referred to in your communications has gained a legal settlement in your county and that he should now be admitted to your county infirmary as a county charge.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

696.

OFFICES INCOMPATIBLE—MEMBER OF THE BOARD OF TRUSTEES OF PUBLIC AFFAIRS AND CLERK OF SAID BOARD.

The officers of member of the board of trustees of public affairs of a village and clerk of the board of trustees of public affairs are incompatible.

COLUMBUS, OHIO, October 15, 1917.

HON. GEORGE C. VON BESELER, *Prosecuting Attorney, Painesville, Ohio.*

DEAR SIR:—I have your letter of September 20, 1917, inquiring whether the offices of member of board of trustees of public affairs and clerk of board of trustees of public affairs are compatible.

Sections 4357, 4360, 4361 and 4219 read:

"Sec. 4357. In each village in which water works, an electric light plant, artificial or natural gas plant, or other similar public utility is situated, or when council orders water works, an electric light plant, natural or artificial gas plant or other similar public utility, to be constructed, or to be leased or purchased from any individual, company or corporation, council shall establish at such time a board of trustees of public affairs for the village, which shall consist of three members, residents of the village, who shall be each elected for a term of two years."

"Sec.4360. The board of trustees of public affairs shall organize by electing one of its members president. It may elect a clerk, who shall be known as the clerk of the board of trustees of public affairs."

"Sec. 4361. The board of trustees of public affairs shall manage, conduct and control the water works, electric light plants, artificial or natural gas plants, or other similar public utilities, furnish supplies of water, electricity or gas, collect all water, electrical and gas rents, and appoint necessary officers, employes and agents. The board of trustees of public affairs may make such by-laws and regulations as it may deem necessary for the safe, economical and efficient management and protection of such works, plants and public utilities. Such by-laws and regulations when not repugnant to the ordinances, to the constitution or to the laws of the state, shall have the same validity as ordinances. For the purpose of paying the expenses of conducting and managing such water works, plants and public utilities, of making necessary additions thereto and extensions thereof, and of making necessary repairs thereon, such trustees may assess a water, light, power, gas or utility rent, of sufficient amount, in such manner as they deem most equitable, upon all tenements and premises supplied with water, light, power, or gas, and, when such rents are not paid, such trustees may certify the same over to the auditor of the county in which such village is located to be placed on the duplicate and collect as other village taxes or may collect the same by actions at law in the name of the village. The board of trustees of public affairs shall have the same powers and perform the same duties as are possessed by, and are incumbent upon, the director of public service as provided in sections 3955, 3959, 3960, 3961, 3964, 3965, 3974, 3981, 4328, 4329, 4330, 4331, 4332, 4333 and 4334 of the General Code, and all powers and duties relating to water works in any of these sections shall extend to and include electric light, power and gas plants and such other similar public utilities, and such boards shall have such other duties as may be prescribed by law or ordinance not inconsistent herewith."

"Sec. 4219. Council shall fix the compensation and bonds of all officers, clerks and employes in the village government, except as otherwise provided by law. All bonds shall be made with sureties subject to the approval of the mayor. The compensation so fixed shall not be increased or diminished during the term for which any officer, clerk or employe may have been elected or appointed. Members of council may receive as compensation the sum of two dollars for each meeting, not to exceed twenty-four meetings in any one year."

On April 25, 1910, former Attorney-General U. G. Denman rendered an opinion, found in the Annual Report of the Attorney-General, 1910-1911, page 1020, in which he held that a member of the board of health could not act as clerk of such board and receive a salary therefor. In that opinion Mr. Denman said that a member of the board could not be elected secretary because of "the paramount principle of public policy that prohibits a member of an administrative board from holding a salaried position under the authority of such board."

On January 26, 1915, former Attorney-General Turner rendered an opinion in which he held.

"A member of the board of sinking fund trustees of a city cannot be selected as secretary of said board and draw a salary fixed by ordinance of council for services of such secretary."

Mr. Turner gave two reasons for this conclusion: First, that there was a certain specific statutory duty resting upon the secretary of the board, which made his office a check upon the board itself and then gave the following additional reason:

> "A further and additional reason why the two offices are incompatible is not only that the one may be a check upon the other but that it would be against public policy for a member of an administrative board to hold a salaried position under the authority of such board, unless expressly authorized so to do. This matter was considered in a somewhat similar case by Hon. U. G. Denman, the then attorney-general, under date of April 25, 1910. * * * Although in the case considered by Mr. Denman the board fixed the salary of its secretary whereas in the case in question said salary is fixed by ordinance of council, yet after a careful consideration of the opinion hereinbefore mentioned, I agree with Mr. Denman relative to the question of public policy."

An examination of our statutes will disclose the fact that in a number of instances the legislature has given its express consent to the appointment or election of a member of a board as its secretary or clerk, and it would seem that, inasmuch as they have done this, they meant to withhold such consent in all other cases.

For this reason, and on the authority of the position taken by this department in the past, as above outlined, I would advise you that the offices of member of the board of trustees of public affairs of a village and the clerk of the board of trustees of public affairs are incompatible.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

697.

COSTS—IN CASE WHEN TAXPAYER HAS RECOVERED FINAL JUDGMENT IN HIS FAVOR AND HAS BEEN ALLOWED COSTS AND REASONABLE ATTORNEY FEE—HOW PAID.

The costs of a taxpayer, who has recovered a final judgment in his favor under the provisions of section 4316 *G. C., and has been allowed his costs including a reasonable attorney fee, are a part of the final judgment and together with the costs of the municipal corporation, unless the latter have been previously paid by the municipality, are to be paid by the trustees of the sinking fund out of funds in their hands in accordance with the provisions of section* 4517 *G. C.*

There is no authority to pay the costs, including attorney fees, which have been assessed against the city in a taxpayer's suit in regard to a bond issue, out of the proceeds of said bond issue.

COLUMBUS, OHIO, October 15, 1917.

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

GENTLEMEN:—I have your communication in which you request my opinion upon the following matter:

> "We are in receipt of a letter from the city auditor of Zanesville, Ohio, under date of July 24, 1917, as follows:
> 'In 1916 the city council issued bonds in the sum of $20,000.00 to re-

habilitate the market house under an emergency ordinance, on account of the market house being partly destroyed by fire in December, 1912.

The ordinance to issue these $20,000.00 market house repair bonds was passed by council after an initiative ordinance had been filed by the people to erect a combination city hall and market house by the issue of $75,000.00 bonds, and before the people had a chance to vote on the initiative petition.

The service director after the $20,000.00 bonds were sold and money in the fund entered into a contract to rehabilitate the market house, and then a taxpayer's suit was begun to enjoin the expenditure of money under this contract, and the court of appeals found in favor of the taxpayer and perpetually enjoined the contractor and the city from going ahead under the contract, and the court order provided that the city should pay all costs in the cases in the common pleas and appeals courts with attorney fees in the sum of $350.00.

Should these costs, including the attorneys' fees, be paid from the general sinking fund, or should they be paid from the proceeds of the $20,000.00 market house repair bond issue?'

We call your attention to section 4316 G. C., relative to the costs and attorney fees in a taxpayer's suit, also to the provisions of section 4517 G. C., relative to the payment of judgments by the trustees of the sinking fund, and we most respectfully ask you the following:

1. Should same be paid by the sinking fund trustees as a judgment?
2. Could such costs and attorney fees be paid from the proceeds of the bond issue in question?"

Section 4517 G. C. provides:

> "The trustees of the sinking fund shall have charge of and provide for the payment of all bonds issued by the corporation, the interest maturing thereon and the payment of all judgments final against the corporation, except in condemnation of property cases. They shall receive from the auditor of the city or clerk of the village all taxes, assessments and moneys collected for such purposes and invest and disburse them in the manner provided by law. For the satisfaction of any obligation under their supervision, the trustees of the sinking fund may sell or use any of the securities or money in their possession."

The foregoing section vests the trustees of the sinking fund of a municipal corporation with the power and charges them with the duty of paying all final judgments against the corporation except in condemnation cases.

Section 11582 G. C. defines a judgment as "the final determination of the rights of the parties in action," and also contains the provision:

> "A direction of a court or judge, made or entered in writing and not included in a judgment, is an order."

Section 4316 G. C. reads:

> "If the court hearing such case is satisfied that the taxpayer had good cause to believe that his allegations were well founded, or if they are sufficient in law, it shall make 'such order as the equity and justice of

the case demand. In such case the taxpayer shall be allowed his costs, and, if judgment is finally ordered in his favor, he may be allowed as part of the costs a reasonable compensation for his attorney."

This section vests the taxpayer with the right of allowance of his costs, if he is successful in his suit, and also permits the court in its discretion to allow him a reasonable compensation for his attorney as part of his costs.

Section 3026 G. C. provides in part:

"On the rendition of judgment, in any cause, the costs of the party recovering, together with his debt or damages, shall be carried into his judgment, and the costs of the party against whom judgment is rendered shall be separately stated in the record, or docket entry."

This section makes the costs recovered by the successful party a part of his judgment and provides that the costs of the unsuccessful party shall be separately stated in the record or docket entry.

Section 3027 G. C. reads:

"The clerk or justice of the peace, issuing execution for such judgment, shall indorse thereon the amount of the costs of the party condemned, which costs shall be collected by the officer to whom such writ is directed, in the same manner and at the same time as the judgment mentioned in the execution."

This section provides in effect that when an execution is issued on a judgment, including the costs of the successful party, the costs of the condemned or unsuccessful party shall be endorsed on the writ and collected in the same manner and at the same time as the judgment mentioned in the execution.

It seems to follow, from the provisions contained in this section, that it was the intention of the legislature to have the costs assessed against the unsuccessful party collected in the same manner and at the same time as the judgment which includes the costs of the successful party. It is true that as far as the trustees of the sinking fund of the municipality are concerned no execution will be issued against them since that would not be the proper way to enforce the judgment. However, when sections 3026 and 3027 are taken in connection with each other, it would seem that the conclusion is inevitable that both kinds of costs therein mentioned are to be collected against the unsuccessful party in the same way. As is stated in your communication, the court has assessed all of the costs against the municipal corporation and has rendered judgment in favor of the taxpayer for all of his costs including an attorney fee in a certain amount. There does not seem to be any doubt from the facts but what a final judgment has been rendered against the municipal corporation and, hence, the requirement contained in section 4517 G. C. that the judgment must be final is net.

In answer to your first question, then, I advise you that the costs of a taxpayer, who has recovered a final judgment in his favor under the provisions of section 4316 G. C. and has been allowed his costs including a reasonable attorney fee, are a part of the final judgment and, together with the costs of the municipal corporation, unless the latter have been previously paid by the municipality, are to be paid by the trustees of the sinking fund out of funds in their hands in accordance with the provisions of section 4517 G. C.

Your second question inquires whether the costs, including attorney fees, in the particular case could be paid from the proceeds of the bond issue in question.

Section 5654 G. C., as amended 103 O. L., 521, is in point and provides:

> "The proceeds of a special tax, loan or bond issue shall not be used for any other purpose than that for which the same was levied, issued or made, except as herein provided. When there is in the treasury of any city, village, county, township or school district a surplus of the proceeds of a special tax or which is not needed for the purpose for which the tax was levied, or the loan made, or the bonds issued, all of such surplus shall be transferred immediately by the officer, board or council having charge of such surplus, to the sinking fund of such city, village, county, township or school district, and thereafter shall be subject to the uses of such sinking fund."

The express inhibition is contained in the section to the effect that the proceeds of a bond issue shall not be used for any other purpose than that for which the same was issued, except as therein provided. The exception contained in the section provides that when there are proceeds of a bond issue which cannot be used or are not needed for the purpose for which the bonds were issued, all of such surplus shall be transferred immediately by the council having charge of same to the sinking fund of such city and shall thereafter be used for sinking fund purposes.

In the facts as set forth in your communication the statement is made that these bonds were issued for the purpose of rehabilitating the market house of the city of Zanesville, and that later on a larger bond issue was had for the purpose of building a new market house, and that in consequence of said latter act the court held that the city was not authorized to expend the funds derived from the first issue of bonds for the repair of the old market house.

The bonds being issued for the purpose of providing funds for repairing and rehabilitating the market house, it could not be said that these funds could be used for the purpose of paying any costs, including attorney fees, which might be assessed against the city by reason of a taxpayer's suit in regard to said bond issue, since this purpose would be something altogether different from the purpose for which the bonds were issued.

In view of the court's holding, then, funds derived from the twenty thousand dollar bond issue cannot be used for the purpose for which said bonds were issued and, hence, in accordance with the provisions of section 5654 G. C. whatever surplus remains from the proceeds of said bond issue should be transferred to the sinking funds to be used for sinking fund purposes.

I therefore advise you that there is no authority to pay the costs, including attorney fees, which have been assessed against the city in a taxpayer's suit in regard to said bond issue out of the proceeds of the bond issue in question.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

698.

STREET IMPROVEMENT—WHAT RESOLUTION OF NECESSITY MUST CONTAIN RELATIVE TO MATERIAL TO BE USED—WHAT ORDINANCE MUST CONTAIN—ALTERNATIVE BIDS—RIGHT OF SERVICE DIRECTOR TO SELECT MATERIAL.

(1) *It is good practice for the council of a city in passing a resolution of necessity providing for a street improvement to have said resolution contain a statement of the materials which may be used in said improvement, although it is not required to be set forth therein unless it becomes necessary so to do in determining the general nature of the improvement. However, the plans, specifications and estimates which are required to be approved in the resolution of necessity should refer to the several kinds of materials which may be used in making such improvement.*

(2) *That in passing its legislation for a street improvement on the assessment plan council may specify several kinds of material that may be bid upon for said improvement in the alternative, and leave the selection of the particular material to be used to the determination of the proper administrative officials of the city.*

(3) *That the director of public service, in the event the contract is for five hundred dollars or less, is authorized, in pursuance of the provision contained in the ordinance of council determining to proceed with the improvement that several kinds of material may be bid upon in the alternative, to select the particular material that will be used from the list set forth in the ordinance, and to enter into a contract for same without any further action on the part of council; and that the action of said director in making said selection amounts only to the performance of a ministerial act and does not involve the exercise of delegated legislative power on his part. However, if said contract is for an amount in excess of five hundred dollars, same should be awarded only on approval of the board of control, which shall direct the director of public service to enter into said contract as provided in section 4403 G. C.*

COLUMBUS, OHIO, October 15, 1917.

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

GENTLEMEN:—I have your communication in which you submit for my opinion the following request:

> "We call your attention to the provisions of Sec. 3815 G. C., that the resolution of necessity shall determine the general nature of a special assessment improvement, also that such resolution shall approve the plans, specifications, estimates and profiles for the proposed improvement; also to the form of such resolution giving as an illustration, on page 266 of Ellis's Municipal Code, fifth edition, you will notice that section 1 of this resolution provides for the general nature of the improvement, material to be used, etc.
>
> Question: Can council pass a resolution of necessity for a special assessment paving improvement, omit in such resolution the material to be used for such paving, or can council legally insert in such resolution to be paved with brick, wood blocks or asphalt, and after the bids have been received, determine the class of material to be used, or leave it to the

discretion of the service director, or must such material be determined in advance and so set forth in the resolution of necessity?"

Section 3814 G. C. provides:

"When it is deemed necessary by a municipality to make a public improvement to be paid for in whole or in part by special assessments, council shall declare the necessity thereof by resolution, three-fourths of the members elected thereto concurring, except as otherwise herein provided. Such resolution shall be published as other resolutions, but shall take effect upon its first publication."

Section 3815 G. C. as amended 107 O. L. 151, reads:

"Such resolution shall determine the general nature of the improvement, what shall be the grade of the street, alley, or other public place to be improved, the grade or elevation of the curbs, and shall approve the plans, specifications, estimates and profiles for the proposed improvement. In such resolution council shall also determine the method of the assessment, the mode of payment, and whether or not bonds shall be issued in anticipation of the collection thereof. Assessments for any improvement may be payable in one to twenty installments at such time as council prescribes."

Section 3825 G. C. provides:

"If the council decides to proceed with the improvement, an ordinance for the purpose shall be passed. Such ordinance shall set forth specifically the lots and lands to be assessed for the improvement, shall contain a statement of the general nature of the improvement, the character of the materials which may be bid upon therefor, the mode of payment therefor, a reference to the resolution theretofore passed for such improvement with date of its passage, and a statement of the intention of council to proceed therewith in accordance with such resolution and in accordance with the plans, specifications, estimates and profiles provided for such improvement."

Section 3834 G. C. provides:

"When special assessments are made upon property for the construction of an improvement, and several kinds of material have been named in the ordinance, or ordinances, providing therefor, and on which bids have been received for the construction of such improvements with any or all of such materials, such assessments shall be valid and binding assessments upon the property so assessed. In the construction of sewers, excepting main or district sewers, notice of the passage of the resolution therefor shall be made in the manner hereinbefore provided."

Section 3815 G. C., which is cited in your communication, and section 3814 G. C. have reference to the preliminary resolutions of the council of a municipality in making improvements, and provide, among other things, that council shall determine therein the general nature of the improvement and shall also approve the plans, specifications, estimates and profiles for the proposed improvement.

These sections do not provide specifically that the council shall set forth in the resolution the particular materials that may be used in the improvement, and unless it would be necessary to do so in describing the general nature of the improvement such action would not be required. However, the plans, specifications and estimates must, of necessity, refer to the materials that may be used in said improvement, since without this reference they would not be comprehensive. It would follow, then, that by approving the plans, specifications and estimates in the resolution the council would thereby indicate the materials that may be used in the improvement.

I am informed that it is the practice in municipalities over the state to set forth in the resolution in determining the general nature of the improvement the materials that may be used in said improvement, in addition to doing so by the approval of the plans, specifications and estimates. It would seem that the statement in the resolution of the materials that may be used would be good practice in the drafting of said resolution, and I would recommend such procedure.

After the resolution provided for in sections 3814 and 3815 G. C. has been passed and the other steps provided for in sections not quoted have been taken, if the council decides to proceed with the improvement it is necessary then for the council, under the provisions of sections 3825 G. C., to pass an ordinance in which it determines to proceed with said improvement. Such ordinance must contain, among other things, a statement of the general nature of the improvement and the character of the materials which may be bid upon therefor. We have, then, the specific requirement with respect to the ordinance determining to proceed that the same shall contain a statement of the character of the materials which may be bid upon therefor, and, regardless of whether it is necessary to set forth that fact in describing the general nature of the improvement, it is necessary to have that provision in the ordinance to proceed. In regard to the ordinance to proceed, then, the question is raised directly as to what it meant by the requirement that the character of the materials which may be bid upon shall be set forth therein.

I take it from your communication that the question you have in mind is whether the materials which may be bid upon in the making of an improvement may be set forth in the alternative in the proceedings with reference to said improvement, and if it is legal to describe the materials in the alternative, that you are desirous of knowing what officer or body of the city is vested with the authority to make the final selection as to the particular material to be used when it becomes necessary to do so.

Our supreme court in the case of Emmert v. City of Elyria, 74 O. S. 185, had before it for consideration the question as to what is meant by the statutory provision that the ordinance to proceed shall contain a statement of the general nature of the improvement and the character of the materials which may be bid upon therefor. The holding of the court on this point is set forth in the first branch of the syllabus, which reads as follows:

> "A statement in an ordinance, providing for the improvement of a street by paving, that the paving material shall be asphalt, brick or other material as may thereafter be determine, meets the requirement of section 55 of the municipal code (1536-215 Revised Statutes), that the ordinance shall contain a statement of the general nature of the improvement and the character of the materials which may be bid upon therefor."

It seems to follow clearly from the foregoing holding that the requirements of section 55 of the municipal code, now section 3825 G. C., have been met by the council of a municipality in deciding to proceed with the improvement of a street

when it provides in the ordinance that said street shall be improved with asphalt. or brick, or some other material. In other words, in view of this decision it seems to be undoubtedly true that a municipal council may set forth in the alternative in the ordinance providing for the improvement of a street what materials may be bid upon therefor.

Section 3834 G. C., which is quoted above, is declaratory of this interpretation of the law, and provides that assessments made in pursuance of improvement legislation in which several kinds of material had been named in the ordinance or ordinances shall be valid and binding upon the property assessed.

The situation then is that the council may provide in the ordinance to proceed that several kinds of material may be used in the making of said improvement. It becomes necessary thereafter for some officer or officers of the city to make a selection as to what particular material out of the several kinds set forth in said ordinance shall be used in said improvement. In determining this question it is necessary to consider several sections of the General Code which refer to the powers and duties of the council and administrative officers of a city.

Section 4325 provides, in part:

> "The director of public service shall supervise the improvement and repair of streets, avenues, alleys * * *."

Section 4328:

> "The director of public service may make any contract or purchase supplies or material or provide labor for any work under the supervision of that department not involving more than five hundred dollars. When an expenditure within the department, other than the compensation of persons employed therein, exceeds five hundred dollars, such expenditure shall first be authorized and directed by ordinance of council. When so authorized and directed, the director of public service shall make a written contract with the lowest and best bidder after advertisement for not less than two nor more than four consecutive weeks in a newspaper of general circulation within the city."

Section 4403:

> "No contract in the department of public service or the department of public safety in excess of five hundred dollars shall be awarded except on the approval of the board of control, which shall direct the director of the appropriate department to enter into the contract. The members of the board shall prepare estimates of the revenue and expenditures of their respective departments to be submitted to the council by the mayor, as provided by law."

Section 4211 (formerly section 123 of the municipal code, section 1536-618 R. S.):

> "The powers of council shall be legislative only, and it shall perform no administrative duties whatever, and it shall neither appoint nor confirm any officer or employe in the city government except those of its own body, except as is otherwise provided in this title. All contracts requiring the authority of council for their execution shall be entered into and

conducted to performance by the board or officers having charge of the matters to which they relate, and after authority to make such contracts has been given and the necessary appropriation made, council shall take no further action thereon."

With reference to the relation between the powers and duties of the council and the administrative officials of a city, after quoting section 123 of the municipal code (section 4211 G. C.), our supreme court says, in the case of Akron v. Dobson, 81 O. S. 66, at page 76 and 77:

"Prior to the adoption of the municipal code of 1902, the city council was an administrative, as well as a legislative body, and one of the reforms contemplated by the adoption of the new code was to make its powers legislative only. * * * The council provides the money for carrying on the government, either by a levy of taxes, or an issue of bonds, and it is proper that it should have some control over the expenditures, but considering these sections in the light of the purpose of the code we think their requirements are met by an ordinance making an appropriation and stating generally the purpose for which it is made, and authorizing the directors to enter into contracts to effect that purpose."

In Emmert v. City of Elyria, supra, at page 195, in the opinion, it is said:

"* * * under the code council is relieved of administrative matters and such duties are imposed on a board of public service. Section 55 of the (municipal) code (now section 3825 G. C.) provides that if council decides to proceed with the improvement an ordinance for the purpose shall be passed and that it shall contain a statement of the general nature of the improvement and the character of the materials thereof. It appears from the finding of facts that council determined that the paving material should be asphalt, brick or other materials as might thereafter be determined. This meets the requirement of the statute."

It is true that in the Elyria case the court does not state in the opinion or the syllabus what particular officer or body is to make this final selection; but when we consider in connection with the court's decision the provision of section 4211 G. C. (formerly section 123 of the municipal code) that "all contracts requiring the authority of council for their execution shall be entered into and conducted to performance by the board or officers having charge of the matters to which they relate, and after authority to make such contracts has been given and the necessary appropriation made, *council shall take no further action thereon,*" we must conclude that the court had in mind that the proper administrative officer or officers of the city were to make the selection from the several kinds of material set forth in the ordinance. In other words, it must have been the view of the court that the making of the particular selection of material from the several kinds authorized to be bid upon was the performance of an administrative function to be exercised by the administrative officials of the city, since the passing of the ordinance to proceed with the improvement is the last action that council is authorized to take up to the time that the contract is let and awarded.

However, the particular questions that are presented to me for my opinion were before the court for consideration in the case of Scott v. City of Hamilton, 4 O. N. P. n. s. 1. At page 7 it was said by the court:

"Was there an illegal delegation of power of council to the board of public services in this case in regard to the selection of material?

The council passed what is called a determining ordinance, providing that this street might be paved with block asphalt, sheet asphalt, or brick. The board of public service advertised for bids upon these three materials, and they selected the bid, and awarded the contract to the bidder for asphalt block."

At page 9 the court further says:

"Now the question in this case is whether council has acted. Undoubtedly if council would pass an ordinance declaring East High street should be paved, and name no material, that would not give the board of public service power to select the material. But here they have named three materials, in the alternative. Council has named them—not simply the board of public service—but the legislative body has named the three materials, and the question is whether delegation of power to select one of three materials named is delegation of legislative authority."

At page 10 the court quotes from the opinion of Ranney, J., in Railway Co. v. Commissioners, 1 O. S. 77, the following:

"The true distinction, however, is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made."

After making this quotation the court goes on to say:

"Now, it seems to the court that this was authority or discretion conferred as to the execution of this particular matter passed by the council, and it falls within the principle laid down by Judge Ranney."

At page 12 the court concludes:

"So in this case when the city council designated the kind of materials to be used, in the alternative, its agents, the board of public service, had the right to make a selection, and when made, such selection became the material chosen by the city council. The contract is binding upon the city because the city council, the local legislature, authorized the selection of the material.

The contract required the authority of council, but after that authority was given the execution of the contract devolved upon the board of public service. See sections 123 and 143, Municipal Code.

The voice which speaks the will of the municipality is the council, but the hand which records that expression is the board of public service."

The foregoing case of Scott v. City of Hamilton was affirmed by the circuit court, and the holding of that court is set forth in the head note of Scott v. City of Hamilton, 7 O. C. C. n. s. 493, as follows:

"A board of public service, where required by a street improvement ordinance to choose one of three materials after bids were received, per-

forms only a ministerial act, and as the agent of the city council executes its legislative command."

In view of all the foregoing, then, I advise you:

(1) That it is good practice for the resolution of necessity providing for a street improvement to contain a statement of the materials which may be used in said improvement, although it is not required to be set forth therein unless it becomes necessary so to do in determining the general nature of the improvement. However, the plans, specifications and estimates which are required to be approved in the resolution of necessity should refer to the several kinds of materials which may be used in making such improvement.

(2) That in passing its legislation for a street improvement on the assessment plan council may specify several kinds of material that may be bid upon for said improvement in the alternative, and leave the selection of the particular material to be used to the determination of the proper administrative officials of the city.

(3) That the director of public service, in the event the contract is for five hundred dollars or less, is authorized, in pursuance of the provision contained in the ordinance of council determining to proceed with the improvement that several kinds of material may be bid upon in the alternative, to select the particular material that will be used from the list set forth in the ordinance, and to enter into a contract for same without any further action on the part of council; and that the action of said director in making said selection amounts only to the performance of a ministerial act and does not involve the exercise of delegated legislative power on his part. However, if said contract is for an amount in excess of five hundred dollars, the same should be awarded only on the approval of the board of control, which shall direct the director of public service to enter into said contract as provided in sections 4403 G. C.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

699.

FEES—OF APPLICANT FOR ADMISSION TO TAKE MEDICAL EXAMINATION—WHEN PAYABLE—BOARD HAS NO RIGHT TO REFUND SAME—NURSES.

The fees provided for by section 1270 *G. C. shall be paid at the time the entrance examiner's certificate is issued to the applicant showing him to have proper preliminary educational qualifications.*

The fees provided by sections 1274-2, 1277, 1282, 1284, 1289, 1292 *and* 1295-11 *shall be paid when the several applications are filed.*

Fees are not properly received by the board from an applicant for a preliminary examination and hence there would be none to return in case he failed to qualify educationally. If, however, such applicant pays the fee when he files such application for a preliminary examination, such fee is simply held for his use and would be returned in case he failed to qualify educationally.

No fees, after being once properly received, for the use of the state or an officer or board thereof, can be returned.

The state medical board can make no rules which provide for the collection of fees not authorized by statute.

There is authority to collect a fee of $3.00 *from nurses for a preliminary educational certificate.*

COLUMBUS, OHIO, October 15, 1917.

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

DEAR SIR:—In your letter of September 17, 1917, you ask my opinion upon the following questions:

"1. Should the fees designated in sections 1270, 1274-2, 1274-3, 1277, 1282, 1284, 1289, 1292 and 1295-11 be paid at the time the various applications are filed with the board?

2. If said fees are required to be deposited with the applications, may they be refunded under any of the following conditions:

A. Failure to qualify educationally?

B. Failure to pass final examination?

C. Withdrawal of application?

D. Or for any other cause?

3. If any of said fees may be properly refunded, how should it be done in view of the provisions of section 24 of the General Code?

4. May the medical board in its rules, authorized by section 1267 G. C., provide for the collection of any fees not authorized by statute?

5. Is there any authority in the provisions of section 1295-5 to collect the fee of $3.00 from nurses which is authorized by section 1270 G. C. to be collected from doctors?"

The sections of the General Code referred to in your question No. 1 are a part of the chapter which provides for the state medical board and for the examination and registration of persons to practice medicine in Ohio.

Said sections read as follows:

"*Sec.* 1270. The state medical board shall appoint an entrance examiner who shall not be directly or indirectly connected with a medical col-

lege and who shall determine the sufficiency of the preliminary education of applicants for admission to the examination. The following preliminary educational credentials shall be sufficient:

A diploma from a reputable college granting the degree of A. B., B. S., or equivalent degree.

A diploma from a legally constituted normal school, high school or seminary, issued after four years of study.

A teacher's permanent or life certificate.

A student's certificate of examination for admission to the freshman class of a reputable literary or scientific college.

"In the absence of the foregoing qualifications, the entrance examiner may examine the applicant in such branches as are required for graduation from a first class high school of this state, and to pass such examination shall be sufficient qualification. If the entrance examiner finds that the preliminary education of the applicant is sufficient, he shall, upon payment to the treasurer of the state medical board of a fee of three dollars, issue a certificate thereof, which shall be attested by the secretary of the state medical board.

The applicant must also produce a certificate issued by the entrance examiner and a diploma from a legally chartered medical institution in the United States, in good standing, as defined by the board, at the time the diploma was issued, and which institution, subsequent to May 1, 1913, requires for admission for the degree of M. D. to such institution, a preliminary education equal to that required for graduation from a first grade high school in this state, or a diploma or license approved by the board which conferred the full right to practice all branches of medicine or surgery in a foreign country.

"*Sec.* 1274-2. For the purpose of establishing the practice of such limited branches the state medical board shall call to its aid the designated persons as provided in section 1274-3 of the General Code, and such designated persons shall examine any person who has practiced any such branch in Ohio for a period of at least one year prior to June first, 1915, and who makes application prior to October first, 1915, on a form prescribed by the board in those subjects only which are appropriate to the limited branch of medicine or surgery, for a certificate to practice which his application is made. No such applicant shall be required to comply with the preliminary educational qualifications provided for in section 1274-5 of the General Code. Any person, practicing in Ohio, who at the time of the passage of this act shall actually be engaged in this state for a period of five years continuously prior to October first, 1915, in the practice of any one or more of the limited branches of medicine or surgery hereinbefore enumerated, and who shall present to and file with the state medical board an affidavit to that effect after the passage of this act shall be exempted from the examination, and shall be entitled to receive from said board a license to practice, upon the payment to said board of a fee of twenty-five dollars. The examination of all other applicants shall be conducted under rules prescribed by the board and at such times and places as the board may determine. Such examination shall be given in anatomy, physiology, chemistry, bacteriology, pathology, hygiene, diagnosis, and in such other subjects appropriate to the limited branches of medicine or surgery, certificate to practice which is applied for, as the board may require; provided, however, that applicants for certificates to practice massage or Swedish movements shall not be examined in pathology and diagnosis.

"*Sec.* 1274-3. For the purpose of conducting such examinations the state medical board shall call to its aid any person or persons of established reputation and known ability in the particular limited branch in which the examination is being held; and in the event that there is in existence a state association or society of practitioners of any such limited branch of medicine or surgery, such association or society, except a state association or society of chiropodists, shall recommend the person or persons to be designated for this service by the board. Any person called by the state medical board to its aid, as provided in this section, shall receive for his services not more than ten dollars per day and his actual and necessary expenses to be fixed and allowed by the state medical board.

If the applicant passes such examination and has paid the fee of twenty-five dollars as required by law, the state medical board shall issue its certificate to that effect. Such certificate shall authorize the holder thereof to practice such limited branch or branches of medicine or surgery as may be specified therein, but shall not permit him to practice any other branch or branches of medicine or surgery nor shall it permit him to treat infectious, contagious or venereal diseases, nor to prescribe or administer drugs, or to perform major surgery.

"*Sec.* 1277. Each applicant for a certificate to practice medicine or surgery in this state shall pay a fee of twenty-five dollars for an examination. On failure to pass such examination the fee shall not be returned to the applicant, but within a year after such failure he may present himself and be again examined without the payment of an additional fee. All fees for examination shall be paid in advance to the treasurer of the board and by him paid into the state treasury to the credit of a fund for the use of the state medical board.

"*Sec.* 1282. The state medical board may dispense with the examination of a physician or surgeon duly authorized to practice medicine or surgery in another state, a territory or the District of Columbia, who wishes to remove from such state, territory or district, and reside and practice his profession in this state, upon his complying with the following conditions:

Such physician or surgeon shall make an application on a form prescribed by the board, pay a fee of fifty dollars and present a certificate or license issued by the medical board thereof; provided the laws of such state, territory or district require of physicians and surgeons practicing therein qualifications of a grade equal to those required of physicians and surgeons practicing in Ohio, and equal rights are accorded by such state, territory or district to physicians and surgeons of Ohio holding a certificate from the state medical board who desire to remove to, reside and practice their profession in such state, territory or district.

Sec. 1284. If the applicant passes a satisfactory examination and has paid a fee of ten dollars, the state medical board shall issue its certificate to that effect, which must be deposited with the probate judge of the county in the manner provided for a physician's certificate, and thereupon entitled its holder to practice midwifery in this state. Such certificate may be refused, revoked or suspended as in the case of certificates to physicians and surgeons.

Sec. 1289. Before he shall be admitted to an examination before the state medical board a person who desires to practice osteopathy shall pay a fee of twenty-five dollars to its treasurer and file with its secretary such evidence of preliminary education as is required by law of applicants for examination to practice medicine or surgery, together with a certificate

from an osteopathic examining committee as hereafter provided, showing that the applicant holds a diploma or a physician's osteopathic certificate from a reputable college of osteopathy as determined by such committee, and he has passed an examination in a manner satisfactory to the committee in the subjects of pathology, physiological chemistry, gynecology, minor surgery, osteopathic diagnosis and the principles and practice of osteopathy.

Sec. 1292. Upon recommendation of the osteopathic committee, the state medical board may dispense with the examination of an osteopath, duly authorized to practice osteopathy in another state, a territory or the District of Columbia, who wishes to remove from such state, territory or district and reside and practice his profession in this state, upon his complying with the following conditions:

Such osteopath shall make an application on a form prescribed by the board, and pay a fee of fifty dollars and present a certificate or license issued by the proper board of such state, territory or district; provided the laws of such state, territory or district require of osteopaths practicing therein qualifications of a grade to those required of osteopaths practicing in Ohio, and equal rights are accorded by such state, territory or district to osteopaths of Ohio holding a certificate from the state medical board who desire to remove to, reside and practice their profession in such state, territory or district.

Sec. 1295-11. Each applicant for a certificate to practice nursing as a registered nurse in this state shall pay a fee of not to exceed ten dollars for examination, which fees shall be fixed by the state medical board. The fees for examination shall be paid in advance to the treasurer of the state medical board and by him paid into the state treasury to the credit of a fund for the use of the said board in the enforcement of this act."

In each one of the above sections there is provided that certain fees shall be paid by those who desire to secure the advantages of the provisions of the sections in which such fees are mentioned and the sections in the same chapter which refer to the same subjects. To illustrate, section 1270 provides a fee of $3.00 shall be paid to the treasurer of the state medical board. This is a certificate fee and is paid for the certificate which is issued to the applicant and which shows that the applicant has the proper preliminary educational credentials, either from a school or college or from such examiner, and which certificate and a diploma from a legally chartered medical institution in the United States are necessary for such applicant prior to the time he files his application to take the examination to practice medicine or surgery in this state.

The fee must be paid after the entrance examiner has ascertained that the educational qualifications of the applicant are sufficient and when the applicant files his application and receives his certificate showing his educational qualifications to be sufficient.

The provisions that the same shall be paid to the treasurer of the state medical board is equal to language which would designate that the same be paid to the board because the payment to an officer of a board having authority to receive the same is a payment to the board.

Section 1274-2 G. C. provides how persons who desire to engage in a limited branch of the practice of medicine may receive certificates to do so. Such limited branches are set out in the preceding section, to wit, section 1274-1. If, as provided by section 1274-2 a person had actually been engaged in the practice of one of such limited branches in the state of Ohio for a period of five years prior to the first day of October, 1915, and would file an affidavit stating such fact, a license

would be issued to such person upon the payment of a fee of $25.00; that is, the fee of $25.00 was and is the license fee for such license certificate. If, however, the person had only practiced such limited branch or branches of medicine for a period of at least one year prior to June 1, 1915, then such person could make an application prior to October 1, 1915, for an examination, the examination to be conducted under the rules prescribed by the board and at such times and places as the board may determine. If the applicant passes such examination "and has paid a fee of $25.00 as required by law," the state medical board shall issue such applicant a certificate to that effect. While it is not clear just when said fee shall be paid, yet it seems to be an examination fee and under the general course provided for by the other sections in said chapter, I take it that the same must be paid at the time the application is filed, that is, prior to the taking of the examination and not after the applicant has passed or attempted to pass such examination. It is, in other words, an application fee and not a certificate or license fee, and I, therefore, advise you that the same should be paid at the time the application is filed for the examination. But in case the applicant has practiced for five years, then the fee is paid at the time the affidavit is filed and the license is granted, for in such case no examination is had.

Section 1277 G. C. provides for a fee of $25.00 from each applicant who desires to receive a certificate to practice medicine or surgery in this state. That is, at the time the applicant files his application for examination he deposits a fee of $25.00 with the state medical board. If he fails to pass such examination then said section provides that the fee *shall not be returned to the applicant* but within a year thereafter such applicant may again be examined by said board without paying any additional fee. The fees so paid to the board for examination shall be paid *in advance* to the treasurer of the board and by him paid into the state treasury to the credit of a fund for the use of the state medical board. While this statute refers primarily to the fees upon applications for examinations of applicants who desire to receive licenses in the regular practice of medicine, yet they apply, as above noted, to those applicants who also take examinations in the practice of a limited branch or branches, as herein described.

Section 1282 provides that the state medical board may dispense with the examination as to a physician or surgeon who is duly authorized to practice medicine or surgery in another state or territory or in the District of Columbia, and which physician or surgeon wishes to remove from such state, territory or district to this state and wishes to reside and practice his profession in this state. But before such person can practice his profession in this state he must receive a certificate or license from the state medical board. Such certificate cannot be received until the physician or surgeon has filed an application with the state medical board and has paid a fee of $50.00 and has presented a certificate or license issued by the state medical board of the state, territory or district in which he formerly resided, provided the laws of such state, territory or district require of physicians and surgeons practicing in such state, territory or district qualifications of a grade equal to those required of physicians and surgeons practicing in Ohio, and provided further that equal rights are accorded by such state, territory or district to physicians and surgeons of Ohio. If the reciprocal provisions above referred to are found to be proper, and if the application and certificate from such state are filed with the board and a fee of $50.00 paid, then the license to practice in this state can be received by such applicant.

Section 1284 G. C. refers to the practice of midwifery and provides that if the applicant passes a satisfactory examination and has paid a fee of $10.00, the state medical board shall issue a certificate to that effect. The fee of $10.00 shall

be paid at the time the application is filed, just the same as the fee of $25.00 is paid when the application under section 1277 is filed and to which reference was made above.

Section 1289 provides that a fee of $25.00 shall be paid by a person before he is admitted by the state medical board to take an examination to practice osteopathy. Such fee shall be paid at the time the application to take the examination is made.

Section 1292 provides for the reciprocal certificate issued to an osteopath and a fee of $50.00 shall be paid at the time the application is made, and what I have said with reference to reciprocal certificates issued under the provisions of section 1282 applies to reciprocal certificates issued under section 1292.

Section 1295-11 provides that a fee of $10.00 shall be paid by each applicant for a certificate to practice nursing as a registered nurse in this state and is a fee for examination and should be paid at the time the application for examination is made. Such fees shall be paid *in advance* to the treasurer of the state medical board and by him paid into the state treasury to the credit of a fund for the use of said board in the enforcement of the act which provides for the examination and registration of nurses in Ohio.

Thus, in answer to your first question, I advise you:

(a) The fees provided for in section 1270 shall be paid at the time of the issuance of the certificate and after the entrance examiner has ascertained that the preliminary qualifications are sufficient.

(b) The fees under section 1274-2, when the applicant has practiced five years, are paid after the affidavit and when the license is received; and when the applicant has practiced less than five years or more than one year, such fee is paid at the time the application for examination is made.

(c) The fees under section 1277 are paid when the application for examination is made.

(d) The fees under section 1282 are paid when the application for license is made.

(e) The fees under section 1284 are paid at the time the application for examination is made.

(f) The fees under section 1289 are paid at the time the application for an examination is made.

(g) The fees under section 1292 are paid at the time the application for license is made.

(h) The fees under section 1295-11 are paid at the time the application for examination is made.

Coming now to your second question:

Having determined that the fees are required to be paid at the times mentioned, you ask if a refunder under any of the following conditions may be made: (A) If a refunder may be made upon the failure to qualify educationally.

Preliminary educational qualifications are provided for in section 1270 G. C., above quoted, and no fee is required of the applicant until the entrance examiner is satisfied either that such applicant has a certificate showing the qualifications mentioned in said section, or has taken an examination. Then the statute provides:

> "If the entrance examiner finds that the preliminary examination of an applicant is sufficient, he shall, upon payment to the treasurer of the state medical board of a fee of $3.00, issue a certificate thereof which shall be attested by the secretary of the state medical board."

That is, the entrance examiner must first find that the applicant has the necessary preliminary education or must give such applicant an examination in the

branches as are required for graduation from a first class high school of this state, and if the examiner finds that the applicant has the educational qualification required, or if such applicant passes the examination given by the entrance examiner, then such entrance examiner shall issue such applicant a certificate, but not until the fee of $3.00 has been paid to the treasurer of the state medical board.

I am informed that it frequently happens that the fee of three dollars is enclosed with the application for a preliminary examination. This proceduce is not in strict compliance with the statute and if same is held by the board or the officials thereof, it is so held only as agent of the applicant, subject to be returned to him at his request, in case he fails to qualify for the preliminary education certificate, or to be received by the board officially, if such applicant qualifies, and when the preliminary educational certificate is furnished to such applicant.

So that, answering your question, subdivision A, I advise you that no fee being properly payable until after the entrance examiner is satisfied of the educational qualifications of the applicant, none could be returned which is properly paid. If, however, the officials of the board are holding any fees simply as agents of the applicant, such fees are returnable on request in case the applicant fails to qualify educationally.

Coming now to subdivision B of your second question, that is, if a fee may be refunded upon the failure of the applicant to pass the final examination, nothing it seems to me could be clearer than the language of section 1277 G. C., which provides that on failure to pass such examination, *the fee shall not be* returned to the applicant, but within a year after such failure he may present himself and be again examined without the payment of an additional fee. Then said section further provides that all fees for examination shall be paid in advance to the treasurer of the board and by him paid into the state treasury to the credit of a fund for the use of the state medical board, and no provision being made for a return of said fees, it is, as above stated, most clear to me that there cannot be a refunder upon a failure to pass a final examination.

The other sections which call for the payment of fees do not provide, as does section 1277, that the fees shall not be returned, neither do they provide that they shall be returned, and I must therefore conclude that provision being made for payment, and no provision being made for a return of such fees, none can be returned which are received officially by the board or its officers.

In sub-division C of your second question you ask if there can be a refunder upon a withdrawal of the application. The statutes makes no provision for the withdrawal of an application and does make provision for the payment of the various fees at the times the various applications are filed and that such fees shall be paid into the state treasury, and makes no provision for the return of said fees. I must, therefore, conclude that there is no way to refund any fees, even if an application can be withdrawn. But I find no provision of statute by which an application may be withdrawn and, therefore, there would be no refunder in that class. This does not apply to a fee paid at the time the application for a preliminary examination is made, as above explained.

Subdivision D of your second question asks if there may be a refunder for any other cause. My answer to subdivision C of said question answers subdivision D, and you are advised that the statute providing for no refunders, none can be had.

In your third question you ask if any of the fees may be properly refunded, how should it be done in view of the provisions of section 24 of the General Code. Said section reads in part as follows:

> "On or before Monday of each week every state officer, state institution, department, board, commission, * * * shall pay to the treasurer of state

all moneys, checks and drafts received for the state, or *for the use* of any such state officer, state institution, department, board, commission * * * during the preceding week, from taxes, assessments, licenses, premiums, *fees,* penalties, fines, costs, sales, rentals or otherwise, and file with the auditor of state a detailed verified statement of such receipts. * * *"

You will note that said section provides that all moneys, etc., "received for the state or for the use of any such state officer," etc., that is, whatever money is so received, shall be paid to the state treasurer on or before Monday of each week. But if any money would be received for the use of any individual, as in case the fee of three dollars is paid at the time the application is filed for the preliminary examination, then and in that case the money would not be paid into the state treasury until such time as the same comes properly into the hands of the board for the use of the state.

So that applying the provisions of said section to the provisions of the act, which provides for the state medical board and for the examination and registration in the practice of medicine in Ohio, whenever fees are paid to the board or to the treasurer thereof, and such fees are paid for the use of the state or an officer or department thereof, then on Monday of each week such fees must be deposited under the provisions of said section 24 with the treasurer of state and a detailed, verified account of same must be filed with the auditor of state.

In your question No. 4 you ask if the state medical board may, in its rules, authorized by section 1267 G. C., provide for the collection of any fees not authorized by statute.

The state medical board is a creature of statute and can only do those things which are permitted under the statute authorizing such board and defining the powers thereof. Section 1267 of the General Code, to which you refer, provides:

"The state medical board shall meet in Columbus on the first Tuesday of January, April, July and October of each year, and at such other times and places as the board may direct. Five members of the board shall constitute a quorum. The board shall have a seal and shall prescribe rules for its government."

The last sentence thereof, which provides that the board shall prescribe rules for its government, in no wise permits the board to levy or collect any fees.

So that, answering your fourth question, I advise you that the state medical board is not authorized under section 1267 of the General Code to provide for the collection of any fees not authorized by statute.

In your question 5 you ask if there is any authority in the provisions of section 1295-5 to collect the fee of $3.00 from nurses which is authorized by section 1270 G. C. to be collected from doctors.

Section 1295-5 G. C. provides:

"On and after January 1, 1916, no person shall practice nursing as a registered nurse in this state without first complying with the requirements of this act. All graduates in nursing shall either personally or by letter or proxy present their diplomas to the nurses' examining committee for verification. Accompanying such diploma the applicant shall file an affidavit, duly attested, stating that the applicant is the person named in the diploma and is the lawful possessor of the same. The applicant shall state date of birth and the actual time spent in the study of nursing. If the committee shall find the diploma to be genuine and from a nurses' training school in

good standing, connected with a hospital or sanitarium in good standing, as defined by the state medical board, and the person named therein to be the person holding and presenting the same, and that said person has paid the fee as hereinafter provided for the examination of applicants, the committee shall issue a certificate to that effect signed by its secretary and chief examiner; such certificate, when left with the probate judge for record as hereinafter required; shall be conclusive evidence that its owner is entitled to practice nursing as a registered nurse in this state. All other persons desiring to engage in such practice in this state shall apply to the nurses' examining committee for a certificate, and submit to the examination hereinafter provided except that all students who were on May 1, 1915, matriculated in a training school for nurses located in the state of Ohio, recognized by the state medical board of Ohio, and who shall have graduated subsequent to May 1, 1915, and who shall file their diploma for registration prior to June 1, 1918, shall receive certificates as heretofore provided. The applicant shall file with the secretary a written application, under oath, on a form prescribed by the state medical board, and provide proof that said applicant is more than twenty-one years of age and of good moral character. The applicant shall file documentary evidence that before matriculating in a training school for nurses, said applicant received an education equivalent to that required for completion of the first year of a high school course of the first grade, in this state, or four units of high school work as defined in the school laws of Ohio, and evaluated by the entrance examiner of the state medical board in the same manner as provided in section 1270 of the General Code of Ohio, and a diploma of graduation from a training school in good standing, connected with a hospital or sanatorium in good standing, as defined by the state medical board, at the time the diploma was issued. At the time of application the applicant shall present such diploma with the affidavit that said applicant is the person named therein and is the lawful possessor thereof, stating date of birth, residence, the training school or schools at which said applicant obtained education and training in nursing, the time spent in each, the time spent in the study and training of nursing, and such other facts as the state medical board requires. If engaged in the practice of nursing, the affidavit shall state the period during which and the place where said nurse has been so engaged."

The part of the above quoted section which applies to your inquiry is that portion which affects applicants who must qualify for examination. That is, the applicant shall file with the secretary of the state medical board a written application under oath on a form prescribed by such board, and provide proof that the applicant is more than twenty-one years of age and of good moral character. The applicant shall file documentary evidence that before matriculating in a training school for nursing, said applicant has received an education equivalent to that required for completion of the first year of a high school course in a high school of the first grade in this state, or what would be defined as four units of high school work. The section then provides:

> "and evaluated by the entrance examiner of the state medical board in the same manner as provided in section 1270 of the General Code of Ohio."

The manner of evaluation, as provided in section 1270 G. C., is that the applicant shall present to the entrance examiner his preliminary educational credentials,

if he has them to present, and if he has no such credentials then the entrance examiner may examine the applicant in such branches as are required therein. If the entrance examiner finds that the preliminary education of the applicant is sufficient, he shall, upon payment to the treasurer, of the state medical board of a fee of three dollars, issue a certificate thereof, which certificate shall be attested by the secretary of the state medical board.

I, therefore, advise you that the fee of $3.00 for the preliminary educational certificate, which is provided for by section 1270, is chargeable under section 1295-5, because the evaluation of credentials under both sections are the same.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

700.

VILLAGE SCHOOL DISTRICT—WHEN CREATED IN A DISTRICT CONTAINING LESS THAN FIFTEEN SQUARE MILES—WHAT TERRITORY ANNEXED—BOARD OF EDUCATION—SPECIAL ELECTION.

1. *When a village school district is created in a rural district, which rural district has less than fifteen square miles, the territory outside of the village is annexed to such village district for school purposes.*

2. *In a newly created village school district a special election may be held for members of a board of education.*

3. *Although the territory of a newly created village district, together with the territory annexed for school purposes, may be the same as that which was originally a rural school district, yet there is a new district and a new board of education shall be elected.*

COLUMBUS, OHIO, October 15, 1917.

HON. SAMUEL DOERFLER, *Prosecuting Attorney, Cleveland, Ohio.*

DEAR SIR:—My opinion is requested by you on the following statement of facts:

> "The village of Euclidville was recently created and became a village school district. The territory of this village previous to its creation was included within the boundaries of the rural school district of Euclid township, which district included more territory than is included in the village, all of which became attached to the village school district for school purposes, as it contained less than sixteen square miles. * * *
>
> At a special municipal election held on September 7th (1917), a school board was attempted to be elected, although the old school board for the rural school district was still in office and claimed the right to conduct the school affairs for a district which they claimed was changed in name only, the territory remaining exactly the same as before the creation of said village.
>
> The citizens of the district outside of the municipality did not vote at the election, although they could have done so if they wanted to. * * *
>
> Was this election legal and is the old school board succeeded by a new one?"

Additional information is given as follows:

"The election in Euclidville on September 7th was a special municipal election called by the agents of the petitioners to the trustees for the incorporation of the village and was the first municipal election held after incorporation.

In the call for that election it was specified that there were to be three members of the board of education elected for a term of four years and two for a term of two years. Ballots were procured and a vote was had for members of the board of education in accordance with the call.

* * * ten days prior to said election legal notice of the election was posted in two public places outside of the village of Euclidville in addition to the notices posted within the village. One of these notices was placed on the bulletin board at the town hall in South Euclid and the other on Mayfield road. Two electors residing outside of the village of Euclidville appeared at the election and cast their votes for members of the board of education."

Further additional information is given as follows:

"The valuation of said district will be over $500,000."

Section 4687 G. C. provides:

"Upon the creation of a village, it shall thereby become a village school district, as herein provided, and, if the territory of such village previous to its creation was included within the boundaries of a rural school district and such rural school district included more territory than is included within the village, such territory shall thereby be attached to such village school district for school purposes, provided such territory has an area of less than sixteen square miles."

That is—and applying the same to your case—the territory from which was created the village of Euclidville was, I am informed, formerly Euclid rural school district and had formerly been a special district, and under the provisions of section 4735 G. C., which provides that all existing township and special districts shall become rural school districts, said Euclid special school district became the Euclid rural school district. When Euclidville was created it did not include all the territory of the Euclid rural school district, but by the provisions of section 4687, above quoted, the remainder of said territory became annexed to the territory of the village for school purposes because there was an area of less than sixteen square miles. So that, as the special district became a rural district by the provisions of section 4735, above mentioned, so now the rural district becomes a village district under the provisions of section 4687, above quoted.

It is further to be noted under the provisions of section 4735 G. C. that:

"All officers and members of boards of education of such existing districts shall continue to hold and exercise their respective offices and powers until their terms expire and until their successors are elected and qualified."

But under the provisions of sections hereinafter noted, when the territory of

a newly created village is held to constitute a village school district, provision is otherwise made by law for a board of education for such newly created school district.

Before it is definitely determined whether or not the territory of a village and that which is annexed to it for school purposes shall constitute a village school district, the provisions of section 4680 G. C. must be considered. Said section reads as follows:

> "Each village, together with the territory attached to it for school purposes, and excluding the territory within its corporate limits detached for school purposes, and having in the district thus formed a total tax valuation of not less than five hundred thousand dollars, shall constitute a village school district."

That is to say, Euclidville, together with the territory attached to it for school purposes, which in this case was the entire district of the Euclid rural school district, became, *ipso facto,* a village district, for, as mentioned in your statement of facts, it has a tax valuation of over $500,000.

So that, for the organization of the district as a village school district, it is next necessary to consider the provisions of section 4710 G. C., which reads as follows:

> "In villages hereafter created, a board of education shall be elected as provided in the preceding section. When villages hereafter created or which have been heretofore created, fail or have failed to elect a board of education as provided in the preceding section, the commissioners of the county to which said district belongs, shall appoint such board, and the members so appointed shall serve until their successors are elected and qualified. The successors of the members so appointed shall be elected at the first election for members of the board of education held in such district after such appointment; two members to serve for two years and three members for four years, and thereafter their successors shall be elected in the manner and for the term as provided by section 4709 of the General Code. The board so appointed by the county commissioners shall organize on the second Monday after their appointment. If the members of such board are elected at a special election held in such district the members so elected shall serve for the term indicated in the preceding section, from the first Monday in January after the preceding election for members of the board of education and the board shall organize on the second Monday after such election."

That is, the village now being created, together with the territory attached for school purposes, containing a tax valuation of upwards of $500,000, a board of education shall be elected as is provided by section 4709, which reads:

> "At the first election in such district a board of education shall be elected, two members to serve for two years and three to serve for four years. At the proper municipal elections held thereafter their successors shall be elected for four years."

The members of such board having been elected at a special election held in such district, the members so elected shall serve, two for the term of two years and three for the term of four years, and said terms shall be counted *from the first*

Monday in January after the preceding election for members of the board of education, which election for members of the board of education occurred the last time in 1915, and the first Monday in January thereafter would be the first Monday in January, 1916. So the terms of the members of the board for the newly created village district began as of the first Monday in January, 1916, two extending two years therefrom or until the first Monday in January, 1918, and three extending four years therefrom, or until the first Monday in January, 1920.

A matter very similar to the one in question here was considered in Opinion No. 757, Annual Reports of the Attorney General for 1912, page 1526, in which a village was incorporated from the territory of a special school district known as the North Kingsville school district, which special school district was located in Kingsville township, Jefferson county, Ohio. Following the creation of said village district, a special election was held and a board of education was elected at such special election. It was held in said opinion that the old board held over only until the new board should organize, which organization should be effected on the second Monday after such special election.

It was again held in Opinion No. D 290, Annual Reports of the Attorney-General for 1911-1912, page 537, that an incorporated village which forms a part of a township school district becomes, *ipso facto,* a village school district upon the attainment of the tax valuation necessary for such village school district.

In Buckman v. State, 81 O. S. 171, the record presented in said case but a single question, that is, did the village of Kenmore, by its creation as an incorporated village, thereby, and by that act alone, become a village school district. It was admitted that the tax valuation of the property within the village at the time of its incorporation was largely in excess of the amount prescribed by statute (at that time $100,000, now $500,000). The court held that the incorporation of the village, together with the territory attached to it for school purposes, must be considered a village school district from and after the time such village was incorporated; that no vote of the electors was necessary in the creation or establishment of such village school district.

It would seem clear, from the above cited sections, opinions and decisions, that a new district was created and that there was a legal election and the old board is succeeded by the new board in said school district. The creation of the village, in a school district which contained less than sixteen square miles, caused the entire territory of such district to become annexed to the territory of the village for school purposes, and although the boundary lines remained the same, there was a new district, while in many respects the same, yet a district which is capable of having rights and advantages different from a rural district. The old district, that is, the rural district, went out of existence when the new district was created and the old board simply held over until the new board was duly elected and qualified. The statute provides for the election of a new board which may be elected at a general or *special* election. In this case the new board was elected at a special election called for that purpose and as soon as the members qualify and organize, the affairs of the schools of said district shall be in the hands of the new board as successors to the old board.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

701.

SCIOTO RIVER—BED BELONGS TO ADJOINING PROPRIETORS.

1. *The bed of the Scioto River belongs to adjoining proprietors. He who owns the land on both sides owns it clear across.*

2. *The proprietor on one side owns in front of his land at the bank to the middle of the stream, or the thread of the stream.*

3. *Being such owners, subject only to an easement, a gravel bar in the river would belong to such adjacent proprietors.*

COLUMBUS, OHIO, October 15, 1917.

HON. C. M. CALDWELL, *Prosecuting Attorney, Waverly, Ohio.*

DEAR SIR:—Under date of September 10, 1917, you request an opinion from this department as follows:

> "1. To whom does the bed of the Scioto river belong?
>
> 2. Do the lands of land-owners adjoining the Scioto river extend to low water mark, or to the thread of the stream?
>
> 3. If a gravel bar starts at the shore and extends some distance out into the river and beyond low water mark, is the adjoining land-owner entitled to pay for gravel taken from this gravel bar?
>
> The gravel bar in question at times has water running on both sides of it, there being a small stream of water between it and the shore most of the time. However, when the River is low it is dry from the shore out to the end of the bar. The commissioners have taken gravel from this gravel bar, and the adjoining land-owner demands payment.
>
> We would like to have your opinion as to the foregoing matters as soon as convenient."

It is apparent that the first and second inquiries amount to the same thing, and the answer to the third is dependent upon the answers to the others. The rule seems to be universal as to unnavigable streams, that the adjoining proprietors own them to the center of the stream. Washburn, upon this subject, says:

> "In respect to streams and rivers which are not navigable, the rule seems to be universal, that describing land as running to the stream or the bank, and by it or along the stream or the bank, extends to the middle or thread of the stream, the *filum aquae,* unless there is something in the description clearly excluding the intermediate space between the edge or bank of the stream and its thread. And if the bed of the stream changes imperceptibly by the gradual washing of the banks, the line of the land bordering upon it changes with it; but if this change is by reason of a freshet, and suddenly done, the line remains as it was originally."
>
> 3 Washburn on Real Property, Sec. 2334.

The Scioto river, however, is a navigable stream in contemplation of law, and as will appear hereinafter the rule is not universally settled, but differs in different jurisdictions. It is made a navigable stream by express legislation by an act of February 17, 1808, entitled, "An act declaring certain streams navigable," as follows:

> "Section 1. Be it enacted by the general assembly of the state of Ohio,

that the following streams be, and they are hereby declared to be, navigable, or public highways, to wit: The Mahoning from the Pennsylvania line as far up as Jesse Holliday's mill; Still Water, from its confluence with the Muskingum river, as far up as the mouth of Brushy Fork of said stream; Will's Creek, from its confluence with the Muskingum as far up as Cambridge; One Log (commonly called Cannotton) as far up as the division line between the 14th and 15th townships in the seventh range; the Scioto from its confluence with the Ohio river, as far up as the Indian boundary line, and the Little Muskingum, from its confluence with the Ohio, up as far as the south line of section 36 in the second township of the seventh range." (6 O. L. 6.)

The other sections of the act prohibit or regulate the building of dams and provide a penalty for violation thereof.

In Vol. 7 Ohio Laws, page 165, this is repealed so far as applies to Still Water. I have been unable to find any further repeal, but in Chase's Statutes, published in 1835, purporting to give all the statutes of the state and of the Northwest Territory from 1788 to 1833, and compiled by the great Salmon P. Chase, this is given in the enumeration of special acts, Chase's Statutes, Vol. III, page 2168, as follows:

"Chap. DCCCXVI—An act declaring certain streams navigable. Passed, February 17, 1808; 6 O. L. 6. See post, O. L. L. c. 818, 832, 847."

The above reference mentions the subsequent act repealing that portion of the former applying to Still Water, passed January 24, 1829, 7 O. L. 108.

No further reference is made to this subject in Chase's Statutes, and after that period it seems to have disappeared, as I find no reference to the subject in any subsequent compilation or edition of the Ohio Statutes; so that, unless there be some repeal that has escaped my notice, the Scioto river is still a navigable stream as far as the Indian boundary line. This line is shown on ancient maps as crossing the river in the neighborhood of the north line of Delaware county, and is the line established by Wayne's treaty with the Indians; therefore Pike county is on that part of the waters of the Scioto which are legally designated as navigable, and we are relieved from the investigation and discussion of whether it be in fact a navigable stream at the present time. A rather full discussion of the subject of boundaries on such navigable streams is given by Washburn, Vol. III, sections 2335 et seq., discussing what is a navigable stream, and the line of riparian ownership in reference to it. We are relieved by the operation of the above statute from the first discussion, interesting though it be. There is, however, some difference in the character of navigable streams with the consequent difference in the decisions as to ownerships of their beds; the distinction is as to those streams which are upon tide water, in reference to which such ownership extends only to the line of the high-water mark. This distinction undoubtedly comes from the English laws, none of the tributary streams in England being navigable, and few of the main streams being navigable above tide water. In this country with very large fresh water rivers a different rule has been adopted, and in some jurisdictions a distinction is made between public and navigable streams by which tide waters were regarded as public highways for all the world, and therefore not the subject of private ownership, and streams within states subject to state jurisdiction as to their navigation and as to the grant of the soil in their beds. In some of the states the beds of these navigable rivers are held to belong to the state, the adjoining proprietors owning only to low water mark; in others, the

common law doctrine is held that the ownership of banks is extended to the thread of the stream, which thread of the stream, by the way, is the middle of the distance across it.

Among the states which hold this latter doctrine are given Connecticut, Ohio, Missouri, Illinois, Massachusetts, Maryland, Wisconsin, South Carolina, Maine, Mississippi, Vermont, New Jersey and New York—thirteen states; while the former doctrine, that of ownership by the state, is held by the same number. It is not important to consider the doctrine in the other states than those given, the statement being made simply to show the fact of a difference of opinion and practice in the different states. The latter doctrine is settled for this state by our supreme court in two cases:

> "In Ohio owners of land situated on the banks of navigable streams running through the state, are also owners of the bed of rivers to the middle of the stream, as at common law."
> *Admrs. of Gavit v. Chambers & Coates,* 3 Ohio 496.

The opinion is a per curiam, and on page 498 is a considerable discussion of the reasons for holding the land subject to the ownership of adjoining proprietors. It is declared not to have been the intention of the United States to reserve an interest in the beds, banks and waters of the rivers other than use for navigation to the public, and all grants of lands upon such waters are held to be made subject to the common law rule, which the court states as follows:

> "He who owns the lands upon both banks, owns the entire river, subject only to the easement of navigation, and he who owns the land upon one bank only owns to the middle of the river, subject to the same easement."

The above case was approved and the same doctrine affirmed in a comparatively modern case: *June v. Purcell,* 36 O. S. 396, the first section of the syllabus being as follows:

> "The principle decided in *Gavit v. Chambers* (3 Ohio 496), that the owners of lands situated on the banks of navigable streams running through the state are also owners of the beds of the rivers to the middle of the stream, as at common law, has become a rule of property, and, irrespective of the question of its original correctness, ought not to be disturbed."

The river in this case was the Sandusky. A very full statement of the facts is given in the report and arguments of counsel stated at length. The opinion, written by Judge White, fully discusses the questions involved and approves the decision in *Gavit v. Chambers* as a rule of property. On page 407 is found the following:

> "The common law doctrine, having been incorporated into the jurisprudence of this state at so early a day, and having been regarded as a rule of property for more than half a century, it ought not now, irrespective of the question of its original correctness, to be disturbed. To disturb the rule now, 'would be a dangerous tampering with riparian rights.'"

The matter you speak about, therefore, it seems may be answered with certainty as follows:

1. The bed of the Scioto river belongs to adjoining proprietors. He who owns the land on both sides owns it clear across.

2. The proprietor on one side owns in front of his land at the bank to the middle of the stream, or the thread of the stream

3. Being such owners, subject only to an easement, a gravel bar in the river would belong to such adjacent proprietors.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

702.

APPROVAL—CONTRACTS BETWEEN SUPERINTENDENT OF PUBLIC WORKS AND M. E. MURPHY COMPANY OF COLUMBUS, OHIO, AND BONDS SECURING SAME.

COLUMBUS, OHIO, October 15, 1917.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—There has been submitted to me for approval the following contracts, together with bonds securing the same:

1. Contract entered into between you and M. E. Murphy Company, of Columbus, Ohio, September 10, 1917, for furnishing materials, equipment and labor and driving approximately 73 piling, each 40 feet long, to protect bank of Ohio canal, about four miles south of Cleveland, Ohio, upon which the bid was one dollar and twenty-five cents ($1.25) per lineal foot when driven in place, the amount of such contract having been estimated by you not to exceed $3,650.00.

2. Contract entered into between you and M. E. Murphy Company, of Columbus, Ohio, September 10, 1917, for furnishing materials, equipment and labor, and driving approximately 50 piling, each 40 feet long, to protect bank of Ohio canal, at Paper Mill, south of Cleveland, Ohio, upon which the bid was one dollar and twenty-five cents ($1.25) per lineal foot when driven in place, the amount of such contract having been estimated by you not to exceed $2,500.00.

I have examined said contracts and the accompanying bonds and find same to be in compliance with law and have therefore approved the same and filed the same in the office of the auditor of state, having received from such auditor certificates that there is money available to cover the estimated amount of said contracts.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

703.

CAPITAL STOCK—FOREIGN CORPORATION—HOW COMPUTED.

The authorized capital stock of a foreign corporation, which is empowered under its charter to issue not more than a given amount of capital stock, par value, and not more than a given amount of preferred stock, an amount of common stock equal to the amount of preferred stock being reserved from issuance except in exchange for the preferred stock, and there being no power to re-issue preferred stock after it has once been retired or exchanged for common stock, is not the sum of the authorized common stock and the authorized preferred stock, but the sum of the unreserved common stock and the preferred stock—or, stated in another way, the whole amount of the common stock.

COLUMBUS, OHIO, October 15, 1917.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I have your letter of September 6th requesting my opinion upon the following question:

> "The Lima Locomotive Works, Inc., a foreign corporation qualified to transact business in this state, filed its annual report for franchise tax for 1917 with this commission.
>
> We are enclosing a copy of the certificate of incorporation and of the certificate of amendment to the articles of incorporation.
>
> What is the amount of the authorized capital stock of this company? This information is requested in order that the commission may determine the basis of the franchise fee as provided by section 5502 General Code."

As stated in your letter, the question is made by the following quotations from certificates, authenticated copies of which have been filed in the office of the secretary of state.

1. Certificate of incorporation of The Lima Locomotive Works, Inc. This certificate recites that the undersigned associated themselves to establish a corporation under the general laws of the state of Virginia, and among other things states the following with respect to the capital stock of the corporation:

> "The capital stock of said corporation shall be of the minimum par value of one thousand dollars ($1,000) and of the maximum par value of ten million seven hundred and fifty thousand dollars ($10,750,000), divided into shares of the par value of one hundred dollars ($100) each. The minimum capital stock shall be common stock, with the rights and privileges hereinafter stated. Of the maximum capital stock three million two hundred thousand dollars ($3,200,000) par value thereof, or a maximum of thirty-two thousand (32,000) shares of the par value of one hundred dollars ($100) each shall be preferred stock, and seven million five hundred and fifty thousand dollars ($7,550,000) par value thereof, or a maximum of seventy-five thousand five hundred and fifty (75,550) shares, of the par value of one hundred dollars ($100) each, shall be common stock; and the terms upon which the said preferred stock and common stock are created and shall be issued are as follows ,to wit:
>
> * * * * * * *
>
> Each and every holder of the preferred stock shall be entitled at any time (except when the stock transfer books of the corporation are closed

for the payment of dividends or for stockholders' meetings), and subject to the laws of the state of Virginia in such case made and provided and under such regulations as may be provided in the by-laws or by resolution of the board of directors of the corporation, to deliver to the corporation, properly endorsed, his certificates for preferred stock and to receive in lieu thereof certificates for common stock, share for share, and thereupon such certificates of preferred stock shall be retired and cancelled and *never again reissued,* and the amount of the capital stock of the corporation represented by the preferred stock certificates so received and cancelled and by the common stock certificates so issued in lieu thereof, shall become and shall thereafter remain common stock; and such further proceedings, if any, as may be necessary to carry out this provision in accordance with the laws of the state of Virginia shall from time to time be taken by the corporation."

2. Certificate of amendment to the certificate of incorporation of said company, filed June 9, 1917. This amendment, to adopt its recital, consists of:

"(a) changing the statement of article fourth of the certificate of incorporation of the division into shares of the maximum amount of common stock so that said statement will read as follows:

'seven million five hundred and fifty thousand dollars ($7,550,000) par value thereof, or a maximum of seventy-five thousand five hundred (75,500) shares of the par value of one hundred dollars ($100) each, shall be common stock'

and (b) including in said article fourth an additional provision to stand as the eighth paragraph of said article as follows:

'No part of three million two hundred thousand dollars ($3,200,000) of the authorized maximum amount of common stock shall be issued except upon surrender for conversion or for redemption and upon cancellation of an equivalent number of shares of the preferred stock.'"

There has been a slight delay in the consideration of this question due to the desire of Messrs. Wheeler and Bentley, counsel for the company, to be heard in the matter.

I feel that I can make no question as to the authority of the company to amend its articles of incorporation in the manner in which the certificate of amendment purports to change them. If in effect such change amounts to a reduction of the authorized capital stock of the company, the result is not altered, for what may be done by amendment, and whether or not a special proceeding is necessary to reduce the capital stock of a Virginia corporation, is a question of Virginia law to be decided in the first instance by the administrative officers whose action is invoked by the presentation of the papers designed to effect a given end. The secretary of state of Virginia having permitted the filing of the certificate of amendment, I assume that it is in all respects valid, and has the effect upon the present provisions of the certificate of incorporation that it purports to have.

Some question may exist as to what was the authorized capital stock of The Lima Locomotive Works, Inc., under its original certificate of incorporation, though I am strongly inclined to the view that it was $10,750,000.00. As amended, however, the certificate of incorporation provides in the first instance for $7,550,000.00 common stock and $3,200,000.00 preferred stock, giving a maximum of $10,750,000.00, with the qualification, however, that $3,300,000.00 of the authorized com-

mon stock may not be issued as ordinary common stock, but only in exchange for preferred stock which shall thereupon be converted, redeemed and cancelled.

It is clear, therefore, that the authority to issue common stock generally is limited to $4,250,000.00 par value of such stock which, added to the $3,200,000.00 authorized preferred stock, gives a maximum of $7,550,000.00 authorized stock which the company will be permitted to have under its certificate of incorporation after its initially authorized preferred stock is fully redeemed or converted into common stock. As suggested, the stock will then all be common stock and the power to issue common stock will be exhausted.

The amount last named would then be the authorized capital stock of the company unless the authority to issue preferred stock would still exist. This requires further consideration of the original certificate of incorporation for this question is not affected by the amendment.

I call attention in this connection to the underscored provisions of the second paragraph above quoted from said original certificate. From these words it clearly appears that when the initial issue of preferred stock has been fully redeemed or converted into common stock, the authority to issue preferred stock will be exhausted.

I think it is apparent from the foregoing that under its amended articles of incorporation The Lima Locomotive Works, Incorporated, can never have more than $7,550,000.00 of stock of any kind.

The authorized capital stock of a foreign corporation, for the purposes of the Ohio compliance statutes and franchise tax laws, is in my opinion that amount of capital stock which the corporation may, without securing further authority from the state by way of amendments to its articles of incorporation or the observance of any other formalities, issue and have outstanding at any one time.

It follows that the authorized capital stock of The Lima Locomotive Works, Incorporated, for the purposes at hand, is $7,550,000.00, and I so advise you.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

704.

SUPERINTENDENT OF SCHOOL DISTRICT—IN WHICH CHILDREN'S HOME IS LOCATED—WHEN FIRST SEMI-ANNUAL REPORT SHOULD BE MADE—TRANSFER OF SCHOOL FUNDS—UNDER SECTION 7678 G. C.—WHEN SUCH TRANSFER SHOULD BE MADE.

The first semi-annual report of the superintendent of a school district in which is located a children's home from which the children attend the schools of such district, shall be made in February of the school year, that is, in the first instance in February, 1918.

The first transfer of school funds to the various districts, as provided by G. C. 7678, *by the county auditor, is made from the February distribution of taxes in* 1918.

COLUMBUS, OHIO, October 15, 1917.

HON. LEWIS F. HALE, *Prosecuting Attorney, Bellefontaine, Ohio.*

DEAR SIR:—You ask my opinion on the following statement of facts:

"Please give decision interpreting sections 7677, 7678 and 7681 of the General Code of Ohio, answering the following questions:

"Should the first superintendent's report to county auditor, as required

by section 7677, have been made in August, 1917, or not be made until February, 1918? Shall the auditor make transfer of school funds in his own county and certify amounts to auditors of other counties as required by section 7678 in August settlement of 1917, or not until the February settlement, 1918? In other words, can tuitions be collected for the six months previous to August, 1917?

"Our auditor has prepared an estimate of the amount chargeable to the various school districts in other counties and is ready to make transfers to the proper school funds, but is in doubt whether he should proceed further. He will hold up this matter until we hear from you."

The sections to which you refer, and section 7676, pertinent to said inquiry, read as follows:

"Sec. 7676. The inmates of a county, semi-public or district children's home shall have the advantage of the privileges of the public schools. So far as possible such children shall attend such schools in the district within which such home is located. Whenever this is impossible and a school is maintained at the home, such school shall be under the control and supervision of the city, township, village or special board of education, having jurisdiction over the school district within which such home is located. Such board of education shall employ with the approval of the superintendent of the home necessary teachers, and provide books and educational equipment and supplies, and conduct such school in the same manner as a public school within the district. The trustees of the home shall furnish necessary furniture, fuel and light."

"Sec. 7677. On or about the first day of February and of August the superintendent of the school district in which the inmates of a county, semi-public or district children's home is located shall furnish the county auditor a detailed report showing the average per capita cost, of conducting a school at such home, or the average per capita cost, except for improvement and repairs, of all the elementary schools in such district in case such inmates attend such a school, for the preceding six months. Such report shall also give the names and former residence of all inmates in attendance at school, the duration of attendance, and such other information as the county auditor may require to carry out the provisions of the next section."

"Sec. 7678. A child who is an inmate of a county, semi-public or district children's home and who was previously a resident of the school district in which such home is located shall be entitled to an education at the expense of such school district, but any child who was not a resident of such school district shall be educated at the expense of the school district of its last residence. Any child who was not a resident of the school district within which such home is located prior to admission or commitment to such home, shall be educated at the expense of the district of its last residence. The county auditor upon receipt of the above report from the board of education shall, before making a semi-annual distribution of taxes collected, estimate the amounts chargeable to the various school districts for tuition of inmates of such home, and shall transfer to the proper school funds such amounts. In case there are inmates from another county, the county auditor of the county in which the home is located shall certify the amount to the auditor of the county of such children's residence who shall forthwith issue his warrant on treas-

urer of the same county for such amount, and shall proceed to apportion the proper amounts to the various school districts of such county in the manner described above."

"Sec. 7681. The schools of each district shall be free to all youth between six and twenty-one years of age, who are children, wards or apprentices of actual residents of the district, but the time in the school year at which beginners may enter upon the first year's work of the elementary schools shall be subject to the rules and regulations of the local boards of education. Inmates of the proper age of county, semi-public and district children's homes shall be admitted after the manner described in section 7676. The board of education may admit the inmates to a private children's home or orphan asylum located in the district, with or without the payment of tuition fees, as may be agreed upon; provided any child who is an inmate of such a home or asylum and previous to admission was a resident of the school district in which such home or asylum is located, shall be entitled to free education; and provided, any such inmate who attends the public schools was prior to admission to such home or asylum a resident of another school district of the state of Ohio and a tuition fee is charged, the same method of reimbursement shall be followed as is provided in sections 7677 and 7678; and provided further, for any such inmate who attends the public schools, and who prior to admission to such home or asylum was not a resident of the state of Ohio, such home or asylum shall pay from its own funds such tuition as may be agreed upon. But all youth of school age living apart from their parents or guardians, and who work to support themselves by their own labor, shall be entitled to attend school free in the district in which they are employed."

Said sections provide for the education of the school youth who resides in a county, semi-public or district children's homes, and in substance charge the education of such youth to the district or districts of their last places of residence. The superintendent of the school district in which the inmates of a county, semi-public or district children's home is located shall furnish the county auditor a detailed report, which report shall show the average per capita cost to such district of conducting a school at such home, or the average per capita cost of conducting all of the elementary schools in such district, in case such inmates attend such school *for the preceding six months,* and such report shall also give the names and former residence of all inmates who attend any of the schools of the district for which the superintendent is making such report, together with the duration of the attendance, and such other information which the county auditor may require in order to carry out the provisions of the law in relation to ascertaining the residence of the child or children which attend such schools, and in order to ascertain the liability of the district or districts which were formerly the places of residence of such children. If the report shows that any of such children were previously residents of the school district in which such home is located, then such pupils are entitled to an education at the expense of said school district, because that school district is the school district of their last place of residence. But any child who was not a residence of such school district in which such home is located, prior to the time it became an inmate of such home, shall be educated at the expense of the school district of its last place of residence, and the county auditor, from the report which is made to him by the superintendent of the schools of the district in which the home is located, shall, when he makes a semi-annual distribution of taxes, estimate the amounts chargeable to the various school districts for tuition to the inmates of such home and shall transfer to the proper school

funds such amounts; that is, from the reports which are made, such county auditor shall ascertain the last place or places of residence of the inmates whose residence, prior to coming into said home, was in a district or districts other than the district in which the home is located and shall then charge to such district or districts the proper tuition for the pupils who resided therein prior to becoming inmates of the home, and credit such tuition to the district in which the home is located, and which is furnishing such pupils the proper schooling, and such county auditor shall make the proper transfer of such funds. In case any of the inmates of such homes resided in another county, the county auditor shall certify the amount to the auditor of the county from which such children came, and the auditor of such county shall issue his warrant on the treasurer in favor of the auditor of the county in which the home is located, and proper distribution shall be made of the funds received on said order.

Said sections, above quoted, were amended in 1917 in house bill No. 164, and became effective June 25, 1917. The act, therefore, would speak from that time, and while said date on which the law became effective is prior to the first day of August, 1917, yet from a careful consideration of the language of section 7677 it seems clear to me that the legislature intended that the first report should be in February, 1918, rather than in August, 1917, for several reasons, among which are: February is mentioned prior to August in said section, and the February settlement is the first semi-annual settlement time in the school year, which begins September 1st, and the first distribution time of the year's taxes; that is, the first semi-annual settlement in a fiscal year is the February settlement, and the August settlement is the second semi-annual settlement in the fiscal year. If said report were made on or before August 1st of 1917, and the calculations were made upon the average per capita cost for the preceding six months, that is, for the six months preceding August 1, 1917, and the county auditor should transfer to the proper school funds such amounts as are necessary to cover the estimates of the past six months, then such school districts would be receiving funds prior to the time the tuition expense was actually furnished for the teaching of said pupils. That is—and putting it in a different way—the school year beginning September 1st, and all youth between the ages of six and twenty-one years are permitted school advantages. The taxes which are levied are collected at the two semi-annual tax-paying periods, viz., December and June. The two annual distributions are made in February and August, 1918. Whatever, then, a board of education of a district in which a children's home is located is compelled to pay out for tuition expenses in the education of the school youth for six months, beginning September 1, 1917, would be returned to such school board, or, in other words, credited to such school board when the first semi-annual settlement is made in February, 1918, and whatever tuition expense such board of education would be compelled to pay during the last half of the school year for the same purpose would be returned to said board when the August settlement would be made, and from the last half of the yearly taxes. I know of no statutes which will compel a school district to pay tuition in advance. Contracts for the payment of tuition may be made in advance of the time the schooling is received, and in this case the statute stands in the place of a contract and makes the various districts where such pupils last lived liable for the tuition thereof. But tuition from one district to another is paid, ordinarily, either monthly, semi-annually or annually, as may be determined by the board. In this case the statute makes the paying time the time of the semi-annual settlement.

I must therefore hold that the first superintendent's report to the county auditor, as required by General Code section 7677, should be made on or before the first day of February, 1918, and that the county auditor should make the proper transfer of school funds for the tuition expenses provided for in the act

of which said section is a part, at the February and August settlement periods in 1918. In other words, the tuition cannot be collected for the six months previous to August, 1917, or previous to the time that such law, of which said section is a part, became effective.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

705.

DISTRICT SUPERINTENDENT—HOW VACANCY IN SAID POSITION FILLED.

Where a vacancy occurs in the position of a district superintendent the same is filled by the electing power, that is, by the presidents of the boards of education, or the members thereof, as the case may be, and is not filled by the county board of education in the first instance.

COLUMBUS, OHIO, October 15, 1917.

HON. E. A. SCOTT, *Prosecuting Attorney, West Union, Ohio.*

DEAR SIR:—Your request for my opinion reads as follows:

> "In one of the supervision districts of Adams county the presidents of the rural boards of education met prior to September 1st of the present year and elected a district superintendent for one year.
>
> A few days ago one of the district superintendents resigned. The county board of education filled the vacancy.
>
> My question is this: Has the county board of education the right to fill said vacancy or should the presidents of the rural boards of education fill the vacancy?"

The county board of education, under the provisions of section 4738 G. C. shall divide the county school district any year into supervision districts. The division so made by the county board shall take effect on the first day of September following the time it is made.

Section 4739 G. C. provides that each supervision district shall be under the direction of a district superintendent. Such district superintendent shall be elected by the presidents of the village and rural boards of education within such district, except that where the supervision district contains three or less rural or village school districts the boards of education of such school district, in joint session, shall elect such superintendent.

Section 4741 G. C. provides that the first election of any district superintendent shall be for a term of not longer than one year and that thereafter he may be re-elected in the same district for a period or term of not to exceed three years, and further provides:

> "Whenever for any cause in any district a superintendent has not been appointed by September first, the county board of education shall appoint such superintendent for a term of one year."

Section 4742 provides that not less than sixty days before the expiration of the term of the district superintendent, the presidents of the boards of education within such supervision district, or within supervision districts which contain three or less village or rural districts the boards of education, of such districts, shall meet and elect his successor, and that the president of the board of education in the village or rural district which has the largest number of teachers shall issue the call and give at least ten days' notice of the time and place of such meeting and such president of the board in the district having the largest number of teachers shall act as chairman of such meeting and certify the results of such meeting to the county board of education.

Section 7610-1 G. C., as enacted in 107 O. L., p. 623, provides:

> "If the board of education in a district fails to provide sufficient school privileges for all the youth of school age in the district, or to provide for the continuance of any school in the district for at least thirty-two weeks in the year, or to provide for each school an equitable share of school advantages as required by this title, or to provide suitable school houses for all the schools under its control, or to elect a superintendent or teachers, or to pay their salaries or to pay out any other school money, needed in school administration, or to fill any vacancies in the board within the period of thirty days after such vacancies occur, the county board of education of the county to which such district belongs, upon being advised and satisfied thereof, shall perform any and all of such duties or acts, in the same manner as the board of education by this title is authorized to perform them. * * *"

The provisions of the above section, however, would probably apply only to the election of a district superintendent in districts where the full board of education acts, but without deciding that question, which is not necessary to be decided in this opinion, the intent and purpose of the legislature is clearly ascertained by the language of said section, coupled with the language of section 4741, above quoted. That is, it is the duty of the county board of education to act in the election of a district superintendent only when the act is not performed by those persons whose duty it is to perform same. In other words, when a supervision district is formed, the presidents of the boards of education of such district, or the members of the various boards, as the case may be, shall elect a district superintendent. If, for any cause, such district superintendent is not elected by the first day of September, which it will be remembered is the beginning of the new school year, then the county board of education shall perform the duty which the presidents or members of the various boards should have performed. Likewise, if under the provisions of section 4610-1, above quoted, a board of education fails to perform any of the acts therein enumerated and the matter is called to the attention of the county board and such board is satisfied that such condition exists, then the county board may perform the act which should have been performed by the district board in the first instance.

The presidents or the members of the various boards are given the right to elect district superintendents and it is a well established principle of law, and is particularly set forth in Throop on Public Officers, section 436, that:

> "A power to elect or appoint to an office includes a power to fill a vacancy therein."

So that the presidents or members of the various boards, as the case may be,

who have the right in the first instance to elect or appoint the district superintendent, have the right to fill a vacancy, should one occur.

Answering, then, your question specifically, I advise you that the presidents of the rural boards of education, and not the county board of education are the proper persons to fill the vacancy which was caused by the resignation of one of your district superintendents.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

706.

MINOR UNDER AGE OF EIGHTEEN YEARS—PLACED ON PROBATION BY JUVENILE COURT—EFFECT OF VIOLATION OF SAID PROBATION AFTER REACHING AGE OF EIGHTEEN YEARS—JURISDICTION OF JUVENILE AND COMMON PLEAS COURTS.

A boy came into the custody of the juvenile court prior to his becoming eighteen years of age and was placed on probation by the court upon certain conditions. After arriving at the age of eighteen he violated this probation. HELD, if the violation of probation in this case consisted of a violation of some rule of conduct imposed by the juvenile court upon this boy prior to his becoming eighteen years of age, the juvenile court can now deal with such boy in exactly the same manner as if he were still under eighteen years of age, except that the court is without authority to commit such boy to the boys' industrial school. If, however, the violation of probation consisted of the commission of some offense against the state laws or local ordinances since such boy became eighteen years of age, the juvenile court has no jurisdiction in the punishment of such offense and the boy should be proceeded against in the same manner and in the same court as though he were an adult.

COLUMBUS, OHIO, October 16, 1917.

HON. R. D. TURNER, *Probate Judge, Kenton, Ohio.*

DEAR SIR:—I have your letter of September 14 ,1917, as follows:

"Section 1652 General Code provides that a juvenile judge may commit a delinquent child under the age of eighteen to the care and custody of a probation officer and may allow such child to remain at its own home subject to the visitation of the probation officer or otherwise as the court may direct and subject to be returned to the judge for further orders for proceedings whenever such action may appear to be necessary.

"The juvenile code also provides that where once a delinquent child comes under the custody of the court it remains a ward of the court until it attains the age of twenty-one years. The question that arises in our court is as follows: We have a boy that came into the custody of the court before he attained the age of eighteen and was placed on probation subject to certain conditions. Since his probation he has attained the age of eighteen and since that time has violated the provisions of his probation. Our understanding is that the rules of the boys' industrial school at Lancaster will not permit us to commit a boy over eighteen to that institution. This being the case, what shall we do with this boy? He has not

committed a felony and we could not commit him to the Ohio state reformatory, and we are at a loss to know what course to pursue and, therefore, ask your advice."

Sections 2084, 1642, 1644, 1652 and 1659 of the General Code read:

"*Sec.* 2084. Male youth, not over eighteen nor under ten years of age, may be committed to the boys' industrial school in the manner provided by law on conviction of an offense against the laws of the state.

"*Sec.* 1642. Such courts of common pleas, probate courts, insolvency courts and superior courts within the provisions of this chapter shall have jurisdiction over and with respect to delinquent, neglected and dependent minors, under the age of eighteen years, not inmates of a state institution, or any institution incorporated under the laws of the state for the care and correction of delinquent, neglected and dependent children and their parents, guardians, or any person, persons, corporation or agent of a corporation, responsible for, or guilty of causing, encouraging, aiding, abetting or contributing toward the delinquency, neglect or dependency of such minor, and such courts shall have jurisdiction to hear and determine any charge or prosecution against any person, persons, corporations, or their agents, for the commission of any misdemeanor involving the care, protection, education or comfort of any such minor under the age of eighteen years.

Sec. 1644. 'Delinquent Child Defined.' For the purpose of this chapter, the words 'delinquent child' includes any child under eighteen years of age who violates a law of this state, or a city or village ordinance, or who is incorrigible; * * * A child committing any of the acts herein mentioned shall be deemed a juvenile delinquent person, and be proceeded against in the manner hereinafter provided.

Sec. 1652. In case of a delinquent child the judge may continue the hearing from time to time and may commit the child to the care or custody of a probation officer, and may allow such child to remain at its own home, subject to the visitation of the probation officer or otherwise, as the court may direct, and subject to be returned to the judge for further or other proceedings whenever such action may appear to be necessary; or the judge may cause the child to be placed in a suitable family home, subject to the friendly supervision of a probation officer, and the further order of the judge, or he may authorize the child to be boarded in some suitable family home in case provision be made by voluntary contribution or otherwise for the payment of the board of such child, until suitable provision be made for it in a home without such payment; or the judge may commit such child, if a boy, to a training school for boys, or, if a girl, to an industrial school for girls, or commit the child to any institution within the county that may care for delinquent children, or be provided by a city or county suitable for the care of such children. In no case shall a child, committed to such institutions, be confined under such commitment after attaining the age of twenty-one years; or the judge may commit the child to the care and custody of an association that will receive it, embracing in its objects, the care of neglected or dependent children, if duly approved by the board of state charities, as provided by law. Where it appears at the hearing of a male delinquent child, that he is 16 years of age, or over, and has committed a felony, the juvenile court may commit such child to the Ohio state reformatory.

Sec. 1659. When a minor under the age of eighteen years is arrested, such child, instead of being taken before a justice of the peace or police judge, shall be taken directly before such juvenile judge; or, if the child is taken before a justice of the peace or a judge of the police court, it shall be the duty of such justice of the peace or such judge of the police court, to transfer the case to the judge exercising the jurisdiction herein provided. The officers having such child in charge shall take it before such judge, who shall proceed and dispose of the case in the same manner as if the child had been brought before the judge in the first instance."

On May 3, 1915, my predecessor, Hon. Edward C. Turner, rendered an opinion to Hon. Edw. C. Peck, juvenile judge, Bryan, Ohio, found in the Opinions of the Attorney-General for 1915, Vol. 1, page 621, in which he held:

"Juvenile court judge is without authority to commit a youth over eighteen years of age to the boys' industrial school, notwithstanding the status of delinquency attached to the youth prior to arriving at the age of eighteen."

Section 1653-1 General Code, not referred to in that opinion, reads:

"The provisions of section 1652 shall not apply to the girls' industrial school or the boys' industrial school, so far as the same allows the commitment of a child under ten years or over eighteen years of age to such institution. In no case shall a child found to be a dependent or neglected child be committed to such institution, nor shall any child under ten years or over eighteen years of age, be committed to such school except as provided in section 2111 of the General Code."

This makes it clear that a boy over eighteen years of age cannot be committed to the boys' industrial school at Lancaster by the juvenile court, even though the status of delinquency attached to such youth prior to his arriving at the age of eighteen.

Section 1643 G. C. reads:

"When a child under the age of eighteen years comes into the custody of the court under the provisions of this chapter, such child shall continue for all necessary purposes of discipline and protection, a ward of the court, until he or she attain the age of twenty-one years. The power of the court over such child shall continue until the child attain such age."

I note that because of this section you seem inclined to the view that the juvenile court would have jurisdiction over the youth referred to concerning the commission of an offense committed subsequent to his arrival at the age of eighteen. In the opinion of Mr. Turner, just referred to, he discusses this question as follows:

"It is my opinion, therefore, that if the delinquent who is now over eighteen years of age has violated a law, the jurisdiction to hear and determine his case would rest in some tribunal other than the juvenile court, notwithstanding that for such purposes the jurisdiction of the juvenile court attached to said delinquent and continues until he may have reached the age of twenty-one years and that there is no jurisdiction in the juvenile

court to commit, in the case under consideration, for an offense committed by the boy, although possessing the status of delinquency, when said offense against the law was committed after the boy had reached the age of eighteen years."

I concur in this view expressed by my predecessor and in direct answer to your inquiry would advise you as follows:

If the violation of probation in this case consisted of a violation of some rule of conduct imposed by the juvenile court upon this boy prior to his becoming eighteen years of age, the juvenile court can now deal with such boy in exactly the same manner as if he were still under eighteen years of age, except that the court is without authority to commit such boy to the boys' industrial school. If, however, the violation of probation consisted of the commission of some offense against the state laws or local ordinances, since such boy became eighteen years of age, then it is my opinion that in the punishment of such offense the juvenile court has no longer jurisdiction and that this boy should be proceeded against in the same manner as though he were an adult.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

707.

SECRET SERVICE OFFICER—AUTOMOBILE—COUNTY COMMISSIONERS HAVE NO AUTHORITY TO FURNISH—MAY NOT BE APPOINTED AS DEPUTY SHERIFF AND SECURE AUTO THROUGH SHERIFF'S DEPARTMENT—PROSECUTING ATTORNEY MAY HIRE AUTO FOR SAID OFFICER UNDER SECTION 3004 G. C.

1. *County commissioners have no authority to furnish an automobile for the use of the county secret service officer.*

2. *Secret service officer cannot be appointed as deputy sheriff and be furnished with an automobile through the sheriff's department for the use of said secret service officer.*

3. *Prosecuting attorney, when he deems it necessary in any specific case, may hire an automobile for the use of the secret service officer and pay for the same out of the fund provided for by section* 3004 *G. C.*

COLUMBUS, OHIO, October 16, 1917.

HON. JARED P. HUXLEY, *Prosecuting Attorney, Youngstown, Ohio.*

DEAR SIR:—I am in receipt of your communication of September 22, 1917, wherein you ask my opinion as follows:

"Is there any way by which the county commissioners can furnish an automobile for the use of the secret service officer of this county, for his work?

Under the law passed at the last session of the legislature, authorizing the county commissioners to purchase automobiles for the use of county officials in the transaction of public business, I thought possibly this might

be accomplished. We are very much in need of an automobile in this department and if there is any possible way by which one can be secured under the law, we are anxious to know it.

If there is no other way, would it be possible to have our secret service officer appointed as a deputy sheriff and then secure the automobile through the sheriff's department?"

Your communication resolves itself into three questions, as follows:

1. Can the county commissioners furnish an automobile for the use of a secret service officer appointed by the prosecuting attorney?
2. Can a secret service officer be appointed as a deputy sheriff and be furnished with an automobile through the sheriff's department?
3. Is there any way in which an automobile can be secured for the use of such secret service officer?

The section referred to by you, which authorizes county commissioners to purchase automobiles for county officials, is section 2412-1 G. C. (107 O. L. 585), which provides as follows:

"That, whenever the county commissioners are of the opinion that it is expedient to purchase one or more automobiles or other vehicles for the use of the county commissioners and county sheriff in order to facilitate the transaction of public county business, they shall adopt a resolution to that effect, and shall file an application in the court of common pleas, setting forth the necessity for such purchase, together with a statement of the kind and number of vehicles required and the estimated cost of each such vehicle. Ten days' notice of the time of hearing such application shall be published in a newspaper of general circulation in the county. If upon such hearing of said application the court shall find that it is necessary and expedient to purchase one or more of such vehicles, it shall so order, and shall fix the number and kind of such vehicles, and the amount to be expended for each."

The above quoted section is very clear in its terms and gives the commissioners authority to purchase automobiles only for their own use and for use of the sheriff. There is no provision of law giving the county commissioners authority, either directly or indirectly, to purchase an automobile for use of a secret service officer.

Therefore, in answer to your first question, I advise you that the county commissioners may not purchase an automobile for the use of a county secret service officer.

Your second question is, can a secret service officer be appointed as a deputy sheriff and be furnished with an automobile through the sheriff's department?

A secret service officer cannot be appointed as a deputy sheriff and thereby secure use of an automobile under authority of section 2412-1, supra, authorizing the commissioners to purchase automobiles for the use of the sheriff, for the reason that the legislature did not intend by this section to provide automobiles for the use of all officials, but only for the use of the commissioners and sheriff; and if a person appointed as deputy sheriff should use an automobile purchased for the sheriff's department, in the discharge of duties as a secret service officer, he would be using said machine for business other than official business of the sheriff's department, a purpose not contemplated or authorized by section 2412-1.

Said section 2412-1 would of course authorize the use of such automobile by a deputy sheriff when acting in such capacity, or in other words when he is performing the duties imposed by law upon the sheriff; but it does not authorize the use of such automobile by the sheriff or his deputies when engaged in work not connected with the sheriff's department.

A deputy sheriff has certain duties to perform. A secret service officer has certain duties to perform. These duties are entirely separate and distinct and it is needless to say that a man cannot act in both capacities at the same time. Therefore, if a person were appointed as deputy sheriff and performed only the duties of a secret service officer, although nominally a deputy sheriff, he would not in reality be a deputy sheriff, and not performing duties connected with the sheriff's department, would not be allowed to use an automobile purchased for the use of such department.

If it were possible for one person to hold the office of deputy sheriff and secret service office (I am not passing on that question here), such person would be permitted to use an automobile purchased for the use of the sheriff, only in the performance of duties as such deputy sheriff, and not when otherwise engaged.

Therefore, in answer to your second question I advise you that a secret service officer cannot be appointed as a deputy sheriff and be furnished with an automobile through the sheriff's department, for the use of said secret service officer.

In your third question you inquire whether there is any way in which an automobile can be secured for the use of such secret service officer.

Section 2915-1 G. C. provides for the appointment of a secret service officer by the prosecuting attorney. It also provides for his compensation. There is, however, no provision in said section allowing expenses incurred by the secret service officer, in the discharge of his official duties. I know of no express provision of law allowing a secret service officer automobile hire or expenses incurred in the discharge of his duties. However, if a case should arise where the circumstances are such that the prosecuting attorney considers it absolutely necessary to hire an automobile for the use of his secret service officer, to enable said officer to perform his duties in connection with said case, I am of the opinion that inasmuch as such expenses are incurred by him "in the furtherance of justice" and are "not otherwise provided for," they may be paid by the prosecuting attorney under section 3004 G. C. Said section provides as follows:

> "Sec. 3004. There shall be allowed annually to the prosecuting attorney in addition to his salary and to the allowance provided by section 2914, an amount equal to one-half the official salary, to provide for expenses which may be incurred by him in the performance of his official duties and in the furtherance of justice, not otherwise provided for. * * *"

Therefore, in answer to your third question I advise you that the prosecuting attorney, when he deems it necessary in any specific case, may hire an automobile for the use of his secret service officer and pay for the same out of his "furtherance of justice" fund.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

708.

DELINQUENT CORPORATION TAX DUPLICATE—HOW SAME SHOULD BE CERTIFIED TO ATTORNEY-GENERAL.

In certifying delinquent corporations to attorney-general the provisions of sections 5491 G. C. must be complied with.

COLUMBUS, OHIO, October 16, 1917.

HON. CHESTER E. BRYAN, *Treasurer of State, Columbus, Ohio.*

DEAR SIR:—We are in receipt of your letter of October 5th wherein you state as follows:

> "The department of the auditor of state has announced its desire and intention to transmit to the attorney-general's department immediately the delinquent domestic corporation tax duplicate, instead of returning such duplicate to the treasurer of state for collection, for a period of thirty days.
>
> I respectfully request your opinion as to whether or not the tax duplicate, after the 15 per cent penalty is added by the auditor of state, can be immediately transmitted to your own department for collection, instead of being returned to the treasurer of state's department and retained here for a period of thirty days. We will be pleased to follow this procedure if your department will give us such authority, or your opinion that such a plan is permissible.
>
> The law covering the collection of these accounts will be found, I believe, in sections 5492 and 5512 G. C., and sections 20 and 268 as amended, O. L. 107, page 546.
>
> I will greatly appreciate your early consideration of this matter, as the delinquent duplicate will be certified by this department to the auditor of state next week."

In your request for opinion you refer to sections 5492, 5512, 20 and 268 of the General Code. None of these sections as I see it are decisive of the question.

Section 5492 refers to the action to be brought for the recovery of taxes or fees and penalties.

Section 5512 permits a suit in injunction to be instituted on failure to pay taxes, fees or penalties.

Sections 20 and 268 are general statutes referring to the collection of general claims in favor of the state and have no reference whatever to the payment of delinquent corporation fees and penalties.

The statute which is determinative of the question which you ask is section 5491, which reads as follows:

> "All taxes received by the treasurer of state, under the provisions of this act, shall be credited to the general revenue fund. If any public utility fails or refuses to pay, on or before the fifteenth day of December, the tax assessed against it, or if any corporation fails or refuses to pay, on or before the dates fixed, in this act, (October 1st as to domestic corporations—see section 5498, December 1st, as to foreign corporations, see section 5503) the fee charged against it, the treasurer of state shall certify the list of such utilities or corporations, so delinquent, to the auditor of

state, who shall add to the tax or fee due, a penalty of fifteen per cent thereon. The auditor of state shall thereupon forthwith prepare proper duplicates and reports of such taxes and fees and penalties thereon and certify them to the treasurer of state for collection. Thirty days after he receives such duplicates of delinquent taxes and fees and penalties thereon from the auditor of state, the treasurer of state shall certify to the commission a list of such public utilities and corporations as have failed to pay such taxes or fees and penalties thereon."

It is apparent therefore that on failure to receive the fees of domestic or foreign corporations on the dates above specified, it becomes the duty of the treasurer to certify the list of such corporations so delinquent to the auditor, who in turn adds a fifteen per cent penalty and certifies the same back to the treasurer of state for collection. The treasurer of state thereupon holds the same for thirty days, and if the same are not paid within said thirty days, the treasurer of state certifies to the tax commission "a list of such public utilities and corporations as have failed to pay such taxes or fees and penalties thereon." After the tax commission has received the same it then proceeds to direct the attorney-general to collect the same under the provisions of section 5492 or to take the action provided under section 5512 G. C.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

709.

COUNTY SURVEYOR—MEMBER OF DITCH COMMISSION—MAY RETAIN COMPENSATION PAID TO HIM AS MEMBER OF SAID COMMISSION.

The county surveyor appointed as a member of the commission to codify, consolidate and clarify the ditch laws of Ohio, under an act found in 107 *O. L.* 611, *is entitled to retain the compensation paid him as member of such commission, in addition to his salary as county surveyor.*

COLUMBUS, OHIO, October 16, 1917.

HON. HARRY S. CORE, *Prosecuting Attorney, Ottawa, Ohio.*

DEAR SIR:—I have a letter from Mr. Perry T. Ford, under date of September 14, 1917, as follows, and am addressing my opinion on same to you:

"The bill providing for the appointment of members to constitute a drainage commission for Ohio specifically prescribes that one member shall be the county surveyor.

The law governing the duties of the county surveyor provides that all his time and attention shall be devoted to the duties of his office and that all fees collected by the surveyor be returned to the county fund.

By request of Mr. Harry Core, prosecuting attorney of Putnam county, I would like to have an opinion from your department as to whether or not, being the surveyor member of that commission, I will have to turn all fees collected from that source back to the county."

I take it that Mr. Ford refers to the commission to codify, consolidate and clarify the ditch laws of Ohio, provision for the appointment of which was made by the last general assembly in an act to be found in 107 O. L., page 611. Sections 1 and 2 of this act read as follows:

> "Section 1. The governor is hereby authorized to appoint a commission of three members to consist of a county surveyor, a farmer and a lawyer, all of whom have had experience in ditch matters, to codify, consolidate and clarify the ditch laws of the state. The commission shall organize within ten days after appointment by electing a chairman and secretary, and shall make a report to the governor prior to January 1, 1918.
>
> "Section 2. Each member shall be paid five dollars for each day actually engaged on the work of the commission, and shall also be paid his actual and necessary expenses incurred while engaged in such work. The commission may employ such assistants as it may deem necessary and fix their compensation, and may purchase such stationery and supplies as may be needed. The compensation and expenses of members and assistants, and cost of stationery and supplies shall be paid on warrant of the auditor of state upon the presentation of vouchers signed by the chairman and secretary of the commission."

Section 7181 G. C., as amended in 107 O. L., p. 110, reads in part:

> "The county surveyor shall give his entire time and attention to the duties of his office and shall receive an annual salary to be computed as follows: * * * Such salary shall be paid monthly out of the general county fund upon the warrant of the county auditor and shall be instead of all fees, costs, per diem or other allowances, and all other perquisites of whatever kind or description which any county surveyor may collect or receive. The county surveyor shall be the county tax map draftsman, but shall receive no additional compensation for performing the duties of such position. When the county surveyor performs service in connection with ditches or drainage works under the provisions of sections 6442 to 6822 inclusive of the General Code of Ohio, he shall charge and collect the per diem allowance or other fees therein provided for, and shall pay all such allowances and fees monthly into the county treasury to the credit of the general county fund. The county surveyor shall do likewise when he performs services under the provisions of sections 2807 to 2814 inclusive of the General Code of Ohio."

The county surveyor, as will be seen from the above, now receives a regular salary which ordinarily is supposed to cover his entire time. However, in passing the act above quoted the legislature made an exception to this rule since it specifically provided that one of the members to be appointed on the commission referred to should be a "county surveyor." I believe they also intended to make an exception to the general rule concerning the compensation of the surveyor, and that they meant to allow the county surveyor appointed on this commission his compensation as a member of such commission in addition to his salary as county surveyor.

The compensation he receives as such member is not received by him as county surveyor. If he chose to decline the appointment he could do so, and so could any and every other county surveyor in the state who might be appointed in his place.

His position as county surveyor does not require a county surveyor to accept this appointment, and it is quite likely that if the surveyor member of the commission were obliged to serve without compensation, it might be difficult to persuade the county surveyor to accept the appointment. In the event that no one of them would accept without compensation, and no compensation could be paid to such surveyor member, the governor would be unable to secure a third member of the commission qualified to accept the appointment.

With these considerations in mind I am convinced, after a careful reading of the two statutes, that the above expressed conclusion is proper. It might be added that the act creating the ditch law codifying commission was passed one day later than the act providing for the county surveyor's salary. I believe it is hardly necessary to dwell upon this fact to sustain our conclusion.

In direct answer to your question, then, I am of the opinion that the county surveyor appointed by the governor as a member of the commission to codify, consolidate and clarify the ditch laws of Ohio is entitled to the compensation provided in the act authorizing such appointment, in addition to the regular salary which such county surveyor receives.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

710.

FEMALES—EMPLOYMENT IN THE TRANSMISSION OF MESSAGES—SECTIONS 1008 AND 12993 NOT IN CONFLICT.

Sections 1008 *G. C. and* 12993 *are not in conflict regarding the employment of females in the transmission of messages.*

Section 1008 *prohibits females over eighteen years of age to be employed more than a certain number of hours in any one day or week in the establishments or vocations therein named when under the law they are permitted to be engaged in such employment.*

Section 12993 *absolutely forbids a female under twenty-one years of age to be employed in the transmission of messages.*

COLUMBUS, OHIO, October 16, 1917.

The Industrial Commission of Ohio, Columbus, Ohio.:

GENTLEMEN:—We have your recent favor in which you state:

> "Our chief deputy of the division of workshops, factories and public buildings, requests that you furnish this department an opinion on the following matter:
>
> 'Sections 12993 and 1008 of the General Code, as amended by the eighty-second general assembly, seem to be in conflict. Section 12993 provides, among other things, that no female under twenty-one years of age shall be employed in the transmission of messages.
>
> Section 1008, as amended, seems to conflict by implication, at least, in that it permits females, over eighteen years of age and under twenty-one, to be employed in the distributing or transmission of messages, provided such females do not work more than nine hours in any one day, or more than fifty hours in any one week, or more than six days in any one week.

Since the _____ Telegraph Company is laboring under the impression that females between eighteen and twenty-one years of age can be employed in the transmission of messages, I will thank you to secure an opinion from the attorney-general on the subject.'"

Section 1008 G. C., as amended in 107 O. L. 149, reads in part:

"* * * Females over eighteen years of age shall not be employed or permitted or suffered to work in or in connection with any factory, workshop, telephone or telegraph office, millinery, or dressmaking establishment, restaurant or in the distributing or transmission of messages or in any mercantile establishment located in any city, more than nine hours in any one day, except Saturday, when the hours of labor in mercantile establishments may be ten hours, or more than fifty hours in any one week, but meal time shall not be included as a part of the work hours of the week or day, provided, however, that no restriction as to hours of labor shall apply to canneries or establishments engaged in preparing for use perishable goods, during the season they are engaged in canning their **products."**

Section 12993 G. C. provides:

"No * * * female child under sixteen years of age shall be employed, permitted or suffered to work in, about or in connection with * * * nor any * * * female under twenty-one years in the transmission of messages. * * *"

These two statutes affecting the same subject matter are in *pari materia,* should be read together and every provision in each should be given its full meaning unless such provisions are so repugnant to each other as to call for the application of the rule of implied repeal.

Section 1008, supra, provides that females over eighteen years of age shall not be employed, etc., in any one of a number of named establishments, or in the distribution or transmission of messages, more than a certain number of hours per day and week. Section 12993 prohibits children of certain age from being employed, etc., in certain named establishments, and further prohibits any female under twenty-one years to be employed in the transmission of messages. This latter section has no reference to the hours of labor. The provisions of section 1008, above quoted, have reference only to the hours of labor permitted. I do not find any conflict in these provisions. Both sections are prohibitive. They do not in words or terms *permit* anything. They prohibit the things set forth in the sections, respectively.

As stated in Conrad v. State, 75 O. S. 52, by our supreme court:

"The rule as to strict construction of penal statutes does not require us to go so far as to defeat the purpose of the statute by a technical application of the rule."

While it is true in section 1008 the statute provides that "females over eighteen years of age shall not be employed, etc., * * * in the distribution or transmission of messages * * * ," and section 12993 provides "* * * or female under twenty-one years in the transmission of messages," even though section 1008 was a later enactment of the legislature, it is my opinion that the later

enactment did not in any manner affect the provision in the prior statute. If the legislature wanted to cut down the age limit in the provision as found in section 12993, which is a general prohibition against the employment of females under twenty-one years in the transmission of messages, they might easily have done so in express terms, and when we find in a statute, which is in *pari materia* but applying to the hours of labor instead of the vocations, certain provisions as to the same class of labor, all in prohibitive language, I do not believe such provisions would work an implied repeal. The rule of implied repeal only obtains when absolutely necessary, and my view of these sections is that they do not necessarily conflict.

As far as the hours of labor are concerned in the establishments and vocations named in section 1008, females over eighteen are prohibited from engaging for longer periods than in said section provided; that is, if they are permitted, under the law, to be employed, permitted or suffered to work in connection with such establishments or in such business. Under section 12993 females under twenty-one years of age are prohibited from being employed, permitted or suffered to work in connection with the transmission of messages.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

711.

APPROVAL—TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE OF COUNTY COMMISSIONERS OF COLUMBIANA COUNTY.

COLUMBUS, OHIO, October 16, 1917.

Industrial Commission of Ohio, Columbus, Ohio.
GENTLEMEN:—

In re bond issue in the amount of $17,450.00 for the improvement of the Columbiana-Youngstown public road in Fairfield township, Columbiana county, Ohio.

I have carefully examined the transcript of the proceedings of the board of county commissioners and other officers of Columbiana county, Ohio, relating to the above bond issue and find said proceedings to be substantially regular and in conformity to the provisions of the General Code of Ohio relating to bond issues of this kind.

I am therefore of the opinion that the bonds of said county covering said issue will constitute valid and binding obligations of said county when the same are properly prepared, signed and delivered.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

712.

APPROVAL—CONTRACT BETWEEN BOARD OF TRUSTEES OHIO STATE UNIVERSITY AND EDGAR H. LATHAM—DISAPPROVAL OF BOND FORM.

COLUMBUS, OHIO, October 16, 1917.

HON. CARL E. STEEB, *Secretary, Board of Trustees, Ohio State University, Columbus, Ohio.*

DEAR SIR:—I have examined the contract which you submitted to me, which contract was entered into on the first of August, 1917, between Edgar H. Latham and your board of trustees, for the construction and completion of an addition to the dining room and the construction of a store room, including an alternate of increasing said store room seven feet in length, at the Ohio Union on the campus of the Ohio State University, said contract calling for the sum of $11,084.00, to be paid from the Ohio State University endowment fund income.

I find said contract to be in compliance with law and have this day approved of the same, the auditor of state having certified that there are funds available for the payment thereof.

The bond accompanying said contract is not in the form as at present prescribed by statute and no money should be paid on the contract until the bond has been corrected or until a certificate has been made by you that all material men, subcontractors and laborers have been paid.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

713.

CEMETERY TRUSTEES—MAY IMPROVE MAIN DRIVEWAY INSIDE OF CEMETERY—WITHOUT PRELIMINARY ACTION OF COUNCIL OF MUNICIPALITY.

A board of cemetery trustees appointed under section 4175 *G. C. has power and authority to improve the main driveway inside the cemetery grounds without any preliminary action of the council of the municipality. They may do this under such rules and orders as they may adopt, subject, however, to any ordinances that may have theretofore been adopted by the village.*

COLUMBUS, OHIO, October 16, 1917.

HON. ALDRICH B. UNDERWOOD, *Prosecuting Attorney, Medina, Ohio.*

DEAR SIR:—I have your communication in which you make the following inquiry:

> "I am writing for your opinion upon the following facts: The village of Medina, Ohio, has a cemetery known as Spring Grove cemetery. A board of cemetery trustees under 4175 G. C. control same. This board has $11,000.00 on hand from sale of lots and other minor sources. They now desire to improve and pave the main driveway inside of and leading into the cemetery proper at an estimated cost of not to exceed $4,000.00 or $5,000.00.

My questions, therefore, are these: (1) Can the board of cemetery trustees make the improvement without legislation by the village council? (2) If so, does the paving or improvement of the driveway fall within the terms 'improvement' or 'embellishment of grounds' as used in statutes above referred to on cemeteries? (3) If so, name what steps are necessary to be taken by the board of cemetery trustees."

By way of introduction let us note that chapter 9, division 4, title XII of part first of the General Code contains provisions regulating the matter of cemeteries for cities and also cemeteries for villages. The control of cemeteries for cities rests with the director of public service, whose powers and duties are specifically set out; while the control of cemeteries for villages is vested in a board of trustees whose duties and powers are the same as are those of the dirctor of public service in reference to city cemeteries.

Sections 4160 to 4175 inc. G. C. of said Chap. 9 relate to cemeteries for cities, and section 4174 to 4182 inc. G. C. of the same chapter cover cemeteries for villages.

Section 4175 G. C. makes provision for the mayor's appointing a board of cemetery trustees consisting of three persons, to have the control and management of village cemeteries.

Section 4178 G. C. provides in part as follows:

"The board of cemetery trustees shall have the powers and perform the duties prescribed in this chapter for the director of public service. * * *"

Under this provision it will be necessary for us to turn to the powers and duties conferred upon the director of public service, found in sections 4160 to 4173 G. C. in said chapter.

Section 4165 G. C. gives authority to said director to determine the size and price of lots to be sold and the terms of payment therefor.

Section 4166 G. C. reads as follows:

"No more shall be charged for lots than is necessary to reimburse the corporation for the expense of lands purchased or appropriated for cemetery purposes, and to keep in order and embellish the grounds, and provision shall be made for the interment in such cemetery of persons buried at the expense of the corporation."

Under this section the moneys arising from the sale of lots shall be used for the purchase or appropriation of lands for cemetery purposes *"and to keep in order and embellish the grounds."*

Section 4167 G. C. provides as follows:

"The director of public service shall have entire charge and control of receipts from the sale of lots, and of the laying off and embellishing the grounds. * * *"

In the same section the director of public service is given powers as follows:

"He shall sell lots, receive payments therefor, *direct the improvements,* and *make the expenditures,* under such rules and orders as he prescribes."

Section 4161 G. C. provides that:

> "The director of public service shall take possession and charge and have the entire management, control, and regulation of public graveyards, burial grounds, and cemeteries located in or belonging to the corporation. * * * "

Section 4162 G. C. provides:

> "The director shall direct all the improvements and embellishments of the grounds and lots. * * *"

From all these provisions it is seen that the director of public service has authority to sell lots, receive the money therefore and expend the same under such rules and orders as he prescribes, and further that he uses the moneys in part to keep in order and embellish the grounds of the cemetery.

Remembering that the board of trustees of village cemeteries has the same power and authority as the director of public service, it seems to me quite evident that the board of trustees would have authority to improve and pave the main driveway inside of and leading into the cemetery proper and expend the money therefor without any action being taken by the council of the village of Medina, and that they would do this under such rules and orders as they themselves may prescribe, under section 4167 G. C.

I might call attention to one provision of section 4161 G. C., to the effect that the powers and duties of the director of public service are subject to the ordinances of the city. This would apply to a village cemetery and if the village has enacted certain ordinances in reference to the matters over which the board of trustees has charge, the provisions of these ordinances should be followed.

In rendering this opinion I am not unmindful of an opinion rendered by my predecessor Hon. Timothy S. Hogan and found in Vol II of the Annual Report of the Attorney-General for 1913, p. 1643. However, the facts in that case were entirely different from those we now have under consideration. Mr. Hogan was dealing with streets fronting the cemetery and not with avenues lying within the cemetery grounds. His opinion was as follows:

> "Inasmuch as the statutes do not confer such power (that is the power to improve streets), the board of trustees of a cemetery in a village may not improve a street fronting on its property."

Neither am I unmindful of an opinion rendered by the court of common pleas of Logan county in the case of State ex rel. Kelley v. Roebuck, 15 Ohio Dec. 400. The court had under consideration the powers and duties of the director of public service and the council of a municipality under statutes which were entirely different from those we now have before us.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

714.

APPROVAL—FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN CLINTON AND AUGLAIZE COUNTIES.

COLUMBUS, OHIO, October 16, 1918.

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

DEAR SIR:—I am in receipt of your letters of October 6 and 8, respectively, in which you enclose final resolutions, for my approval, as follows:

Clinton County—Sec. "A," Wilmington-Hillsboro road, I. C. H. No. 254.
Auglaize County—Sec. "A-2," Wapakoneta-St. Marys road, I. C. H. No. 165.

I have carefully examined these final resolutions and find them correct in form and legal. I am, therefore, returning the same to you with my approval endorsed thereon, in accordance with the provisions of section 1218 G. C.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

715.

TOWNSHIP'S SHARE OF COST AND EXPENSE OF JOINT COUNTY ROAD IMPROVEMENT—UPON WHAT PROPERTY LEVY SHOULD BE MADE TO TAKE CARE OF SAME.

The levy which must be made to take care of a township's share of the cost and expense of a joint county road improvement must be made upon the property of the entire township and not upon that located outside of a municipality or municipalities that may be located within the township. This is true whether the proceedings would be controlled by the Cass highway act or the White-Mulcahy law.

COLUMBUS, OHIO, October 16, 1917.

HON. CALVIN D. SPITLER, *Prosecuting Attorney, Tiffin, Ohio.*

DEAR SIR:—I have your communication of October 5, 1917, which reads as follows:

"In 1916 a petition was filed for the improvement of a road along the county line between Seneca and Crawford counties approximately nine miles in length. Action was taken on said petition by the joint board of commissioners of Seneca and Crawford counties and the improvement was granted and all other proceedings were had including the apportionment of the expenses which were apportioned as follows: Five per cent to each of the counties; five per cent to the land owners of each county whose lands will be benefited by the improvement; and forty per cent to each of the townships in which said improvement is located.

It so happens that Bloom township of Seneca county, Ohio, is unable to raise the money to pay her proportionate share of this improvement by

reason of the fact that the corporation of Bloomville, in said township, cannot increase its tax budget, and the question arises whether a road district can be created in Bloom township under section 3298-25 excluding the corporation of Bloomville for the purpose of raising the money for the township's share of the cost of this improvement. In other words, can such a road district be created so as to include the improvement of joint county roads lying *within the township?"*

In order to answer the question suggested in your communication, it might be well for us to note the provisions of the law as it has existed since the 28th day of June, 1917, inasmuch as section 3298-25 G. C., to which you refer, is a part of the White-Mulcahy act which became effective on said date. Said section reads as follows (107 O. L. 83):

"Sec. 3298-25. The board of trustees of a township in which township there is located a municipal corporation or corporations, or a part of a municipal corporation, may by resolution erect that portion of such township not included within the corporate limits of such municipal corporation or corporations into a road district, whenever in their opinion it is expedient and necessary and for the public convenience and welfare for the purpose of constructing, reconstructing, resurfacing or improving the public roads within such road district. The road district so created shall be given an appropriate name by which it shall be known and designated."

Sections 3298-25 to 3298-53 G. C. (107 O. L. 83) are entirely new matter and provide a scheme by which the township trustees may create a separate road district out of the territory of a township which lies outside of the municipality or parts of municipalities that may be located in the township. This new matter was enacted to enable the township trustees to construct township highways and pay for the same without making a levy upon the property which lies inside the municipal corporations that may be located in the township. This was done for the reason that many municipalities are taxed almost up to the limit at present and hence cannot bear the extra tax necessary to take care of the matter of road improvement.

Your question now is as to whether this principle could be applied in the improvement of a road located on the county line between Seneca and Crawford counties and in which, of course, both counties are interested.

As said before, let us first note the provisions of the new law relative to the matter of improving roads by the joint board of county commissioners of two or more counties.

Section 6934 G. C. (107 O. L. 102) provides:

"When a joint board is proceeding upon a petition, the compensation, damages, costs and expenses of the improvement shall be apportioned and paid in the method specified in the petition which may be any one of the methods provided by section 6919 of the General Code. When a joint board acts by unanimous vote and without the filing of a petition, they shall set forth in their resolution declaring the necessity for the improvement the method of apportioning and paying the compensation, damages, costs and expenses of the improvement, which may be any one of the methods provided by section 6919 of the General Code. * * *"

We will now turn to section 6919 G. C. and ascertain how the cost and expenses for a road improvement may be provided. It will be noted that there are

four different methods set out in said section. In the road improvement which you have under consideration, evidently the first method set out in section 6919 G. C. was selected. This section reads in part as follows (107 O. L. 98):

> "Sec. 6919. * * *
> 1. Not less than thirty-five per cent nor more than fifty per cent thereof shall be paid out of the proceeds of any levy or levies for road purposes upon the grand duplicate of all taxable property in the county, or out of any funds available therefor; not less than twenty-five per cent nor more than forty per cent thereof shall be paid out of the proceeds of any levy or levies for road purposes upon *the taxable property of any township or townships* in which said improvement may be in whole or part situated. * * *"

It is readily seen, from the provisions of this section, that the amount apportioned to the township must be realized from a levy upon the taxable property of the township or townships, not the taxable property located outside the municipality or municipalities. Hence it is clearly evident from these provisions of the new law that the township's share of the cost and expense of a joint county improvement could not be paid out of the proceeds of the levy made upon the property located outside of a municipality or municipalities in the township. This evidently is the correct construction to be placed upon the new law, relative to the matter about which you inquire. However, I desire to proceed further and suggest that the improvement about which you inquire could not proceed under the provisions of the new law, but would have to come under those of the old.

In an opinion rendered by me on July 16, 1917, No. 449, after going into the matter pretty carefully, I arrived at the conclusion that a road improvement is a proceeding under the terms of section 26 G. C. I quote the following from said opinion:

> "From all these cases it seems to me that there can be no question but that the matter of a road improvement constitutes a proceeding under the terms of section 26 G. C."

Said section 26 provides:

> "Whenever a statute is repealed or amended, such repeal or amendment shall in no manner affect pending * * * proceedings. * * *"

Under this section, if a road improvement were pending at the time the Cass act was amended by the White-Mulcahy act, then the amendment of the said act would not affect the proceeding which was pending at the time the amendment took effect, namely, on June 28, 1917.

From the facts set out in your communication, the proceeding in reference to the road improvement therein mentioned was undoubtedly pending, inasmuch as the county commissioners had allowed the petition and had proceeded with the apportionment of the costs and expenses of the improvement to the different counties, townships and abutting property owners.

Hence, it will be seen that the further proceedings relative to the said improvement would be governed by the old law and not by the new. However, under the old law there was no such a provision as that found in section 3298-25, supra, of the new. Therefore, the further proceedings in reference to the improvement could not be based upon the provisions of section 3298-25.

So in looking at your question from either standpoint, in view of the provisions of the old law or those of the new, section 3298-25 G. C. could not apply in the matter of paying the township's share of the cost and expense of a joint county road improvement.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

716.

TAX LEVY—UNDER SECTION 3298-15d G. C.—MUST BE INCLUDED IN REGULAR BUDGET EACH YEAR—WHEN LEVY SHOULD BE MADE—TOWNSHIP TRUSTEES—IN ISSUING BONDS FOR ROAD IMPROVEMENT—MAY ANTICIPATE TAXES TO BE LEVIED YEAR AFTER YEAR—CERTAIN CONDITIONS—COMPELLED TO LEVY TAX FOR INTEREST AND SINKING FUND.

1. *The tax levy provided for in section 3298-15d G. C., in anticipation of which bonds may be issued under section 3298-15e G. C., must be included in the regular budget each year, and the said levy must be made at the same time as are other tax levies.*

2. *Township trustees, in issuing bonds to provide for the cost of a proposed road improvement, may anticipate the taxes to be levied year after year under authority of section 3298-15d G. C., and are not compelled merely to anticipate the tax levy of the year in which the bonds are issued, with the condition that all the bonds mature within ten years.*

3. *Township trustees are compelled to levy a tax from year to year sufficiently large to provide for the interest and at the same time to create a sinking fund for the redemption of all outstanding bonds at maturity. Sec. 11 of Art. XII of the constitution and section 5649-1 G. C., make this obligatory upon the township trustees.*

COLUMBUS, OHIO, October 16, 1917.

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

DEAR SIR:—I have your communication of September 15, 1917, in which you ask me to place a construction upon sections 3298-15d and 3298-15e (107 O. L. 79), with a view to answering the following questions:

"1. Under the foregoing statutes, assume that the tax duplicate in a certain township is one million dollars, and the board of trustees of that township is desirous of improving certain roads; that the rate of taxation was such in the township that the board of trustees could make a levy of three mills.

(a) When must the board make this levy?

(b) Must it be made in the May levy, or may it be made at any other time during the year?

(c) If it can be made at any other time, in what manner must the board proceed?

2. Further, assume that the board made a levy of three mills at the proper time of the year, and then proceeded to issue bonds in anticipation of the collection of the levy. (It is at once apparent that this three mill levy on a million dollar duplicate would return three thousand dollars.)

(a) Can the board issue bonds to exceed the sum of three thousand dollars?

(b) If the board would issue bonds for even three thousand dollars, when should those bonds come due?

If the levy is made and put on the duplicate, it is the duty of the treasurer to collect this money, and ordinarily the money would have found its way into the township treasury, the August settlement of the following year. (This might vary, depending when it was placed on the duplicate.

But statute 3298-15e says that these bonds must mature within ten years. This seems to say that the bonds need not be paid off as soon as the money is available for that purpose, but such bonds may mature any time within ten years.

3. Again, assume that the board would issue bonds in the sum of ten thousand dollars under the foregoing condition of the duplicate and tax rate. Ten thousand dollars could easily be paid off within ten years.

(a) Can the board issue bonds in the sum of ten thousand dollars, as a matter of law?

(b) If it does issue bonds in the sum of ten thousand dollars, how and when can it make a levy to take care of the interest and redeem the bonds at maturity?

You will note that the question that is concerning me is this: Section 3298-15d says that the trustees may 'levy annually.' Section 3298-15e says that the trustees may issue bonds in anticipation of the collection of that levy. So it must follow that there must be some kind of a levy made before bonds can be issued in anticipation thereof. Now, if a levy must be made each year, and there is no provision of law whereby there may be a provision made in the resolution providing for the issue of the bonds for this annual levy, what is the object and purpose of the provision that says that these bonds may extend over a period of ten years? Has the present board authority to pass a resolution that will be binding on future boards, in respect to this levy? If it has not such power and authority, then future boards might refuse to make such levy.

In other words, under the above statutes, for what amount may bonds be issued in any one year? Can the amount exceed three mills on the duplicate of the township, and if so, may it be in such amount that a three mill levy each year, for not to exceed ten years, will pay the interest and principal?"

The particular parts of sections 3298-15d and 3298-15e G. C. (107 O. L. 79), upon which you ask me to place a construction, are as follows:

"Sec. 3298-15d. * * * For the purpose of providing by taxation a fund for the payment of the township's proportion of the compensation, damages, costs and expenses of constructing, reconstructing, resurfacing or improving roads * * * the board of trustees of any township is hereby authorized to levy annually a tax not exceeding three mills upon each dollar of the taxable property of said township. * * *"

"Sec. 3298-15e. The township trustees, in anticipation of the collection of such taxes and assessments or any part thereof, may, whenever in their judgment it is deemed necessary, sell the bonds of said township in any amount not greater than the aggregate sum necessary to pay the estimated compensation, damages, costs and expenses of such improvement. Such

bonds shall state for what purpose they are issued and shall bear interest at a rate not to exceed five per cent per annum, payable semi-annually, and in such amounts and to mature at such times as the trustees shall determine, subject to the provision, however, that said bonds shall mature in not more than ten years. * * *"

The particular words which give rise to the questions in your mind are "annually" as found in section 3298-15d G. C., and "such taxes" found in section 3298-15e G. C. In order to reach a correct understanding of the answers to be given your questions, it may be well for us to consider one or two other sections.

Section 5649-3a G. C. provides that on or before the first Monday in June, each year, the trustees of each township shall submit, or cause to be submitted to the county auditor, an annual budget setting forth in itemized form an estimate stating the amount of money needed for their wants for the incoming year and for each month thereof. That is, in each and every year the township trustees must levy a tax to take care of the amount of money needed for their wants for the incoming year. This would apply to the levy provided for in section 3298-15d G. C., as well as for other purposes. A levy is made each year and this levy extends no further than to take care of the amount of money needed for all purposes during the incoming year.

Section 5649-1 G. C. provides as follows:

"In any taxing district, the taxing authority shall, within the limitations now prescribed by law, levy a tax sufficient to provide for sinking fund and interest purposes for all bonds issued by any political subdivision, which tax shall be placed before and in preference to all other items, and for the full amount thereof."

Under the provisions of this section it is obligatory upon the township trustees of any township to levy a tax sufficient to provide for the sinking fund and interest purposes for all bonds issued by the township in the past. That is, year after year it is made obligatory upon the township trustees to levy a tax that will be sufficient to create a sinking fund for the redemption of all bonds as they become due year after year, and to pay the interest upon the same, and this tax shall be placed before and in preference to all other items and for the full amount thereof. This provision applies to the bonds issued under and by virtue of the provisions of section 3298-15e G. C., as well as to any other bonds that may be issued. In connection with the provisions of this section I desire to call attention to section 11 of article XII of the constitution, which reads as follows:

"No bonded indebtedness of the state, or any political subdivisions thereof, shall be incurred or renewed, unless, in the legislation under which such indebtedness is incurred or renewed, provision is made for levying and collecting annually by taxation an amount sufficient to pay the interest on said bonds, and to provide a sinking fund for their final redemption at maturity."

Under this provision no bonded indebtedness can be incurred by the township trustees, unless they provide at the same time for levying and collecting annually by taxation an amount sufficient to pay the interest on said bonds and to provide a sinking fund for their final redemption.

In other words, there are constitutional and statutory provisions that the township trustees must levy annually, that is from year to year, a sufficient tax to pay

the interest on all bonds outstanding, and at the same time to provide a sinking fund for their redemption whenever they may fall due. With this in mind, let us turn to the provision of section 3298-15e, supra, which is as follows, that in anticipation of the collection of such taxes, the township trustees may sell the bonds of the township in a sum not greater than necessary to pay the estimated cost of an improvement. This does not mean in anticipation of taxes already levied by the township trustees, and hence is not limited to the amount of money that will be collected during any one year. But looking ahead to the taxes which the township trustees are authorized to levy year after year, the township trustees, in anticipation of these levies and the collection thereof, may sell the bonds to take care of the costs of an improvement, provided the bonds are made to mature in not to exceed ten years. This provision does not contemplate that the board of trustees which makes provision for the issuance of the bonds shall levy the tax necessary to take care of the bonds, nor does it mean that said board shall levy any particular rate at that particular time; but, as said before, it contemplates the levy that will be made by the trustees, year after year, under the authority of section 3298-15d, supra.

It might assist us, in understanding the provisions of these sections, to note the reasoning of the court in Link v. Karb, Mayor, 89 O. S. 326, in which the court was placing a construction upon section 11 of article XII of the constitution, above quoted. To be sure, the matter under consideration by the court was different from that which we now have before us, but the reasoning applies as well to this case as it does to that of Link v. Karb, supra. On p. 338 of the opinion in Link v. Karb, supra, the court reasons as follows:

> "* * * we have reached the conclusion that, in obedience to this amendment to the constitution the taxing officials of any political subdivision of the state must provide in the resolution or ordinance authorizing such issue, or in a resolution or ordinance in relation to the same subject-matter passed prior to the issuing of such bonds, for levying and collecting annually by taxation an amount sufficient to pay the interest thereon and provide a sinking fund for their final redemption at maturity. This, of course, does not require the immediate levying of a tax certain, either in amount or rate, for the provision of this amendment is that this tax shall be levied annually and collected annually, but it does mean that, at the time the issue of bonds is authorized, the taxing authorities proposing to issue such bonds shall provide that a levy shall be made each year thereafter during the term of the bonds in an amount sufficient to pay the interest thereon and retire the bonds, and such provision, so made at the time the bonds are authorized, shall be binding and obligatory upon these taxing officers of that political subdivision and their successors in office until the purpose of such levy shall have been fully accomplished by the retirement of the bonds so issued. Such a provision fills the full purpose of this amendment to the constitution and is not subject to the objection that it is impossible at the time of issue to determine either the amount that must be raised for that purpose or the rate that must be levied to raise such an amount. That amount may be determined from year to year, and levied annually, for that is the command of the amendment itself; but having declared at the time of the issue of such bonds that a levy shall be made in an amount sufficient, there then remains for the taxing officials the mere matter of calculation as to the amount. The levy must be made at all events in pursuance to the original provisions therefor, and subsequent taxing authorities must make such annual levy, regardless of what exigencies may arise in the future."

In view of all the above, I will answer your questions as follows:

1. Answering your first question, it is quite evident that the amount of money necessary to pay the interest and create a sinking fund to redeem the bonds that mature from year to year must be submitted with the annual budget and the levy made for this purpose at the same time that the levy is made for all other purposes.

2. Answering your second question, the township trustees, in issuing bonds to provide for the cost of a proposed road improvement, may anticipate the taxes to be levied year after year under authority of section 3298-15d and are not compelled merely to anticipate the tax levy of the year in which the bonds are issued, with the condition that all the bonds mature within ten years. However, the bonds issued at any one time should be issued with a view to the money that can be realized from year to year from a levy of three mills on the tax valuation of the township, and also with a view to the amount of bonds which, up to any particular time, have been issued and outstanding under section 3298-15e G. C.

3. Your next question is as to whether the present board of township trustees has authority to pass a resolution to sell bonds and thus bind future boards to make a levy to take care of the interest and create a sinking fund for the redemption of the bonds so issued by the present board. As said before, the constitutional provision above quoted and the legislative enactment found in section 5649-1 G. C. make it obligatory upon future boards to make such a levy. If they do not, they could be compelled to do so through a mandamus proceeding.

In answering your second question I used the following language:

> "However, the bonds issued at any one time should be issued with a view to the money that can be realized from year to year from a levy of three mills on the tax valuation of the township, and also with a view to the amount of bonds which, up to any particular time, have been issued and outstanding under section 3298-15e G. C."

While you do not particularly ask the question to which I am going to give a little attention, yet it occurs to me that it is one which is so directly connected with the questions which you do ask that it should be given some attention.

Section 3298-15d G. C. specifically limits the rate of tax which may be levied for the purposes set out in said section to three mills on all the taxable property of the township. Then section 3298-15e immediately follows and provides that "the township trustees, in anticipation of the collection of such taxes and assessments * * * may * * * sell the bonds of said township * * *." As said before in reference to this provision, the township trustees may anticipate a levy of taxes and a collection of the same from year to year during the time for which the bonds are issued to mature, but not to exceed ten years. The question now is, what tax levy can the township trustees anticipate. Manifestly, they cannot anticipate the levy and collection of taxes to exceed a rate of three mills upon a valuation such as exists at the time of the issuance of the bonds. If the tax levy is limited to three mills the township trustees cannot issue bonds for the purposes set out in section 3298-1 G. C. to mature in amounts faster than can be cared for, together with the interest, by a levy of three mills. At the same time that the bonds are issued, the township trustees must provide for the levy of a tax to take care of the interest of the bonds from time to time and also to create a sinking fund which will be sufficient to redeem the bonds at their maturity, but they cannot provide for a sinking fund and interest that will exceed an amount which can be realized from a levy of three mills upon the taxable property of the township, and this for the reason that they are specifically limited by law to three mills.

In reference to this matter I desire to call attention to a principle of law laid down by Dillon, in his work on Municipal Corporations, Vol. I, section 212:

> "By the constitutions of Texas and Louisiana and Alabama the amount of the tax which may be levied is limited. In these constitutions there is therefore not only a requirement that provision shall be made for the levying of a tax for the payment of the principal and interest of the indebtedness, but the amount of the tax which may be levied is also limited. The direct requirement is that the tax shall be 'sufficient' to pay the debt, and this requirement carries with it a correlative prohibition against incurring any debt greater than such amount as may be satisfied and paid by the levy of a tax within the limit of the constitution. In other words, the constitution requires not only that no debt shall ever be created above such a sum as the levy directed will pay, but also that when and before the debt is created it shall be ascertained whether the maximum amount of the tax permitted by the constitution will annually pay the interest and provide for the principal or for the sinking fund required by the constitution. The debt is not to go beyond what a tax can be levied to pay. If at the time when the debt is incurred a tax is levied which is not sufficient in amount to pay the interest and to create the prescribed sinking fund, the debt will be sustained up to the amount which is justified by the tax directed to be levied and will be held to be invalid as to the excess."

In examining the cases cited by Mr. Dillon, to substantiate the principles of law thus enunciated by him, I conclude that the principles stated by him are borne out by the decisions of the courts, but I desire to note but one case which is to the same effect as the situation above made.

In The Citizens Bank v. The City of Terrell, 78 Tex., 450, we find, among other principles of law set forth in the syllabus, the following:

> "8. The command of our constitution is that when the debt is created provision shall then be made for levying and collecting a tax to discharge it. It amounts to more than a direction that no debt shall ever be created above such a sum as the directed levy will pay. The constitution will not be obeyed unless it shall be ascertained when and before a debt is created whether one-fourth of one per cent or less on the taxable valuation will annually pay the interest and sinking fund.
>
> 9. As a limit upon the amount of debt the city can incur it must look to the assessment tax rolls taken for the city and under its authority."

And in the opinion on page 459 the court reasons as follows:

> "The command of our constitution is that when the debt is created provision shall then be made for levying and collecting a tax to discharge it. It amounts to more than a direction that no debt shall ever be created above such a sum as the directed levy will pay.
>
> The constitution will not be obeyed unless it shall be ascertained, when and before a debt is created, whether one-fourth or one per cent or less on the taxable valuation will annually pay the interest and sinking fund."

Also on page 459, in commenting upon a decision rendered by the supreme court of the United States in which it was interpreting the constitution of the state of Nebraska, the court used the following language:

> "In this case the constitution of the state of Nebraska, under which

the question arose, limited the amount of the debt that could be created to '10 per cent of the assessed valuation.'

Upon this point the opinion holds that the amount of the assessed value of the taxable property was ascertainable only by a reference to the assessment itself, 'a public record equally accessible to all intending purchasers of bonds as well as to the county officers;' and that the county officers 'are bound, it is true, to learn from the assessment what the limit upon their authority is, as a necessary preliminary in the exercise of their functions and the performance of their duty; but the information is (not) for themselves only. All the world besides must have it from the same source and for themselves. The fact, as it is recorded in the assessment itself, is intrinsic and proves itself by inspection, and concludes all determinations that contradict it.'"

From all the above and from what would seem to be sound reasoning, the township trustees, while they are permitted to anticipate the levy of a tax from year to year during the time for which the bonds were issued, yet they cannot anticipate a levy of more than three mills upon a tax duplicate such as it is at the time the bonds are issued. Hence the township trustees cannot issue bonds under section 3298-15e to an amount which, with former issues under the same section, would cause more bonds to mature in any one year than could be taken care of, together with interest, by a levy of three mills upon a tax valuation such as that which exists at the time the bonds are issued.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

717.

BOARD OF EDUCATION—MAY ASSIGN CHILDREN TO VARIOUS SCHOOLS OF THE DISTRICT—MANAGEMENT BY TRUSTEES OF STATE NORMAL COLLEGE.

A board of education of a city school district may assign the youth of such district to the various schools located therein and may arrange with the trustees of a state normal college to assume the management of certain schools of such district, not to exceed six rooms thereof.

COLUMBUS, OHIO, October 16, 1917.

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

DEAR SIR:—I have your communication in which you request my opinion upon the following statement of facts:

"I desire your official opinion as to the authority of Kent village school district to assign and set off a certain portion of the territory of their said district to the Kent state normal college which is located also within the limits of such district and thereby refuse admission to pupils of such assigned territory from attendance at the other schools of such district.

In explanation of the above question, permit me to advise you that at the time the legislative committee of the state was investigating and decid-

ing upon a site for such normal school, as authorized under act found in volume 101 Ohio Laws, page 320, the said board of education of Kent village school district passed the following resolution:

'The clerk read the following resolution:

Resolved, By the board of education of Kent village school district, that in the event the state normal school for northeastern Ohio being located at Kent, said board hereby promises and agrees to enter into an agreement with the trustees of said school that sufficient territory of said district contiguous to said normal school will set apart to the normal school sufficiently large to permit at least 250 pupils to attend the training school.

Moved by Andrews, seconded by Bowers, that the foregoing resolution be adopted. *Vote*—Ayes, 4—Bechtle, Bowers, Parkinson, Andrews (cd).' Thereafter such board of education under date of June 26, 1916, passed a resolution fixing such assignment of territory as above indicated in the following to wit:

'The following territory and district lines were agreed upon:

The territory east of river and bounded by Crain Ave. to DePeyster St.; DePeyster to Main St.; and Main St. to the river to constitute the DePeyster district.

All territory west of river will constitute the central district.

The territory east of the river and bounded by the north and east by Hall St., east to Vine St., and Vine St., south to township line will constitute the south school district.

The normal school district to be the territory bounded by Crain Ave., to DePeyster St., DePeyster to Main St., Main St. to the river; the river to Hall St.; Hall St. to Vine St.; Vine St. to the township line. This division will throw about 25 pupils living between Williams and Hall St., into the normal school district and somewhat relieve the congestion in the south school.'

Again such board thereafter at their meeting held September 24, 1917, passed the following:

'Moved by Bowers, seconded by Longcoy that school boundary lines as approved and adhered to of meeting date June 26th, 1916, as found on page 213 of record of meetings be continued and enforced. Ayes—Andrews, Kneifel, Longcoy, Bowers (4) cd.'"

In relation to the matters contained in your inquiry, conferences have been permitted to be had with the officials of the Kent state normal school and with representatives of the office of the superintendent of public instruction, and this opinion is based upon the facts contained in your letter and also upon those facts received through said conferences.

Chapter 10, title 5 of part 2 of the General Code provides for state normal schools and house bill No. 44, passed May 10, 1910, found in 101 O. L. 320, reads in part as follows:

"Sec. 1. That the normal school system of the state of Ohio created and established by chapter ten of the General Code, be extended by the creation and establishment of two additional state normal schools, one in northeastern Ohio and one in northwestern Ohio, to be so located as to afford the best opportunity possible for all the people to obtain the benefits and advantages to be derived from teachers trained both theoretically and practically. Neither of such schools shall be located in any city or village which now has a college located therein.

Sec. 2. Within thirty days after the passage of this act the governor shall appoint a commission composed of five persons, not more than three of whom shall be from any one political party, and no one of whom shall be personally or financially interested in any site determined upon by said commission. Said appointees shall constitute a commission with full power and authority to select suitable locations, lands, or lands and buildings and secure options on the same as said commission may find necessary for the establishment of said normal schools and upon such terms and conditions as said commission may deem to be for the best interests of the state and submit a report of their proceedings to the governor for his approval on or before the first day of December, 1910. The members of said commission shall serve without compensation but shall be paid their reasonable and necessary expenses while in the discharge of their official duties and shall serve until the appointment and organization of the boards of trustees, hereinafter provided.

Sec. 3. As soon thereafter as the general assembly shall appropriate a sufficient amount of money for the purchase of said sites and the erection of suitable buildings thereon, the governor shall appoint by and with the advice and consent of the senate five competent persons who shall constitute a board of trustees for the proposed normal school in the northeastern portion of Ohio, and five other competent persons who shall constitute a board of trustees for the proposed normal school in the northwestern portion of Ohio.

Sec. 4. Each board of trustees shall organize immediately after its appointment by the election from its members of a president, a secretary and a treasurer. The treasurer, before entering upon the discharge of his duties shall give bond to the state of Ohio for the faithful performance of his duties, and the proper accounting for all moneys coming into his care. The amount of said bond shall be determined by the trustees but shall not be for a less sum than the estimated amount which may come into his control at any one time. Said bond shall be approved by the attorney-general.

Before adopting plans for the buildings of said normal schools each board shall elect a president of known ability for the school under its control, who shall have advisory power in determining said plans. In planning said buildings, ample provisions shall be made for the establishment of a well equipped department for the preparation of teachers in the subject of agriculture.

The boards of trustees in connection with the presidents of the normal schools shall select and appoint an able and efficient corps of instructors for the said schools, provide a suitable course of study for the theoretical and practical training of students who desire to prepare themselves for the work of teaching, fix rates of tuition and provide proper equipment.

Said boards shall proceed without unnecessary delay to purchase said selected sites, lands and buildings, as the case may be, and erect thereon suitable and substantial buildings or enlarge, reconstruct and properly repair in a suitable and substantial manner such building or buildings, if any there be, and complete said buildings as soon as conditions will permit. And said board of trustees shall do any and all things necessary for the proper maintenance and successful and continuous operation of said normal schools and may receive donations of lands and moneys for the purpose of said normal schools.

The governor when appointing said board of trustees shall designate one member of each board to serve one year, one to serve two years, and one to serve three years, one to serve four years and one to serve five years, and thereafter one trustee for each board shall be appointed annually for five years for the control and management of said normal schools. They shall serve without compensation other than their reasonable and necessary expenses while engaged in the discharge of their official duties. Not more than three members of each board shall be selected from any one political party."

General Code section 7644 provides that each board of education shall establish a sufficient number of elementary schools to provide for the free education of the youth of school age within the district under its control, and that such board may establish such schools at such places as will be most convenient for the attendance of the largest number of pupils thereof.

General Code section 7663 provides that a board of education may establish one or more high schools whenever it deems the establishment of such school or schools proper or necessary for the convenience or progress of the pupils attending them, or for the conduct or welfare of the educational interests of such district.

General Code section 7690 provides that each board of education shall have the management and control of all of the public schools of whatever name and character in the district, and General Code section 7684 provides that boards of education may make such assignment of the youth of their respective districts to the schools established by them as in their opinion will promote the interest of education in their districts.

In your inquiry you ask what, if any, authority the Kent village school district has to assign and set off a certain portion of its territory to the Kent state normal college, and inasmuch as the board of education of the Kent village school district has no power to transfer territory but has power to assign pupils, I am taking it that you meant to ask if the board of education of the Kent village school district has the right to make such assignment of youth of their respective school districts.

The Kent school district is an exempted village school district, and under the provisions of law above quoted the board of education therein provided that there should be assigned to the various schools in said district the pupils who lived in the territory bounded and described in the resolution of June 26, 1917, quoted above, and not necessary to again quote. Suffice it, however, to say that there were four districts denominated: DePeyster district, central district, south school district and normal school district, and your question calls for an opinion as to whether or not the board of education has a right to assign the pupils of the village district to the various schools located therein and especially to the schools located in the state normal school district.

In the district in which is located the state normal school is also located what is commonly called a ward building. Said building is denominated the normal school district building, and means that the building is located in the district in which the normal school is also located. It is entirely within the province of the board of education under and by virtue of section 7684, above referred to, to assign the youth of that portion of the Kent village school district to the school which is established by said board of education in the district in which the normal school is located, and said board does so by finding that in its opinion such assignment will best promote the interests of education in said district. The board of education of a city school district may also arrange with the trustees of the state normal school to assume the management of all or such part of the

schools of such district as may be necessary to provide adequate facilities for practicing teaching by the students of said normal school, provided the number of rooms for which appropriation is made does not exceed six for each of said normal schools.

The section of our General Code which contains the above provision is section 7654-7, as found in 107 O. L. 627, and reads as follows:

> "Each of the state normal schools at Athens, Oxford, Bowling Green and Kent shall be authorized to arrange with the boards of education of rural districts to assume the management of one-teacher rural schools, or of rural schools having two or more teachers, or both types of rural schools having two or more teachers, or both types of rural schools and to maintain such schools as model rural schools. In no case shall there be more than one of each type of such rural schools established in a rural school district nor more than six model rural schools established by any state normal school. Each state normal school which complies with the provisions of this section, subject to the approval of the superintendent of public instruction, shall receive five hundred dollars annually from the state for each class room of such model schools when vouchers therefor have been approved by the superintendent of public instruction, and each of said normal schools shall also be authorized to arrange with the boards of education of village and city school districts to assume the management of the schools of the district or such part of them as may be necessary to provide adequate facilities for practice teaching by the students of said normal school and providing the number of rooms for which such appropriation is made does not exceed six for each state normal school."

So that, answering your question specifically, I advise you that the board of education of the Kent village school district has power to assign the pupils of that portion of said district to the school which is located in the territory in which the state normal school is located, and that the pupils so assigned shall attend the schools of said district.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

718.

APPROVAL—TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE OF COUNTY COMISSIONERS OF WILLIAMS COUNTY.

COLUMBUS, OHIO, October 17, 1917.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:

> RE:—Bonds of Williams county, Ohio, in the sum of $18,500.00 for the purpose of meeting the cost and expense of constructing certain road improvements petitioned for by F. L. Doughton et al.

I have carefully examined the transcript of proceedings of the board of county commissioners and other officers in Williams county, Ohio, relating to said bond issue, and I find that said proceedings are in conformity with the provisions of the General Code relating to bond issues of this kind.

I am therefore of the opinion that bonds properly prepared and executed by the proper officers of said county in accordance with the resolution of the board of county commissioners providing for their issue will, when so executed and delivered, constitute valid and subsisting obligations of said county.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

719.

APPROVAL—CERTIFICATE OF INDUSTRIAL COMMISSION—REQUIRED UNDER SECTION 1218-1 G. C. (107 O. L.)

A certificate of the industrial commission, to the effect that a contractor has paid into the state insurance fund the premium due according to law and the rules of the department, and that said applicant is entitled to the rights and benefits of said fund for a period of six months from the date of the payment of said premium, substantially complies with the provisions of section 1218-1 *G. C.* (107 *O. L* 131). *This would apply to only those cases in which the contractor pays a premium and does not elect to directly compensate his injured employes.*

COLUMBUS, OHIO, October 17, 1917.

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

DEAR SIR:—I have your communication of October 8, 1917, reading in part as follows:

> "On request for certificate by several contractors, the industrial commission made statement as follows:
>
> 'This is to certify that (name of contractor) of (address of contractor) has paid into the state insurance fund the premium due according to law and the rules of this department, and that said applicant is entitled to the rights and benefits of said fund for a period of six months, beginning _____, 191____.
>
> The Industrial
> _____Auditor. Commission of Ohio.
>
> I respectfully ask your opinion whether the aforesaid certificate is sufficient to comply with the provisions of section 1218-1. If not sufficient, I ask that you prepare the proper certificate to be used to comply with the provisions of section 1218-1."

That part of section 1218-1 G. C. (107 O. L. 131) which you quoted in your communication is as follows:

> "* * * No estimate shall be paid to any contractor by the state highway commissioner until the industrial commission of Ohio has certified that such contractor has complied with each and every condition of the act of February 26, 1913, and of all acts amendatory thereof and supplementary thereto and known as 'the workmen's compensation law."

In comparing that part of section 1218-1 G. C. above quoted with the certificate which is being furnished by the industrial commission in compliance with the

provisions of section 1218-1 G. C., it is to be noted that the industrial commission furnishes a certificate to the effect that the contractor has paid into the state insurance fund the premium due according to law and the rules of their department, and that said applicant is entitled to the rights and benefits of said fund for a period of six months beginning with the date upon which the premium is paid; whereas said section provides that the industrial commission shall certify that the contractor has complied with each and every condition of the act of February 26, 1913, and all acts amendatory thereof and supplementary thereto and known as the workmen's compensation law.

The question in your mind is as to whether the certificate furnished by the industrial commission is a substantial compliance with the provisions of the law, and whether you would be justified in accepting said certificate as a compliance with the law and which would entitle you to pay estimates to a contractor relative to whom said certificate is made.

In order to answer this question it might be well for us to consider what particular object and purpose the legislature had in mind in enacting said provision of section 1218-1 G. C. The legislature undoubtedly had in mind that the state could not with justice and propriety enter into a contract with some one to improve certain parts of the highways of the state, and pay said contractor for said improvement when the contractor was not complying with the provisions of the law which would take care of the injured or killed employes, if any, in his employ; that is, if the state, through its laws, makes it obligatory upon those employing five or more persons to comply with certain regulations which shall be for the benefit of the employes, then it could not with justice pay the contractor money out of the state treasury when the contractor is not obeying the law.

We will briefly note the provisions of the workmen's compensation law to ascertain whether the certificate provided by the industrial commission substantially covers the vital provisions of the law.

Section 1465-53 G. C. provides as follows:

> "The state liability board of awards shall classify occupations with respect to their degree of hazard, and determine the risks of the different classes and fix the rates of premium of the risks of the same, based upon the total pay-roll and number of employes in each of said classes of occupation sufficiently large to provide an adequate fund for the compensation provided for in this act (G. C. sections 1465-41a to 1465-43, 1465-45, 1465-46, 1465-53 to 1465-106), and to maintain a state insurance fund from year to year."

Section 1465-69 (107 O. L. 159) reads as follows:

> "Except as hereinafter provided, every employer mentioned in subdivision two of section 1465-60, General Code, shall, in the month of January, 1914, and semi-annually thereafter, pay into the state insurance fund the amount of premium determined and fixed by the industrial commission of Ohio for the employment or occupation of such employer the amount of which premium to be so paid by each such employer to be determined by the classifications, rules and rates made and published by said commission; and such employer shall semi-annually thereafter pay such further sum of money into the state insurance fund as may be ascertained to be due from him by applying the rules of said commission, * * *."

Section 1465-72 G. C. provides:

"The state liability board of awards shall disburse the state insurance fund to such employes of employers as have paid into said fund the premium applicable to the classes to which they belong, who have been injured in the course of their employment, wheresoever such injuries have occurred, and which have not been purposely self-inflicted, or to their dependents in case death has ensued. * * *"

From these three sections we note that:

(1) The state liability board of awards (now the industrial commission) shall fix the rates of premium to be paid by the employer;

(2) The employer shall pay into the state insurance fund the premium so fixed by the industrial commission, in the month of January, 1914, and semi-annually thereafter;

(3) When this is done the industrial commission shall disburse the state insurance fund to such employes of employers as have paid into said fund the premium so fixed by the industrial commission.

From these provisions and from what was evidently the object and purpose of the legislature in the enactment of the provision found in section 1218-1, supra, it is my opinion that the form of the certificate provided by the industrial commission substantially complies with the law; that is, if the industrial commission certifies that the contractor has paid into the state insurance fund a premium as fixed by the industrial commission, then under the law and under the certificate itself the contractor would be entitled to the rights and benefits of the fund for a period of six months. In other words, his employes, if injured or killed, would be entitled to the relief provided for under the law and under the rules of the commission, and as said before this was the object and purpose of the above enactment.

Hence, answering your question specifically, it is my opinion that the form of the certificate set out in your communication is a substantial compliance with the provisions of said section 1218-1 G. C., and that you would be justified and warranted in making estimates to a contractor in reference to whom said certificate has been made.

In passing I might say that the above form of certificate would not answer in those cases in which employers elect to directly compensate their injured employes, but it would apply to all those cases in which employers pay premiums, fixed by the industrial commission, into the state insurance fund.

Further, the certificate which is issued by the industrial commission at any one time covers no more than the period set out in the certificate itself. At the end of this time, of course, your department would be under the necessity of requiring a new certificate from the industrial commission.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

720.

APPROVAL—TRANSCRIPT OF PROCEEDING FOR BOND ISSUE OF BOARD OF EDUCATION OF LAKEWOOD CITY SCHOOL DISTRICT —DISAPPROVAL BOND FORM.

COLUMBUS, OHIO, October 18, 1917.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

RE:—Bonds of Lakewood city school district, in the sum of $100,000.00, purchased by the industrial commission of Ohio as a part of an issue of $620,000, voted and authorized by said school district for the purpose of constructing, repairing and furnishing school buildings in said school district.

I have carefully examined the transcript of proceedings of the board of education and other officers of Lakewood city school district relating to the above bond issue, and I find said proceedings to be substantially regular and in accordance with the provisions of the General Code relating to bond issues of this kind. The only irregularity of any kind that I find in the proceedings relating to said bond issue is one with respect to the canvass of the votes of the electors authorizing said bond issue in the sum of $620,000.00 for the purpose above stated.

It appears that the election on the proposition of said bond issue was held on June 12, 1917. The board of education of the school district being in regular session on the evening of said date, and the clerk of the board having received the returns of the election while the board was thus in session, said board proceeded to canvass said returns and entered the result of the election on the minutes of said meeting, instead of having a meeting held on the second Monday after the election as contemplated by the provisions of section 5120 General Code, which provides that in school elections the returns shall be made by the judges and clerks of each precinct to the clerk of the board of education of the district not less than five days after the election, and that thereupon such board shall canvass such returns at a meeting to be held on the second Monday after the election, and the result thereof entered upon the records of the board.

However, I am disposed to view the provisions of section 5120 General Code as directory only in so far as they designate the time of the meeting at which the returns of the vote at such an election should be canvassed, and in as much as the canvass made by the board of the votes shows that said bond issue received the affirmative vote of 932 electors as against a vote of 175 in opposition to same, I am disposed to hold that the result of said election should not be questioned by reason of the irregularity in the canvass of the same.

No irregularities have been found in the proceedings relating to the issue of said bonds.

The tax rate sheet returned by the auditor of Cuyahoga county to the state tax commission shows that the tax rate for all purposes on the taxable real and personal property in said school district for the year 1917 to be 15.3 mills; 3/10 mills of which combined rate is outside of all limitations of the Smith one per cent law; and that the combined rate for all purposes within the fifteen-mill limitations of said law is fifteen mills.

Inasmuch as taxes to meet the interest and principal on this bond issue is subject to the fifteen-mill limitation, it is not clear how, if the present combined

rate for all purposes covered thereby is to be maintained, any additional levy can be made for the purpose of paying the interest on this bond issue and paying the principal of such bonds as they mature.

In this connection I might say that there is nothing in the tax rate sheet above referred to to indicate that any levy was made by the board to meet the interest on said bonds and the principal thereof payable in the year 1918. That is, there is nothing at all entered in column 47 of said rate sheet showing a levy for indebtedness incurred after June 2, 1911, by a vote of the people.

I am unable to say, as a matter of law, that the board of education of this school district will not be able to levy within the limitations prescribed by law a sufficient amount from year to year to pay the interest on said bonds and to provide a sinking fund for the payment of such bonds at maturity, and this for the reason that section 5649-1 General Code provides that in taxing districts the taxing authority shall, within the limitations now prescribed by law, levy a tax sufficient to provide for sinking fund and interest purposes for all bonds issued by any political subdivision, which tax shall be paid before and in preference to all other items and for the full amount thereof.

The transcript shows that the school district now has bonds outstanding in the sum of $1,078,500.00, with an estimated tax duplicate valuation of $48,000,000.

My best information is that Lakewood is a live, growing city, and one whose tax duplicate valuation will in all probability rapidly increase as the years go by. It does not appear that either the said school district or the municipality has ever defaulted as to any of its bonded indebtedness, and it is probable that these bonds, if purchased by you, could and would be taken care of as said bonds and the interest thereon mature. However, I am calling your attention to the foregoing facts to the end that you may exercise your own independent judgment in this matter, which is one that I cannot decide as a matter of law.

The transcript contains a form of the proposed bonds. The form is abbreviated and is not altogether satisfactory to me. In addition to the recitals therein contained there should, I think, be express recitals to the effect that said bonds are issued pursuant to the affirmative vote of more than a majority of the electors of the said school district in favor of said bond issue; that said issue of bonds does not exceed any constitutional or statutory limitation of indebtedness of said school district; and that due provision has been made for an annual levy of taxes to pay the interest on said bonds and to create a sinking fund for the retirement of said bonds at maturity.

I wrote to the clerk of the board of education advising him that I was not satisfied with the bond form, but was advised by him that the treasurer of state has approved said bond form.

Under the circumstances you may view this question as one that is foreclosed; however, though said bond form probably contains all that the law really requires, it will be understood that in approving the proceedings relating to said bond issue I have not given my approval to the said bond form as it appears in the transcript.

Very truly yours,

Attorney-General.

JOSEPH MCGHEE,

721.

RURAL SCHOOL DISTRICT—ELECTION—MEMBERS OF BOARD OF EDUCATION—TERM—BOARD OF ELECTION SHOULD DESIGNATE NUMBER TO BE VOTED FOR AND LENGTH OF TERM—IF FOR DIFFERENT TERMS.

In a rural school district which was a township district prior to 1904, *three members of the board of education shall be elected at the November election in* 1917.

Members of boards of education in rural school districts are elected for the term of four years except at the first election in a newly created district when two shall be elected for two years and three for four years.

Boards of election should designate the number to be voted for and if for different terms then the length of each term.

COLUMBUS, OHIO, October 18, 1917.

HON. W. D. FULTON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—A letter has been received by this department which contains a question of such general importance that I am directing my reply thereto to you and will send the inquirer a copy of same. The request reads as follows:

> The West Farmington village was created in 1891 from territory in the township of Farmington, Warren county, Ohio. In 1912 the village school district and the township district were united by a transfer of the territory of the village district to the township district. The township board of education assumed control of the village schools at that time. In 1909 four members of the board of education were elected for the term of four years. In 1911 one member was elected for the term of four years. In 1913 four members were elected for the term of four years and in 1915 one member was elected for the term of four years. Said member last elected resigned July 25, 1916, and the board filled the vacancy for the unexpired term. Four members are now nominated. Shall the board of elections in the preparation of the ballots designate the term of four years for said nominees or shall a two-year term be designated for some and a four-year term for others?"

General Code section 4745 provides:

> "The terms of office of members of each board of education shall begin on the first Monday in January after their election and each such officer shall hold his office for four years * * * and until his successor is elected and qualified."

General Code section 4712 provides:

> "In rural school districts, the board of education shall consist of five members elected at large at the same time township officers are elected and in the manner provided by law, for a term of four years."

So that, it may be assumed at the outset that the term of office for which a

member of a rural school district board of education shall be elected is four years, unless there be some other provision of our law which may in some manner modify the provisions of said sections in relation thereto.

The history of the legislation in relation to the election of members of boards of education for rural school districts, coupled with the facts related by the inquirer, assists somewhat in the solution of this problem. When our school laws were codified in 1904 there was enacted section 3915 of the Revised Statutes, which read as follows:

> "The board of education of township school districts shall consist of five members elected at large at the same time and in the same manner as township officers are elected, for the term of four years from the first Monday in January after their election or until their successors are elected and qualified. *At the first township election held after the passage of this act there shall be a board of education elected in all township districts, as provided for herein, two to serve for two years and three to serve for four years,* and at the township election held every second year thereafter their successors shall be elected for the term of *four* years. Upon the organization of said boards upon the succeeding first Monday in January of their election, the previously existing township boards of education *shall be thereby abolished* and the newly elected and organized boards shall be their successors in all respects."

This, then, was the authority for the election of the board of education of which the present board is the successor. Said law became effective April 25, 1904, and the first election for township officers after it took effect was held on the first Tuesday after the first Monday in November in the same year.

General Code section 1442, as amended in senate bill No. 187, passed March 29, 1904, and approved by the governor March 31, 1904, changed the time of township elections from the first Monday in April, the time at which they had theretofore been held, to the first Tuesday after the first Monday in November. Said section read as follows:

> Township officers and justices of the peace shall be elected on the first Tuesday after the first Monday in November annually, in the manner provided by law. All township officers hereafter elected shall begin their respective terms on the first Monday in January after their election and all township officers now holding office, including assessors in municipalities who are serving as such by appointment and those hereafter elected, shall hold their offices until their successors are elected and qualified."

So that, the first board of education of the Farmington township school district, which was elected under the provisions of Revised Statutes 3915, above quoted, was elected on the first Tuesday after the first Monday in November in 1904. Two members thereof were elected for the term of two years and three members thereof were elected for the term of four years, said terms to begin on the first Monday in January, 1905, and to extend for the respective terms, and *until their successors were elected and qualified.* When the sucessors to the members of said board, who were so elected in 1904, were elected, they could only be so elected for the term of four years, thus preserving the continuity of the board. Said section 1442 Revised Statutes was amended in senate bill No. 168, passed March 31, 1906, to read as follows:

> "Township officers shall be chosen for a term of two years and justices of the peace for a term of four years by the electors of each township,

on the first Tuesday after the first Monday in November in the *odd* numbered years, and their terms of office shall commence on the first day of January next after their election."

So that, the first township election at which successors to any of the members of the board of education, above mentioned, could be elected was held on the first Tuesday after the first Monday in November in 1907, and the members of the board which were elected at said election began their terms on the first Monday in January, 1908. It will be remembered that at the election held in November, 1904, there were two members elected for the term of two years and until their successors were elected and qualified. The successors to the said two members, then, having been elected on the first Tuesday after the first Monday in November in 1907, their terms—that is, the terms of those two—began on the first Monday in January, 1908, and extended for the period of four years. The three, however, who were elected "at the first township election" were elected for the term of four years and until their successors were duly elected and qualified, and the change in the time of election affected the terms of said members so that instead of terminating on the first Monday in January, 1909, said terms did not terminate until the first Monday in January, 1910; that is, the successors of said members were elected on the first Tuesday after the first Monday in November, 1909, to serve for the term of four years from and after the first Monday in January next thereafter and until their successors were duly elected and qualified. In 1911, at the November election, two members should have been elected for the term of four years from and after the first Monday in January, 1912, but the inquirer states that only one member was elected, and I shall speak of this condition again in this opinion.

In 1912 the village district was transferred to the rural district under and by authority of General Code section 4692, which at that time read as follows:

"*Any school district* or any part thereof may be transferred *to an adjoining school district* by the mutual consent of the boards of education having control of such districts. * * *"

From that time to the present time the territory of what formerly composed the West Farmington village district and the territory of Farmington township school district has all been under the jurisdiction of the township school board.

In 1914 section 4735 was amended to read:

"The present existing township and special school districts shall constitute *rural* school districts until changed by the county board of education, and all officers and members of boards of education of such existing districts shall continue to hold and exercise their respective offices and powers until their terms expire and until their successors are elected and qualified."

It was by the authority of said section, above quoted, that what was formerly the Farmington township school district became the Farmington rural school district as it now exists and has existed to this time. Vacancies have existed in said board from time to time (I am informed by the clerk of the board) and the same have been filled by the remaining members of the board. This by virtue of section 4748, which reads as follows:

"A vacancy in any board of education may be caused by death, nonresidence, resignation, removal from office, failure of a person elected or

appointed to qualify within ten days after the organization of the board or of his appointment, removal from the district or absence from meetings of the board for a period of ninety days, if such absence is caused by reasons declared insufficient by a two-thirds vote of the remaining members of the board, which vote must be taken and entered upon the records of the board not less than thirty days after such absence. *Any such vacancy shall be filled by the board at its next regular or special meeting, or as soon thereafter as possible, by election for the unexpired term. A majority vote of all the remaining members of the board may fill any such vacancy."*

As originally enacted in 1904, said section read as follows:

"Vacancies in any board of education arising from death, non-residence, resignation, removal from office, failure of person elected or appointed to qualify within ten days after the organization of the board or of his appointment, removal from the district or from other cause, *shall be filled by the board of education at its next regular or special meeting, or as soon thereafter as possible, for the unexpired term. A majority vote of all the remaining members of the board can fill any vacancy or vacancies that may exist in said board."*

The fact that the vacancies were filled by the remaining members of the board and for the unexpired term preserved the continuity of said board and permitted the terms, as originally fixed, to continue, that is, the term of two members of said board shall begin on the first Monday in January of even numbered years, divisible by four, and the terms of three members to begin in even numbered years, not divisible by four. That arrangement, then, continuing until now would cause the terms of three members to end on the first Monday in January, 1918, and the successors of said members shall be elected on the first Tuesday after the first Monday of November in this year.

In Opinion No. 596, rendered to Hon. H. W. Cherrington, prosecuting attorney, Gallia county, on September 6, 1917, this department held that outside of the first election in a township, village or newly created school district, there is no authority in our school laws to elect a member of a board of education for a term other than four years, and without repeating the language of said opinion and that you may have the same before you, I am enclosing a copy of same herewith.

You are, therefore, advised that at the election to be held November 6th of this year, there shall be elected three members of the board of education in said district, and section 5018-1 G. C. provides that where the names of several persons are grouped together upon the ballots, as candidates for the same office, the ballots shall contain, immediately above the names of such candidates, the words "vote for not more than _____." The blank space shall be filled in with the number representing the persons who may lawfully be elected to such office. In this case the word "three" shall be written in the blank space and three members will be elected who will take their office on the first Monday in January, 1918. It is merely a matter of calculation from your minutes to ascertain which are the three members to be succeeded, and the other two being members, who were either originally duly elected or appointed, will serve until their successors are duly elected and qualified, and their successors will be elected at the November election in 1919 and will begin their terms on the first Monday in January, 1920.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

722.

COUNTY COMMISSIONERS—WHEN THEY MAY ERECT BRIDGES—VACATION OF STREETS.

1. *County commissioners have authority to erect bridges in villages or cities, provided the bridges are located upon state or county roads running into or through the village or city, but they have no authority to erect a bridge upon a street laid out for the use and benefit of the village or city.*

2. *A county and village can change the location of a bridge from one street to another and vacate that part of the street upon which the bridge originally stood and which will no longer be used for public travel, provided that said streets are either county or state roads as well as streets.*

COLUMBUS, OHIO, October 18, 1917.

HON. CLARE CALDWELL, *Prosecuting Attorney, Warren, Ohio.*

DEAR SIR:—I have your communication of September 12, 1917, in which you enclose a copy of letter received by you from W. W. Pierson, solicitor of the village of Girard, and ask my opinion in reference to a matter set out in Mr. Pierson's letter. Your communication reads as follows:

> "Enclosed is a copy of a letter from W. W. Pierson, solicitor of the village of Girard, in which he raises the question which is substantially as follows:
>
> Can the county commissioners construct a bridge along Main street across the Mahoning river at Girard, and thereby destroy the bridge on the next parallel street, to wit: West Liberty street?
>
> This point is not real clear in Mr. Pierson's letter. However, I understand that the construction of a bridge in Main street across the river would destroy the approaches to the present West Liberty street bridge. If this were not so, there would be no question but what a bridge could be constructed as desired, and West Liberty street bridge could be left as it is.
>
> I am unable to find any authority under our laws, which would permit the commissioners to abandon the Liberty street bridge.
>
> Would appreciate your opinion in this matter."

The facts, as I gather them from your communication and from that received by you from the solicitor of the village of Girard, are as follows:

Through the village of Girard there runs the Mahoning river, and parallel with the Mahoning river a number of railroad tracks. Also running through the village of Girard are West Liberty street and Main street, running parallel with each other and across the railroad tracks and the Mahoning river at or about right angles. On West Liberty street there is now a bridge crossing the Mahoning river, said street crossing said railroad tracks at grade. Said West Liberty street is a county road formerly called the Weathersfield road. Main street was laid out as a street by the village of Girard and terminates at the said railroad tracks.

The county commissioners and the railroad company are desirous of erecting an overhead bridge both across the tracks of said railroad company and the Mahoning river, but in doing this it is advisable to locate the bridge on Main street, rather than on West Liberty street, where it is now located. However, the railroad company will not join in this matter unless the crossing at West Liberty street can be abandoned. In the erection of the bridge at Main street it will be necessary to destroy the approaches to the present West Liberty street bridge.

The question now is as to whether the county commissioners can legally proceed with the erection of said bridge on Main street under the facts above set forth. To answer same it will be necessary for me to note two sections of the General Code, which are very similar in their provisions.

Section 2421 G. C. provides:

> "The commissioners shall construct and keep in repair necessary bridges over streams and public canals on state and county roads * * * except only such bridges as are wholly in cities and villages having by law the right to demand, and do demand and receive part of the bridge fund levied upon property therein. If they do not demand and receive a portion of the bridge tax, the commissioners shall construct and keep in repair all bridges in such cities and villages. The granting of the demand, made by any city or village for its portion of the bridge tax, shall be optional with the board of commissioners."

Inasmuch as there is no provision of the General Code conferring upon cities and villages the right to demand and receive a part of the bridge fund, that part of the section which refers to that matter is of no particular force or effect.

Section 7557 G. C. provides as follows:

> "The county commissioners shall cause to be constructed and kept in repair, as provided by law, all necessary bridges in villages and cities not having the right to demand and receive a portion of the bridge fund levied upon property within such corporations, on all state and county roads, free turnpikes, improved roads, transferred and abandoned turnpikes and plank roads, which are of general and public utility, running into or through such village or city."

From both of these sections it is to be noted that the county commissioners shall cause to be constructed all necessary bridges in villages and cities on all state and county roads.

In connection with this matter I desire to call attention to two decisions of our courts. One is City of Piqua v. Geist, 59 O. S. 163. The court in this case sets forth the law as follows, in the syllabus:

> "Under the amendment made February 8, 1894, of section 860, Revised Statutes (91 Laws 19) county commissioners are not required to construct and keep in repair bridges over natural streams and public canals, on streets established by a city or village for the use and convenience of the municipality, and not a part of a state or county road, though the city or village receive no part of the bridge fund levied on the property within the same. It is the duty of the city or village to construct and keep in repair such bridges, and is liable in damages to one injured by its neglect to do so."

In this case the court was construing section 860 R. S., which afterwards became section 2421 G. C.

In City of Newark v. Jones, 16 O. C. C. 563, the court found in the syllabus as follows:

> "In villages and cities not having the right to demand and receive any portion of the bridge fund levied upon property within such corporation,

> the county commissioners have the authority and duty to construct and maintain all necessary bridges in state and county roads, free turnpikes and plank roads, which are of general and public utility, running into and through any such village or city, but they have no authority to construct bridges in the streets, as such, of such villages and cities."

From a reading of the statutes above quoted and the decisions of the courts as herein set out, it is quite evident that the county commissioners are authorized to construct the bridge about which you inquire, on Main street of the village, providing Main street is a state or county road. However, the facts set out in your communication show that Main street, as far as it runs, namely, to the railroad tracks, is not a state or county road, but merely a street laid out by the village of Girard. Hence from the above quoted decisions and statutes, the county commissioners would have no authority to erect a bridge upon Main street.

Further, I desire to call your attention to the fact that from the ending of Main street at the railroad tracks to Marshall road, there is neither a street nor a county road. Therefore, neither the county nor the village would have authority to construct a bridge over this route. From this fact it develops that the county commissioners will of necessity be compelled to take an initial step precedent to the step which they take in reference to the building of the bridge, namely, they will have to lay out a county road extending Marshall road across the Mahoning river and the railroad tracks, until it at least joins with Main street, or further if it should be desired. It is my opinion that the road laid out should extend at least as far as the approach will extend on Main street.

That the county commissioners have full authority to lay out a county road which extends through an incorporated village or city, is clear from a number of cases.

In Wells v. McLaughlin et al., 17 Ohio 99, the court held as follows in the syllabus:

> "The power conferred upon county commissioners to lay out and establish county roads authorizes them to locate a road within or through an incorporated town or city."

This principle was affirmed in Lewis v. Laylin, 46 O. S. 663, 672.

In laying out this county highway, the county commissioners would proceed under and by virtue of section 6860 et seq. .G C. After the county road has been established, it is quite evident, under the above quoted sections and decisions, that the county commissioners will have authority to erect this bridge on Main street, which will then not only be a street, but will also be a county road.

After the bridge is erected at Main street, the municipal authorities and the county commissioners could, and, as I understand it from their agreement with the railroad company, would be compelled to vacate that part of West Liberty street no longer needed. The municipal authorities could vacate it in so far as the highway partakes of the nature of a street, provision for which is made in section 3725 et seq. G. C.

However, it was held in Railway v. Cummins, 53 O. S. 683, without report, that a municipal corporation cannot abandon a county road which by annexation has been brought within its limits. Under this holding of the court it will be necessary also for the county commissioners to vacate this part of the highway under the provisions of section 6860 et seq. G. C.

It must be remembered that the proposed improvement is not only the erection of a bridge across a river, as provided in sections 2421 and 7557 G. C., but it is more

particularly the erection of a high level bridge across the railroad tracks, in order to eliminate the grade crossing. This compels us to take note of another section of the General Code, namely, section 8863 et seq.

Section 8863 G. C. reads as follows:

> "If the council of a municipal corporation in which a railroad or railroads, and a street or other public highway cross each other at a grade or otherwise, or the commissioners of a county in which a railroad or railroads and a public road or highway cross each other at grade, and the directors of the railroad company or companies are of the opinion that the security and convenience of the public require alterations in such crossing, or the approaches thereto, or in the location of the railroad or railroads or the public way, or the grades thereof, so as to avoid a crossing at grade, or that such crossing should be discontinued with or without building a new way in substitution therefor, and if they agree as to the alterations they may be made as hereinafter provided; provided, however, that the commissioners of a county shall have the same powers with respect to that part of a state, county or township road which lies within the limits of a municipal corporation as are conferred upon municipal corporations to alter or require to be altered, any railroad crossings, or to require any improvement in connection therewith to be made, and to apportion the cost thereof between the county and such railroad or railroads, as is provided in sections 8874, 8875, 8876, 8877, 8878, 8879, 8880, 8881, 8882, 8883, 8884, 8885, 8886, 8887, 8888, 8889, 8890, 8891, 8892, 8893 and 8894, of this chapter."

This section gives the county commissioners full authority to build a high level bridge upon a state, county or township road which lies within the limits of a municipal corporation. In doing this, they have the same powers given to them that are given to the council of a municipal corporation, either to agree amicably with a railroad company in the matter of the erection of a high level bridge, and by so doing eliminate a grade crossing, or by compelling the railroad company so to do.

On account of the fact that this proposed improvement involves the erection of a high level bridge and the elimination of a grade crossing, it will be necessary for the commissioners to follow the provisions of section 8863 et seq. G. C., in making the improvement.

In passing, I desire to note a suggestion made by the village solicitor, that the question of issuing bonds will soon be put up to the voters of Liberty township and the village of Girard. While I am not asked for an opinion in reference to this matter, yet I wish to state it will be well to note carefully the provisions of section 8863 et seq. G. C. in the matter of paying the cost and expense of the erection of a high level bridge.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

723.

TOWNSHIP TRUSTEES—MAY CONTRIBUTE TO MAINTENANCE OF THE ROADS OF VILLAGE—STREETS DISTINGUISHED—MAY BUILD ROADS IN MUNICIPALITY.

1. *Under section 7467 G. C., township trustees have authority, by agreement with a village, to contribute to the maintenance and repair of the ROADS of the village, but not of the streets as such, viz., the highways of a village which were laid out by the village as streets.*

2. *Township trustees have authority, under section 3298-1 G. C. (107 O. L. 73) to construct or build roads in a municipality, but they have no authority to build or construct public highways within a municipality when they are streets as such, viz., those laid out by the municipality for its use and benefit.*

COLUMBUS, OHIO, October 18, 1917.

HON. SUMNER E. WALTERS, *Prosecuting Attorney, Van Wert, Ohio.*

DEAR SIR:—I have your communication of recent date which reads in part as follows:

> "Under the present highway laws of the state have township trustees authority to improve that portion of a public highway which lies within the limits of a municipality?"

In submitting your question you use two terms which are very broad and somewhat uncertain as to the meaning which should be given them. These two terms are "improve" and "public highway." The word "improve" is broad enough to include both construction and reconstruction of public highways as well as the maintenance and repair of the same; while the term "public highway" is broad enough to include the streets of a municipality which have been laid out by the municipality as streets as well as to include those streets which are also state, county or township roads. The fact that these two terms are very broad and inclusive must be kept in mind in giving an answer to your question.

Let us first consider the matter of the improvement of the public highways of a municipality, limiting the word "improvement" to a mere maintenance and repair. Answering your question in this limited sense we turn to sections 7464, 7465, 7466 and 7467 G. C., but more especially to section 7467 G. C. Without quoting these sections in full let it suffice for me to say that they have to do peculiarly and particularly with the question of maintenance and repair of public highways and have nothing to do with the construction or building of highways.

Section 7467 G. C. reads as follows:

> "The state, county and township shall each maintain their respective roads as designated in the classification hereinabove set forth; provided, however, that either the county or township may, by agreement between the county commissioners and township trustees, contribute to the repair and maintenance of the roads under the control of the other. The state, county or township or any two or more of them may by agreement expend any funds available for road construction, improvement or repair upon roads inside of a village, or a village may expend any funds available for street improvement upon roads outside of the village and leading thereto."

From the provisions of this section it is quite evident that the township trustees may by agreement with the village expend money upon roads within a village, but from the provisions of this section as a whole it is quite evident that this has reference merely to a contribution by the township trustees towards the maintenance and repair of the public highways inside a village. It does not give nor aim to give the township trustees authority to go into a village and take the initiative in the matter of the construction or building of the streets of the village, whether they be streets proper—that is, laid out as such by the village—or whether they be not only streets but township, county or state roads as well. But it does give to township trustees authority to contribute, out of their funds available for the construction, improvement or repair of roads, to the maintenance and repair of the roads inside a village. Inasmuch as the word "roads" is used in said section 7467, it is my opinion that this section is limited to a contribution to the maintenance and repair of state, county or township roads within a village, and not to streets as such, namely, those laid out by the village as streets, for its use and benefit. This section contemplates that the village assumes the initiative and the jurisdiction over the maintenance and repair of its streets, and that the township trustees by agreement merely contribute out of their funds for that purpose. It must also be remembered further that the provisions of this section are limited to villages and do not apply to cities. Such, I take it, are the powers granted and the limitations set out in said section 7467, in so far as it applies to your question.

Let us next inquire as to whether the township trustees under any circumstances can enter a municipality and assume jurisdiction over the matter of improving the streets of the municipality, whether they be streets as such or are as well township, county and state roads. I am now using the word 'improvement" in its broad sense as including not only maintenance and repair of public highways, but also the construction or building of the same.

Section 3298-1 G. C. sets out the general jurisdiction of township trustees over public highways, and reads as follows:

> "The board of trustees of any township shall have power, as hereinafter provided, to construct, reconstruct, resurface or improve any public road or roads, or part thereof, under their jurisdiction. Such trustees shall also have the power to construct, reconstruct, resurface or improve any county road or inter-county highway or main market road within their township; provided, however, that in the case of a county road the plans and specifications for the proposed improvement shall first be submitted to the county commissioners of the county and shall receive their approval and in the case of an intercounty highway or main market road such plans and specifications shall first be submitted to the state highway commissioner and shall receive his approval. The township trustees shall have power to widen, straighten or change the direction of any part of a road in connection with the proceedings for its improvement."

That is, the trustees of a township have power (1) to construct, reconstruct, resurface or improve any public road or roads or part thereof under their jurisdiction; (2) to construct, reconstruct, resurface or improve any county road or intercounty highway or main market road within their township.

Before determining the question as to whether the provisions of this section are broad enough to give township trustees jurisdiction over the streets of a municipality in the improvement of the same, using "streets" in its broad sense as including streets proper, as well as streets which are also township, county or state roads, and also using the word "improve" in its broad sense, let us note what

authority county commissioners have in the improvement of public highways of a municipality. Such a consideration may assist us in answering your question.

Section 6949 G. C. (107 O. L. 69) provides that:

> "The board of county commissioners may construct a proposed road improvement into, within or through a municipality."

However, before they can do this, the consent of the municipality must be given. This section and those which follow map out the complete course to be followed by the county commissioners and the municipality in said construction.

Section 6949 G. C., above quoted, and the sections which immediately follow give authority to the county commissioners to construct a proposed road improvement into, within or through a municipality; that is, county commissioners may construct a road improvement into, within or through a municipality, provided it is an extension of an improvement outside the municipality, and provided further that the consent of the municipality is first secured. It is to be noted in this section that the power and authority of the county commissioners are not limited to villages, but they have jurisdiction in cities as well, inasmuch as the word "municipalities" is used.

With this in mind, let us return to the question of the authority of the township trustees to improve a public highway within the limits of a municipality, using the word "improve" to mean construct or build. First let me say that there is no provision whatever in reference to the powers and duties of township trustees within a municipality, such as is above set out relative to county commissioners.

The question then immediately arises, have the township trustees any such powers as those which pertain to county commissioners as set out in section 6949 et seq. G. C., supra. This question is to be answered by considering whether the above provisions relating to county commissioners are a grant of power or a limitation upon the power which the county commissioners had before the enactment of said provisions. If sections 6949 et seq., supra, are strictly a grant of power to the county commissioners, then it would seem that the legislature did not intend that the township trustees should have any such power or authority, or it would have at the same time granted the power specifically to township trustees. However, if sections 6949 et seq. are a limitation of the power already possessed by the county commissioners, then no such conclusion could be drawn.

Inasmuch as the county commissioners have always had the right and authority to enter a municipality in order to improve the county highways located within the municipality, it is my opinion that the provisions of section 6949 et seq. should be considered as a limitation upon the power and authority of county commissioners, rather than a grant, for they cannot enter a municipality for the purposes of said sections, namely, extending a road improvement into, through or within the municipality, unless they first secure the consent of the municipality itself.

I am further of the view that the same law would apply to the power and authority of the township trustees to enter a municipality for the purpose of improving the public roads thereof, as would apply to the power and authority of the county commissioners to enter a municipality for the same purpose.

Hence, since the township trustees are given no particular power and authority under the highway laws of the state, it will be necessary for us to note what the law has been as construed by the courts in reference to this matter.

In Wells v. McLaughlin, 17 Ohio Rep. 99, the court held as follows: (Syll.)

> "The power conferred upon county commissioners, to lay out and establish county roads, authorizes them to locate a road within or through an incorporated town or city."

This principle was affirmed in Lewis v. Laylin, 46 O. S. 663, 672. In the third branch of the syllabus of Lewis v. Laylin, supra, we find the following principle of law stated:

> "County commissioners have authority under the two-mile assessment pike law to improve a state, county or township road, although the improvement embraces that part of the highway which lies within the limits of a municipal corporation."

We must note, however, that this is limited to the improvement of a state, county or township road.

In City of Newark v. Jones, 16 O. C. C. 563, the court say in the syllabus:

> "County commissioners have the authority and duty to construct and maintain all necessary bridges in state and county roads, turnpikes and plank roads, which are of general and public utility, running into and through any such village or city, but they have no authority to construct bridges in the streets as such of such villages and cities."

To the same point we might cite:

> City of Piqua v. Geist, 59 O. S. 163.

While the above decisions relate to the power and authority of county commissioners, yet, as said before, I am of the opinion that the same principles of law would also apply to township trustees.

Therefore, in view of all the above the answer to your question is fairly clear to the effect:

(1) That the township trustees have no authority whatever to enter into a municipality and construct or build streets which are streets as such merely—that is, those which were laid out by the municipality for its own use and benefit; but they have authority to enter into a municipality and construct or build the public highways thereof which are not only streets but also township roads.

(2) That the township trustees have authority, by agreement with a village, to contribute to the maintenance and repair of the roads of the village—that is township, county or state roads—but they have no authority to contribute to the maintenance and repair of streets as such, viz., those laid out by the municipality for its own use and benefit.

Very truly yours,
JOSEPH McGHEE,
Attorney-General.

724.

APPROVAL—FINAL RESOLUTION FOR ROAD IMPROVEMENT IN MONROE, KNOX, SANDUSKY AND OTTAWA COUNTIES.

COLUMBUS, OHIO, October 20, 1917.

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

DEAR SIR:—I am in receipt of your two communications of October 11, and

two bearing dates October 12 and 13 respectively, enclosing for my approval final resolutions for the following improvements:

Monroe County——Sec. "J," Woodsfield-Marietta road, I. C. H. No. 389 (in duplicate).
Knox County—Sec. "K," Columbus-Wooster road, I. C. H. No. 24.
Sandusky County—Sec. "P-1," Fremont-Port Clinton road, I. C. H. No. 277.
Ottawa County—Sec. "H," Toledo-Elmore road, I. C. H. No. 52.

I have carefully examined said resolutions, find them correct in form and legal, and am therefore endorsing my approval thereon, in accordance with the provisions of section 1218 G. C.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

725.

DISAPPROVAL—BOND ISSUE—WILLIAMS COUNTY—LIMITATION OF AMOUNT OF BONDS THAT MAY BE ISSUED UNDER SECTION 6929 G. C.

Under the provisions of section 6929 General Code, as amended 107 O. L., 69 (101), the county commissioners are not authorized to issue the bonds therein provided for in an amount greater than the aggregate sum necessary to pay the estimated compensation, damages, cost and expense of the improvement.

COLUMBUS, OHIO, October 22, 1917.

Industrial Commission of Ohio, Columbus, Ohio.
GENTLEMEN:—

"RE:—Bonds of Williams county, Ohio, in the sum of $38,500.00 for the purpose of meeting the cost and expense of constructing the improvement of Stryker-Evansport road, I. C. H. 312. Petitioned for by J. W. Sloan.

I have made an examination of the transcript of the proceedings of the board of county commissioners of Williams county and other officers relating to the above bond issues, and I am returning the same herewith without my approval.

The proceedings relating to this bond issue are regular and in conformity with the provisions of the General Code, save in one particular. The road improvement in question was initiated by a resolution adopted by the board of county commissioners of said county December 18, 1917, under the authority of section 6910 General Code, authorizing the board of county commissioners to initiate road improvements of this kind without petition. In this resolution the board of county commissioners directed the county surveyor to make such survey, plats, profiles, cross-sections, estimates and specifications as the improvement might require, and thereafter such proceedings were had by the board of county commissioners that on August 20, 1917, said board approved and adopted said plans, profiles, specifications and estimates for the improvement.

By additional transcript furnished by the county auditor at my request I am advised that the estimate of the aggregate amount necessary to pay compensation, damages, cost and expense of the improvement is the sum of $23,500. The resolution of the board of county commissioners providing for the issue of said bonds provides for the issue of the same in the aggregate sum of $38,500.00.

Section 6929 of the General Code, as it read at the time this road proceeding was initiated, provided authority in the board of county commissioners to sell bonds to meet the cost and expense of such a road improvement "in the aggregate amount necessary to pay the estimated cost and expense of such improvement." With respect to this particular point, section 6929 General Code, was amended in the White-Mulcahey act, which went into effect as the law June 28, 1917, so as to provide that the board of county commissioners may sell the bonds of the county "in an amount not greater than the aggregate sum necessary to pay the estimated compensation, damages, cost and expense of the improvement."

Whether we apply these provisions of section 6929 General Code as they read at the time this improvement was initiated, or the provisions of the section as amended and as in force at the time the resolution of the board of county commissioners providing for this bond issue was adopted, it must be said in either event that the legislature did not contemplate any authority in the board of county commissioners to issue and sell bonds of the county in an amount exceeding the total estimate of the cost and expense of said improvement approved by such board.

For the reason, therefore, that this issue of bonds is in an amount in excess of the estimate of the cost and expense of this improvement, I am unable to approve the same. Though not now deciding the point, I am inclined to the view that the legislation of the board of county commissioners providing for this bond issue may be sustained as valid to the extent of the bonds issued thereunder not in excess of said estimate (Smith v. Village of Rockford, 9 C. C. N. S. 465); but inasmuch as your resolution providing for the purchase of this issue does not indicate any intention or desire on your part to purchase any part of this issue less than the whole amount thereof, I do not feel that I can do otherwise than to disapprove the proceedings providing for the issue, and to advise you not to purchase the bonds.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

726.

DISAPPROVAL—BOND ISSUE—WILLIAMS COUNTY—LIMITATION OF AMOUNT OF BONDS THAT MAY BE ISSUED UNDER SECTION 6929 G. C.

Under the provisions of section 6929 General Code as amended in 107 O. L. 69 (101), the county commissioners are not authorized to issue the bonds therein provided for in an amount greater than the aggregate sum necessary to pay the estimated compensation, damages, cost and expense of the improvement.

COLUMBUS, OHIO, October 22, 1917.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

RE:—Bonds of Williams county, Ohio, in the sum of $25,000.00, for the purpose of meeting the cost and expense of constructing certain road improvements petitioned for by G. W. Cassell et al.

I am herewith returning without my approval the transcript of proceedings of the board of county commissioners and other officers of Williams county, Ohio, relating to the above bond issue.

The proceedings relating to this bond issue are regular and in conformity with the provisions of the General Code, save in one particular. The road improvement in question was initiated by a petition filed June 10, 1916, signed by fifty-one per cent of the lot and land owners resident of said county to be especially taxed or assessed therefor.

Thereupon, after finding that said petition was signed by fifty-one per cent of the property owners to be assessed, the county commissioners directed the county surveyor to make such survey, plats, profiles, cross-sections, estimates and specifications as the improvement might require, and thereafter such proceedings were had by the board of county commissioners that on May 28, 1917, said board approved and adopted said plans, profiles, specifications and estimates for the improvement.

By additional transcript furnished by the county auditor at my request, I am advised that the estimate of the aggregate amount necessary to pay compensation, damages, cost and expense of the improvement is the sum of $23,500.00. The resolution of the board of county commissioners providing for the issue of said bonds provides for the issue of the same in the aggregate sum of $25,000.00.

Section 6929 of the General Code, as it read at the time this road proceeding was initiated, provided authority in the board of county commissioners to sell bonds to meet the cost and expense of such a road improvement "in the aggregate amount necessary to pay the estimated cost and expense of such improvement." With respect to this particular point, section 6929 of the General Code was amended in the White-Mulcahey act, which went into effect as the law June 28, 1917, so as to provide that the board of county commissioners may sell the bonds of the county "in an amount not greater than the aggregate sum necessary to pay the estimated compensation, damages, cost and expense of the improvement."

Whether we apply these provisions of section 6929 General Code as they read at the time this improvement was initiated, or the provisions of the section as amended and as in force at the time the resolution of the board of county commissioners providing for this bond issue was adopted, it must be said in either event that the legislature did not contemplate any authority in the board of county commissioners to issue and sell bonds of the county in an amount exceeding the total estimate of the cost and expense of said improvement approved by such board.

For the reason, therefore, that this issue of bonds is in an amount in excess of the estimate of the cost and expense of this improvement, I am unable to approve the same.

Though not now deciding the point, I am inclined to the view that the legislation of the board of county commissioners providing for this bond issue may be sustained as valid to the extent of the bonds issued thereunder not in excess of said estimate (Smith v. Village of Rockford, 9 C. C. N. S. 465); but inasmuch as your resolution providing for the purchase of this issue does not indicate any intention or desire on your part to purchase any part of this issue less than the whole amount thereof, I do not feel that I can do otherwise than to disapprove the proceedings providing for the issue, and to advise you not to purchase the bonds.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

727.

DISAPPROVAL—BOND ISSUE—WILLIAMS COUNTY—LIMITATIONS OF AMOUNT OF BONDS THAT MAY BE ISSUED UNDER SECTION 6929 G. C.

Under the provisions of section 6929 General Code, as amended, 107 O. L. 69 (101), the county commissioners are not authorized to issue the bonds therein provided for in an amount greater than the aggregate sum necessary to pay the estimated compensation, damages, cost and expenses of the improvement.

COLUMBUS, OHIO, October 22, 1917.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

RE:—Bonds of Williams county, Ohio, in the sum of $35,500.00, for the purpose of improving section "A" of the Montpelier-Jimtown road, initiated by a unanimous resolution of the board of county commissioners, November 27, 1916.

I am herewith returning without my approval the transcript of proceedings of the board of county commissioners and other officers of Williams county, Ohio, relating to the above bond issue.

The proceedings relating to this bond issue are regular and in conformity with the provisions of the General Code, save in one particular. The road improvement in question was initiated by a resolution adopted by the board of county commissioners of said county November 27, 1916, under the authority of section 6910 General Code, authorizing the board of county commissioners to initiate road improvements of this kind without petition. In this resolution the board of county commissioners directed the county surveyor to make such survey, plats, profiles, cross-sections, estimates and specifications as the improvement might require, and thereafter such proceedings were had by the board of county commissioners that on May 28, 1917, said board approved and adopted said plans, profiles, specifications and estimates for the improvement.

By additional transcript furnished by the county auditor at my request I am advised that the estimate of the aggregate amount necessary to pay compensation, damages, cost and expense of the improvement is the sum of $34,082.00. The resolution of the board of county commissioners providing for the issue of said bonds provides for the issue of the same in the aggregate sum of $35,500.00.

Section 6929 of the General Code, as it read at the time this road proceeding was initiated, provided authority in the board of county commissioners to sell bonds to meet the cost and expense of such a road improvement "in the aggregate amount necessary to pay the estimated cost and expense of such improvement."

With respect to this particular point, section 6929 General Code was amended in the White-Mulcahey act, which went into effect as the law June 28, 1917, so as to provide that the board of county commissioners may sell the bonds of the county "in an amount not greater than the aggregate sum necessary to pay the estimated compensation, damages, cost and expense of the improvement."

Whether we apply these provisions of section 6929 General Code as they read at the time this improvement was initiated, or the provisions of the section as amended and as in force at the time the resolution of the board of county commissioners providing for this bond issue was adopted, it must be said in

either event that the legislature did not contemplate any authority in the board of county commissioners to issue and sell bonds of the county in an amount exceeding the total estimate of the cost and expense of said improvement approved by such board.

For the reason, therefore, that this issue of bonds is in an amount in excess of the estimate of the cost and expense of this improvement, I am unable to approve the same. Though not now deciding the point, I am inclined to the view that the legislation of the board of county commissioners providing for this bond issue may be sustained as valid to the extent of the bonds issued thereunder not in excess of said estimate (Smith v. Village of Rockford, 9 C. C. N. S. 465); but inasmuch as your resolution providing for the purchase of this issue does not indicate any intention or desire on your part to purchase any part of this issue less than the whole amount thereof, I do not feel that I can do otherwise than to disapprove the proceedings providing for the issue, and to advise you not to purchase the bonds.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

728.

APPROPRIATION—PERSONAL SERVICE—WHERE AN APPROPRIATION IS FOR SPECIFIC NUMBER OF ASSISTANTS—HEAD OF DEPARTMENT MAY NOT EXPEND SAME FOR A LESSER NUMBER OF ASSISTANTS WITHOUT AUTHORITY OF CONTROLLING BOARD.

Where one of the items of a gross personal service appropriation in the budget bill of 1917 is "19 assistants—$22,800.00" the head of the department may not, without application to the controlling board, expend the moneys covered thereby for the compensation of a lesser number of assistants than that designated; but must assign to each position for which the legislature appropriated an adequate salary, regard being had to the grade of the service, etc.; but upon application by the head of the department the controlling board, acting under section 4 of the appropriation act, may authorize the head of the department to expend the amount covered by the item for the compensation of a lesser number of assistants.

An appropriation in gross to a department for personal service, itemized in part by allowances for the payment of "19 assistants" and the like, and coupled with the authority of the controlling board to authorize the total amount appropriated to be expended otherwise than in accordance with the itemization is "specific" within the meaning of article II, section 22 of the Constitution. The constitutional provision does not require that a separate appropriation be made for the salary of each person employed.

COLUMBUS, OHIO, October 22, 1917.

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

DEAR SIR:—I have your letter of recent date in which you request my opinion as follows:

"Article II, section 22, of the Ohio Constitution, provides that 'No

money shall be drawn from the treasury except in pursuance of a specific appropriation made by law; and no appropriation shall be made for a longer period than two years.'

House bill No. 584 carries an item for the department of state fire marshal, as follows: '19 assistants—$22,800.00.'

It is now the desire of the state fire marshal to employ only eighteen assistants and distribute the amount appropriated for nineteen assistants as follows:

1 assistant----------$2,400.00 per annum
17 assistants, each----------$1,200.00 per annum

Can this be legally done? In other words, do you consider '19 assistants—$22,800.00' a specific appropriation? If you hold that it is a specific appropriation, then how much of this appropriation is each of the nineteen assistants entitled to?"

Answering your first question, I beg to state that the item which you quote from the appropriation bill does not purport to be an appropriation at all, much less a specific appropriation. The personal service items in house bill No. 584, passed by the last session of the general assembly, have been as a matter of practice classified as "items" instead of as "appropriations," which was the case with the budget bill of the preceding session. The only "appropriation" involved in your question is one of $60,150.00 in amount for the year 1917-1918, and a corresponding amount for the year 1918-1919. (See 107 O. L., pages 212, 288.)

If the $22,800.00 item were really an appropriation, then the principles of the opinion of my predecessor, Hon. Edward C. Turner, addressed to you under date of April 27, 1915 (Opinions of Attorney-General for that year, volume 1, page 564), would come into play and dictate to your second general question an answer to the effect that such an appropriation for the salaries of nineteen assistants could not lawfully be expended for the salaries of eighteen assistants, and that while the head of the department necessarily has discretion in dividing up such an appropriation among the number of clerks for the compensation of whom it is made, that discretion is so limited as that he must assign to each of the nineteen positions which the legislature had in mind a substantial salary, having regard to the grade of work to be performed and other like factors which must be assumed to have been in the minds of the legislature.

The general budget bill of 1915 provided for this matter by specific machinery furnished by section 9 thereof (106 O. L. 828), dealt with in the opinion of my predecessor to the industrial commission of Ohio under date of September 1, 1916 (volume 2, 1916 (volume 2, Reports of the Attorney-General for that year, page 1495).

As pointed out, however, the present bill is framed upon a theory entirely different from either the partial appropriation bill of 1915 or the general budget bill of that year, inasmuch as the appropriations for personal service have been treated in the manner which I have described, instead of being made as distinct appropriations and placed in the second column of figures found in the bill. This treatment of the general subject-matter of personal service appropriations made unnecessary any such provision as was found in section 9 of the general budget bill of 1915; for the extent to which the specification of items set forth in the first column of the bill is controlling and the manner in which a variation therefrom may be authorized is expressly provided for by section 4 of the appropriation bill (107 O. L. 350). This section is lengthy and I assume that you are perfectly familiar with it. Therefore, I shall not quote it. Suffice it to say that in the first instance and without further authority, an item set forth in the first column of

the appropriation bill is absolutely controlling upon the head of a department. Therefore, in the absence of any further action the principles of the opinion of April 27, 1915, above referred to, would apply and the answer hereinbefore abstracted would have to be given to your second question.

However, if application is properly made to the controlling board, as is also provided in section 4, and that board approves the departure from the itemized classification of purposes sought by the application and grants the authority prayed for, the proposed change in the plan of expenditure may be made.

Completely answering your second question, then, I beg to advise that the controlling board, upon application, may authorize the state fire marshal to do as he desires to do; but that without such authority the state fire marshal may not lawfully expend the $22,800.00 item for the salaries of nineteen assistants in the payment of the salaries of eighteen assistants, and that without such application to the controlling board he must assign to each of the nineteen positions for which the appropriation is made a substantial salary, to be determined upon the principles above referred to.

I have thus far not answered your question as to whether or not an appropriation for "19 assistants—$22,800.00" is a specific appropriation within the meaning of article II, section 22 of the Constitution, except by saying that it does not purport to be an appropriation at all, but merely one of the specifications of a larger appropriation of $60,150.00, which said larger appropriation is further amplified as to the purposes for which it may be expended by the power given to the controlling board by section 4 of the law. I have no disposition, however, to avoid answering your question in such a way. In my opinion, the appropriation which the legislature has made is a specific one and satisfies the constitutional requirement. That this is the case is demonstrable by referring to the legislative practice in the past but no exhaustive discussion of what this practice has been is necessary in the present instance. The $60,150.00 appropriation which has actually been made is distributed by a detailed itemization. The only way in which the legislature could have been more specific than it has been would be to fix the exact compensation of each person to be employed by the fire marshal. This it might conceivably do, but it may well stop short of this and give some discretion to the employing authority with respect to the amount of compensation without failing to be specific. The discretion is not absolute and the bill itself throws limitations about its exercise in many ways. Nor is the discretion of the controlling board absolute. The $60,150.00 appropriation can be expended only for personal service within the proper limits of the state fire marshal's department, no matter to what extent the controlling board authorizes the itemization thereof to be varied. In my opinion, a general appropriation of $60,150.00 to the fire marshal's department for personal service, without any such limitations except the one implied in the nature of the case, viz.: that the money must be spent for the proper purposes of the fire marshal's department and for personal service, would be specific enough to satisfy the constitutional requirement.

For these reasons your first question is answered in the affirmative.

Another way of putting the same thing is to say that the framers of the Constitution by requiring appropriations to be specific did not intend to deprive the legislature of the power of permitting the head of a department to fix the compensation of his subordinates. There are many permanent statutes in our Code granting this power, and no question has ever been raised as to their constitutionality.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

729.

PROBATE DIVISION—OF CONSOLIDATED PROBATE AND COMMON PLEAS COURTS—COMPENSATION OF DEPUTIES, ETC.—BY WHOM FIXED—JUDGE IS EX OFFICIO CLERK—BY WHOM WRITS AND AFFIDAVITS SIGNED—DEPUTY CLERK MAY ADMINISTER OATHS IN CERTAIN MATTERS—SEAL—FEES—SALARY OF DEPUTIES FROM WHAT FUND PAYABLE—APPLICATION FOR ADDITIONAL ALLOWANCE—WHERE SAME SHOULD BE FILED.

1. *Where the probate and common pleas courts of a county have been consolidated, the judge of the common pleas court having a probate division is authorized to fix the compensation or salary of the deputies, clerks, assistants, etc., in the probate division of that court.*

2. *In such consolidated court the judge thereof is ex-officio clerk of the probate division of said court and the clerk of the common pleas court does not become the clerk of the probate division.*

3. *All writs issued by such combined court would be signed by the clerk thereof. Affidavits would be signed by the officer authorized to issue the oath.*

4. *The deputy clerk of said probate division is authorized to administer oaths in all ministerial matters when necessary in the discharge of his duties. The deputy clerk cannot sign writs issuing out of said probate division except that writs required to be signed by the clerk can be signed "per" the deputy.*

5. *The seal of the probate division of said combined court, and not the seal of the court of common pleas, should be attached to writs issued from the probate division.*

6. *All fees taxed for services in said probate division are governed by sections* 1601, 1602 *and* 1603 *G. C.*

7. *In the event that such courts are combined during any calendar year, the salary for deputy hire after consolidation is payable out of the balance of the fund remaining at the time of consolidation, from the aggregate sum theretofore allowed the probate judge.*

8. *In the event it is found necessary to have an additional allowance for said probate division under section* 2980-1 *G. C., the application therefor should be filed by the judge of said combined courts in the court of common pleas, and such application should be heard before a foreign judge in the same manner as in any other cause in which the judge had a disqualifying interest.*

COLUMBUS, OHIO, October 23, 1917.

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

DEAR SIR:—Some time ago I received a request from you for written opinion upon certain questions arising out of the consolidation and combining of the probate court with the common pleas court, by virtue of the constitutional amendment authorizing same, and under sections 1604-1 et seq. G. C. which were acts of the legislature carrying into execution the constitutional provision. Some time prior to receipt of your request, I had a request from Hon. E. A. Scott, prosecuting attorney of Adams county, asking some questions on the same subject matter.

I am addressing an opinion to you covering the questions propounded by you and Mr. Scott, and will furnish the prosecuting attorney of Adams county with a copy of this opinion.

The questions may be stated as follows:

1. Where the probate and common pleas courts of a county have been

combined and consolidated, who is authorized to fix the compensation or salary of the deputies, clerks, assistants, etc., in the probate division of that court?

2. Does the clerk of the common pleas court become clerk of the probate division of said court, and would the clerk be the proper officer to sign all writs, certificates and affidavits issued in the probate division of such combined and consolidated courts?

3. If the clerk of the common pleas court is not the proper officer to sign said documents, what would be the proper official signature to such writs and affidavits of said probate division?

4. Have the appointees of said probate division, namely, the deputies, clerks and assistants, authority to sign such writs, administer oaths and take affidavits?

5. Should the seal of the court of common pleas, in the custody of the clerk of said court, be attached to writs issued from the probate division?

6. Should the fees taxed for services in said probate division be those set forth in sections 1601, 1602 and 1603 G. C., or would they be taxed as provided for clerks in the common pleas court?

7. Would the salary for deputy hire, allowed by the county commissioners prior to such consolidation, be the salary for deputy hire in the probate division of the common pleas court after said courts are combined?

8. In the event it is found necessary to have an additional allowance for said probate division under section 2980-1 G. C., where should such application be filed and before what judge should it be heard?

The following sections of the Constitution and the General Code will have to be considered in the answering of the above questions:

Sec. 7 of Art. IV of the Constitution, adopted September 3, 1912, provides:

"Sec. 7. There shall be established in each county, a probate court, which shall be a court of record, open at all times, and holden by one judge, elected by the electors of the county, who shall hold his office for the term of four years, and shall receive such compensation payable out of the county treasury, as shall be provided by law. Whenever ten per centum of the number of the electors voting for governor at the next preceding election in any county having less than sixty thousand population as determined by the next preceding federal census, shall petition the judges of the court of common pleas of any such county not less than ninety days before any general election for county officers, the judge of the court of common pleas shall submit to the electors of such county the question of combining the probate court with the court of common pleas, and such courts shall be combined and shall be known as the court of common pleas in case a majority of the electors voting upon such question vote in favor of such combination. Notice of such election shall be given in the same manner as for the election of county officers. Elections may be had in the same manner for the separation of such courts, when once combined."

To carry this provision into effect, the legislature (103 O. L. 960) passed the act found in the General Code under section numbers 1604-1 et seq., and under which courts of common pleas and probate courts of counties availing themselves of these provisions have been combined and consolidated.

Section 1604-1 G. C. provides for the requisite petition for submission of the question of combining the probate and common pleas courts.

Section 1604-3 G. C. provides in part as follows:

> "* * * * * * *
> If a majority of the votes cast at such an election shall be in favor of combining said courts, such courts shall stand combined and consolidated at the expiration of the term for which the probate judge has been elected in the county wherein such election has been held."

Section 1604-4 G. C. provides:

> "When the probate court and the court of common pleas have been combined there shall be established in the court of common pleas a probate division, and all matters whereof the probate court has jurisdiction by law shall be filed in and separately docketed in said probate division, and the resident judge of the court of common pleas, shall appoint the necessary deputies, clerks and assistants to have charge and perform the work incident to the probate division. The salaries of such deputies, clerks and assistants to be regulated by section 2980-1 of the General Code. Error may be prosecuted or appeals taken from said probate division to the court of appeals in all cases where the same lie to the court of common pleas in counties where such courts have not been combined."

Under the provisions of the Constitution and the above legislative enactments, in certain counties of this state the probate court and the court of common pleas have been combined and in the court of common pleas in such counties "a probate division" shall be established and "all matters wherof the probate court has jurisdiction by law shall be filed in and separately docketed in said probate division. Error may be prosecuted or appeals taken from said probate division to the court of appeals in all cases where the same lie to the court of common pleas in counties where such courts have not been combined."

It will be noted that there is no specific provision that the probate court in such counties is abolished; neither is it expressly stated that the common pleas court after such consolidation shall succeed to and be endowed with all the powers, duties and jurisdiction of the old probate court; yet I believe it is a fair inference, from the language used in section 1604-4 G. C., that the succession and endowment spoken of above was intended by the legislature. Now, since all of the provisions of the law regarding the probate court remain on the statute books without express change or repeal, I take it that all of the statutory law regarding probate courts and probate judges apply in the counties where there has been a consolidation of the two courts, save only as necessarily modified by the fact of consolidation and the establishment of the probate division in the court of common pleas.

It is my view then that in all the sections of the General Code which make provision regarding the probate court, wherever the term "probate judge" is found such words shall be read "the judge of the court of common pleas having a probate division," and wherever the words "probate court" are found in said statutes, such words shall be read "the court of common pleas having a probate division," except as herein noted.

So in my opinion the common pleas judge, as far as the probate division of his court is concerned, stands in the shoes of the probate judge, and to determine his powers and duties reference will have to be made to part first, title IV, chapter 6 of the General Code, entitled "Probate Court," sections 1580 et seq.

The act providing for the consolidation and combining of said courts, in section 4 thereof, now being section 1604-4 G. C., provides that the resident judge of the court of common pleas—

"shall appoint the necessary deputies, clerks and assistants to have charge and perform the work incident to the probate division. The salaries of such deputies, clerks and assistants to be regulated by section 2980-1 of the General Code."

Section 2978 G. C. provides:

"Each *probate judge* * * * shall charge and collect the fees, costs, percentages, allowances and compensation allowed by law * * *."

Section 2980 G. C. provides:

"On the twentieth of each November such officer shall prepare and file with the county commissioners a detailed statement of the probable amount necessary to be expended for deputies, assistants, bookkeepers, clerks and other employes, except court constables, of their respective offices, showing in detail the requirements of their offices for the year beginning January 1st next thereafter with the sworn statement of the amount expended by them for such assistants for the preceding year. Not later than five days after the filing of such statement, the county commissioners shall fix an aggregate sum to be expended for such period for the compensation of such deputies, assistants, bookkeepers, clerks or other employes of such officer, except court constables, which sum shall be reasonable and proper, and shall enter such finding upon their journal."

Section 2980-1 G. C., as amended 106 O. L. 14, reads as follows:

"The aggregate sum so fixed by the county commissioners to be expended in any year for the compensation of such deputies, assistants, bookkeepers, clerks or other employes, except court constables, shall not exceed for any county auditor's office, county treasurer's office, probate judge's office, county recorder's office, sheriff's office, or office of the clerk of the courts, an aggregate amount to be ascertained by computing thirty per cent on the first two thousand dollars or fractional part thereof, forty per cent on the next eight thousand dollars or fractional part thereof and eighty-five per cent on all over ten thousand dollars, of the fees, costs, percentages, penalties, allowances and other perquisites collected for the use of the county in any such office for official services during the year ending September thirtieth next preceding the time of fixing such aggregate sum; provided, however, that if at any time any one of such officers require additional allowance in order to carry on the business of his office, said officer may make application to a judge of the court of common pleas, of the county wherein such officer was elected; and thereupon such judge shall hear said application and if, upon hearing the same said judge shall find that such necessity exists, he may allow such a sum of money as he deems necessary to pay the salary of such deputy, deputies, assistants, bookkeepers, clerks or other employes as may be required, and thereupon the board of county commissioners shall transfer from the general county fund, to such officers' fee fund, such sum of money as may be necessary to pay said salary or salaries.

Notice in writing of such application and the time fixed by such judge for the hearing thereof shall be served by the applicant, five days before said hearing upon the board of county commissioners of such county. And said board shall file in said proceeding their approval or disapproval of the allowance asked for and shall have the right to appear at such hearing and be heard thereon; and evidence may be offered.

When the term of an incumbent of any such office shall expire within the year for which such an aggregate sum is to be fixed, the county commissioners at the time of fixing the same, shall designate the amount of such aggregate sum which may be expended by the incumbent and the amount of such aggregate sum which may be expended by his successor for the fractional parts of such year."

In the case of those counties where at the last regular election it was voted to consolidate such courts, the commissioners of course at the time fixed had allowed a certain amount for deputy hire in the then existing probate court, and when said court was consolidated and combined with the common pleas court there probably was an unexpended balance in the fund remaining to the proabte court. It is my opinion that this balance would inure to the probate division of the common pleas court in such counties where said courts were combined.

I will address myself now to your specific questions:

1. Section 1604-4 G. C. specifically grants the authority to and imposes the duty upon the resident judge of the common pleas court having a probate division, to appoint the necessary deputies, etc. The act providing for the consolidation does not specifically state that such judge of the court of common pleas shall fix the salaries, but it does provide that such salaries shall be "regulated by section 2980-1 of the General Code."

Section 2981 G. C. authorizes the officers referred to in sections 2978 and 2980-1 G. C., which include probate judge, not only to appoint and employ the necessary deputies, etc., but to fix their compensation; and since it is my opinion that the common pleas court stands in the place of the probate judge, as far as the probate division of his court is concerned, it would follow that the power and duty of fixing the compensation of deputies, etc., in the probate court, which was formerly given the probate judge under section 2981 G. C., would devolve upon the common pleas judge, where the common pleas court had a probate division, and it would be his duty to fix the compensation or salary of the deputies, etc., in the probate division of his court.

2. Sec. 16 of Art. IV of the Constitution of Ohio provides:

"There shall be elected in each county, by the electors thereof, one clerk of the court of common pleas, who shall hold his office for the term of three years, and until his successor shall be elected and qualified. He shall, by virtue of his office, be clerk of all other courts of record held therein; but, the general assembly may provide, by law, for the election of a clerk, with a like term of office, for each or any other of the courts of record, and may authorize the judge of the probate court to perform the duties of clerk for his court, under such regulations as may be directed by law. Clerks of courts shall be removable for such cause and in such manner as shall be prescribed by law."

Since the probate court is a court of record (Railroad v. Belle Center, 48 O. S. 273), this section of the Constitution would, unless otherwise provided by law, constitute the clerk of the common pleas court the clerk of all other courts

of record within the county. But since it is my view that the legislature intended that the provisions applying to probate courts, as referred to in chapter 6, supra, should, after a consolidation and combination of courts, as provided by law, remain in full force and effect, and that all provisions specifically applying to probate judges should be read as applying to the common pleas court having a probate division, I am of the opinion that the section of the Constitution above quoted has no such force or effect.

Section 1584 G. C. provides:

> "Each probate judge shall have the care and custody of the files, papers, books, and records belonging to the probate office. He is authorized to perform the duties of clerk of his own court. He may appoint a deputy clerk or clerks, each of whom shall take an oath of office before entering upon the duties of his appointment, and when so qualified, may perform the duties appertaining to the office of clerk of the court. Each deputy clerk may administer oaths in all cases when necessary, in the discharge of his duties. Each probate judge may take a bond with such surety from his deputy as he deems necessary to secure the faithful performance of the duties of his appointment."

Inasmuch as this section specifically authorizes the probate judge to perform the duties of clerk of his own court, it is my view that it imposes upon a common pleas judge of a court having a probate division the same duties and gives him the same authority. I am therefore of opinion that the judge of a common pleas court having a probate division is ex officio clerk of said probate division, and that the clerk of the court of common pleas would have no authority, as such clerk, to sign writs, certificates and affidavits issued in the probate division of such combined courts.

3. Since the judge of the common pleas court having a probate division is ex officio clerk of the probate division by virtue of section 1584 G. C., all writs of said probate division would be signed by said judge, as judge and ex officio clerk of the probate division of his court.

In the matter of affidavits, of course the officer administering the oath would attach his jurat to the affidavit sworn to and use whatever title designates his official character.

4. Under the provisions of section 1584 G. C., supra,

> "* * * Each deputy clerk may administer oaths in all cases when necessary, in the discharge of his duties. * * *"

So as far as administering oaths is concerned, the deputies are fully authorized, in the discharge of their duties, to act, and such deputy clerk or clerks under said section,

> "may perform the duties appertaining to the office of clerk of the court. * * *"

Section 9 G. C. provides that "a deputy, when duly qualified, may perform all and singular the duties of his principal."

In Warwick v. State of Ohio, 25 O. S. 21, it was held that a deputy clerk of the probate court has authority to administer oaths to parties making applications for marriage licenses, touching the merits of such applications, and perjury may be assigned upon such oaths. The decision was based on the fact that the administering of such oaths was regarded as ministerial and not as judicial duties.

Welch, J., referring to the fact that such duties were formerly imposed upon the clerk of the court of common pleas and at that time regarded as merely ministerial, says:

> "If they were ministerial in the hands of the clerk, they remained ministerial in the hands of the probate judge. In the absence of a deputy clerk, the probate judge is his own clerk, and responsible for acts done or omitted as such clerk, on the same principles applicable to other ministerial officers. The provision of law authorizing him to appoint a *deputy* clerk plainly implies that he is his own clerk—that he is both court and clerk; for there can be no deputy where there is no principal."

In State v. Metzger, 10 N. P. (N. S.) 97, the court says at page 106:

> "The judge of probate certainly cannot appoint a substitute for himself as judge. He occupies a dual position and undertakes dual functions. The performance of the clerical function is insured by placing upon him as an authorized official the clerical duty of doing that work and under the statute he is legally responsible for the performance of these duties."

It is therefore clear that a deputy cannot act in all matters enjoined upon the probate court. Whenever the acts enjoined are judicial, of course no one but the judge himself can perform the act; for example, in the case of Mellinger et al. v. Mellinger, 73 O. S. 221, the court held that the duties enjoined upon the probate court by section 5964 R. S. are judicial duties and cannot be performed by the deputy clerk of said court. Section 5964 R. S. is now sections 10570 et seq. G. C.

So it is my view that as to all ministerial duties imposed by law on the probate judge, his duly qualified deputies are authorized to act in his stead.

It might be well to call attention to a decision of the Franklin county common pleas court in 1897, in the case of Littleton v. Marshall, as found reported in 8 Ohio Dec. N. P. 672, wherein objection was raised to a summons issued by a clerk of the common pleas court, on the ground that it had not been signed by the clerk as required by law, but the clerk's signature was printed and signed "Per" with the signature of the clerk's deputy. Judge Pugh held that even a strict construction of the law would permit that the clerk's name could be written, printed or stamped at the end of the summons, and that the clerk's deputy signed his name after the printed name of the clerk, with a "Per," which proves an adoption of the printed signature by the clerk through his deputy. Further verification, says the court, was afforded by the seal of the clerk duly affixed. This case, which is the only reported decision, on the question therein involved, in Ohio, as far as I can find, might be considered in connection with the answer to the third question herein.

5. As to all writs, documents and other papers issued in the probate division of the combined courts, it is my view that the seal of the probate court should be used, and that there is no authority for the use of the seal of the court of common pleas. As hereinbefore said, I am of the opinion that wherever in the General Code the words "probate court" are found, they should be read "common pleas court, probate division," as applying to counties having such combined courts.

Section 31 G. C., providing what shall be engraved upon all official seals, reads in part as follows:

> "* * * The seal of the * * * *probate court* of each county,

> shall * * * be one and three-fourths inches in diameter, and each, respectively, shall be surrounded by these words: * * * 'Probate Court ----------County, Ohio' (insert the name of the proper county)."

I believe that the seal above mentioned, instead of "Probate Court," as above shown, should be surrounded by these words: "Court of Common Pleas, Probate Division, ---------- County, Ohio" (insert the name of the proper county).

6. For the reason heretofore given, I hold that the fees taxed for services in said probate division of such combined courts are governed by sections 1601, 1602 and 1603 G. C., and that these sections should be read by substituting "judge of the court of common pleas having a probate division," wherever the words "probate judge" are found.

7. It appears from a mere reading of sections 2980 and 2980-1 G. C. that the legislature did not have the question of combined probate and common pleas courts in mind when said sections were passed; still under familiar principles of law they would have application to subsequently enacted legislation. Had the courts not been combined, the probate judge would have continued to pay salaries for deputy hire, etc., from the fund allowed him by the county commissioners, as we have determined that when the courts are consolidated the probate court continues on, although designated as the probate division of the common pleas court, and although the functions of probate judge are performed by the resident common pleas judge. As said common pleas judge stands in the shoes of the former probate judge, he would have the same right to expend the fund in question.

So it is my opinion that the salary for deputy hire, theretofore allowed prior to such consolidation, would be paid from the balance remaining of the aggregate sum so fixed by the county commissioners for deputy hire in the probate court. It is to be remembered that under section 2980 G. C. the commissioners fix an aggregate sum to be expended for the year beginning January 1 next after the statement required to be filed by the county officer, and the amount of such aggregate sum is fixed under section 2980-1 G. C., subject to the additional allowance therein provided for.

The county commissioners have nothing to do with fixing the salaries of the deputies, although they do fix the aggregate sum that is to be expended, as before mentioned. Whatever sum is so fixed for deputy hire, etc., for a probate court in any one year, is the fund from which the deputies of such probate court would be paid, and if in that year under the law the probate court was consolidated and combined with the common pleas court, the salary of the deputies, etc., of the probate division of said combined court for that year would be paid out of the aggregate sum first fixed for the probate court.

8. It will be noted that section 2980-1 G. C. provides among other things that if at any time any of the county officers referred to required additional allowance to carry on the business of the office, said officer may make application—

> "to a judge of the court of common pleas, of the county wherein such officer was elected; and thereupon such judge shall hear said application and if, upon hearing the same said judge shall find that such necessity exists, he may allow such a sum of money as he deems necessary to pay the salary of such deputy, * * *."

Repeating my former observation, that the common pleas judge of the consolidated court, so far as the statute relating to probate judges is concerned, occupies the same position as the probate judge did, it is my view that whenever it becomes necessary to have an additional allowance to take care of the expenses of the deputies and other employes in the probate division of such consolidated

court, the common pleas judge of such combined court would file in the common pleas court his application for such additional allowance, in the manner and form as provided in section 2980-1 G. C., and that said application would be treated the same as if it had been filed by the probate judge prior to the consolidation of the courts. All the rules of law applicable to such proceedings would apply to this proceeding, and of course under familiar principles the common pleas judge could not pass upon his own case. It would become his duty to see that the application should be for hearing before a judge of the court of common pleas, called in to temporarily preside and hold court in that county, just the same as in any other matter pending in such court, wherein the local judge was disqualified or disabled.

In conclusion I might say that while the questions herein involved have been under consideration, it has been brought to my attention that in the two counties which have availed themselves of the law permitting a consolidation of the probate and common pleas courts, the judges of such courts have interpreted the law, at least as to some of the questions herein involved, especially relating to the one whether or not the clerk of the court of common pleas was or was not the clerk of the probate division of the combined court, and have been proceeding in these matters along the lines indicated in this opinion. The practical interpretation of doubtful statutes by contemporaneous officials is entitled to some weight, and I have given that fact due consideration in reaching the conclusion in those matters herein.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

730.

APPROVAL—ABSTRACT OF TITLE—ELIZABETH KING FARRINGTON TO STATE.

COLUMBUS, OHIO, October 23, 1917.

HON. CARL E. STEEB, *Secretary, Board of Trustees, Ohio State University, Columbus, Ohio.*

DEAR SIR:—A few days ago you submitted to this department an abstract of title covering the following premises, situated in the county of Franklin and in the state of Ohio, and bounded and described as follows:

> "Being tract 'D' set off in partition to Elizabeth King in the case of Elizabeth King, an infant, etc., versus William N. King, Case No. 44686 in the court of common pleas of Franklin county, Ohio, and being of record in Complete Record 244 page 390, said court. Beginning at a point in the north line of King avenue distanced 371.18 feet westwardly from the southwest corner of Elizabeth J. McMillen's homestead addition; thence westwardly with the north line of King avenue 772.86 feet to the east bank of Olentangy river; thence south 37 degrees 29′ west 36.80 feet to a point in the center line of King avenue; thence north 86 degrees 45′ west with the center line of King avenue 221 feet to the center of the Olentangy river as described in the deed of William Neil and wife to Elizabeth J. McMillen, dated March 23, 1853, and recorded in the Franklin county recorder's office; thence north 31 degrees 15′ east with the center line of said river as designated in said deed 165 feet to a point; thence north 86 degrees 45′ west

82½ feet to a point on the west bank of said river as described in said deed; thence northerly with the west bank of said river as described in said deed following the meanderings thereof to the north line of said McMillen land; thence south 86 degrees 31' east with said last mentioned line 149 feet to three sycamores on the east bank of the said Olentangy river; thence south 86 degrees 31' east with the said north line of said McMillen land, being also the south line of the lands of the Ohio state university 871.20 feet to a point distant 621.18 feet westwardly from an iron pipe in the west line of Perry street extended northwardly; thence south 3 degrees 14' west parallel with the west line of said Perry street as extended north and with the west line of said street, 1401.25 feet to the place of beginning, containing 25.193 acres more or less of dry land on the east side of said river, and 6.9 acres more or less of land between the banks of said river.

With the abstract you also submitted a deed covering the same piece of property where in Elizabeth King Farrington and Thayer B. Farrington, her husband, deed said property to the state of Ohio.

I have carefully examined said abstract, dated September 17, 1917, and find that the title to the premises described is in the name of Elizabeth King Farrington. The deed submitted covenants that Elizabeth King Farrington is lawfully seized of the premises and that said premises are free and clear from all encumbrances except all taxes and assessments due and payable after June, 1917.

I am, therefore, of the opinion that if this deed is accepted it will fully convey the title to said premises to the state of Ohio, free and clear from all encumbrances, except the taxes above noted which, under the form of deed submitted, will have to be paid by the state.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

731.

APPROVAL—ABSTRACT OF TITLE—MARY HORTON KING TO STATE.

COLUMBUS, OHIO, October 23, 1917.

HON. CARL E. STEEB, *Secretary, Board of Trustees, Ohio State University, Columbus, Ohio.*

DEAR SIR:—A few days ago you submitted to this department an abstract of title covering the following premises, situated in the county of Franklin and in the state of Ohio, and bounded and described as follows:

"Being a part of tract 'C' set off in partition to William N. King in the case of Elizabeth King an infant, etc., versus William N. King, Case No. 44686 in the court of common pleas of Franklin county, Ohio, and being of record in Complete Record 244, page 390, said court. Beginning at a point in the north line of King avenue distanced 102.76 feet west from the southwest corner of Elizabeth J. McMillen's homestead addition to the city of Columbus; being the southwest corner of lot No. 129 in said addition; thence north 3 degrees 14' east on a line parallel with the west line of Perry street and the west line of Perry street produced northwardly 1400.15 feet

to a point in the north line of said McMillen land, being the south line of the lands of the Ohio State University, which said point is distanced 352.76 feet westwardly from an iron pipe in said north line of said McMillen land, which said pipe is placed in said line on the line of the west line of Perry street produced northwardly; thence westwardly from said point 268.42 feet to a point in said line, being the northwest corner of said tract 'C' as designated on the plat and report of the commissioners in said partition proceedings; thence southerly parallel with the west line of Perry street produced northwardly as aforesaid and the west line of Perry street, south 3 degrees 14' west 1401.25 feet to a point in the north line of King avenue distanced 268.42 feet westwardly from the place of beginning, thence eastwardly with said north line of King avenue 268.42 feet to the place of beginning, being a strip or parcel of ground 268.42 feet in width off of the west side of said tract 'C' in said partition, as designated and delineated on the plat filed with said commissioners' report."

With the abstract you also submitted a deed covering the same piece of property wherein Mary Horton King, widow, deeds said property to the state of Ohio.

I have carefully examined said abstract dated September 17, 1917, and find that the title to the premises described is in the name of Mary Horton King. The deed submitted covenants that Mary Horton King is lawfully seized of the premises and that said premises are free and clear from all encumbrances except all taxes and assessments due and payable after June, 1917.

I am, therefore, of the opinion that if this deed is accepted it will fully convey the title to said premises to the state of Ohio, free and clear from all encumbrances except the taxes above noted, which, under the form of deed submitted, will have to be paid by the state.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

732.

DEPOSITION—IN CRIMINAL CASE—WHERE SAME MAY BE TAKEN.

1. *A deposition in a criminal case may be taken within or without the state of Ohio.*
2. *A deposition in a criminal case cannot be taken without the state of Ohio when the defendant is in prison.*
3. *A deposition of a non-resident of Ohio may be taken within the state of Ohio, whether the defendant is imprisoned or not.*

COLUMBUS, OHIO, October 23, 1917.

HON. JARED P. HUXLEY, *Prosecuting Attorney, Youngstown, Ohio.*

DEAR SIR:—In your request for my opinion you state:

"We have a prisoner in our county jail charged with first degree murder, the case being assigned for trial for November 12th. I have reason to believe that the defendant's attorneys are about to file an application to the court for a commission to take depositions of witnesses who reside in

or about Henderson, Kentucky. I do not know whether they will attempt to take these depositions at Henderson or whether they will attempt to take them at Cincinnati or some other point within the state of Ohio.

Under the new law, passed at the last session of the legislature, to amend sections 13668 and 13668-1 of the General Code, I would like to have your opinion as to whether or not these depositions of witnesses who do not live within this state could possibly be taken by bringing them into the state for the sole purpose of taking the depositions; also, whether in your opinion there is any possibility of them having the right to take the depositions out of the state and taking the defendant out of the state for the purpose of being present when these depositions are taken."

General Code sections 13668 and 13668-1, as amended in 107 O. L. 451, read as follows:

"*Sec.* 13668. When an issue of fact is joined upon an indictment and material witness for the defendant or for the state resides out of the state, or, residing within the state, is sick or infirm or about to leave the state, or is confined in prison, such defendant or the prosecuting attorney may apply in writing, to the court or the judge thereof in vacation, for a commission to take the deposition of such witness or witnesses. Such commission shall not be granted and said order shall not be made until there is filed with the clerk of said court an affidavit stating in substance the evidence sought to be secured by deposition, and that it is competent, relevant and material and that the defendant is not confined in prison or, if confined in prison, that the deposition is not to be taken outside of the state of Ohio. If it appear to the court, or judge, upon such application supported by said affidavit that the evidence sought to be secured by deposition is relevant, competent and material and that the defendant is not confined in prison, or, if confined in prison, that the deposition is not to be taken outside of the state of Ohio, the court or judge shall grant such commission and make an order stating in what manner and for what length of time notice shall be given to the prosecuting attorney or to the defendant before such witness or witnesses shall be examined.

Sec. 13668-1. When the deposition is to be taken in the state of Ohio and such commission is granted, and the defendant is confined in prison, the sheriff or deputy shall be ordered by the court or judge to take the defendant to the place of the taking of such deposition and have him before the officer at the taking of such deposition. Such sheriff or deputy shall be reimbursed for actual reasonable traveling expenses, for himself and the defendant, so incurred, the bills for the same, upon approval by the county commissioners, to be paid from the county treasury on the warrant of the county auditor. Such sheriff shall receive as fees therefor one dollar for each day in attendance thereat. Such fees and traveling expenses shall be taxed and collected as other fees and costs in the case."

That is, when an issue of fact is properly joined upon an indictment and a material witness, either for the state or for the defendant, resides out of the state, or, if such material witness resides within the state and is sick, infirm, about to leave the state or is confined in prison, then and in either of such events the defendant, or the prosecuting attorney, as the case may be, may apply in writing to the court or to the judge of the court in vacation for a commission to take the deposition of such witness or witnesses. Before such commission is granted by

the court, the party asking for same shall file with the clerk of such court an affidavit which states in substance the evidence sought to be secured by the taking of such deposition, and the affidavit must also state that such evidence is competent, relevant and material to the issue thus joined. The affidavit must further state whether or not the defendant is confined in prison and if the defendant is confined in prison then the affidavit must state that the deposition is not to be taken outside of the state of Ohio. The court or judge, as the case may be, must, before such commission is granted to take such deposition, find that the evidence sought to be secured by such deposition is relevant, competent, and material and that the defendant is either confined in prison or not. If however, the court finds that the defendant is confined in prison, then the court must further find that the deposition is not to be taken outside of the state of Ohio. If, however, the court finds that the evidence sought to be secured by deposition is relevant, competent and material and that the defendant is confined in prison and that the deposition is not to be taken outside of the state of Ohio, then and in either of such events the court or judge, as the case may be, shall grant such commission and at the time of the granting of such commission shall make an order, in which order the court or judge, as the case may be, shall state in what manner and for what length of time notice of the taking of such deposition shall be given to the prosecuting attorney or the defendant, as the case may be, and such witness or witnesses shall not be so examined until such notice is given pursuant to such order and until such commission is granted, as aforesaid. If such deposition is to be taken within the state of Ohio, and the commission has been granted, as aforesaid, and the defendant is confined in prison, the sheriff, or a deputy thereof, shall be ordered by the court or judge to take the defendant to the place of the taking of such deposition and shall have such defendant before the officer at the time such deposition is taken. If, however, the deposition is to be taken outside of the state of Ohio, and the defendant is not confined in prison, then it is not necessary for the court to make an order requiring that the defendant be taken to the place of the taking of such deposition, but the notice of the issuing of said commission and of the taking of such deposition is sufficient notice to the defendant.

So that, answering your several questions I advise you that in your case, and being a case in which the defendant is confined in prison, the deposition cannot be taken outside of the state of Ohio and can only be taken within the state of Ohio under the conditions above mentioned. There is no authority to compel the attendance of witnesses from without the state of Ohio at the place of the taking of such depositions, but if a witness voluntarily attends or comes from without the state of Ohio to a place designated within the state of Ohio, then and in that event the deposition may be taken within the state of Ohio. In no event, however, when a prisoner is confined, can a court order such defendant to be taken outside of the state of Ohio to be present at the taking of depositions and in no event can such depositions be taken outside of the state of Ohio when such prisoner is so confined.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

733.

COUNTY AUDITOR—WARRANT ISSUED UPON EXHAUSTED FUND—AFTER ENACTMENT OF SECTION 5649-3d G. C.—STAMPED NOT PAID FOR WANT OF FUNDS—CASHED BY BANK—INTEREST PAID TO BANK BY COUNTY MAY BE RECOVERED.

If a county auditor issued warrants upon exhausted funds or appropriation accounts after the enactment of sections 5649-3d, *and the same were not paid but stamped "Not paid for want of funds;" and if a bank then cashed the warrants and subsequently received interest thereon from the county treasury, such interest may be recovered from the bank.*

COLUMBUS, OHIO, October 23, 1917.

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

GENTLEMEN:—I acknowledge receipt of your letter of recent date requesting my opinion as follows:

> "We desire to call your attention to two opinions of Attorney-General Timothy S. Hogan, to be found in full in the Annual Reports of the Attorney-General for 1912, Vol. 1, page 163, and Vol. 2, page 1127, in which Mr. Hogan held that sections 2676 and 2677, General Code, were impliedly repealed when the Smith One Per Cent Tax Law was enacted.
>
> If these section were, in fact, repealed, and a county auditor still issued warrants upon exhausted funds or appropriation accounts, and the county treasurer refused to pay same, but stamped them unpaid for want of funds, and a bank cashed them and was then paid interest on same, may this interest be recovered, and if so, from whom?"

I agree with the opinions of Mr. Hogan to which you call attention and which held, in substance, that section 5649-3d of the General Code by providing that "all expenditures within the following six months shall be made from and within such appropriations and balances thereof" superseded sections 2676 and 2677 of the General Code, authorizing the county treasurer to endorse all warrants presented to him and not paid for want of money belonging to the fund on which they were drawn "Not paid for want of funds."

The theory of these opinions was not so much that sections 2676 and 2677 are in themselves repealed or amended by implication, but rather that there is no authority in the auditor for the issuance of any warrant unless there is money in the treasury and appropriated for the purpose for which the warrant is issued because of the controlling provisions of the more recent section 5649-3d. Hence, if the auditor has no authority to issue such warrants it is obvious that the county treasurer would have no authority to create obligations against the county by stamping them "Not paid for want of funds" and thus giving rise to the accrual of interest.

Another way of putting the same thing is to say that sections 2676 and 2677 of the General Code authorize the treasurer to stamp warrants only when the warrants are legal and constitute a binding obligation of the county; and inasmuch as a warrant issued since section 5649-3d was passed is not legal and creates no obligation against the county if there was no appropriation upon which it might be drawn or the appropriation is exhausted, the authority of

the treasurer under the sections cited is indirectly, but none the less effectually, destroyed.

Your letter infers that in spite of these conclusions a county auditor still assumed after section 5649-3d became effective to issue warrants when there was no money in the treasury appropriated for their payment. Obviously, on the principles just stated, such warrants were of no legal significance whatever and could not be treated as legal warrants by anybody. On presentation to the county treasurer he was accordingly without authority to create any obligation against the county by stamping them "Not paid for want of funds," although possibly there was nothing inherently wrong in so stamping them. Any one presenting these warrants for payment of interest under sections 2676 and 2677 would not have any valid claim against the county, and the payment of interest on such warrants would be an illegal drawing of money from the treasury.

There is, of course, no question whatsoever that the receiver of moneys drawn from the treasury without authority of law may, under existing statutes, be held liable therefor. Accordingly I advise that a bank receiving money as interest under the circumstances stated by you may be compelled to refund same to the county.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

734.

OIL—PURCHASED BY RAILROAD COMPANY OUTSIDE OF STATE AND DISTRIBUTED FOR ITS OWN USE—NOT SUBJECT TO INSPECTION.

Where a railroad company operating in the state of Ohio purchases a car of oil outside of the state and has the same shipped into Ohio and distributed for its own use, such oil is not subject to inspection.

COLUMBUS, OHIO, October 23, 1917.

HON CHARLES L. RESCH, *State Inspector of Oils, Columbus, Ohio.*

DEAR SIR:—I have your letter of September 25, 1917, in which you say:

> "If a railroad company, operating in the state of Ohio, were to purchase a car of oil in Pennsylvania, have the same shipped into Ohio and distributed for their own consumption, must this car of oil be inspected as required by the laws of the state of Ohio?"

Section 854 of the General Code reads:

> "Before being offered for sale to a consumer for illuminating purposes within this state, all mineral or petroleum oil, and any fluid or substance, the product of petroleum, or into which petroleum or a product of petroleum enters or is a constituent element, whether manufactured within the state or not, shall be inspected as provided in this chapter."

From your statement it is clear that the oil purchased by the railway

company in Pennsylvania is not offered for sale or sold in Ohio but used by the railway company in this state for its own purpose. This being the case it is my opinion that no inspection is necessary.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

735.

APPROVAL—CONTRACTS BETWEEN THE STATE OF OHIO AND EDGAR H. LATHAM AND THE HUFFMAN-CONKLIN COMPANY.

COLUMBUS, OHIO, October 23, 1917.

HON. CARL E. STEEB, *Sec'y., Board of Trustees, Ohio State University, Columbus, Ohio.*

DEAR SIR:—You have submitted several contracts entered into between the board of trustees of the Ohio State University and various contractors, as follows:

1. Contract entered into between the board of trustees of Ohio State University and Edgar H. Latham, on the 2nd day of October, 1917, for the construction and completion of the laboratory building for the School of Military Aeronautics on the campus of your University, the contract calling for the payment of the sum of$25,980.00, and also a bond securing said contract.
2. Contract entered into between the board of trustees of Ohio State University and The Huffman-Conklin Company, on the 2nd day of October, 1917, for the heating, plumbing and sewer system for the laboratory building for the School of Military Aeronautics on the campus of the University, said contract calling for the payment of the sum of $11,086.00, and also a bond securing the same.
3. Contract entered into between the board of trustees of Ohio State University and Edgar H. Latham, on the 2nd day of October, 1917, for the construction and completion of the barracks building group for the School of Military Aeronautics on the campus of the University, said contract calling for the sum of $27,906.00, and also a bond securing the same.
4. Contract entered into between the board of trustees of Ohio State University and The Huffman-Conklin Company, on the 2nd day of October, 1917, for the heating, plumbing and sewer system for the barracks building group for the School of Military Aeronautics on the campus of the University, said contract calling for the sum of $14,147.00, and also a bond securing the same.

I have carefully examined the said contracts foregoing mentioned and the bonds securing the same, and finding said contracts to be in accordance with law have this day approved the same.

The auditor of state having certified that there is money available for the purposes of the various contracts, I have this day filed said contracts and bonds with the auditor of state.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

736.

COUNTY COMMISSIONERS—HAD AUTHORITY TO MAKE LEVY FOR NEEDY BLIND—UNDER SECTION 2969 G. C.

County commissioners had authority to make levy for support of needy blind under section 2969 G. C.

COLUMBUS, OHIO, October 23, 1917.

HON. JOHN C. D' ALTON, *Prosecuting Attorney, Toledo, Ohio.*

DEAR SIR:—On August 29, 1917, you submitted the following letter to this department for opinion:

"The writer, his attention having been directed to the facts of a particular case, with respect to the right of a certain blind person to relief under our Blind Pension Law, has come to the conclusion that the legislature has repealed that part of the pension law which makes the same effective.

By reference to Vol. 103 O. L. at page 60, we find that sections G. C. 2967, 2967-1 and 2968 were amended and that original sections G. C. 2962, 2963 and 2964 were repealed. In Vol. 103 at pages 833-835, we find sections 2965, 2966, 2969 and 2970 were repealed. In Vol. 104 O. L. at page 200, we find that sections 2967 and 2967-1 were apparently supplemented by sections 2967-2 and 2967-3, although as noted above, sections 2967 and 2967-1 had been repealed in Vol. 103 O. L. at pages 61 and 835.

Section 8 of an act to 'create an institute for the relief of the needy blind,' Vol. 103 O. L. at page 833, provides for a levy to be made by the state for the purpose of creating a fund for the maintenance of such an institution. But, as the law now stands we are unable to find any authority such as that given in repealed section 2969, for county commissioners to make a levy to provide for a fund to give relief to the needy blind.

The auditor informs me that in accordance with his instructions from Columbus, the county commissioners have this year, as in former years, made a levy in accordance with provisions of former section G. C. 2969.

The questions that now naturally arise are as follows:

1. Had the county commissioners the authority to make a levy for the support of the needy blind?

2. If they had not such authority, what is to be done with the funds arising from this levy?

Will you kindly give this subject such attention as in your judg ment it deserves?"

In order to understand the matter clearly it will be necessary to refer somewhat to the history of the various acts referred to.

Prior to the act found in 103 O. L., 60, blind relief was administered by the blind relief commission composed of three persons, residents of the county. The act found in 103 O. L., 60, abolished the county blind relief commission and transferred its functions to the county commissioners. In order to accomplish this object sections 2962, 2963 and 2964 were repealed and sections 2967, 2967-1 and 2968 were amended. Subsequently, by an act passed at the same session of the general assembly, it was determined to create an institution for the relief of the needy blind, to be administered by the state and to accomplish that

purpose H. B. 678, 103 O. L. 833, was enacted. This act repealed sections 2962, 2963, 2964, 2965, 2966, 2967, 2967-1, 2968, 2969 and 2970. In other words, it repealed the entire legislation for county blind relief.

The constitutionality of the act last referred to, creating a state institution for the relief of the needy blind, was contested in the case of State ex rel. Walton v. Edmondson, auditor of Hamilton County, 89 O. S. 351, and the act was declared unconstitutional, the syllabus reading as follows:

> "1. The act of April 2, 1908 (99 O. L. 56), 'To provide for the relief of needy blind,' now included in sections 2962 to 2970, General Code, as amended February 18, 1913 (103 O. L., 60), is a valid exercise of legislative power not repugnant to the federal or state constitutions.
>
> 2. The act of April 28, 1913 (103 O. L. 833), 'To create an institution for the relief of the needy blind,' requires the expenditure of public funds raised by taxation, for a private purpose and also violates section 5, Article XII of the Constitution. It is, therefore, unconstitutional and viod.
>
> 3. Where an unconstitutional statute contains a clause repealing a prior valid law, for which the later statute was a substitute, the repealing clause will also be held inoperative, in the absence of an expressed intention to repeal the prior law without regard to the substitute."

In view of the decision of the supreme court in the case last mentioned, the old sections of the statute, to wit, sections 2965 to 2970 with the amendments of sections 2967, 2967-1 and 2968 as found in 103 O. L. 60, were restored, thereby giving the county commissioners the duty of providing blind relief in the county.

In view of the fact that the act found in 103 O. L., 833, was in force and effect and not as yet declared unconstitutional at the time that the levy for county blind relief should have been made, many counties did not provide blind relief by a levy at the proper time and were therefore unable to provide blind relief. In view of that fact, in order to relieve the situation, the act found in 104 O. L. 200 was passed as an emergency act, the reasons being set forth in section 3 of said act.

It would appear therefore that the act found in 103 O. L. 833 having been declared unconstitutional, section 2969 as found in the General Code prior thereto was restored, said section reading as follows:

> "In addition to the taxes levied by law for other purposes, the county commissioners of each county shall levy a tax not to exceed three-tenths of one mill per dollar on the assessed value of the property of the county, to be levied and collected as provided by law for the assessment and collection of taxes, for the purpose of creating a fund for the relief of the needy blind of their respective counties."

In answer to your question I would therefore advise that under section 2969 the county commissioners had the authority to make a levy for the support of the needy blind.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

737.

PUBLICATION—NOTICE OF AMENDMENT TO ARTICLES OF INCORPORATION—THREE CONSECUTIVE WEEKS—COMPLIANCE—WHAT NOTICE SHOULD CONTAIN.

1. *Under the provisions of section 8722 General Code providing for the publication of notice of amendments to the articles of incorporation publication of such notice once a week for three consecutive weeks is sufficient; but publication will not be deemed complete until the lapse of three full weeks from the date of the first publication.*

2. *Inasmuch as said section 8722 General Code does not specifically require amendments of the articles of incorporation of a corporation to be set out in full in said notice it would seem that the statute would be complied with by correctly and fully setting out the substance of the amendments adopted. However, inasmuch as it has been the usual and approved practice for such notice to set out a copy of the resolution adopted by the stockholders or the members of the corporation, as the case may be, providing for such amendments, thus carrying into the notice the amendments in full, such practice should not be departed from.*

COLUMBUS, OHIO, October 23, 1917.

HONORABLE WILLIAM D. FULTON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I am in receipt of a communication from you under date of October 3, 1917, in which you call my attention to section 8722 General Code providing for the publication of notices of amendments to articles of incorporation, and with respect to the provisions of which you ask my opinion on the questions stated by you as follows:

> "1. Must notice be given each day for three consecutive weeks, or once a week for three consecutive weeks?
> 2. Shall the notice contain the amendments in full or just the substance of the amendments?"

Section 8722 General Code reads as follows:

> "Amendments to articles of incorporation shall not take effect until filed for record with the secretary of state, nor, unless it be waived, until the corporation gives notice of them in some newspaper of general circulation in the county where its principal office is located, for three consecutive weeks."

With respect to your first question, it is generally held that where a notice is required to be published for a certain number of weeks, publication once a week for that number of weeks successively is sufficient.

Davis v. Huston, 15 Neb., 28.
Alexander v. Alexander, 26 Neb., 68.
Swett v. Sprague, 55 Me., 190.
Cass v. Bellows, 31 N. H., 501.
Bachelor v. Bachelor, 1 Mass., 256.
Ricketts v. Village of Hyde Park, 85 Ill., 110.

I am of the opinion therefore that it will be a sufficient compliance with the provisions of section 8722 if the notice therein provided for be published in some newspaper of general circulation in the county where the principal office of the corporation is located once a week for three consecutive weeks.

The preposition "for" as used in this connection means "during," and for this reason I am inclined to the view that the publication provided for in this section is not complete until the lapse of three full weeks from the date of the first publication.

Early v. Doe, 57 U. S., 609.
State v. Cherry Co., 58 Neb., 734.

With respect to your second question it will be noted that the section above quoted does not specifically require amendments of articles of incorporation of a corporation to be set out in said notice and it would seem that the statute would be complied with by correctly and fully setting out the substance of the amendments adopted. However, it has been the usual and approved practice for such notice to set out a copy of the resolution adopted by the stockholders or members of the corporation, as the case may be, providing for such amendments, together with a recital that the same had been adopted by a vote of the owners of three-fifths of the capital stock therein subscribed; or, if the corporation has no capital stock, that said resolution has been adopted by a vote of at least three-fifths of its members. This, of course, carries into the notice the amendments in full.

I do not think that this practice should be departed from although, as above indicated, I am not prepared to hold that a notice which fully and correctly states the substance of the amendments would not be a compliance with the statutes.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

738.

CEMETERY ASSOCIATION—LAND—APPROPRIATION—PURCHASE.

Section 10093 *G. C. gives the right to a company or association, incorporated for cemetery purposes, to appropriate or otherwise acquire one hundred acres for cemetery purposes, and section* 10094 *G. C. gives the right to such a company or association to purchase an additional one hundred acres, but does not give authority to appropriate additional lands for such purposes.*

COLUMBUS, OHIO, October 24, 1917.

HON. GEORGE S. ADDAMS, *Judge of Insolvency Court, Cleveland, Ohio.*

DEAR SIR:—I have your communication of September 25, 1917, in which you ask whether this department has ever placed a construction upon sections 10093 and 10094 G. C., and that if it has not, you inquire what construction should be given to these sections, in connection with the question you ask, which is as follows:

"A cemetery association in this county owns one hundred acres which it is using for the purposes mentioned in its articles of incorpora-

tion. It has, however, sold off in cemetery lots a large portion of this ground. It now desires to enlarge its holdings so that it may continue to sell cemetery lots. Has it the right to appropriate more ground? Has the question been passed on by your department?"

The two sections above referred to read as follows:

"Sec. 10093. A company or association incorporated for cemetery purposes may appropriate or otherwise acquire and hold, not exceeding one hundred acres of land; also, take any gift or devise in trust for cemetery purposes, or the income from such gift or devise according to the provisions of such gift or devise, in trust, all of which shall be exempt from execution, from taxation, and from being appropriated to any other public purpose, if used exclusively for burial purposes, and in no wise with a view to profit.

Sec. 10094. Such company or association which is limited to the ownership, by appropriation or otherwise, of a designated number of acres of land for such purpose, may purchase, according to law, additional lands to the extent necessary therefor, but not more than fifty acres in any year, nor purchase or hold more in the aggregate than one hundred acres."

It will assist us, in arriving at a conclusion in this matter, to note briefly the history of what might be called the cemetery act. The original cemetery act was passed February 24, 1848. On March 12, 1873, an act was passed amending section 5 of the original act. This section 5 was subdivided into a number of sections in the Revised Statutes, but the first part of section 5 embodied the principles set out in section 10093 G. C., to the effect that no cemetery association should acquire and hold more than one hundred acres of land and read as follows:

"Sec. 5. That such association shall be authorized to purchase, to take by gift or choice, or to appropriate and to hold, not exceeding one hundred acres * * *."

I desire particularly to call attention to the fact that the provision which afterwards became section 10094 G. C. was not a part of the act of March 12, 1873. But on March 22, 1877, an act was passed by the general assembly entitled:

"An act to provide for the procurement of additional lands for cemetery purposes."

Section 1 thereof read as follows (74 O. L., 60):

"Be it enacted by the general assembly of the state of Ohio, That any company incorporated under the laws of this state, for cemetery purposes, and limited thereby to the ownership by appropriation or otherwise to a designated number of acres of land for such purpose, may purchase, according to law, additional lands to the extent necessary for such purposes; provided, not more than fifty acres shall be purchased in any one year, and not more in the aggregate shall be so purchased and held by any such association than one hundred acres,

as provided in section five of the act providing for the incorporation of cemetery associations, passed February 24, 1848."

This section became by the codification of 1880 section 3572 R. S., reading as follows:

"Any such company or association which is limited to the ownership, by appropriation or otherwise, of a designated number of acres of land for such purpose, may purchase, according to law, additional lands to the extent necessary for such purposes; but not more than fifty acres shall be purchased in any year, and not more in the aggregate shall be so purchased and held by any such company or association than one hundred acres."

This section then became section 10094 G. C. and was made to read as above quoted. It might be noted that section 5 applies merely to an association, while section 1, as above quoted, applies to an incorporated company; but as these sections now stand as found in sections 10093 and 10094 General Code they include both a company and an association.

We will now try to ascertain the purpose of the enactment which later became section 10094 G. C. It is plainly evident from the act as it formerly stood, before the enactment which became section 10094 G. C., that a cemetery association could acquire and hold one hundred acres of land, but not to exceed that amount.

With this in mind, what was the purpose of enacting what afterwards became section 10094 G. C.? The title of the act gave this purpose: "To provide for the procurement of *additional* lands for cemetery purposes." Section 10094 G. C. itself provides that such company may purchase *additional* lands *to the extent necessary therefor*—that is for cemetery purposes. This certainly means lands in addition to the one hundred acres theretofore allowed under the provisions of the law as it existed prior to the enactment of the provision which became section 10094 G. C.

How much additional land can such company purchase? (1) It cannot purchase more than fifty acres in any one year. (2) It cannot "purchase or hold more in the aggregate than one hundred acres." This latter limitation is the one that causes some difficulty. This might be construed to mean one hundred acres as a whole, including its powers under section 10093 as well as those under section 10094 G. C. It is ready susceptible of such a construction, but if this construction were placed upon it, the section would serve no purpose whatever, as the former law gave such rights and powers before section 10094 G. C. was enacted. Hence this construction should not be placed upon it, if there is any other which can reasonably be given it.

The other construction is that the company is entitled to acquire by condemnation or otherwise under section 10093 G. C. one hundred acres and hold the same, but if this amount is sold off for burial purposes to such an extent that more land is needed for such purpose, the company then may purchase under section 10094 G. C. land up to one hundred acres. This it seems to me is the correct construction inasmuch as it gives effect to the provisions of both sections and does violence to neither.

With this in mind we will take one step further. Section 10094 provides that the company "may purchase according to law" additional lands. Your question is as to whether the company can *appropriate* additional lands.

The question then is as to whether an appropriation could be held to be a "purchase according to law." It is my opinion that the words "may purchase according to law" could not be so interpreted as to include the right of appro-

priation. The courts and text writers usually hold that inasmuch as the right to appropriate is an extraordinary right, the general assembly must clearly and unequivocally grant the right, or it will not be assumed to have been given.

Randolph in his work on Eminent Domain, Sec. 111, lays down the following proposition:

> "Authority to purchase does not include the power to condemn although *purchase* at the common law includes technically all modes of acquisition other than descent. Its meaning in a statute is limited to acquisition by contract between the parties without governmental interference. If a statute permits a corporation to acquire land, and does not plainly authorize condemnation, it will be effectuated as authorizing purchase."

While the cases cited by the author to substantiate the propositions of law thus laid down are not very well selected, yet it is my opinion that the propositions of law thus laid down by the author are sound.

In Boston & Lowell Ry. Co. v. Salem & Lowell Ry. Co., 2 Gray 1, the following proposition is set out in the syllabus:

> "An act of the legislature appropriating private property to public uses, under the power of eminent domain, in order to be consistent with article X of the declaration of rights, must show by express words or necessary implication the intention of the legislature to exercise this power and must be accompanied by provisions for making compensation to the owner."

From the above and from what would seem to be a sound principle of law, I am of the opinion that section 10094 G. C. grants to a cemetery association no power to condemn property, but simply to purchase property by agreement with the owner thereof; that is, section 10093 gives a cemetery association the right to appropriate and hold not to exceed one hundred acres, while section 10094 gives the association the right to purchase an additional one hundred acres for cemetery purposes.

I am aware that section 10094 uses the language "may purchase *according to law*." It might be held that the phrase "according to law" would so extend the ordinary meaning of the word "purchase" that it would include the right to condemn. However, it is my opinion that the said phrase would not include the right of condemnation.

Hence answering your question specifically, my view is that section 10093 G. C. gives a company or association incorporated for cemetery purposes the right to appropriate not exceeding one hundred acres of land, and that section 10094 gives to such company the right to purchase an additional hundred acres for cemetery purposes. Your company already having acquired one hundred acres under section 10093 G. C., it would not have authority to appropriate any additional lands, but might purchase additional lands under section 10094; that is, section 10093 provides that you may acquire and hold not exceeding one hundred acres of land. Inasmuch as you have sold the greater part of the hundred acres which you already have and therefore are in need of additional lands for cemetery purposes, you have authority to purchase additional lands under section 10094, but not to appropriate the same.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

739.

APPROVAL—FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN OTTAWA AND PICKAWAY COUNTIES.

COLUMBUS, OHIO, October 24, 1917.

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

DEAR SIR:—I have your communication of October 22, 1917, in which you enclose for my approval final resolutions for the following improvements:

Ottawa county—Sec. "F-1," Bowling Green-Port Clinton road, I. C. H. No. 279 (in duplicate).

Ottawa county—Sec. "K-1," Toledo-Elmore road, I. C. H. No. 52. Contract No. 1.

Ottawa county—Sec. ("K-2"), Toledo-Elmore road, I. C. H. No. 52. Contract No. 2.

Ottawa county—Sec. "A," Fremont-Oak Harbor road, I. C. H. No. 280.

Ottawa county—Sec. "E-1," Oak Harbor-Genoa road, I. C. H. No. 439. Type A.

Ottawa county—Sec. "E," Fremont-Port Clinton road, I. C. H. No. 277.

Pickaway county—Sec. "K," Lancaster-Circleville Northern road, I. C. H. No. 463.

I have carefully examined said final resolutions, find them correct in form and legal, and am therefore returning the same to you with my approval thereon, under section 1218 G. C.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

740.

PUBLIC HEALTH NURSE—CITY NOT AUTHORIZED TO PAY PORTION OF COMPENSATION—MAY NOT BE APPOINTED MEMBER OF SANITARY POLICE FORCE AND RECEIVE COMPENSATION FROM MUNICIPALITY.

A city may not legally appropriate and expend money to pay a portion of the compensation of a public health nurse; nor is a municipal board of health authorized to appoint such a nurse as a member of the sanitary police force and thereby endeavor to pay her for said services in that way.

COLUMBUS, OHIO, October 24, 1917.

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

GENTLEMEN:—I have your communication of October 10th requesting my opinion on the following:

"We are enclosing you herewith communications from the city

solicitor of Athens, Ohio, and the president of the board of health of said city, and we respectfully request your written opinion upon the following matter:

A nurse has been employed as public health nurse by a welfare organization of the city of Athens. This organization has no direct connection with the municipal government of said city.

Question: May the city legally appropriate and expend moneys to pay a portion of the compensation of said nurse in the event that such nurse is also appointed a sanitary police by the board of health of a city, if such nurse is not under the entire supervision and command of the Athens board of health or health officer of said board?"

The question that is contained in your communication was presented, in substance, to my predecessor, Honorable Edward C. Turner, by the state board of health and was passed on by him in an opinion rendered to that board under date of May 13, 1915, found in volume 1, Opinions of the Attorney-General of Ohio for 1915, at page 726. In the course of that opinion it was said by Mr. Turner:

"* * * Particular stress is laid on the authority contained in section 4411 of the General Code, which is as follows:

'The board may also appoint as many persons for sanitary duty as in its opinion the public health and sanitary condition of the corporation require, and such persons shall have general police powers, and be known as the sanitary police, but the council may determine the maximum number of employes so to be appointed.'

and which is supplemented in 103 O. L., at page 436, as follows:

'The board shall determine the duties and fix the salaries of its employes; but no member of the board of health shall be appointed as health officer or ward physician.'

The sections quoted above provide for the employment of persons to be known as 'sanitary police' who shall have and exercise general police powers, and it is argued that because of the development of certain disease and the progress made in the determination as to cause and prevention of disease, that a broad interpretation would be given to the sections quoted above for the purpose of meeting the various situations which exist and which come under the control of the state board of health.

I am unable to place a public nurse in the class as comprehended by section 4411 of the General Code. The legislature had under consideration the question of the necessity of a nurse to be employed by the board of health, and in section 4436 of the General Code, provided as follows:

'When a house or other place is quarantined on account of contagious diseases, the board of health having jurisdiction shall provide for all persons confined in such house or place, food, fuel and all other necessities of life, including medical attendance, medicine and nurses, when necessary. The expenses so incurred, except those for disinfec-

tion, quarantine, or other measures strictly for the protection of the public, when properly certified by the president and clerk of the board of health, or health officer where there is no board of health, shall be paid by the person or persons quarantined, when able to make such payment, and when not by the municipality in which quarantined.'

The section quoted above contains the only authority which addresses itself to the employment of a nurse, and this is limited to special cases. It would appear, therefore, that if there be the need for a public nurse that is to be gathered from the very able argument of Mr. Bauman, the question is one which should be addressed to the legislature rather than to this office, as I am of the opinion that there is no authority on the part of council to appropriate to the board of health the funds necessary to pay the compensation and expenses of a public nurse, nor is there authority on the part of the board of health to employ such nurse, except that contained in section 4436 of the General Code."

I concur in the reasons given by Mr. Turner and in the conclusion reached, and therefore advise you that a city may not legally appropriate and expend moneys to pay a portion of the compensation of a public health nurse, and that a municipal board of health is not authorized to appoint such nurse as a member of the sanitary police force and thereby endeavor to pay her for said services in that way.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

741.

OSTEOPATH—NOT PHYSICIAN WITHIN MEANING OF SECTIONS 1954 AND 1956 G. C.—LUNACY PROCEEDINGS.

An osteopath is not a physician within the meaning of sections 1954 *and* 1956 *G. C. relative to lunacy proceedings.*

COLUMBUS, OHIO, October 24, 1917.

The Ohio Board of Administration, Columbus, Ohio.

GENTLEMEN:—I have your letter of August 31, 1917, requesting my opinion on an inquiry presented to your board by Dr. E. A. Baber, superintendent of the Dayton State Hospital, which inquiry reads as follows:

"I would be pleased to have you obtain for me from the attorney-general's office, information concerning any provision that has been made whereby a doctor of osteopathy would be entitled to sign the medical certificate of a committment paper for admission to a hospital for the insane, as provided in section 1954 of the General Code, which says two of the witnesses must be reputable physicians.

An application for admission to this institution in the matter of George Schweitzer of Shelby county, has been received in this office and dated the 28th of July, 1917, and issued over the signature of

Probate Judge H. H. Needles, at Sidney, Ohio. Lester C. Pepper, M. D., and F. D. Clark, D. O., constitute the medical witnesses. The 'M. D.' which is printed in the form, after Dr. Clark's name has been crossed out and 'D. O.' substituted. On line 5 of the medical certificate this statement is printed above Dr. Clark's signature: 'I am a registered physician of the state of Ohio and have had at least five years' experience in the practice of medicine.'

I would be pleased to receive his opinion in this matter at once in order to properly instruct Judge Needles concerning the selection of his medical witnesses."

Section 1954 G. C. reads:

"When such affidavit is filed, the probate judge shall forthwith issue his warrant to a suitable person, commanding him to bring the person alleged to be insane before him, on a day therein named, not more than five days after the affidavit was filed, and shall immediately issue subpoenas for such witnesses as he deems necessary, two of whom shall be reputable physicians, commanding the persons in such subpoenas named to appear before him on the return day of the warrant. If any person disputes the insanity of the party charged, the probate judge shall issue subpoenas for such person or persons as are demanded on behalf of the person alleged to be insane."

Section 1956 G. C. provides:

"Unless for good cause the investigation is adjourned, the judge, at the time appointed, shall proceed to examine the witnesses in attendance. Upon the hearing of the testimony, if he is satisfied that the person charged is insane, he shall cause a certificate to be made out by two medical witnesses in attendance that the person is insane to the best of their knowledge and belief. The medical witnesses must have at least five years' experience in the practice of medicine, shall not be related, by blood or marriage, to the person alleged to be insane or to the person making the application for commitment, nor have any official connection with any state hospital. The medical certificate shall contain answers to such interrogatories as the Ohio board of administration, with the advice of the superintendent of the several hospitals, prescribes."

It will be noted that section 1954 provides that two of the witnesses "shall be reputable physicians," and section 1956 provides:

"The medical witnesses must have at least five years' experience in the practice of medicine."

In other words, the statute contemplates an examination and certification by two "reputable physicians" who must have "at least five years' experience in the practice of medicine." The question presented then is, whether or not an osteopath is a physician within the meaning of section 1954, and if he is, is he engaged in the practice of medicine within the meaning of section 1956?

The word "physician" has been often defined, but many of the definitions rest upon statutes in the various states defining either the word physician itself

or what shall constitute the "practice of medicine," so that a great many of these definitions are useless in the case submitted.

In Vol. 30 of Cyc, page 1544, we find the following definition:

> "The word 'physician' is defined to mean a person who has received the degree of doctor of medicine from an incorporated institution; one lawfully engaged in the practice of medicine."

This definition is the same as found in Bouvier's Law dictionary, volume 3, page 2586, and practically the same as is found in the Standard dictionary. These definitions express, I believe, the meaning of the word "physician" as it is ordinarily used and thus defined the word could not be held to include an "osteopath."

Section 1954 G. C. was originally section 20 of an act passed March 23, 1878, 75 O. L., p: 69. I think it is clear that at the time the legislature used the word "physician" in the sense above expressed it did not mean to include an osteopath.

Quoting from Nelson v. State Board of Health, 22 Ky. Law Rep., 438, 50 L. R. A., 383:

> "The proof shows that osteopathy is a new method of treating diseases, which is said to have originated with Dr. A. T. Still, of Kirksville, Missouri, about the year 1871. He practiced it more or less from that time until about the year 1890, when he opened a school for the instruction of others. In 1892 he obtained an imperfect charter for his schools under the laws of Missouri."

From this it is seen that at the time the act of 1878 was passed, osteopathy had only been known for seven years and it was not until twelve years after the act was passed that the first school of osteopathy was opened. In 1878, when the legislature of Ohio enacted this statute, no legislative recognition had ever been given to osteopathy, and it is not difficult to arrive at the conclusion that section 1954 G. C., when originally enacted, did not refer to or include osteopaths.

However, I am not unmindful of the rule laid down in State v. Cleveland, 83 O. S., p. 61, that:

> "The statute may include by inference a case not originally contemplated when it deals with a genus within which a new species is brought."

It therefore is proper to look into the statutes regulating the practice of medicine in Ohio to learn whether an osteopath, though not originally classed as a physician within the meaning of section 1954, has since become a physician within the meaning of the term as used in that statute. As before noted, section 1956 G. C. provides that the medical witnesses certifying to the insanity of a person "must have at least five years' experience in the practice of medicine," and we now look to the provisions of the present statutes relative to the practice of medicine in Ohio.

Section 1270 General Code sets forth the preliminary educational credentials which an applicant for a certificate to practice medicine or surgery must possess. Sections 1273 and 1274 provide:

"Sec. 1273. The examinations of applicants for certificates to practice medicine or surgery shall be conducted under rules prescribed by the state medical board. Each applicant shall be examined in anatomy, physiology, pathology, chemistry, materia medica and therapeutics, the principles and practice of medicine, diagnosis, surgery, obstetrics and such other subjects as the board requires. The applicant shall be examined in materia medica and therapeutics and principles and practice of medicine of the school of medicine in which he desires to practice, by the number of members of the board representing such school.

Sec. 1274. If the applicant passes such examination, and has paid the fee required by law, the state medical board shall issue its certificate to that effect, signed by its president and secretary, and attested by its seal. Such certificate when deposited with the probate judge as required by law, shall be conclusive evidence that the person to whom it is issued is entitled to practice medicine or surgery in this state. An affirmative vote of not less than five members of the board is required for the issuance of a certificate."

These statutes all refer to the general practice of medicine, including all of its branches.

Special and separate provision is then made in the statutes for the practice of osteopathy. Sections 1288, 1289, 1290, 1291, 1292 and 1293 provide:

"Sec. 1288. The provisions of this chapter shall not apply to an osteopath who passes an examination before the state medical board in the subjects of anatomy, physiology, obstetrics, and diagnosis in the manner required by the board, receives a certificate from such board, and deposits it with the probate judge as required by law in the case of other certificates. Such certificates shall authorize the holder thereof to practice osteopathy in the state, but shall not permit him to prescribe or administer drugs, except anesthetics and antiseptics necessary in the practice of osteopathy; neither shall the certificate permit the holder to perform major surgery, which is hereby declared to be all operative procedures requiring the use of the knife or other surgical instruments for the opening of any natural cavity of the body or the amputation of any member or part of the body. Such certificates may be refused, revoked or suspended as in the case of certificates to physicians and surgeons.

Sec. 1289. Before he shall be admitted to an examination before the state medical board a person who desires to practice osteopathy shall pay a fee of twenty-five dollars to its treasurer and file with its secretary such evidence of preliminary education as is required by law of applicants for examination to practice medicine or surgery, together with a certificate from an osteopathic examining committee as hereafter provided, showing that the applicant holds a diploma or a physician's osteopathic certificate from a reputable college of osteopathy as determined by such committee, and that he has passed an examination in a manner satisfactory to the committee in the subjects of pathology, physiological chemistry, gynecology, minor surgery, osteopathic diagnosis and the principles and practice of osteopathy.

Sec. 1290. Upon recommendation of the Ohio osteopathic society, the state medical board shall appoint three persons who shall constitute the state osteopathic examining committee. One member of such com-

mittee shall be appointed each year who shall serve for a term of three years.

Sec. 1291. Upon recommendation of the osteopathic committee and the payment by the applicant of a fee of fifty dollars, the state medical board may issue a certificate without examination to a graduate of a reputable school of osteopathy, who is of good moral character, and has been engaged in the practice of osteopathy in any other state for at least five years.

Sec. 1292. Upon recommendation of the osteopathic committee, the state medical board may dispense with the examination of an osteopath, duly authorized to practice osteopathy in another state, a territory or the District of Columbia, who wishes to remove from such state, territory or district and reside and practice his profession in this state, upon his complying with the following conditions:

Such osteopath shall make an application on a form prescribed by the board, pay a fee of fifty dollars and present a certificate or license issued by the proper board of such state, territory or district; provided the laws of such state, territory or district require of osteopaths practicing therein qualifications of a grade equal to those required of ostetopaths practicing in Ohio, and equal rights are accorded by such state, territory or district to osteopaths of Ohio holding a certificate from the state medical board who desires to remove to, reside and practice their profession in such state, territory or district

Sec. 1293. The osteopathic examining committee shall meet at the office of the state medical board for action on applications for osteopathic certificates at such time as the board directs. Each member of the committee shall receive the same compensation as a member of the state board, payable as provided in such case."

It will be noted that the examinations provided for those desiring to become practitioners of medicine in all of its branches are quite different from examinations provided for persons who are applicants for certificates to practice osteopathy. It will also be noted that the legislature does not speak of osteopaths as "practitioners of medicine" but as persons "practicing osteopathy." It does not refer to them as surgeons or physicians, but as osteopaths. In section 1288 General Code, it distinguishes between the two in providing that the certificates of osteopaths "may be refused, revoked or suspended as in the case of certificates of physicians and surgeons."

This distinction is further emphasized by the provisions of sections 1286 and 1288 and sections 12694 and 12696. These sections were formerly sections 43, 44, 45, 52 and 54 of an act entitled "an act to revise and consolidate the laws relating to the appointment, powers and duties of the state board of health, the state board of medical registration and examination, the Ohio board of pharmacy and the state board of embalming examiners," passed May 9, 1908, and found in 99 O. L., p. 492.

Section 43 of this act read:

"A person shall be regarded as practicing medicine, surgery or midwifery, within the meaning of this act, who uses the words or letters, 'Dr.', 'Doctor', 'Professor', 'M. D.', or any other title in connection with his name which in any way represents him as engaged in the practice of medicine, surgery or midwifery, in any of its branches, or who examines or diagnoses for a fee or compensation of any kind, or pre-

scribes, advises, recommends, administers or dispenses for a fee or compensation of any kind, direct or indirect, a drug or medicine, appliance, application, operation or treatment of whatever nature for the cure or relief of a wound, fracture or bodily injury, infirmity or disease. The use of any such words, letters or titles in such connection or under such circumstances as to induce the belief that the person who uses them is engaged in the practice of medicine, surgery or midwifery, shall be prima facie evidence of the intent of such person to represent himself as engaged in the practice of medicine, surgery or midwifery."

Section 44 provided certain exceptions.
Section 45 read:

"The provisions of this act shall not apply to an osteopath who passes an examination before the state medical board in the subjects of anatomy, physiology, obstetrics and diagnosis in the manner required by the board, receives a certificate from such board, and deposits it with the probate judge as required by law in the case of other certificates. Such certificate shall authorize the holder thereof to practice osteopathy in the state, but shall not permit him to prescribe or administer drugs, or to perform major surgery."

Section 52 read:

"Whoever practices medicine or surgery in any of its branches in this state before he obtains a certificate from the state medical board in the manner required by law, or whoever so practices medicine or surgery after such certificate has been duly revoked, shall be fined not less than twenty-five dollars nor more than five hundred dollars or be imprisoned in the county jail not less than thirty days nor more than one year, or both."

Section 54 read:

"Whoever announces or advertises himself as an osteopath, or practices as such, without complying with all the provisions of law relating to the practice of osteopathy, shall be fined not less than twenty-five dollars nor more than five hundred dollars, or be imprisoned in the county jail not less than thirty days nor more than one year, or both."

Sections 43 and 44 of this act were originally section 2 of an act entitled "An act to amend sections 4403c and 4403f of an act entitled 'an act to regulate the practice of medine in the state of Ohio,' passed February 27, 1896," passed April 14, 1900, and found in 94 O. L., p. 197.

Section 2 of this act, after providing who should be regarded as practicing medicine or surgery, provided that the act should not apply "to any osteopath who holds a diploma from a legally chartered and regularly conducted school of osteopathy in good standing, as such, where the course of instruction requires at least four terms of five months each in four separate years, provided that the said osteopath shall pass an examination satisfactory to the state board of medical registration and examination on the following subjects: anatomy, physiology, chemistry and physical diagnosis, providing that said osteopath shall not be granted the privilege of administering drugs nor of performing major or operative surgery."

From a reading of these sections and an examination of all the statutes relating to the practice of medicine and osteopathy, it will be seen that the legislature has clearly recognized the fact that the practice of medicine and the practice of osteopathy are not one and the same, but two different things, and bearing in mind the different educational qualifications required and the totally different examinations provided with reference to the two professions, I cannot but conclude that an osteopath is not a physician within the meaning of sections 1954 and 1956 of the General Code and am therefore of the opinion that a certificate of insanity, signed only by one doctor of medicine and one osteopath, or signed only by two osteopaths, does not meet the requirements of the statute.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

742.

APPROVAL—LEASE OF CANAL LANDS IN LICKING COUNTY TO C. M. JOHNSON.

COLUMBUS, OHIO, October 25, 1917.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your communication of October 22, 1917, in which you enclose resolutions in duplicate, providing for the sale of part of the abandoned canal property located in Licking county, Ohio, to C. M. Johnson, for the sum of one hundred and sixty-five dollars, and ask my approval of the said sale.

I have carefully examined the different steps leading up to the sale of said property and find them all correct in form and legal. I have therefore endorsed my approval on said resolutions and am forwarding them to the governor of the state for his consideration.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

743.

APPROVAL—LEASE OF CERTAIN CANAL LANDS TO H. H. PILLE, MASSILLON—OHIO FISHING CLUB, BUCKEYE LAKE—AND E. L. DUFFIELD, NEWARK.

COLUMBUS, OHIO, October 25, 1917.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your communication of October 22, 1917, in which you enclose, in triplicate, three leases of canal lands, as follows:

	Valuation.
H. H. Pille, Massillon, Ohio, Ohio Canal	$16,250 00
Ohio Fishing Club, Buckeye Lake, Ohio	600 00
E. L. Duffield, Newark, Ohio	1,666 66

I have carefully examined these leases and find them correct in form and legal and have endorsed my approval thereon. I have forwarded said leases to the governor of the state for his consideration.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

744.

APPROVAL—FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN PREBLE, CRAWFORD AND DELAWARE COUNTIES.

COLUMBUS, OHIO, October 27, 1917.

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

DEAR SIR:—I am in receipt of your two communications of October 24, enclosing final resolutions, for my approval, on the following improvements:

Preble county—Sec. "D-1," Eaton-Hamilton road, I. C. H. No. 180.
Crawford county—Sec. "L," Galion-Bucyrus road, I. C. H. No. 201.
Delaware county—Sec. "A," Delaware-Prospect road, I. C. H. No. 116.

I have carefully examined these resolutions, find them correct in form and legal and am therefore returning the same to you with my approval endorsed thereon, in accordance with the provisions of section 1218 G. C.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

745.

APPROVAL—TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE BY COUNCIL OF CITY OF COSHOCTON.

COLUMBUS, OHIO, October 27, 1917.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

IN RE: Bonds of the city of Coshocton, Ohio, in the sum of $16,000.00, for the purpose of providing funds for the improvement of Third street in said city.

I have carefully examined the transcript of the proceedings of the city council and other officers of the city of Coshocton relating to the above bond issue, and find said proceedings to be in all respects regular and in conformity to the provisions of the General Code relative to bond issues of this kind.

I am, therefore, of the opinion that bonds covering said issue, properly prepared in accordance with the ordinance of council providing for said issue and according to the bond form submitted, will, when signed and delivered, constitute valid and binding obligations of said city.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

746.

APPROVAL—ARTICLES OF INCORPORATION OF THE AMERICAN MUTUAL AUTOMOBILE INSURANCE COMPANY.

COLUMBUS, OHIO, October 27, 1917.

HON. WILLIAM D. FULTON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I am herewith returning, with my approval, articles of incorporation of the American Mutual Automobile Insurance Company.

I find that said articles of incorporation are drawn in conformity with the provisions of the act of March 21, 1917, amending certain sections of the General Code relating to the incorporation of mutual insurance companies, other than life and mutual protective associations. The particular kind of insurance contemplated by the articles of incorporation is that authorized by sub-section 1 of section 9607-2, General Code, as amended in said act.

Finding said articles of incorporation to be in conformity with said act, and not inconsistent with the constitution and laws of this state or of the United States, the same are for this reason approved.

I am also returning herewith check for $25.00 enclosed with your letter.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

747.

APPROVAL—TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE OF BOARD OF EDUCATION OF CRANE TOWNSHIP RURAL SCHOOL DISTRICT, PAULDING COUNTY.

COLUMBUS, OHIO, October 31, 1917.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

IN RE: Bonds of Crane township rural school district, in the sum of $5,000.00, for the purpose of improving public school property owned by said school district.

I have carefully examined the transcript of the proceedings of the board of education of Crane township rural school district, Paulding county, Ohio, relating to the above bond issue and find the same to be in all respects regular and in conformity to the provisions of the General Code of Ohio relative to bond issues of this kind.

I am of the opinion, therefore, that bonds properly prepared in accordance with the resolution of the board of education covering this issue will, when properly signed and delivered, constitute valid and binding obligations of said school district.

No bond form was submitted with the transcript, but I am this day asking the prosecuting attorney of the county to forward to me a copy of the bond and coupon form before the same goes to print, and for this reason I will retain the transcript until I receive such bond and coupon form, to the end that when same is approved it can be made a part of the transcript.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

748.

LINE FENCE STATUTES—CONSTITUTIONALITY—WHAT ASSESSMENTS AUTHORIZED.

The unreported case of Roth v. Beach, 80 O. S. 746 does not, in effect, hold the line fence statutes unconstitutional, as was the holding of the lower courts; but was decided on grounds identical with those on which Alma Coal Co. v. Cozad, 79 O. S. 348, was decided and is consistent with McDorman v. Ballard, 94 O. S. 183.

The line fence statutes are not to be so interpreted as to authorize an assessment against an owner of lands which are, and are to remain, unenclosed; but, subject to this limitation, are constitutional.

COLUMBUS, OHIO, October 31, 1917.

HON. GEORGE F. CRAWFORD, *Prosecuting Attorney, Greenville, Ohio.*

DEAR SIR:—I acknowledge receipt of your letter of October 20th requesting my opinion as follows:

"I desire an opinion on the constitutionality of sections 5908 and following, concerning the powers of township trustees to apportion fences and on failure of the owner on either side to construct his portion, to sell the same and certify the costs, etc., to the county auditor for collection.

In the case of the Alma Coal Co. v. Cozad, Treas., 79 O. S., 348, it is held in the second paragraph of the syllabus:

'The act of April 18, 1904 (97 O. L. 138), may not be so construed and administered as to charge an owner of lands which are, and are to remain, unenclosed, with any part of the expense of constructing and maintaining a line fence for the sole benefit of the adjoining proprietor.'

In the case of Beach v. Roth, et al., 18 C. C. (n. s.) 579, it is held that section 4243 Rev. Stat. (now sections 5913, 5914, 5915 of the General Code) providing for the building of line fences and the assessment of the costs thereof on adjoining proprietors, is unconstitutional.

This judgment of the circuit court was affirmed by the supreme court of Ohio, in the case of Roth et al. v. Beach, in the 80th O. S. 746.

In the case of McDorman v. Ballard, et al., 94 O. S. 183, the court holds that the maintenance of fences around enclosed lands (Sec. 5908, and following, of G. C.) is constitutional. The court, in the opinion in this case, refers to the case of the Alma Coal Co. v. Cozad, Treas., 79 O. S. 348, but makes no mention whatever of the case of Roth et al. v. Beach, in the 80th O. S. 746.

From the above, it occurs to me that the case first above mentioned, in the 79 O. S. limits the application of the above sections to cases in which the lands are wholly unenclosed, and which are so to remain, but valid as to lands which are, or in future, are to be enclosed. The case above referred to in 80 O. S. seems to make a sweeping judgment, declaring the whole partition fence law unconstitutional.

In the 94 O. S., cited above, the supreme court seems to ignore entirely the judgment of the 80 O. S., and to reaffirm the 79 O. S. If the sections of the General Code providing for the payment of the amount assessed against the adjoining owner, are unconstitutional, as found in the 80 O. S., it seems that the trustees might have authority to award portions of the fence, but not to collect for payment on sale of same. This case stands unreversed so far as I am able to find.

The above decisions have created a doubt in my mind as to the rights and powers of the trustees, under these sections, and for this reason I desire your opinion, as before stated."

It will not be necessary to refer to the reported cases cited by you, as you have correctly stated the purport of the decisions therein. I suggest, however, that it is inaccurate to suppose that in affirming the judgment of the circuit court in Beach v. Roth, supra, the supreme court necessarily affirmed all that the circuit court said in its opinion in deciding that case. As a matter of fact, an examination of the original record in the case shows that the same allegations were made therein as were made in the petition in Alma Coal Co. v. Cozad, supra, viz: that the lands of the plaintiff were, and were to remain, unenclosed, so that the assessment against him would be a taking of his property for the benefit of his neighbor. The brief memorandum in Roth v. Beach shows that the judgment was affirmed on the authority of Alma Coal Co. v.

Cozad; and, of course, the allegations of the petition, as I have summarized them, made a case clearly within the principles of the former case.

It is seen, therefore, that there is nothing in the judgment of affirmance of Roth v. Beach in any way inconsistent with Alma Coal Co. v. Cozad, nor with McDorman v. Ballard.

The supreme court has never held the statute unconstitutional. It has merely declined, perhaps on constitutional grounds, to interpret it so as to authorize an exaction to be made by assessment against the property of an owner whose lands are, and are to remain, unenclosed.

I take it that the foregoing statement will clear up the doubt that exists in your mind.

Very truly yours,
JOSEPH McGHEE,
Attorney-General.

749.

PROSECUTING ATTORNEY—HAS NO RIGHT TO EMPLOY COUNSEL OTHER THAN HIS REGULAR ASSISTANTS IN CIVIL ACTIONS—MAY NOT PAY FOR SUCH SERVICES UNDER 3004 G. C.—COMMISSIONERS ONLY COUNTY OFFICIALS WHO MAY EMPLOY COUNSEL OTHER THAN PROSECUTING ATTORNEY.

A prosecuting attorney has no right to pay from the fund provided by section 3004 G. C. any amount to an attorney who assisted such prosecuting attorney in the trial of a civil action.

The prosecuting attorney has no right to employ counsel other than to appoint his regular assistants when such employment is in a civil action.

No county officer has a right to employ counsel, or an attorney outside of the prosecuting attorney, except that the county commissioners may employ an attorney when they deem it for the best interests of the county and on request of the prosecuting attorney.

COLUMBUS, OHIO, October 31, 1917.

HON. R. A. KERR, *Prosecuting Attorney, Troy, Ohio.*

DEAR SIR:—You request my opinion on the following facts:

> "Can a prosecutor pay from the money allowed him under G. C. 3004 a sum of money to an attorney to represent him, or rather represent the county in any action, and if so, can it be done in a civil action?"

Upon my request for additional information you state that:

> "He (the ex-prosecutor) received a telephone message that the conservancy act would be for hearing before the court of appeals and that he wished P. T. to assist, but that the commissioners were not in session and he did not have time to get them in session to act on the matter in time for him to have Mr. T. appear for the county before the court of appeals, and because of this fact he paid Mr. T. from his expense fund."

In his report the state examiner made the following finding of fact in relation thereto:

"Mr. F. C. G. was prosecutor of this county from January, 1915, to January, 1917. As provided in section 3004 G. C. he drew $1,275.00 from the treasury for the expenses for the year 1915 * * *. The two principal items of expense are shown to be expenses in connection with the conservancy flood proposition * * *. There are three items in the conservancy expense list that your examiner believes wholly illegal. They are

June 22, 1915, to P. T., attorney fee	$25 00
July 8, 1915, to P. T., part fee in conservancy	100 00
Sept. 1, 1915, to P. T., part fee in conservancy error proceedings.	100 00
The total of these three items is	$225 00

We claim they are illegal because the prosecutor has no statutory authority to employ the services of other attorneys to be paid for by the county * * *. The conservancy case was a civil case. Mr. T. was employed in this case by the commissioners on request of the prosecutor, as is shown on the commissioners' journal No. 14, pp. 57 and 244. These two resolutions show contracts with Mr. T. for certain sums * * *. There can be no connection between these two specific contracts made by the commissioners with Mr. P. T. and the $225.00 paid him by prosecutor G."

Section 3004 G. C. provides:

"There shall be allowed annually to the prosecuting attorney, in addition to his salary and to the allowance provided by section 2914, an amount equal to one-half of the official salary, *to provide for expenses which may be incurred by him in the performance of his official duties and in the furtherance of justice, not otherwise provided for.* Upon the order of the prosecuting attorney the county auditor shall draw his warrant on the county treasurer payable to the prosecuting attorney or such other person as the order designates, for such amount as the order requires, not exceeding the amount provided for herein, and to be paid out of the general fund of the county.

Provided that nothing shall be paid under this section until the prosecuting attorney shall have given bond to the state in a sum not less than his official salary to be fixed by the court of common pleas or probate court with sureties to be approved by either of said courts, conditioned that he will faithfully discharge all the duties enjoined upon him, by law, and pay over, according to law, all moneys by him received in his official capacity. Such bond with the approval of such court of the amount thereof and sureties thereon and his oath of office inclosed therein shall be deposited with the county treasurer.

The prosecuting attorney shall annually, before the first Monday in January, file with the county auditor an itemized statement, duly verified by him, as to the manner in which fund has been expended during the current year, and shall if any part of such fund remains in his hands unexpended, forthwith pay the same into the county treasury. * * *"

Section 2412 G. C. provides:

> "If it deems it for the best interests of the county, *upon the written request of the prosecuting attorney* the board of county commissioners may employ legal counsel to assist the prosecuting attorney in the prosecution or defense of any suit or action brought by or against the county commissioners or other county officers and boards, in their official capacity."

In your case one P. T., an attorney-at-law, was employed under the provisions of both of said sections and paid from county funds. No question is raised about his employment under the provisions of section 2412, for in those cases the prosecuting attorney made written requests of the county commissioners for said employment and the county commissioners passed proper resolutions finding it to be for the best interest of the county that P. T. should be so employed, and thus employed him.

It is only the employment of P. T. by the prosecuting attorney, and his payment from the fund provided by section 3004 G. C. which is held by the examiner to be illegal.

Section 2917 G. C. provides as follows:

> "The prosecuting attorney shall be the legal adviser of the county commissioners and all other county officers and county boards and any of them may require of him written opinions or instructions in matters connected with their official duties. *He shall prosecute and defend all suits and actions which any such officer or board may direct or to which it is a party, and no county officer may employ other counsel or attorney at the expense of the county except as provided in section twenty-four hundred and twelve.* He shall be the legal adviser for all township officers, and no such officer may employ other counsel or attorney except on the order of the township trustees duly entered upon their journal, in which the compensation to be paid for such legal services shall be fixed. Such compensation shall be paid from the township fund."

In your case I am assuming for the purpose of this opinion that the county commissioners, or some officer or board of the county, were parties to the conservancy case, for if no such officer or board were parties to the case I am of the opinion there would have been no right to spend any public funds in the prosecution or defense thereof.

The prosecuting attorney is authorized by section 2915 G. C. to appoint necessary assistants, clerks and stenographers for his office and may fix the salary of such assistants, which, however, is to be kept within the amount allowed such prosecuting attorney by the judge or judges of the common pleas court.

Section 2914 G. C. provides that the judge or judges of the common pleas court, shall, on or before the first Monday in January of each year, fix an aggregate sum to be expended by the prosecuting attorney for the incoming year in the payment of compensation for assistants, clerks and stenographers. It is thus provided how the regular assistants in the prosecuting attorney's office are employed and paid. But because conditions may arise wherein it will be necessary to employ counsel other than the regular assistants in the office of the prosecuting attorney, provision is made by section 2412 that the board of county commissioners may, if it deems it for the best interest of the county,

and upon the written request of the prosecuting attorney, employ legal counsel to assist the prosecuting attorney *in the prosecution or defense of any suit or action brought by or against the county commissioners or other county officers and boards in their official capacity.* That is, the county commissioners have no right to employ counsel to assist the prosecuting attorney except upon the written request of the prosecuting attorney and then only when they find that it will be for the best interests of the county and when the services are necessary in the prosecution or defense of an action or suit brought by or against the county commissioners or other county officers or boards in their official capacity. Section 2917 G. C. provides that the prosecuting attorney shall be the legal adviser of the county commissioners and that he shall prosecute and defend all suits and actions which any such officers or boards may direct or to which it is a party, and then further provides:

> "And no *county officer* may employ other counsel or attorney at the expense of the county except as is provided in section 2412."

It is noted above what section 2412 provides, that is, that the county commissioners may employ, under the conditions therein mentioned, and that no county officer has a right to employ counsel, or an attorney other than the prosecuting attorney, except as is provided in section 2412. The prosecuting attorney, then, being a county officer, would have no right to employ any attorney to assist him under any circumstances, except, however, his regular assistants, as above mentioned.

It is urged, however, that the employment can be made under and by virtue of section 3004. Said section provides a fund equal to one-half of the salary of the prosecuting attorney as an expense fund for such prosecuting attorney and such fund may be used by him to pay any expenses which may be incurred by him in the performance of his official duties and in the furtherance of justice not otherwise provided for. There is no provision made in our law, other than the above section, for the expenses of the prosecuting attorney while he is performing his official duties, and so whatever expenses he would necessarily be compelled to pay in the performance of his official duties would have to be paid from the fund created by section 3004. Outside of said expenses the only other provision is that he may expend from said fund in the furtherance of justice.

I am of the opinion that the phrase "in the furtherance of justice" refers only to criminal matters and has no reference to a civil action.

Holding these views, then, I advise you that a prosecuting attorney cannot pay from the money allowed under section 3004 G. C. any sum of money to an attorney to represent him, or rather represent the county, in an action when said action is a civil proceeding.

Yours very truly,
JOSEPH MCGHEE,
Attorney-General.

750.

STATE FIRE MARSHAL—HAS NO JURISDICTION OVER PROPERTY OWNED BY UNITED STATES GOVERNMENT.

The state fire marshal of Ohio has no jurisdiction over property in Ohio purchased by the United States government for the erection of a postoffice building.

COLUMBUS, OHIO, October 31, 1917.

HON. T. ALFRED FLEMING, *State Fire Marshal, Columbus, Ohio.*

DEAR SIR:—I have your letter of October 9, 1917, as follows:

> "Upon recent inspection made in the town of Urbana, Ohio, our inspector found some dilapidated barns and sheds on the property owned by the United States government, located in that city. We immediately issued orders, calling for their removal. The attached letter is self-explanatory.
>
> "What I am anxious to know is, whether the state gives us and waives any right as suggested in turning over the property. I feel, in this particular instance, that the building will be removed, but would like to have your opinion so that it may be my guide in the future.
>
> I cannot see why we would not have control of fire hazard conditions if they exist on property owned by the federal government and located in this state."

Since receiving your communication I have been given the additional information by your department that the buildings referred to are buildings resting upon a site purchased by the United States government for the erection of a new postoffice building in Urbana.

Section 8 of article 1 of the constitution of the United States (clause 17) gives congress the power

> "To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock yards, and other needful buildings:"

Sections 13770, 13771, 13772 and 13773 of the appendix to the General Code read:

> "Sec. 13770. That the consent of the state of Ohio is hereby given, in accordance with the seventeenth clause, eighth section, of the first article of the constitution of the United States, to the acquisition by the United States, by purchase, condemnation, or otherwise, of any land in this state required for sites for custom houses, court houses, post-offices, arsenals, or other public buildings, whatever, or for any other purposes of the government.
>
> Sec. 13771. That exclusive jurisdiction in and over any land so acquired by the United States shall be and the same is hereby, ceded to

the United States, for all purposes except the service upon such sites of all civil and criminal process of the courts of this state; but the jurisdiction so ceded shall continue no longer than the said United States shall own such lands.

Sec. 13772. The jurisdiction ceded shall not vest until the United States shall have acquired the title to the said lands by purchase, condemnation or otherwise; and so long as the said lands shall remain the property of the United States when acquired as aforesaid, and no longer, the same shall be and continue exempt and exonerated from all state, county and municipal taxation, assessment or other charges which may be levied or imposed under the authority of this state; provided that nothing in this act contained shall be construed to prevent any officers, employes or inmates of any national asylum for disabled volunteer soldiers located on any such land over which jurisdiction is ceded herein, who are qualified voters of this state from exercising the right of suffrage at all township, county and state elections in any township in which such national asylum shall be located.

Sec. 13773. That the act entitled 'An act ceding to the United States exclusive jurisdiction over certain lands acquired for public purposes within this state, and authorizing the acquisition thereof,' passed the sixth day of May, 1902, shall not be so construed as to have a retroactive operation, or to apply to any land or lands acquired by the United States for any of the purposes mentioned in section 1 of said act, prior to the date of passage thereof."

I shall assume that the postoffice site referred to was purchased subsequent to the passage of sections 13770 and 13771—that is, subsequent to May 5, 1902—and that therefore these sections apply to the postoffice site in question.

In United States vs. Cornell, 2 Mason Reports, p. 60, the defendant was indicted for murder of one William Kane in Fort Adams in Newport Harbor, alleged to be a place within the sole and exclusive jurisdiction of the United States. The defendant killed a fellow soldier in the garrison. He pleaded not guilty and the case was referred to the supreme court on the question of jurisdiction. Judge Story delivered the opinion of the court and at page 63 said:

"The constitution of the United States declares that congress shall have power to exercise 'exclusive legislation' in all 'cases whatsoever' over all places purchased *by the consent of the legislature of the state* in which the same shall be, for the erection of forts, magazines, arsenals, dock yards and other needful buildings. When therefore a purchase of land for any of these purposes is made by the national government, and the state legislature has given its consent to the purchase, the land so purchased by the very terms of the constitution ipso facto falls within the exclusive legislation of congress, and the state jurisdiction is completely ousted. This is the necessary result, for exclusive jurisdiction is the attendant upon exclusive legislation; and the consent of the state legislature is by the very terms of the constitution, by which all the states are bound, and to which all are parties, a virtual surrender and cession of its sovereignty over the place. Nor is there anything novel in this construction. It is under the like terms in the same clause of the constitution that exclusive jurisdiction is now exercised by congress in the District of Columbia; for if exclusive legislation and exclusive

jurisdiction do not import the same thing, the states could not cede, or the United States accept for the purposes enumerated in this clause, any exclusive jurisdiction. And such was manifestly the avowed intention of those wise and great men who framed the constitution."

The legislature of Rhode Island, in furtherance of an object to assist the government to erect forts to fortify the harbor of Newport, by an act of that body passed in 1794, authorized any town or person in the state, by and with the consent of the governor of the state, to sell and dispose of to the president, for the use of the United States, all such lands as should be deemed necessary to erect fortifications upon for the defense of the port harbor of Newport, and to execute deeds therefor in due form of law. The act also contained the proviso, similar to that found in section 13770 G. C., above quoted, that all civil and criminal processes, under the authority of the state, or any officer thereof, may be executed on the land so ceded and within the fortifications that may be erected thereon, in the same way and manner as if the lands had not been ceded as aforesaid.

Judge Story in his opinion continued at page 65:

"The counsel for the prisoner next contend that the state has retained a concurrent jurisdiction over the place; and if so, then the averment in the indictment is not supported in point of fact. This leads us to the consideration of the true intent and effect of the proviso already mentioned. In its terms it certainly does not contain any reservation of concurrent jurisdiction or legislation. It provides only that civil and criminal processes, issued under the authority of the state, which must of course be for acts done within, and cognizable by, the state, may be executed within the ceded lands, notwithstanding the cession. Not a word is said from which we can infer that it was intended that the state should have a right to punish for acts done within the ceded lands. The whole apparent object is answered by considering the clause as meant to prevent these lands from becoming a sanctuary for fugitives from justice, for acts done within the acknowledged jurisdiction of the state. Now there is nothing incompatible with the exclusive sovereignty or jurisdiction of one state, that it should permit another state, in such cases, to execute its processes within its limits. And a cession, or exclusive jurisdiction, may well be made with a reservation of a right of this nature, which then operates only as a condition annexed to the cession, and as an agreement of the new sovereign to permit its free exercise as *quoad hoc* his own process. This is the light in which clauses of this nature (which are very frequent in grants made by the states to the United States), have been received by this court on various occasions, on which the subject has been heretofore brought before it for consideration; and it is the same light in which it has also been received by a very learned state court."

(Commonwealth v. Clary, 8 Mass. R., 72.)

In Ft. Leavenworth R. R. v. Lowe, 114 U. S., 525, Field, J., delivering the opinion of the court, said at page 532:

"When the title is acquired by purchase by the consent of the legislatures of the states, the federal jurisdiction is exclusive of all state authority. This follows from the declaration of the constitution that

congress shall have 'like authority' over such places as it has over the district which is the seat of government. That is, the power of 'exclusive legislation in all cases whatsoever.' Broader or clearer language could not be used to exclude all other authority than that of congress; and that no other authority can be exercised over them has been the uniform opinion of federal and state tribunals and of the attorneys general."

The court then cites with approval both the case of the United States v. Cornell, 2 Mason, 60, and that of Commonwealth v. Clary, 8 Mass. R., 72. These cases were both followed in the case of Sinks v. Reese, 19 O. S., p. 306, in which it was held:

"Asylums for disabled volunteer soldiers of the United States are among the 'needful buildings' for the erection of which the government of the United States, through the medium of a corporation created by itself or otherwise, may purchase and hold territory, under the provisions of article 1, section 8, of the constitution of the United States."

Brinkerhoff, C. J., in the opinion of the court, said:

"This act of the state legislature, consenting to the establishment of the asylum within her borders, and ceding jurisdiction of the lands and appurtenances of the asylum to the United States, under the operation of the clauses of the eighth section of the first article of the constitution of the United States above referred to, fixes the exclusive jurisdiction of the general government over this institution, its lands and its inmates, 'in all cases whatsoever,' except as to the execution of process issuing under state authority."

There is no question but what the postoffice building is a "needful building" within the meaning of the provision of the United States constitution, above quoted, and it is therefore my opinion that the state fire marshal of Ohio can exercise no jurisdiction over the postoffice site referred to.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

751.

COUNTY SURVEYOR—SALARY BASED ON ROAD MILEAGE IN COUNTY — MAY RECOVER DIFFERENCE BETWEEN AMOUNT RECEIVED AND AMOUNT ACTUALLY ENTITLED TO—WHEN AUDITOR'S ESTIMATE OF NUMBER OF MILES IS LESS THAN ACTUALLY EXIST IN COUNTY —COUNTY MAY RECOVER WHEN HE HAS RECEIVED MORE SALARY THAN HE IS ENTITLED TO.

1. *If a county surveyor has received a less amount in salary than that which he was entitled to receive, due to the fact that the county auditor fixed a road mileage less than that which actually exists in the county, he would be entitled to receive the difference between that which he did receive and that which he was entitled to receive.*

2. *If the county surveyor has received more salary from the county than that to which he was entitled, due to the fact that the county auditor fixed a road mileage in excess of that which actually exists in the county, the county would be entitled to recover the difference between that which he did receive and that which he was entitled to receive.*

COLUMBUS, OHIO, October 31, 1917.

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

GENTLEMEN:—I have your communication of October 3, 1917, which is as follows:

> "Attorney-General Edward C. Turner, in an opinion rendered to this bureau September 21, 1915 (Opinions 1915, Vol. 2, page 1798), in answering the tenth inquiry, held:
>
> 'It is the duty of the county auditor to determine the mileage of public roads upon which the county surveyor's salary is to be based.'
>
> Acting in accordance with this opinion the auditor of a certain county determined the mileage of public roads in his county to be 800 miles. The county surveyor was paid upon this basis for two years, or until his retirement from office on the first Monday of September, 1917. The new surveyor insists that there are over 1,000 miles of public roads in the county, and the auditor desires to know if, in the event he makes a new determination, he will be legally justified in paying the ex-surveyor an amount sufficient to reimburse him for salary he was entitled to but did not receive.
>
> Should your opinion be in the affirmative, could the examiners of this bureau make findings for recovery against a county surveyor who had received too much salary because of an error made by a county auditor in determining the mileage of the public roads of his county?"

The section of the General Code which fixes the salary of the county surveyor is section 7181 both in the Cass act and in the White-Mulcahey act. Under the Cass act the salary of the county surveyor was based on the road mileage of the county, and also upon the population of the county. The provisions in reference to road mileage read as follows:

> "The county surveyor * * * shall receive an annual salary to be computed as follows: One dollar per mile, for each full mile of the first one thousand miles of the public roads of the county, * * *"

Under the law as it now stands in section 7181 of the General Code, the salary of the county surveyor is based upon the road mileage of the county, the population of the county, and the tax duplicate of the same, and the provision which has to do with the road mileage of the county reads as follows:

> "The county surveyor shall receive an annual salary to be computed as follows: One dollar per mile for each full mile of the first one thousand miles of the public roads of the county."

In both of these sections the matters upon which the salary of the county surveyor, or as he was formerly called the "county highway superintendent," are definite and certain. These are matters of record, and the record of any county would show definitely the road mileage of the county, the population of the county, and also the tax duplicate of the county, and the county surveyor is and was entitled to receive a salary as set out in said section 7181, and this provides that he is to receive one dollar per mile for each full mile of the first one thousand miles of the public roads of the county. It is not based upon road mileage as fixed by the county auditors of the different counties, but is based upon a road mileage as it actually exists; and therefore if the county surveyor whose term expired on the first Monday of September, 1917, was paid a salary less than that which he should have received due to the fact that it was based upon a road mileage less than that which actually exists in the county, then he would be entitled to receive an additional amount to be computed upon the difference between the road mileage which actually exists in the county, and that upon which he was paid during the year which ended the first Monday in September, 1917.

And, in reference to this matter, I desire to say further that the amount to which he may be entitled over and above that which he received is to be based upon the difference between the road mileage as it actually exists and the road mileage upon which his salary was based, and not upon the road mileage which the county auditor may determine to exist in the county.

You further ask as to whether the county would be entitled to recover the amount which was paid a county surveyor over and above that which he was entitled to receive owing to the fact that his salary was based upon a road mileage in the county in excess of that which actually exists. It is my opinion that the county would be entitled to recover. The mistake that would be made in reference to this matter is a mistake of fact and not one of law, and hence the parties interested in the matter would not be bound by the mistake which was made in reference to road mileage of the county.

I am not unmindful of the opinion of Honorable Edward C. Turner, found in Vol. 2, page 1798, 1915 Opinions of the Attorney-General, to which you call attention in your communication. It is my opinion that Mr. Turner was dealing with the question as to how the county auditor might protect himself in the matter of issuing warrants for the salary of the county surveyor. To be sure, the county auditor would be compelled to protect himself in that he should not issue warrants in excess of that to which the county surveyor would be entitled, and hence it would be up to him, in a way, to decide as to what the road mileage in any county is, in order that he might be protected in the matter of issuing warrants. It was this point, as I view it, with which the opinion of Mr. Turner has to do; but the mere fact that the county auditor would decide that road mileage in a certain county is a certain number of miles would not prevent the county surveyor from receiving the amount to which he was actually entitled, and would not prevent the county from recovering the amount

which the county surveyor received over and above that which he should have received.

Hence, answering your question specifically, it is my opinion that a county surveyor would be entitled to receive from the county the difference between the salary which he should have received as based upon the road mileage of the county and that which he did receive; and also that the county would be entitled to recover from the county surveyor if he received more than that to which he was entitled due to the fact that the county auditor fixed a road mileage in excess of that which actually exists in the county.

Very truly yours,
JOSEPH McGHEE,
Attorney-General.

752.

DOMESTIC CORPORATIONS—REPORTS—FEES—TAX COMMISSION—EFFECT OF DECISION OF SUPREME COURT IN CASE OF THE STATE V. LITTLE MIAMI R. R. CO.

The case of the State v. Little Miami Railroad Company is not to be regarded as deciding the point as to the liability of corporations organized for the purpose of constructing and operating public utilities which have never entered upon the operation of such utilities; which do not own utilities which are being operated by others as their lessees, etc.; or which have wholly abandoned the operation of what were originally public utilities or have sold the same; but the scope of the decision as controlling administrative action should be limited to the case of the liability of "underlying companies" so-called.

COLUMBUS, OHIO, October 31, 1917.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I acknowledge receipt of your letter of October 23d requesting my opinion as follows:

> "You are respectfully requested to advise this commission what classes of domestic corporations are exempted from making reports to the tax commission and paying the fee of three-twentieths of one per cent upon their subscribed or issued and outstanding stock under the ruling of the supreme court in the Little Miami Railroad Company case. There are a number of cases pending before the commission to which it desires to apply the ruling of the court and it therefore requests your instruction as to the effect of the court's decision."

In short, your letter asks me to state what has been decided by the supreme court in the case of State v. Little Miami Railroad Company.

Accurately speaking, the supreme court has decided that there is no error prejudicial to the state apparent on the face of the record of the proceedings of the lower courts; so that for this reason the court has overruled the motion for an order to the court of appeals to certify its record in the case.

Strictly speaking, therefore, the supreme court did not pass upon the merits of any question that might be made in the court below, save in so far as it was

necessary to do so in order to determine the probability of the intervention of error prejudicial to the state, which was the complaining party.

Two separate opinions were rendered in the lower courts, one by Bigger, J., of the common pleas court, and one by Kunkle, J., for the court of appeals. Judge Bigger in interpreting section 5518 of the General Code, in connection with the sections providing for the collection of the tax and particularly sections 5415 and 5416, General Code, held that when a corporation organized for the purpose of constructing and operating a railroad or other public utility has leased its entire plant to another corporation, together with the authority to operate it, the entire enterprise constitutes but one "public utility" for the purposes of the law; so that the payment of excise taxes measured by the gross earnings of that utility is to be taken as a substitute for payment of any franchise taxes on account of the corporate franchises of the lessor and lessee, respectively. This interpretation of the statutes constituted one ground of Judge Bigger's decision.

The common pleas court went further, however, and held that the Hollinger act of 1911 was to be regarded, so far as what is now section 5518 of the General Code was concerned, as merely a revision or codification of the previous law which had been interpreted by the courts in the case of The State v. The Cleveland & Pittsburgh Railroad Company. The court therefore regarded the verbal changes that were made in the section as compared with original section 7 of the Willis law of 1902 as not intended to change the substance of the law. Hence, it would follow that the case of The State v. The Cleveland & Pittsburgh Railroad Company is controlling under the new law as well as under the old.

These two grounds of decision are quite distinct, as will be observed. Both of them are put forward by Judge Bigger as reasons for his judgment.

The court of appeals did not render a lengthy opinion in the matter, contenting itself with a general approval of what Judge Bigger had said in his opinion, but giving express sanction to the second ground of decision noted in the above analysis of the opinion of the common pleas court, namely, that the new law was a virtual revision of the old and that the former decision was controlling. It does not appear, however, that the court of appeals intended to disapprove the other reasoning of Judge Bigger.

The answer to your question depends upon which of these two grounds of decision is accepted. If the first is the true rule, then the case may be regarded as deciding merely that a public utility corporation which has leased all of its property to another company, which is operating the plant, is not liable for franchise taxes.

If the second ground of decision is adopted, it would seem, according to the opinion of Judge Winch in the Cleveland & Pittsburgh case, 2 Ohio App. Rep., 228, that all corporations which are organized for the purpose of constructing and operating a given public utility, such as a railroad or an interurban railroad, would because of their names, so to speak, never become liable for franchise taxes.

In spite of the express dicta of the courts on the point, I can not bring myself to the conclusion that the second ground of decision is to be taken as adjudicated law. To do so would do too much violence to present section 5518 of the General Code in its application to public utilities. The language is:

> "An incorporated company, whether foreign or domestic, owning or operating a public utility in this state, and as such required by law to

file reports with the tax commission and to pay an excise tax upon its gross receipts or gross earnings * * *" shall be exempt from the franchise tax.

It is very clear that at the very least the ownership of a public utility is required in order to satisfy the terms of this section. What the lower courts really meant in stating in substance that the Cleveland & Pittsburgh case was still a controlling decision in spite of the amendment of the statute was, I think, that the statute was to be regarded as merely a revision of the pre-existing law, in so far as that law applied to so-called "underlying companies," that is to say, to lessor companies and those in a similar situation. I am satisfied that at the least the remarks of the courts must be limited to the case which was before them.

I therefore advise that all that can be taken as distinctly decided by the case to which you refer is that "underlying companies," which is to say, companies which have leased public utilities to "operating companies" but still retain their general ownership, are exempt from the franchise tax. The case decides nothing as to corporations which have been organized for public utility purposes but which have never acquired ownership of a public utility by construction or purchase thereof, or which have abandoned the operation of the public utility or parted with all property therein. As to all such companies it may be said, I think, that the words of the statute do not exempt them and that until it is held otherwise by the courts at least your commission should rule that the franchise tax is due from them.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

753.

COUNTY SURVEYOR—EXPENSES—CONSULTATION WITH STATE HIGHWAY DEPARTMENT.

The county surveyor who upon his own motion makes a trip to Columbus to consult with the state highway department concerning road and bridge matters may be allowed his expenses incurred in so doing when such trip is made in good faith.

COLUMBUS, OHIO, November 3, 1917.

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

GENTLEMEN:—I have your letter of September 27, 1917, as follows:

"Can a county surveyor, who, upon his own motion, makes a trip to Columbus to consult with the state highway department, concerning road and bridge matters, be allowed his expenses incurred in so doing under the provisions of section 2786 G. C., or any other section?"

Section 2786 of the General Code reads:

"The county surveyor shall keep his office at the county seat in such room or rooms as are provided by the county commissioners, which shall be furnished with all necessary cases and other suitable articles, at the expense of the county. Such office shall also be furnished with all tools, instruments, books, blanks and stationery necessary for the proper discharge of the official duties of the county surveyor. The cost and expense of such equipment shall be allowed and paid from the general fund of the county upon the approval of the county commissioners. The county surveyor and each assistant and deputy shall be allowed his reasonable and necessary expenses incurred in the performance of his official duties."

Section 7191 G. C., as amended in 107 O. L., 115, reads:

"The county surveyor may request advice and assistance from the state highway commissioner in all matters relating to his duties. In so far as the highways, bridges and culverts under the control of the state are concerned the county surveyor shall be governed in the conduct of his work by the instructions of the state highway commissioner as issued from time to time for the guidance of county surveyors."

It will be noted that section 7191 G. C. provides that "the county surveyor may request advice and assistance from the state highway commissioner in all matters relating to his duties." I think it must be admitted that a county engineer may not always find it practical to advise with the state highway commissioner by letter, since advice upon engineering matters often involve the examination of plans and discussion of the same. If, therefore, it becomes necessary in a given case for the county surveyor to consult the state highway commissioner personally, there is but one way to accomplish this and that is by the surveyor making a trip to Columbus. In such case it is my opinion that his actual and necessary expenses might be paid under section 2786.

Of course this practice might be abused in some instances, but in the case you submit I find no hint of any such abuse and I am assuming that the trip you refer to was made in perfect good faith.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

754.

STATE BUILDING CODE—PROVISIONS DO NOT APPLY TO DWELLINGS—CITY COUNCIL—LOCAL BOARD OF HEALTH—MAY NOT ENACT ORDINANCE OR RESOLUTION BY REFERENCE ONLY.

The provisions of the state building code do not apply to dwellings.

It is not within the province of a city council or local board of health to enact an ordinance or a resolution by reference only, without giving specific or detailed requirements and to include therein the provisions of the Ohio building code.

COLUMBUS, OHIO, November 3, 1917.

HON. JAMES E. BAUMAN, *Secretary and Executive Officer, State Department of Health, Columbus, Ohio.*

DEAR SIR:—I have your communication in which you ask this department

to review the holdings of my predecessors wherein they have held that the state building code does not apply to dwellings.

You call attention to a number of the provisions of part 4 of the state building code, under the title of "Sanitation," and you contend that these provisions clearly show that they apply to dwellings.

You also submit the following question:

> "Is it within the province of a city council or local board of health to enact an ordinance or resolution by reference only, without giving specifications or detailed requirements, and to make the provisions of part 4, sanitation, Ohio building code, sections 12600-137 to 12600-273 General Code, inclusive, applicable to buildings or persons not affected or included in the administrative and penalty sections, Nos. 12600-274 to 12600-282 General Code, inclusive?"

In view of the conclusions herein reached, it will not be necessary to quote the provisions of the statutes to which you have called attention. These provisions and others no doubt were under consideration by Honorable Timothy S. Hogan, when he states in an opinion to the state board of health, under date of June 25, 1912, and recorded in volume 1, page 821, of the attorney general's reports for 1912:

> "Provisions not germane to the title, and really not intended to apply to other than public matters, have possibly by inadvertence crept into its 142 pages. I cannot see my way clearly to say that this act was ever intended to apply to the owner or occupant of a family homestead, or dwelling, or a single lot in a village as to his sewerage, vault, or use thereof. While the sections relative thereto, cited by you, *standing alone*, might include the dwelling or a village town lot; yet, I think these sections must be construed in the light of the whole act, and not taken verbatim *et liberatim*."

In this opinion Mr. Hogan holds that the state building code does not apply to dwellings. He makes the same holding in an opinion under date of July 12, 1912, to your board, and found at page 823 of the above report.

The first opinion, and which is the one referred to by you in your letter, is found at page 1638 of volume 2, reports of the attorney-general for the year 1911.

Honorable Edward C. Turner, as attorney-general, makes a like holding in an opinion to your board, under date of December 8, 1915, and reported in volume 3, page 2348, opinions of the attorney-general for the year 1915.

After carefully considering these opinions and the sections referred to by you, I see no reason for overruling the holdings of my predecessors and I therefore conclude with them that the state building code does not apply to dwellings.

Your second question is in reference to the right of a municipality to enact an ordinance which by reference merely will include and cover the specifications of the state building code covering the law of sanitation, without specifically reciting the provisions of said act in the ordinance.

The statutes provide the method in which municipalities may enact ordinances.

Section 4224, General Code, provides:

> "The action of council shall be by ordinance or resolution, and on

the passage of each ordinance or resolution the vote shall be taken by 'yeas' and 'nays' and entered upon the journal, but this shall not apply to the ordering of an election, or direction by council to any board or officer to furnish council with information as to the affairs of any department or office. No by-law, ordinance or resolution of a general or permanent nature, or granting a franchise, or creating a right, or involving the expenditure of money, or the levying of a tax, or for the purchase, lease, sale, or transfer of property, shall be passed, unless it has been fully and distinctly read on three different days, and with respect to any such by-law, ordinance or resolution, there shall be no authority to dispense with this rule, except by a three-fourths vote of all members elected thereto, taken by yeas and nays, on each by-law, resolution or ordinance, and entered on the journal. No ordinance shall be passed by council without the concurrence of a majority of all members elected thereto."

Section 4226 General Code provides:

"No ordinance, resolution or by-law shall contain more than one subject, which shall be clearly expressed in its title. No by-law or ordinance, or section thereof, shall be revived or amended, unless the new by-law or ordinance contains the entire by-law or ordinance, or section revived or amended, and the by-law or ordinance, section or sections so amended shall be repealed. Each such by-law, resolution and ordinance shall be adopted or passed by a separate vote of the council and the yeas and nays shall be entered upon the journal."

This latter section refers to amendments of an ordinance or by-law, and it specifically provides that "no by-law or ordinance, or section thereof, shall be revived or amended, unless the new by-law or ordinance contains the entire by-law or ordinance, or section revived or amended."

This provision is like the provision contained in the constitution of the state of Ohio which governs the general assembly as to laws passed by it. Article II, section 16, of the constitution reads, in part, as follows:

"Every bill shall be fully and distinctly read on three different days, unless in case of urgency three-fourths of the house in which it shall be pending, shall dispense with the rule. No bill shall contain more than one subject, which shall be clearly expressed in its title, and no law shall be revived, or amended unless the new act contains the entire act revived, or the section or sections amended, and the section or sections so amended shall be repealed."

This provision of the constitution clearly shows that it was intended that bills should not be enacted by reference merely, but that each act should contain the entire provision to be enacted into law. The same general provision is contained in section 4226, General Code, as to ordinances.

While there is no express provision that an original act or ordinance shall contain the entire act or ordinance, yet the same principle and general rule will apply.

There is no authority, therefore, for a municipality to enact an ordinance and by reference merely to include therein statutory provisions. This same principle will apply to rules made by the local board of health. This is shown by the provisions of section 4413, General Code, which reads as follows:

"The board of health of a municipality may make such orders and regulations as it deems necessary for its own government, for the public health, the prevention or restriction of disease, and the prevention, abatement or suppression of nuisances. Orders and regulations not for the government of the board, but intended for the general public, shall be adopted, advertised, recorded and certified as are ordinances of municipalities, and the record thereof shall be given, in all courts of the state, the same force and effect as is given such ordinances."

Your second question is, therefore, answered in the negative.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

755.

DISAPPROVAL—BOND ISSUE—AMITY RURAL SCHOOL DISTRICT—BOARD OF EDUCATION—SPECIAL MEETING—NOTICE REQUIRED.

A special meeting of a board of education can be legally called only by the service of notice thereof on the members in the manner provided by section 4751 *General Code; and proceedings of such board providing for an issue of bonds of the school district are invalid where vital action pertaining thereto was taken at a special meeting from which one member was absent, where no written notice of the meeting had been served on each member of the board in the manner provided by said section.*

COLUMBUS, OHIO, November 3, 1917.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

In re: *Bond issue of Amity rural school district in the sum of* $8,000, *for the purpose of building and equipping a new school building in said school district.*

I am herewith returning to you, without my approval, transcript of the proceedings of the board of education and other officers of Amity rural school district relating to the above bond issue. The transcript shows that the meeting of the board of education, under date of January 16, 1917, at which the board of education adopted the resolution providing for the submission of the question of said bond issue to the electors of the school district, was a special meeting, but the transcript fails to show that this meeting was called in the manner provided in section 4751 of the General Code. Neither has the board of education been willing or able to give me any assurance that notice of this meeting was given in the manner required by said section. Inasmuch as one of the members of the board of education was not present at this meeting, I find no escape from the conclusion that said meeting was illegal and that the bond issue is wholly unauthorized.

Kattman v. Board of Education, 15 *O. C. C. (n. s.),* 232.

The meeting of the board of education under date of March 26, 1917, at which pursuant to the election the resolution was adopted providing for the issue of the bonds in question, was likewise a special meeting with respect to which the transcript fails to show that the same was called in the manner required by section 4751 General Code. All the members of the board of education were present at this meeting, however, and this circumstance probably cured the irregularity with respect to the legal character of this meeting. By reason, however, of the fatal irregularity with respect to the first meeting of the board of education, above noted, I am compelled to disapprove said bond issue and to advise you not to purchase the same.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

756.

SECRETARY OF AGRICULTURE—IMPLIED AUTHORITY TO PURCHASE LAND TO ESTABLISH FISH HATCHERIES.

In carrying out the provisions of section 1390 *G. C.* (107 *O. L.* 486) *the secretary of agriculture has the implied power, if not express authority, to purchase such lands as he may need in order to enable him to establish necessary fish hatcheries to propagate fish for the waters of the state. However, a purchase of lands for this purpose could not be made unless the legislature has appropriated money which could be used for said purpose.*

COLUMBUS, OHIO, November 3, 1917.

HONORABLE N. E. SHAW, *Secretary of Agriculture, Columbus, Ohio.*

DEAR SIR:—I have your communication of October 10, 1917, which communication reads as follows:

> "This department has in operation at Chagrin Falls a small hatchery consisting of three ponds fed by a flow of spring water for a distance of five miles. In view of the fact that the demand for fish for stocking purposes has become so great, not only for this district but in all parts of the state, we find it necessary to enlarge the hatchery at Chagrin Falls.
>
> We have an opportunity to purchase additional grounds containing approximately four acres, adjacent to the hatchery, for the sum of $1,100.00. Mr. I. S. Myers, member of our board, and Mr. A. C. Baxter made a careful inspection of this site and found it very suitable for this purpose. The land lays entirely within the village of Chagrin Falls, and the price is considered very reasonable, but purchase must be made promptly if this price holds good.
>
> If this purchase meets with your approval, I should like to be advised at your earliest convenience."

The concluding paragraph of your communication is as follows:

> "If this purchase meets with your approval, I should like to be advised at your earliest convenience."

I take it, however, that it is not so much my approval of the purchase under contemplation that you desire, but rather as to whether you have authority under the law to make the purchase.

In examining the statutes carefully I find no provision whatever requiring the attorney-general to approve a purchase of lands made by you for the purposes set out in your communication; but there might be a question raised as to whether you have authority, as the agent of the state, to purchase lands to provide for a fish hatchery.

I might suggest in passing that the provision in reference to the acquiring of lands for the establishment of game preserves is much more definite and specific than is the provision in reference to purchasing lands for fish hatcheries.

Section 1423 G. C., 107 O. L., 488, provides, in part, as follows:

> "* * * At least fifty per cent of the money arising from all such licenses shall be expended by the secretary for the purchase and propagation of game birds and game animals to be used in restocking sections where a scarcity of such birds and game animals exist and for establishing and purchasing or otherwise acquiring title to lands for game preserves, and the secretary is hereby empowered to organize such lands into game preserves, * * *."

Here the provision is definite and specific to the effect that the secretary may purchase lands for the purpose of establishing game preserves; but when we turn to fish hatcheries the provision is not so definite and specific.

Section 1390 G. C., 107 O. L., 486, provides as follows:

> "The secretary of agriculture shall have authority and control in all matters pertaining to the protection, preservation and propagation of song and insectivorous birds, game birds, game animals and fish within the state and in and upon the waters thereof. He shall enforce by proper legal action or proceedings the laws of the state for the protection, preservation and propagation of such birds, animals and fish; shall establish fish hatcheries and propagate fish therein or in any other manner for the waters of the state, and, so far as funds are provided therefor, shall adopt and carry into effect such measures as he deems necessary in the performance of his duties."

It will be noticed under this section that the secretary of agriculture is commanded to establish fish hatcheries and propagate fish therein or in any other manner for the waters of the state, and, so far as he may have funds, he is ordered to adopt and carry into effect such measures as he deems necessary in the performance of his duties.

There are other provisions of the General Code which make it quite evident that the secretary of agriculture is authorized and empowered to maintain fish hatcheries. For example, in section 1454 G. C., 107 O. L., 489, we find the following:

> "Nothing in this chapter shall prevent the secretary of agriculture, his agents and employes from taking fish at any time or place or in any manner for the maintenance or cultivation of fish in hatcheries."

and in section 1455 G. C., 107 O. L., 490, we have the following:

"For the purpose of obtaining spawn for the fish hatcheries, the secretary of agriculture may place his agents in any boat used in taking fish and pay for such spawn such amount as he may fix."

From all these provisions, both directly and indirectly, the secretary of agriculture is authorized and empowered to establish fish hatcheries, but in none of these provisions, nor in any other provision of the General Code with which I am familiar, is he authorized specifically and directly to purchase lands upon which fish hatcheries may be established.

But the provision of law is quite familiar that when a public official is empowered and authorized, and as in section 1390 G. C. is commanded to do a certain thing, he has power and authority to do all those things which are necessary to enable him to perform the duties which are placed upon him by law. That is, he has the implied power to do those things which are essential to enable him to carry out those things which he is expressly authorized to carry out. Of course, it is quite evident that the secretary of agriculture cannot establish fish hatcheries without acquiring land upon which the same may be established. Further, said section 1390 G. C. itself provides that he "shall adopt and carry into effect such measures as he deems necessary in the performance of his duties."

From all the above, it is my opinion that if the secretary of agriculture deems it necessary in order to enable him to carry out the duties which are imposed upon him in reference to fish hatcheries to purchase or acquire lands in the name of the state, he is impliedly authorized, if not expressly authorized, under the provisions of section 1390 G. C. to so purchase lands. In purchasing land, to be sure, he should use sound discretion as to the location thereof and the price he should pay for the same. Such is the general power and authority of the secretary of agriculture in the matter referred to by you in your communication.

We now come to the question as to whether you have authority to enter into a contract for the specific purchase set out in your communication. While you have the general power to purchase and acquire lands for the purpose of establishing fish hatcheries upon the same, yet unless an appropriation has been made for the purpose of acquiring land by you, you would have no power or authority to enter into a contract to purchase, and this for the reason that there could be no obligation created against the state without an appropriation having been made.

Section 2288-1 G. C., 107 O. L. 453, reads as follows:

"It shall be unlawful for any officer, board or commission of the state to enter into any contract, agreement or obligation involving the expenditure of money, or pass any resolution or order for the expenditure of money, unless the auditor of state shall first certify that there is a balance in the appropriation pursuant to which such obligation is required to be paid, not otherwise obligated to pay precedent obligations."

When we turn to the provisions of the appropriation act as passed by the last general assembly we find no provision made which would enable you to carry out the specific object which you have in mind. It is true on page 197 of 107 Ohio Laws the legislature appropriated $25,000.00 for "fish propagation and distribution," but when we turn to page 194 of the same volume we find that this is for "contract and open order service." This upon its face would

evidently not include the matter of purchasing real estate, and further the bill itself shows that this was not the intention because when we turn to page 340 we find a division styled "additions and betterments." Under this heading of "additions and betterments" we find, on page 344, the heading "fish and game." The only appropriation that is made under this particular heading is $1,000.00 for drainage of the London hatchery.

From all the above it is quite evident that the legislature has not seen fit to make appropriation for the purchase of real estate by you for the purposes set out in your communication. Hence, there having been no appropriation made you could not enter into a valid contract for the purchase of the real estate mentioned by you in your communication. So that while you have the general authority under section 1390 G. C. to purchase real estate, yet you cannot purchase at this particular time, due to the fact that no appropriation has been made for payment for the land which would be purchased.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

757.

CANDIDATE—WHEN NOTICE OF WITHDRAWAL MUST BE FILED WITH BOARD OF ELECTIONS.

1. *Where five days before the election candidates file written notices of withdrawal with the board of elections, such withdrawals come too late to affect the duties devolving upon election officers in counting, canvassing and abstracting the votes.*

2. *The withdrawal of a candidate to be effectual must be filed with the deputy supervisors of elections before they have provided for the printing of the ballots.*

COLUMBUS, OHIO, November 3, 1917.

HON. J. P. HUXLEY, *Prosecuting Attorney, Youngstown, Ohio.*

DEAR SIR:—Your telegram to me reads as follows:

> "All candidates for city solicitor except B————, Republican, have given written notice to board of elections of withdrawal of their candidacy. Should votes cast for those who have withdrawn be counted by the board?"

You do not say when the withdrawing candidates filed their written notices of withdrawal, but I take it that same must have been done very recently and that such fact occasioned your telegram.

It will be necessary to consider several sections of the election law which bear upon the question submitted.

Section 5010 G. C. provides:

> "If a person nominated as herein provided die, withdraw, or decline the nomination, or if a certificate of nomination is insufficient or imperfect, the vacancy thus occasioned, may be filled or the defect cor-

rected in the manner required for original nominations. Such nomination to fill a vacancy, or corrected certificate must be certified to the secretary of state at least thirty days or to the board of deputy state supervisors at least twenty-five days previous to the day of election. If, when the original nomination was certified, there was certified a committee authorized to represent the party, as herein provided, it may fill such vacancy."

Section 5012 G. C. will have no application because it merely refers to a vacancy caused by the death of a candidate.

It will be seen from section 5010 G. C. that provision is made for the filling of a nomination that has been declined or when a person nominated has withdrawn, provided the certificate to fill the vacancy is certified to the deputy state supervisors of elections at least twenty-five days previous to the day of election.

So if this were a case of filling a vacancy, the time for such filling having gone by, no vacancy could be filled. But your question really has to do with the duties of the election officers at and after the election, and whether such officers can pay any attention to the withdrawal of the candidacy thus made a few days before the election.

In State ex rel. v. Taylor, Sec'y of State, 55 O. S. 385, the supreme court had before it a question regarding the omission from a ticket of the name of a candidate who subsequently withdrew, there being no nomination to fill the vacancy. The court held in the first paragraph of the syllabus as follows:

> "It is the imperative duty of the secretary of state, as state supervisor of elections, to send to the deputy supervisors the form of ballot to be used at an approaching election immediately upon the expiration of the time allowed for correcting certificates of nomination."

And further held that since the withdrawal of the candidate had not been filed prior to the time when, in the performance of his duties, the secretary of state would have sent out the form of ballot, such withdrawal was too late and that the name should appear upon the ballot.

At p. 391 the court says:

> "All the supervisors are charged with important and clearly defined duties with respect to the filling of vacancies. It is not their duty to aid in the creation of vacancies that are not to be filled."

So in the instant case, as far as the ballot is concerned, which is to be delivered to the elector, a withdrawal, after the ballot has been prepared by the supervisors of elections, is wholly unavailing. It is the same as if no withdrawal had been filed at all. Withdrawals to be effectual must certainly be prior to the time of the printing of the ballots or prior to the time within which, under the law, the supervisors of elections should have printed the ballots.

Under the so-called absent voters' law, section 5078-1 et seq. G. C. (107 O. L. 52), an elector who finds that he will be unavoidably absent from his home precinct on election day may, by taking the proper steps, obtain a ballot and cast same.

Section 5078-3 G. C. (107 O. L. 54) provides that at any time not more than thirty days nor less than three days prior to the day of election, the elector

who has made application for and received the absent voter's supplies therein provided for, may appear before the proper officer and mark and seal his ballot and have same returned to the deputy supervisors of elections of his home county for proper casting on election day. This presupposes that at sometime not later than thirty days before the election the deputy supervisors of elections shall have had the ballots printed; otherwise the applications received from absent voters could not be attended to.

I take it under the law that the city ticket in question had been duly prepared at least thirty days prior to the election and that opportunities have been given to the absent voters of Youngstown to receive the official ballot and to mark and return same, for a long time prior to the filling of the withdrawals of the candidates in question.

Absent voters may have voted for these very candidates who are now seeking to have their names withdrawn. These absent voters' ballots, as well as the ballots cast at the different precincts in your city on election day, must necessarily contain the names that have been printed upon the official ballot, and when the judges come to count the ballots on the closing of the polls, their duty is no different than it is under all other circumstances; that is, the mere fact that knowledge has been brought home to them that some person has withdrawn, gives them no right or authority to allow that knowledge to affect the performance of their official duties in casting and counting the vote.

Section 5083 G. C. provides for the counting of the votes.

Section 5088 G. C. provides that the clerk shall enter in separate columns by tallies under or opposite the names of the persons voted for, all the votes read by the judges, and that after the examination of the ballots has been completed, the number of votes for each person shall be enumerated under the inspection of the judges and set down as provided in the form of the tally sheets.

In your telegram you ask whether or not the "votes cast for those who have withdrawn be counted by the board." Of course the deputy supervisors of elections have nothing to do with the counting of the votes cast at the polls on election day. The returns of such voting come to them under the provisions of section 5093 G. C., and it is from such returns that the board makes the abstract required by section 5094 G. C.

In view of the foregoing it is my opinion that the duties of the election officers require that they count all the votes cast for any person on any ticket on the ballot; that the mere fact that some of the candidates, whose names appear on the ballot, have withdrawn since the printing of the ballots, has no effect whatever; that it is the duty of the election officers to transmit the returns of the election in their respective precincts to the deputy supervisors of elections, without respect to any withdrawals; and further that the deputy supervisors of elections, in their duty of obstracting the returns, can pay no attention to the fact that there is on file in their office withdrawals of certain candidates. If a man is voted for at an election in any manner, receives the highest number of votes for the office, and is duly qualified therefor, he is elected to said office. If he does not want the office, he need not qualify, or if he qualifies, it is in his power to resign.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

758.

BOND SALE—DELIVERY OF BOND TO PURCHASER—BIDS.

Where bonds are sold at public sale in conformity with law, the notice of proposals as published, making no specifications relative to delivery, no expense in connection with such delivery is payable from public funds.

Officers of a taxing district cannot legally insert in the notice for proposals for the public sale of bonds, a clause stating that the bonds will be delivered to the city or office of the purchaser.

Where no specification relative to delivery is embodied in the notice for proposals for the public sale of bonds, and a bidder inserts in his bid, that the bid is based upon the bonds being delivered at his bond house or city, such bid does not comply with the advertisement for proposals and is not a legal bid.

COLUMBUS, OHIO, November 3, 1917.

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

GENTLEMEN:—Under date of October 12, 1917, you submit the following inquiries:

> "Where bonds are sold at public sale in conformity with law, the notice for proposals as published making no specifications whatever relative to delivery, is any expense in connection with such delivery payable from public funds?
>
> May the officers of a taxing district legally insert in the notice for proposals as published in clause stating that the bonds will be delivered to the purchaser?
>
> Where no specification relative to delivery is embodied in the notice for proposals as published, and a bidder inserts in his bid that the bid is based upon the bonds being delivered at his bond house or city, can such bid in this form be legally accepted by the officers of a taxing district?
>
> If your answer to question 3 be in the affirmative, what officer, or officers, are entitled to draw from the public funds the expense of such delivery?
>
> If your answer be that expenses incurred in delivery of bonds to the purchaser are legally payable from public funds, in view of the statutory requirements that the proceeds of bond sale can only be used for the purpose for which such bonds are issued, from what funds could such expenses of delivery be legally paid?"

Your question covering all bonds issued by any political subdivision will be answered, however, in reference to sales made under authority of sections 2294 and 3924 General Code. Section 2294 General Code reads as follows:

> "All bonds issued by boards of county commissioners, boards of education, township trustees, or commissioners of free turnpikes, shall be sold to the highest bidder after being advertised once a week for three consecutive weeks and on the same day of the week, in a newspaper having general circulation in the county where the bonds are issued, and, if the amount of bonds to be sold exceeds twenty thousand dollars, like publications shall be made in an additional newspaper hav-

ing general circulation in the state. The advertisement shall state the total amount and denomination of bonds to be sold, how long they are to run, the rate of interest to be paid thereon, whether annually or semi-annually, the law or section of law authorizing the issue, the day, hour and place in the county where they are to be sold."

Section 2295 General Code provides:

"None of such bonds shall be sold for less than the face thereof with any interest that may have accrued thereon, and the privilege shall be reserved of rejection of any or all bids. When such bonds have been once advertised and offered at public sale, as provided by law, and they, or any part thereof, remain unsold, those unsold may be sold at private sale at not less than their par value and accrued interest. All moneys from the principal on the sale of such bonds shall be credited to the fund on account of which the bonds are issued and sold, and all moneys from premiums and accrued interest on the sale of such bonds shall be credited to the sinking fund from which said bonds are to be redeemed."

Section 3924 General Code provides as follows:

"Sales of bonds, other than to the trustees of the sinking fund of the city or to the board of commissioners of the sinking fund of the city school district as herein authorized by any municipal corporation, shall be to the highest and best bidder, after publishing notice thereof for four consecutive weeks in two newspapers printed and of general circulation in the county where such municipal corporation is situated, setting forth the nature, amount, rate of interest, and length of time the bonds have to run, with the time and place of sale. Additional notice may be published outside of such county by order of the council, but when such bonds have been once so advertised and offered for public sale, and they, or any part thereof, remain unsold, those unsold may be sold at private sale at not less than their par value, under the directions of the mayor and the officers and agents of the corporation by whom such bonds have been, or may be, prepared, advertised and offered at public sale."

Section 3926 General Code, reads as follows:

"Municipal corporations may issue bonds and other obligations in such denominations as the council may determine and sell them at popular subscription at a price of not less than par. Such bonds may be issued as registered or coupon bonds, or payable to bearer only, and provision may be made for the redemption, retirement or reissue of them. All such bonds shall be first offered the sinking fund trustees as is provided in the preceding sections, and shall be advertised and sold as provided in such sections, setting forth the amount of bonds to be sold and the denomination in which they will be issued, with an invitation for tenders for all or part of such issue. Such advertisement shall state the time and place when tenders will be opened and the award made. All tenders shall be in sealed envelope and shall not be opened until the day and hour specified in the advertisement. At the time so specified the tenders shall be opened."

The foregoing sections provide the manner in which sales of bonds by municipal corporations and by county commissioners and other political divisions shall be made. They also provide for the advertisement of such sale and such advertisements are to state the time and place of sale.

There are no provisions in these sections, which would authorize the delivery of these bonds at any place other than in the political subdivision making sale thereof.

Attention is called to the provisions of section 1465-58 General Code, in reference to the offering of bonds to the industrial commission of Ohio. There is specific provision contained in this section which authorizes the delivery of bonds to the state treasury. This section reads as follows:

> "The state liability board of awards shall have the power to invest any of the surplus or reserve belonging to the state insurance fund in bonds of the United States, the state of Ohio, or of any county, city, village or school district of the state of Ohio, at current market prices for such bonds; provided that such purchase be authorized by a resolution adopted by the board and approved by the governor; and it shall be the duty of the boards or officers of the several taxing districts of the state in the issuance and sale of bonds of their respective taxing districts, to offer in writing to the state liability board of awards, prior to advertising the same for sale, all such issues as may not have been taken by the trustees of the sinking fund of the taxing district so issuing such bonds; and said board shall, within ten days after the receipt of such written offer either accept the same and purchase such bonds or any portion thereof at par value and accrued interest, or reject such offer in writing; and all such bonds so purchased forthwith shall be placed in the hands of the treasurer of state, who is hereby designated as custodian thereof, and it shall be his duty to collect the interest thereon as the same becomes due and payable, and also the principal thereof, and to pay the same, when so collected, into the state insurance fund. The treasurer of state shall honor and pay all vouchers drawn on the state insurance fund for the payment of such bonds when signed by any two members of the board, upon delivery of said bonds to him when there is attached to such voucher a certified copy of such resolution of the board authorizing the purchase of such bonds; and the board may sell any of said bonds upon like resolution, and the proceeds thereof shall be paid by the purchaser to the treasurer of state upon delivery to him of said bonds by the treasurer."

There is no other authority of statutes for any officer to make delivery of bonds at any place outside of the political district of which he is an officer.

In order for such officer to make delivery in any other place, specific authority of statute would be required. As there is none, such delivery could not be legally made. The statutes contemplate that delivery shall be made at the offices of the officer or boards making the sales of bonds. This places all bidders upon an equal footing.

Answering your questions specifically:

1. Where bonds are sold at public sale in conformity with law, the notice of proposals as published, making no specifications relative to delivery, no expense in connection with such delivery is payable from public funds.

2. Officers of a taxing district cannot legally insert in the notice for pro-

posals for the public sale of bonds, a clause stating that the bonds will be delivered to the city or office of the purchaser.

3. When no specification relative to delivery is embodied in the notice for proposals for the public sale of bonds and a bidder inserts in his bid, that the bid is based upon the bonds being delivered at his bond house or city, such bid does not comply with the advertisement for proposals and is not a legal bid.

This disposes of your fourth and fifth questions and they need not be answered.

We understand that there has been a general practice of delivering these bonds to the buyers at the expense of the political subdivision, and we recommend that no finding be made as to past transactions.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

759.

APPROVAL—TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE BY WELLINGTON VILLAGE SCHOOL DISTRICT, LORAIN COUNTY.

COLUMBUS, OHIO, November 3, 1917.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—IN RE Bonds of Wellington village school district, Lorain county, Ohio, in the sum of $8,500.00, for improving the school building within said school district and *providing sanitary facilities therefor.*

I have carefully examined the transcript of the proceedings of the board of education and other officers of Wellington village school district relating to the above bond issue, and find said proceedings to be in conformity to the provisions of the General Code relative to bond issues of this kind.

I am, therefore, of the opinion that bonds properly prepared according to the bond form submitted will, when signed by the proper officers, constitute valid and binding obligations of said school district.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

760.

APPROVAL—LEASE OF CANAL LAND TO FREDERICK A. STACEY—CHILLICOTHE, OHIO.

COLUMBUS, OHIO, November 5, 1917.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your communication of October 31, 1917, in which you enclose lease, in triplicate, of lands which are a part of the abandoned canal lands of the state, to Frederick A. Stacey of Chillicothe, Ohio.

I have carefully examined said lease and find the same correct in form and legal. I have therefore endorsed my approval thereon and am forwarding it to the Governor for his consideration.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

761.

TRANSFER OF TERRITORY—SECTION 4696 G. C. RELATIVE TO FILING PETITION FOR TRANSFER OF TERRITORY DOES NOT APPLY—WHEN TRANSFER IS MADE FROM ONE DISTRICT TO ANOTHER WITHIN COUNTY SCHOOL DISTRICT.

The provisions of section 4696, relative to the filing of a petition for transfer of territory from one county school district to another, or from one county school district to an exempted village school district, do not apply when territory is transferred from one district to another within the county school district.

COLUMBUS, OHIO, November 5, 1917.

HON. S. L. GREGORY, *Prosecuting Attorney, Wilmington, Ohio.*

DEAR SIR:— In your inquiry for my opinion you say:

> "'Garrison Corner' district, which joins Blanchester village school district on the south has petitioned the county board of education of Clinton county to transfer their district to Blanchester for school purposes, 26 out of a possible 30 voters signing the petition. Both districts are in Marion township, Clinton county, Ohio, and are contiguous. Blanchester village school district is under the supervision of the county superintendent but has its own individual superintendent and is not under the supervision of a district superintendent.
>
> "Now will section 4696, Laws of Ohio, page 397, vol. 105-106, apply where it says 'If 75 per cent of the qualified voters or electors sign the petition the county board must transfer?'"

When you say that "both districts are in Marion township, Clinton county, Ohio," I am taking it that you mean both of said districts, that is, the Garrison

Corner district and the Blanchester village district, are in Clinton county school district.

Section 4696 G. C. reads:

> "A county board of education may transfer a part or all of a school district of the county school district to an adjoining exempted village school district or city school district, or to another county school district, provided at least fifty per centum of the electors of the territory to be transferred petition for such transfer. Provided, however, that if at least seventy-five per cent. of the electors of the territory petition for such transfer the county board of education shall make such transfer. No such transfer shall be in effect until the county board of education and the board of education to which the territory is to be transferred each pass resolutions by a majority vote of the full membership of each board and until an equitable division of the funds or indebtedness be decided upon by the boards of education acting in the transfer; also a map shall be filed with the auditor or auditors of the county or counties affected by such transfer."

That is to say, the county board of education of Clinton county may transfer a part or all of a school district of said county school district to an *exempted village school district* or to a city district or another county school district.

An exempted village school district is defined by section 4688 G. C., which reads:

> "The board of education of any village school district containing a village which according to the last federal census had a population of three thousand or more, may decide by a majority vote of the full membership thereof not to become a part of the county school district. Such village district by notifying the county board of education of such decision before the third Saturday of July, 1914, shall be exempt from the supervision of the board."

So that, an exempted village district is one which is not under county or district supervision, but in your case you say the district has county supervision, that is, it is under the direct supervision of the county superintendent, and if such be the case said district would not be an exempted village district but would be a separate supervision district, which class of districts is defined by section 4740 G. C., which reads:

> "Any village or wholly centralized rural school district or union of school districts for high school purposes which maintains a first grade high school and which employs a superintendent shall upon application to the county board of education before June 1st of any year be continued as a separate district under the direct supervision of the county superintendent until the board of education of such district by resolution shall petition to become a part of a supervision district of the county school district. Such superintendents shall perform all the duties prescribed by law for a district superintendent, but shall teach such part of each day as the board of education of the district or districts may direct."

The district, then, being a separate supervision district, and being in the same county school district in which the contiguous district lies, transfer,

if any be made, would not be made under the provisions of General Code section 4696, but under the provisions of section 4692, or, 4736 in case a new district was formed. That the provisions of section 4696 do not apply to the transfer of territory from one school district to another in the same county school district is settled by the case of Board of Education v. DeTray, 95 O. S. In that case territory was transferred from one county school district to another and a majority of the residents of the territory so transferred filed a remonstrance within thirty days seeking to prevent such transfer from becoming effective, and while it was admitted that the transfer was made under and by authority of the provisions of section 4696, yet it was contended that because sections 4696, 4692 and 4736 were all enacted in the same bill, the provisions with reference to circumstances which were contained in section 4692 and 4736 should also apply to section 4696.

Mathias, J., in delivering the opinion of the court, used the following language:

> "The action of the boards of education of the two counties is authorized by section 4696 General Code, which provides that a part or all of a school district of the county school district may be transferred to an adjoining exempted village school district or city school district, or to another county school district, provided at least fifty per centum of the electors of the territory to be transferred petition therefor, and that if at least seventy-five per cent of the electors petition therefor the county board of education shall make such transfer. * * * Under section 4692 the county board may transfer territory from one district to another within the county without petition, but a majority of the electors, by filing a remonstrance, within thirty days, may avoid or veto the action of the board of education; whereas, on the other hand, under section 4696, territory cannot be transferred from one county school district to a district of another county until at least fifty per cent of the electors residing in the territory proposed to be transferred seeks the same by petition.
>
> A county board of education may transfer territory to another county district upon the petition of fifty per cent of the qualified electors of the territory to be so transferred, and must make such transfer upon the petition of seventy-five per cent of such electors. If the provision of section 4692, with reference to remonstrances, applied to proceedings under section 4696, then it would be possible for a bare majority of the electors to recall the action of the board of education initiated by the petition of fifty per cent of the electors of such territory; and such remonstrance would have a like effect even if the proceedings to transfer such territory had been initiated by at least seventy-five per cent of the electors of the territory, and the board of education had acted pursuant to the mandatory provisions of section 4696.
>
> It is therefore quite apparent that although these two sections of the General Code were enacted at the same time and as a part of the same general legislation, the provision for a remonstrance has to do only with the proceeding provided for in section 4692, and has no application whatever to a proceeding pursuant to provisions of section 4696."

If, then, the provisions for a remonstrance which are contained in section 4692 cannot apply, when territory is transferred from one county school dis-

trict to another, or from one county school district to an exempted village district, it must be equally clear that the provisions of section 4696 cannot apply to a transfer of territory which must be made under section 4692. That is to say, territory is only transferred upon a petition of fifty per cent of the electors or upon seventy-five per cent, as the case may be, when such territory is from one county school district to another, or from one county school district to an exempted village school district, or to a city district, and said provisions do not apply where the territory is transferred from one district to another in the same county school district.

Answering your question specifically, then, I advise you that the provisions of section 4696 do not apply to the transfer of territory where both districts are in Marion township, Clinton county school district.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

762.

CRIMINAL DOCKET—MAYOR OR POLICE JUDGE HAS NO AUTHORITY UNDER SECTION 1742 TO RETAIN PART OF FINES COLLECTED TO PAY FOR SAME.

Neither a mayor nor a police judge has authority, under section 1742 *or any other section of the General Code, to retain a part of the fines or penalties collected by him to pay for criminal dockets used in the performance of his duties.*

COLUMBUS, OHIO, November 5, 1917.

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

GENTLEMEN:—Your letter of September 28, 1917 received, in which you ask for the following information:

> "Section 1742 G. C. clearly provides how a justice of the peace may be provided with dockets for use in his court.
>
> Can a mayor of a municipality, which contains a mayor's court, or a judge of a police court, secure their criminal dockets in like manner?"

The section to which you refer in your communication provides in part as follows:

> "Sec. 1742. A justice of the peace may retain out of fines or other moneys belonging to the county coming into his hands in criminal proceedings, the amount paid for a criminal docket, * * * . A justice of the peace paying out money for such purpose shall file with the county auditor, at the expiration of his term of office, a sworn itemized statement thereof. In making the annual statement to the auditor as required by law, a justice of the peace, having made such expenditures or having such moneys in his hands contemplated for such purposes, shall include therein the moneys so paid or held by him."

Your question is as to whether a mayor of a municipality or a police judge would be warranted in retaining money out of fines and penalties received by him, sufficient to enable him to purchase criminal dockets, under this same section.

In the first place it will be noted that this section is specific in limiting its provisions to a justice of the peace. Again, this said section is found in the chapter which relates entirely to justices of the peace, this chapter 11 being headed "Justices of the Peace." So there would be nothing in this section or in its context which would seem to warrant the conclusion that the provisions of the same should be made to apply to a mayor or a police judge.

Further, in considering the provisions relative to a mayor of a municipality and a police judge, I find none similar to these set out in said section 1742. Not only is there nothing similar to these provisions, but on the other hand the provisions in reference to fines and penalties, as to mayors and police judges, seem to indicate that they are given no such authority as that found in section 1742.

Section 4270 G. C. provides:

> "*All* fines and forfeitures collected by the mayor, or which in any manner comes into his hands, and all moneys received by him in his official capacity, other than his fees of office, shall be by him paid into the treasury of the corporation weekly * * * . *All* fines, penalties, and forfeitures collected by him in state cases shall be paid over to the county treasurer monthly."

This would seem to clearly indicate that there was no intention on the part of the legislature that a mayor should retain any of the fines and penalties received by him. It is different with a justice of the peace. Not only do we find the provisions as set forth in said section 1742, but also in section 13429G. C. we find the following:

> "Fines collected by a justice of the peace shall be paid into the general fund of the county where the offense was committed within thirty days after collection *unless otherwise provided by law.*"

The provisions of this section fit into those of section 1742, to the effect that there are cases in which a justice of the peace is not required to pay the fines collected by him into the treasury of the county. However, there is no such provision as this in reference to mayors.

When we come to the matter of police judges, we find the following set out in section 4599 G. C.: That the clerk of the police court shall make a report each month, under oath, to the city auditor and county auditor, of all fines paid in during the preceeding month in city cases and state cases respectively. The section then provides:

> "He shall immediately pay into the city and county treasuries, respectively, the amount then collected, or which may have come into his hands, from all sources, during the preceeding month."

There is nothing in this or any other section of the General Code, relative to police judges, to indicate that the legislature intended that they should retain any part of the fines collected by them.

Hence, answering your question specifically, it is my opinion that neither

a mayor nor a police judge would be warranted, under section 1742 or any other section of the General Code, in retaining a part of the fines and penalties collected by him, to pay for the crimminal dockets required by him in the performance of his duties.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

763.

APPROVAL—ARTICLES OF INCORPORATION OF THE BUCKEYE MUTUAL ACCIDENT ASSOCIATION.

COLUMBUS, OHIO, November 5, 1917.

HON. WILLIAM D. FULTON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I am herewith returning with my approval articles of incorporation of the Buckeye Mutual Accident Association, finding the same to be in accordance with the provisions of sections 9445, et seq., of the General Code, and not in conflict with the provisions of the constitution and laws of the United States or of the state of Ohio.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

764.

RESIDENCE—HOW DETERMINED—PROBATE COURT—NO JURISDICTION TO HOLD LUNACY INQUEST ON NON-RESIDENT OF COUNTY.

Residence is a question of mixed law and fact and change of residence is a question of intention and fact, or facts in the light of intention, and it may continue in a certain territory or jurisdiction, after actual connection with any particular spot therein has ceased.

Under the facts set out in this inquiry S. has not gained a residence in Logan county and the probate court of that county has no jurisdiction to hold an inquest of lunacy on him.

COLUMBUS, OHIO, November 7, 1917.

HON. EARNEST TOMPSON, *Probate Judge, Bellefontaine, Ohio.*

DEAR SIR:—Under date of August 21st, you make the following request for an opinion:

> "S. lived in Wayne county, Ohio, for six or eight years. His family physician examined him during a spell of sickness and discovered and so stated that he should be sent to a hospital for the insane. This occurred last of August, 1916. Instead of filing affidavlit in probate court, his father put him in a private sanatorium for ten days, then took him to the father's home in Hardin coun-

ty, Ohio. The wife and children of S. came to Logan county the last of August, 1916, and started the children to school. S. came to Logan county to his family September, 1916. In October, S. returned to Wayne county, Ohio, where he roomed and boarded while working. He worked in factory in Wayne county during the winter of 1916-17, going from there to his father in Hardin county in June, 1917, and coming to his wife and family three weeks later where he has been since.

August 2nd, 1917, the wife filed with the probatte court of Wayne county an affidavit in regular form charging lunacy against S. The honorable probate court held that S. was not a resident of Wayne county. Thereupon, the wife made affidavit in lunacy against S. in the probate court of Logan county, and on August 8th the Logan county probate court found S. insane and made out the papers and application.

Twelve months will not have expired since S. left Wayne county the first time until the last of August, 1917. S. has been in Logan county not more than two months; his family will not have been here twelve months until the last of August.

General Code, sec. 1819 says if the judge finds that the person whose commitment or admission is 'in doubt' etc. he shall notify without delay the Ohio Board of Administration giving his reasons for requesting commitment or admission.

Please give me your opinion as to whether or not this is a proper case to be taken up with the Ohio Board of Administration, and said board be requested to say where S. should be sent.

Is S. a legal resident of Wayne or Logan county for the purposes of an inquest, under the above statement?"

The answer to your last question will be confined to a consideration of whether or not S. is a legal resident of Logan county. This department has no authority to volunteeer opinions intended to govern the probate judge of Wayne county in the absence of any request coming from that county, and while the assumption in your question that S. is a legal resident of one or the other of the counties must in the nature of the case be correct, and while a decision that he is not such resident of your county leaves this unfortunate man and his wife in the situation of having no place to go and of being denied the benefit of the humane provisions for those in his condition, yet the answer to your question must be confined to what may be given within the authority of this department.

It is not necessary to consider the question raised by you as to whether a legal settlement under the poor laws is necessary to give jurisdiction to the probate court to hold an inquest of lunacy. According to your statement of fact S. has not been in Logan county for one year, so that if the statutes did require such legal settlement he has not gained it.

Section 7437 G. C.

If the legal residence required by law be not required to amount to the legal settlement required by the above section, but means residence generally, the subject becomes one which has received a great deal of attention from the courts at all times.

In considering this question it is necessary to observe that it is a mixed question of law and fact, and it is also to be determined upon a mixed ques-

tion consisting both of the intention of S. as to his residence, and the facts above stated. Or, to state it in another form, a consideration of the above facts in the light of the intention of S. It is rendered more difficult by the question of the mental condition of S. as to whether he was capable of forming or entertaining an intention upon the subject of his residence. This question we will first consider.

The statement of fact nowhere shows him absolutely to be insane at any time. Every fact contained in the statement is consistant with his sanity. The fact that a doctor called him "crazy" at one time, and that his father at another time put him in a private sanatorium for a few days, and that his wife had filed two applications charging him with lunacy, and that his family and the family doctor have generally looked upon him as insane for a year or so, only give grounds for the suspicion of his insanity. In passing an opinion upon this fact, therefore, it is necessary to consider him at all times sane and perfectly capable of entertaining intentions as to his place of residence.

We find him a resident of Wayne county and that he made certain moves back and forth and did certain acts, all having a bearing upon the question of fact and his intention of moving from the county.

The question of residence seems to be settled in Ohio, in conformity with the general doctrine elsewhere, to be commonly but not universally equivalent to that of domicile. This word is defined in the Century dictionary as follows:

> "1. In general, a place of residence of a person or a family; in a narrow sense, the place where one lives; a place of habitual abode, in contradistinction to a place of temporary sojourn.
>
> 2. In law, the place where a person has his home, or his principal home, or where he has his family residence and personal place of business; that residence from which there is no present intention to remove, or to which there is a general intention to return."

It has been generally held by our supreme court that the terms "resident" and "residence" referred to this thing known as "domicile."

Henderson v. Horner, 16 Ohio Reports, 145.

This was a case involving a conflict of laws as to whether a contract is governed by the laws of the state in which it was made or where it was to be enforced, and it was held to be controlled by the subject of residence. Brichard, C. J., at page 148, says:

> "In general, the term 'residence' implies the place of domicile, the place where a person has his home, and where he has gained a residence. Sometimes it implies the place where a man temporarily resides, where he transacts business for a brief period. There is an obvious distinction between 'a person resident at the time,' and 'a person having gained a residence, or a settlement.' And in gathering the meaning of an act of legislation, the whole act must be taken together. The object to be obtained must be considered, and if necessary to give force to it according to the true spirit and intention of the law giver, words having a general and a more limited signification may be enlarged or limited so as to meet the general object of the law. We think the legislature intended to provide for a case like this, and that Forsyth, while in Albany, was a person 'resident without this state

> at the time such contract was made,' in the sense and within the meaning of those words as used in the statute, and as bearing upon the contract then made and there to be performed. True, he had a legal residence in Ohio at the same time. But it is not true that he was then actually resident in this state. He was non-resident, for the time, at the place of his legal residence."

Of the two kinds of residence mentioned above, the real residence, in the present case, governs the permanent residence, so that if S. left Wayne county as the saying is *animus revertendi*, or if upon going to Harding county or to Logan county he had no intention of taking up a residence there he might still retain such residence in Wayne county. As to what his actual intention was there is no statement. His wife evidently understood the intention to be to retain the family residence in Wayne county as she resorted thereto in her attempt to secure the holding of an inquest. None of the acts stated indicate an intention to remove to Logan county or to Hardin county, but rather the contrary. As to his going to a private sanatorium, in whatever county that was, that has no effect upon the question as the statement is "his father put him in a private sanatorium for ten days, then took him to his father's home in Hardin county." In respect to these things S. had no intention, as the statement shows that he was not acting voluntarily, but was under the control of his father. When the wife and children came to Logan county, your verbal statement is that they came to her father and that they did not keep house, and that their household goods were stored. Whether this storage was in Logan or Wayne county is not stated and this, though a very slight circumstance, might have some remote bearing as indicating to some slight extent in which county they proposed to reside. However, there is nothing in the circumstance that indicates anything more than a prolonged visit to the father-in-law rendered necessary probably by the circumstances of the family at the time. Some significance might be attached to the fact that the children went to school in Logan county, as some strictness is now used in reference to the admission of children to schools other than those where they have had their residence; they ought to go to school, however, and where a visit is prolonged throughout the substantial part of a term of the school, children should be admitted to the school where they are located, either paying or not paying tuition.

For the purpose of voting, a man's residence is where his wife lives. S. did not vote, so far as we know; neither are we helped out by the consideration of this fact, as the wife's residence is dependent upon the circumstances and considerations above mentioned, and not controlled by the fact that for the time being she was living off the charity of her father at his house. The return of S. to Wayne county without his family would have no perceptible effect on determining his residence as he might have gone any place where he was acquainted or where he could obtain employment and remain there away from his family without acquiring a residence. It has no other significance than indicating to some extent that he still considered he had a connection with Wayne county, and his returning to Hardin county and Logan county could have no further effect than his ordinary going to those places, unless with an actual intention to acquire a new residence or unless under circumstances from which such intention would necessarily be implied. In such cases the presumption of regularity and continuance is entitled to weight. If the statement be made that a man is a resident of Wayne county in August, 1916, it affords a presumption that that is his present residence, which pre-

sumption it would be necessary to remove at least by some evidence. One important circumstance, however, should not be overlooked—he has not a definite habitation in Wayne county, no particular house or spot to which he can point as his home in that county. This, however, while one potent fact in determining residence is not entirely conclusive, as there are examples where for the purpose of voting persons are considered temporarily absent from their place of residence for years at a time, during which period they have no definite habitation in the precinct in which they vote, and are to all intents and purposes living elsewhere, but still maintain their residence, founded upon their temporary removal with the intention to return.

It may be that the question of intention extends further in reference to residence for voting purposes than for general purposes, as the practice is to retain such residence by mere intention without actual physical connection with the place, and is also permitted in the same manner to change it and acquire the new residence by such intention, as held by our supreme court in 1878:

> "An inmate of a county infirmary, who has adopted the township in which the infirmary is situated as his place of residence, having no family elsewhere, and who possesses the other qualifications required by law, is entitled to vote in the township in which said infirmary is situated."
>
> *Sturgeon v. Korte*, 34 O. S., 525.

Of course it must always be borne in mind that the elector must vote in the precinct of his residence, and in this case the offering to vote in the precinct in which he has his actual domicile seems to have been considered sufficient to indicate such intention.

Johnson, J., speaking for the supreme court in a somewhat later case, says:

> "What constitutes a person a resident of Ohio, for the purpose of voting, of admission to the public schools and benevolent institutions of the state, for the administration of estates and in other cases, has been a frequent matter for consideration in the courts. There is no substantial difference between the words residence and domicile in regard to these matters, though they are not always synonymous. For business purposes and perhaps for purposes of taxation, a man may have more than one residence, but he can have but one domicile."
>
> *Grant v. Jones*, 39 O. S. 506, 515.

Here, as elsewhere in the law, is recognized some difference between residence and domicile, though they are generally one and the same, but in at least two instances judges of the supreme court of this state have said that a man may have more than one residence, and necessarily may have a residence different from his domicile. A domicile necessarily is an actual residence, as the name implies a *domus* or house, and yet in practice men have or rather they retain that mysterious and intangible thing "residence" other than a domicile. The distinction between "residence" and "domicile" is very fully set out in III Bouvier's Law Dictionary, page 2920, and the subject is discussed by the supreme court of Massachusetts in an opinion as follows:

"* * * 'citizenship,' 'habitancy' and 'residence' are severally words which may in the particular case mean precisely the same as 'domicil,' but very frequently they may have other and inconsistent meanings; and while in one use of language the expression a change of domicil * * * of residence, are necessarily identical or synonymous, in a different use of language they import different ideas * * * .

We cannot construe the statute to mean anything else than 'being domiciled in.' A man need not be a resident any where. He must have a domicile. He cannot abandon, surrender or lose his his domicil, until another is acquired * * * . It surely was not the purpose of the legislature to allow a man to abandon his home, * * * with no intention of making any place a place of residence or home, and thus avoid taxation. Such a construction of the law would create at once a large migratory population * * * .

We think, however, that the sounder and wiser rule is to make taxation depend upon domicil. Perhaps the most important reason for this rule is , that it makes the standard certain. Another reason is, that it is according to the general views and traditions of our people."

This is quoted by Honorable U. G. Denman, Attorney-General of Ohio, in an opinion upon the subject of residence for taxing purposes, found in report of the attorney-general, 1910-11, page 808, in which he held that one might retain his domicile in a city where he had his permanent home, but had abandoned it and retained no settled connection with any particular spot in the city. By the opinion such person was required to pay his taxes in his last domicile, which seemed to have gone largely upon the ground that he had not gained another, and which therefore is particularly applicable. This opinion is quoted with approval by Honorable Edward C. Turner, attorney-general, in an opinion by him, found in Vol.I, of the Opinions of 1915, at page 121.

From all these considerations the best opinion I am able to give you is that, upon the facts as stated by you, S. has not acquired a residence in Logan county. It is perfectly apparent, however, from the above discussion that the matter would have to be determined from all the facts, and that there are various other details than those mentioned which should be taken into acount; that it could only be determined by a court fully hearing the evidence and that the decision of the court might depend to some extent upon other details not mentioned in your inquiry. At any rate, it would be upon all the facts developed upon a full hearing.

You further inquire whether it is a proper matter to submit to the decision of the Ohio Board of Administration. The authority of this board upon the subject of residence is found in section 1819 General Code, above quoted, and in section 1820. We have noticed that section 1818 requires the question to be answered:

"When did the person become a resident of this state," and also the further question:

"When did he become a resident of the county?"

Section 1819, however, speaks only of a legal residence in this state, that is to say, if the judge finds that the person has not a legal residence in this state, or his legal residence is in doubt or unknown, the board of administration shall be notified.

Section 1820 provides that:

"The Ohio board of administration by a committee, its secretary, or such agent as it designates, shall investigate the legal residence of such person, and may send for persons and papers and administer oaths or affirmations in conducting such investigation. At any time after investigation is made, and before or after the admission, or commitment to such institution, a non-resident person whose legal residence has been established may be transported thereto at the expense of this state."

These sections were also passed before the law making counties liable, and should be interpreted as they would be without the existence of such liability, and therefore would seem to apply to the question of residence in the state. This application is made more probable by the concluding part of section 1820, which is as follows:

"* * * At any time after investigation is made, and before or after the admission, or commitment to such institution, a non-resident person whose legal residence has been established may be transported thereto at the expense of this state."

It would therefore seem that the board of administration is given authority by this section to make an investigation as to whether the person is entitled at all to enter the institutions, and therefore to investigate only the question of residence in the state, and that the other question is not submitted to them, as between conflicting counties which is to have the expense. That question did not exist at the time of this provision for the decision by the state board, and neither is it likely that a question which is principally one of financial liability would be so committed to a board or taken away from the ordinary tribunals for judicial decision of such questions.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

765.

APPROVAL—CONTRACT BETWEEN BOARD OF TRUSTEES OF OHIO STATE UNIVERSITY AND THE BABCOCK & WILCOX COMPANY.

COLUMBUS, OHIO, November 7, 1917.

HON. CARL E. STEEB, *Sec'y., Board of Trustees, Ohio State University, Columbus, Ohio.*

DEAR SIR:—You have submitted to me a contract entered into on September 12, 1917, between the Board of Trustees of the Ohio State University and The Babcock & Wilcox Company, of Chicago, Illinois, for the construction and completion of one Babcock & Wilcox boiler with soot blower, in the new power house on the Ohio state University Campus, for the sum of $21,241.00, and at the same time you submitted a bond securing said contract.

I have examined the contract and bond and finding the same in compliance with law, have this day approved the same.

The auditor of state having certified that there is available moneys for the payment of the contract price, I have this day filed the contract and bond with the auditor of state.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

766.

STATE EMBALMING BOARD—EXPENSES OF MEMBERS CANNOT BE PAID FOR ATTENDANCE OF MEMBERS AT ANNUAL CONFERENCE—AGE —APPLICANT FOR LICENSE NOT MATERIAL.

1. *No expense of members of the state embalming board may be paid from state funds for attendance of such members at the annual conference of undertakers and embalmers at Jacksonville, Fla. However, application may be made to the emergency board under the provisions of section* 2313-3 *G. C.*

2. *The question of age is not to be considered in the granting of a license by affidavit. A person must have been in the practice of embalming prior to January* 1, 1903, *and must have had at least three years practical experience.*

3. *Age is not a condition precedent for an applicant to matriculate in a school or college or for an apprentice under a licensed embalmer.*

COLUMBUS, OHIO, November 7, 1917.

HON. B. G. JONES, *Secretary-Treasurer, State Board of Embalming Examiners, Columbus, Ohio.*

DEAR SIR:—In your request for my opinion you say:

"I respectfully ask for your opinion upon the following questions:

"1. Has the state board of embalming examiners the authority under the General Code to pay the expenses or part of the same of a member or members of this board who are selected to represent Ohio at the annual conference of undertakers' and embalmers' examining boards, which this year will be held at Jacksonville, Florida.

2. Must an applicant for a license by affidavit be of legal age before he can secure credit for practice prior to 1903 as required under section 1343 G. C.? If not, at what age should we construe this experience from?

3. At what age must the applicant for an embalmer's license be when he begins his apprenticeship under a licensed embalmer, as required under section 1342, or starts his college course as required in same section."

In answer to your first question: General Code section 1339, as amended in 107 O. L., 655, provides that each appointed member of the state board of embalming examiners, except the secretary-treasurer, "shall receive ten dollars per day and their reasonable and necessary traveling expenses *while discharging the actual duties of their office.* The secretary-treasurer shall receive an annual salary which shall be fixed by said board and such necessary expenses *as are incurred in the performance of his duties as secretary treasurer* * * * .

The salaries and expenses incurred by the board and the members thereof, *in the discharge of their duties*, shall be paid by the state auditor on vouchers countersigned by the secretary-treasurer, and the state of Ohio shall not be liable for same or be at any expense in this connection beyond the amount received as fees."

The above provision is the only provision of law which provides for any officer or member of the state board of embalming examiners. It cannot be said that the member or members of the board who would be selected to attend

the annual conference of undertakers' and embalmers' examining boards would be doing so either "while discharging the actual duties of their office," or, if the secretary is selected, "in the performance of the duties as secretary- treasurer." Where no provision of law is made for expenses, none can be contracted and paid.

A leading case in Ohio which stands as authority upon the above proposition is Richardson v. State, ex rel, 66 Ohio State, 108. In that case a county commissioner actually paid railroad fare, livery hire, horse feed and horse shoeing, his board and other expenses of like personal character, but the court held that such expenses were not valid claims against the county and could not be paid from the county funds. On page 113, Williams, C. J., delivering the opinion of the court, uses the following language:

> "It is a fair inference that if it had been intended to reimburse the commissioner for expenditures of this character, the legislature would have expressed that intention in plain terms. It is well settled that the compensation of public officers cannot be enlarged, by implication, beyond the terms of the statute."

It was held by this department in opinion 108, rendered to the bureau of inspection and supervision of public offices, on March 31, 1917, that where no provision is made for the payment of expenses, no payment therefor can be made under our laws.

In opinion No. 651, Annual Report of the Attorney-General, 1913, Vol. 1, page 416, the question was being considered as to whether or not a teacher who has been appointed by a board of education as delegate to the educational congress might legally be paid out of a school treasury. It was held:

> "Such expense may not be paid from the school treasury nor can the expenses of members of the board of education to such convention be paid out of the city fund. The expenses of persons not members of a board of education or teachers, incurred in attending the above named congress, may not be paid from the school fund. Before such expenses can be paid, an appropriation for this purpose must be made by the legislature."

Following the reasoning of said decisions and opinions I must conclude, in answer to your first question, that the state board of embalming examiners has no authority under the General Code to pay the expenses or part of the same of a member or members of said board who may be selected to represent Ohio at the annual conference of undertakers' and embalmers' examiners which will this year be held in Jacksonville, Florida.

However, I wish to call your attention to section 2313-3 G. C. (106 O. L., p. 183), which reads as follows:

> "No * * * board * * * shall attend at state expense any association, conference or convention outside the state unless authorized by the emergency board. Before such allowance may be made, the head of the department shall make application in writing to the emergency board showing necessity for such attendance and the probable cost to the state. If a majority of the members of the emergency board approve the application, such expense shall be paid from the emergency fund."

Coming now to your second question, that is, must an applicant for a license by affidavit be of legal age before he can secure credit for practice prior to 1903, as required under section 1343 G. C., section 1343 G. C. provides in part:

> "This section and the preceding sections shall not * * * apply to any person engaged in the practice of embalming or the preparation of the dead for burial, cremation or transportation prior to January 1, 1903, provided that he or she has at least three years' practical experience, if such person prior to January 1st, 1918, makes application to the state board of embalming examiners for a license * * * and an affidavit certifying that he or she was in such practice before January 1st, 1903, and thereupon the state board of embalming examiners shall issue a license to such applicant * * * ."

You were advised in opinion No. 525, rendered to you on August 12, 1917, that although three years experience is necessary under section 1343 G. C., and it is a condition precedent to the granting of a license to a person who has had such three years' experience, that such person was engaged in the practice prior to January 1, 1903, such experience may have been secured prior to January 1, 1903, or a part before and a part after said date. But it is impossible for me to conceive of a person being engaged in the practice prior to January 1, 1903, and yet be under the age of majority now. There is nothing in our law anywhere which provides at what age a person must have arrived before a license may be issued to such person, except section 1342, which provides:

> "All applications for a license to practice embalming and the preparation of the dead for burial, cremation or transportation in this state, must be made to the state board of embalming examiners in writing and contain the name, age, residence and the person or persons with whom employed, the name of the school attended, together with a certificate from two reputable citizens that the applicant is of legal age and of good moral character, * * * ."

But, as noted above, the provisions of said section shall not apply to a person who is entitled to a license by affidavit. That is to say, if an application is filed under the provisions of section 1343, by which the applicant desires to secure a license under the provisions of said section, the first thing your board must determine is, was such applicant in the practice prior to January 1, 1903, and second, has such applicant three years practical experience. Nothing is said in said section that a person must be of legal age or must have arrived at the age of majority before he begins to secure such experience, and I must therefore advise you that age is not to be considered in the granting of such license by affidavit, as is provided for under section 1343.

Coming now to your third question, viz., at what age must the applicant for an embalmer's license be when he begins his apprenticeship under a licensed embalmer, as required under section 1342, or starts his college course as required in same section. The provision of said section 1342, applicable thereto, was quoted above and provides in substance that the application must be accompanied by a certificate from two reputable citizens that the applicant is of legal age.

"Legal age," as defined by 2 Cyc., p. 51, is:

"The time at which one attains full personal rights and capacities; the time at which a person is enabled to do certain acts which before, through want of years and judgment, he was prohibited from doing."

Legal age in Ohio, with reference to contracts, is the age of majority, as defined by section 8023, which reads:

"All male persons of the age of twenty-one years and upward, and all female persons of the age of *eighteen* years and upward, *who are under no legal disability, shall be capable of contracting respecting goods, chattels, lands, tenements, and any other matter or thing which may be the legitimate subject of a contract, and, to all intents and purposes, be of full age.*"

I shall therefore take it that the legislature meant that the term "legal age," as used in said phrase in section 1342, above quoted, means the age of majority as defined by the above quoted section 8023. But there is nothing in said section which provides that a person must be of any given age at the time of matriculation in a school or college or at the time he begins his apprenticeship under a person who is a legally licensed embalmer, and I must therefore conclude that age is not a requirement which may be demanded as a condition for such matriculation or apprenticeship. All that is required is that such person must be of legal age before the application for examination provided for in said section is made.

I therefore advise you, in answer to your third question that legal age is not a condition for an applicant to matriculate in a school or college or as an apprentice under a licensed embalmer, as required by the provisions of section 1342 G. C.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

767.

"WHOLLY CENTRALIZED"—DEFINED—DISTRICTS NOT CENTRALIZED—NOT ENTITLED TO SEPARATE SUPERVISION UNDER 4740 G. C.—HOW BOARD OF EDUCATION MAY CENTRALIZE SCHOOLS AFTER PROPOSITION CARRIED AT ELECTION.

1. *The words "wholly centralized" mean that the district in which the schools are located has voted on centralization, as provided by section 4726 G. C.*

2. *Any districts which have not so voted to centralize, as provided by section 4726 G. C., are not entitled to have separate supervision, as provided by section 4740 G. C.*

3. *Where centralization of the schools has been carried at an election called for that purpose, the board of education may centralize the schools in more than one place. It is not necessary that all the schools be centralized "under one roof."*

COLUMBUS, OHIO, November 7, 1917.

HON. EARL K. SOLETHER, *Prosecuting Attorney, Bowling Green, Ohio.*

DEAR SIR:—Your request for my opinion reads as follows:

"The county board wishes to know what is meant by 'wholly centralized.' Does this mean that rural districts, partly centralized, that have been exempted for years, must give up superintendents and go under district supervision? Do you consider this section constitutional, since, in some cases, it will permit a village school with six teachers to exempt from district supervision, while it requires some partially centralized district with twelve teachers under the same roof to go under district supervision?

We have in this county a number of townships which have voted to centralize, who are maintaining a centralized school in their township, and in addition to that they also maintain one or more schools around the township for the instruction of the elementary pupils. In other words, do the words 'centralized schools' mean that all of the schools of the township must be under one roof?"

The section of the General Code which contains the words "wholly centralized" is No. 4740 and as amended is found in 107 O. L., 622. Said section reads as follows:

"Any village or wholly centralized rural school district or union of school districts for high school purposes which maintains a first grade high school and which employs a superintendent shall upon application to the county board of education before June 1st of any year be continued as a separate district under the direct supervision of the county superintendent until the board of education of such district by resolution shall petition to become a part of a supervision district of the county school district. Such superintendents shall perform all the duties prescribed by law for a district superintendent, but shall teach such part of each day as the board of education of the district or districts may direct."

Schools are centralized under and by virtue of section 4726 G. C., which reads as follows:

"A rural board of education may submit the question of centralization, and, upon the petition of not less than one-fourth of the qualified electors of such rural district, or upon the order of the county board of education, must submit such question to the vote of the qualified electors of such rural district at a general election or a special election called for that purpose. If more votes are cast in favor of centralization than against it, at such election, such rural board of education shall proceed at once to the centralization of the schools of the rural district, and, if necessary, purchase a site or sites and erect a suitable building or buildings thereon. If, at such election, more votes are cast against the proposition of centralization than for it, the question shall not again be submitted to the electors of such rural district for a period of two years, except upon the petition of at least forty per cent. of the electors of such district."

This is the only section of the General Code which provides the method by which centralization can be had. It has frequently been considered that when under and by virtue of the provisions of section 7730 certain schools were suspended and the pupils who were residents of the district in which the

suspended school was located were assigned to another school or schools, that that act was in effect a centralization of schools; but since the decision of our supreme court in State ex rel, etc., v. Board of Education, 95 O. S., 181, that theory of centralization must be disregarded. Johnson, J., in delivering the opinion of the court, page 183, uses the following language:

> "It will be observed that the only provisions for centralization are found in section 4726, in which the method by which centralization can be had is specifically described. By those provisions the matter of centralization is required to be left to a vote of the people.
>
> By the provisions of section 7730 the board of education of any rural or village district may suspend any or all schools in the district, and in a village district may provide, and in rural districts shall provide, for the conveyance of pupils attending such schools, to a public school in the rural or village district, or to a public school in another district.
>
> It will be observed that in this section there is no reference to centralization, nor to the abolition entirely of the suspended district. The use of the term 'suspend' necessarily implies the possibility of a revivor or re-establishment, and the terms of the proviso indicate, of course, that the legislature contemplated the reopening of any 'suspended school'."

So that, whatever may have been considered as a centralization of schools, whether by vote of the electors or by action of the board, must, since the above holding of our supreme court, be confined exclusively to a vote of the electors, as provided by section 4726 G. C., and it would be impossible, since no provision is made for a part of a district to be centralized, to have anything except a wholly centralized district where centralization is had. This, however, does not mean that the schools of the district must all be centralized "under one roof."

In State v. Chester Township Board of Education, 15 Ohio Cir. Dec., 424, an action was brought against the board of education to compel it to purchase a site and erect a school building thereon after a vote had been had on centralization. The court held:

> "We are of the opinion, therefore, that the action of the present board, in proceeding to centralize the schools in *two* places within the township, whether wise or unwise, if done in good faith, cannot be prevented by mandamus."

So that, if as in your case the board of education determined that for the advanced pupils there should be one central school and for the elementary pupils there should be a sufficient number of buildings located elsewhere than at the central point, I am of the opinion the same is within the proper discretion of the board of education and still comes within the rule of centralization. If, however, the schools of the district have not been centralized according to the provisions of section 4726 G. C., then under the provisions of section 4740 such district is not entitled to separate supervision.

Answering your questions I advise you, first, that the words "wholly centralized" mean that the district in which the schools are located has voted on centralization, as provided by section 4726 G. C.; second, any districts which have not so voted to centralize, as provided by section 4726 G. C., are not entitled to have separate supervision, as provided by section 4740 G. C.; and

third, where centralization of the schools has been carried at an election called for that purpose, the board of education may centralize the schools in more than one place. It is not necessary that all the schools be centralized "under one roof."

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

768.

COUNTY COMMISSIONERS—PROVISIONS OF 6907 THAT COMMISSIONERS SHALL GO UPON LINE OF THE PROPOSED IMPROVEMENT WITHIN THIRTY DAYS AFTER THE PETITION IS FILED, MERELY DIRECTORY—ROAD IMPROVEMENT.

The provision in section 6907 G. C. (107 O. L., 95) to the effect that the commissioners shall go upon the line of the proposed improvement within thirty days after the petition is filed praying for the improvement, is merely directory. County commissioners will not lose jurisdiction over the subject matter of the petition even though they do not go upon the line of the improvement until after the time so specified in the statute.

COLUMBUS, OHIO, November 7, 1917.

HON. C. A. STUBBS, *Prosecuting Attorney, Celina, Ohio.*

DEAR SIR:—I have your communication of October 19, 1917, which reads as follows:

> "This is to inquire whether the provision in G. C. 6907 concerning the commissioners going upon the line of the proposed improvement within sixty days after such petition is presented (and as amended in 107 Ohio Laws to thirty days) is mandatory or simply directory.
>
> There are several road petitions filed in the auditor's office of Mercer county upon which the commissioners have as yet taken no action, which have been filed for considerably more than sixty days, some of them as long as a year.
>
> Under G. C. 6907 would the commissioners have the right to go upon the line of these improvements after the sixty-day period has expired?"

Section 6907 G. C., as it stood prior to the taking effect of the White-Mulcahy act, read as follows:

> "Section 6907. When a petition is presented to the board of commissioners of any county asking for the construction, reconstruction or repair of any public road or part thereof, as hereinafter provided for, signed by at least fifty-one per cent. of the land or lot owners, residents of such county, who are to be specially taxed or assessed for said improvement as hereinafter provided, the county commissioners shall go upon the line of said proposed improvement within sixty days after

such petition is presented and, after viewing the proposed improvement, shall determine whether the public convenience and welfare require that such improvement be made."

Said section as it now stands reads in part as follows (107 O. L. 95):

"Sec. 6907. When a petition is presented to the board of commissioners of any county asking for the construction, reconstruction, improvement or repair of any public road or part thereof, as hereinafter provided for, signed by at least fifty-one per cent of the land or lot owners, residents of such county, who are to be specially taxed or assessed for said improvement as hereinafter provided, the county commissioners shall, within thirty days after such petition is presented, go upon the line of said proposed improvement and, after viewing the same, determine whether the public convenience and welfare require that such improvement be made. * * *"

You inquire whether the sixty-day provision of the former act and the thirty-day provision of the act as it now stands are mandatory or merely directory. The former act provided that the county commissioners shall go upon the line of said proposed improvement within sixty days after petition is presented. The new act provides that:

"* * * the county commissioners shall, within thirty days after such petition is presented, go upon the line of said proposed improvement * * *."

The general provision of law applying to this matter may be stated as follows:

"A statute specifying a time within which a public officer is to perform an official act regarding the rights and duties of others is directory merely, unless the nature of the act to be performed, or the phraseology of the statute, or of other statutes relating to the same subject-matter, is such that the designation of time must be considered a limitation upon the power of the officer."

This language is used in Cyc., Vol. 36, page 1160, and the principle therein stated is borne out by the decisions of the courts.

So far as I am able to see, there is nothing in the nature of the act which is to be performed within thirty days, under the law as it now stands, which would seem to indicate that time is of the essence of the act and that if it is not performed within the time specified it cannot be performed thereafter. Neither is there anything in the phraseology of the particular section, nor in the phraseology of the statute of which this section is a part, which would appear to indicate that the time therein set out must be considered as a limitation upon the power of the officer.

In considering this question, I should like to call attention to the fact that there is no provision within this section which fixes a time within which the county commissioners must determine whether the improvement should be made or not; that is, a time within which the petition must either be allowed or disallowed. The sixty and thirty day provisions relate to the time within which the county commissioners must go upon the line of said proposed improvement

to get the information upon which they afterwards may arrive at a correct conclusion or finding as to whether or not the improvement should be made.

Furthermore, this limitation has nothing whatever to do with the filing of the petition; that is, there is no provision that the petitions must be filed within any particular time; but there is a provision that after the petition is filed the county commissioners must go upon the line within thirty days (sixty days under the old law).

The intention of the legislature certainly was not such that in the event the county commissioners should fail to go upon the line within thirty days, the public would lose all its rights under the petition. The petition remains on file. The prayer still stands. It is my opinion that even if the county commissioners do not act within the time prescribed, they do not lose their jurisdiction over the matter involved in the petition.

In James v. West, 67 O. S. 28, the court passed upon a matter which is somewhat similar to the one in question. In the third branch of the syllabus we find the following:

> "The statute which requires courts, referees and special masters to determine and adjudicate all causes within ninety days after final submission, is directory merely, and does not have the effect to oust the jurisdiction."

In the opinion (p. 43) the court quotes the act which read as follows:

> "1. Any cause now pending, or that may hereafter be begun in any court of record in this state, when submitted on motion or demurrer, shall be determined and adjudicated thereon by such court within thirty days after such submission. And any such cause when submitted to the court on proceedings in error, or on final trial on the issues joined, shall be determined and adjudicated within ninety days after such submission.
>
> 2. This act shall apply to all causes sent to a referee or special master, and to all motions affecting the confirmation, modification, or vacation of any report of such reference or master."

Commenting upon the act the court said:

> "This statute is directory merely, and does not have the effect to deprive the court, referee, or special master of jurisdiction. The object of the statute is to secure speedy action by the court, referees, and masters; but to take away jurisdiction would have the opposite effect, and cause intolerable delay."

In Caldwell v. Cleveland, et al., 12 O. N. P. (N. S.) 484, the court held a follows (third branch of syllabus):

> "The provisions of sections 8876 and 8877, requiring the preparation of plans within a limited period after the passage of an ordinance for abolishing dangerous crossings, is directory and not mandatory, and is a provision which may be waived by the parties for the purpose of giving more time for preparing the plans and for other purposes."

In the opinion (p. 496) the court uses the following language:

"It is undoubtedly true that the provisions of the statutes, sections 8876 and 8877, General Code, requiring the preparation of plans within a limited period after the passage of the ordinance, are clearly directory, and are in no sense mandatory, so far as they concern anyone except a railroad company and the municipality as the contracting parties. This provision as to the time of preparing plans is clearly for the purpose of fixing a reasonable time within which plans shall be prepared; and it is undoubtedly a provision which can be waived by the parties for the purpose of extending the time for preparing the plans, or otherwise."

Many cases in other states might be cited, but I will quote from but a few.

In Blumm v. Commonwealth, 7 Bush 320, the court was considering a law in which the following provision was found:

"If the order be made in vacation for a special term, notice thereof shall be posted up at the court house door *ten days* before its commencement."

The court held that the prescribed notice of ten days is merely directory and that an eight days' notice was sufficient. In the opinion the court say:

"Did the legislature intend that ten days' notice should be indispensable to the jurisdiction, or in other words a fundamental condition of the validity of the proceedings of the called term, or intend only that the requisition of the notice should be merely directory or precautionary? It seems to us that the latter was the purpose."

Other cases to the same point are:

The People v. Allen, 6 Wend. 486.
The People v. Board of Supervisors, 33 Calif., 487.
People ex rel. v. Earl, et al., 42 Colo. 238.

In view of all the above it is my opinion that the time limit prescribed in section 6907, supra, is directory merely, and that the county commissioners would not lose jurisdiction over the matter contained in the petition, even though they should not act within the time limit and should desire to act at a time after the time limit had expired.

Of course there might be such a period of time elapse after the filing of the petition, asking for the improvement, that it would be altogether unreasonable for the county commissioners to take up the matter of the petition with a view of allowing the same, but, as in all other cases of a similar kind, it is impossible for this department or a court to say just what would be an unreasonable period of time. This is a matter that ought to be considered by the county commissioners in exercising a sound discretion relative to any petition that might be filed with them. However, as a general proposition the above holding is evidently correct.

Very truly yours,
JOSEPH MCGHEE,
Attorney General.

769.

SCHOOL DISTRICTS—NOT CONSOLIDATED OR CENTRALIZED—TO WHAT AMOUNT OF STATE AID ENTITLED AFTER CONSOLIDATION OR CENTRALIZATION.

Any school district which is entitled to state aid for weak school districts, when the schools are conducted, not centralized or not consolidated, shall be entitled to the same amount of state aid for payment of any deficit in teachers' salaries and for transportation of pupils after such schools are consolidated or partly consolidated, or centralized.

COLUMBUS, OHIO, November 8, 1917.

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

DEAR SIR:—You request my opinion upon the following statement of facts:

"We are in receipt of a letter from the clerk of the board of education of Troy township (rural school district), Adams county, in which he advised me that one-half or more of the schools in said township (rural school district) have (been) suspended and transport pupils, part to other schools within the same township (rural school district) and part to the schools within the Coolville village school district and requested advice as to how to proceed in order that state aid might be obtained as provided by section 7730 G. C., as amended on March 21, 1917, 107 O. L., 638.

"Will you kindly give us an opinion construing the provisions of that section providing for state aid? Also advise us how under that section we are to calculate the sum of state aid to be extended."

Section 7730 G. C., to which you refer, and as found in 107 O. L., 638, reads as follows:

"The board of education of any rural or village school district may suspend any or all schools in such village or rural school district. Upon such suspension the board in such village school district may provide, and in such rural school district shall provide, for the conveyance of all pupils of legal school age, who reside in the territory of the suspended district, to a public school in the rural or village district, or to a public school in another district. When the average daily attendance of any school for the preceding year has been below ten, such school shall be suspended and all of the pupils of legal school age, who reside in the territory of the suspended district, transferred to another school or schools when the county board of education so directs the board of education of the village or rural district in which said school is located. Notice of such suspension shall be posted in five conspicuous places within such village or rural district by the board of education of such village or rural district within ten days after the county board of education directs the suspension of such school; provided, however, that any suspended school as herein provided, shall be re-established by the suspending authority upon its own initiative, or upon a petition asking for re-establishment, signed by a majority of the voters of the suspended district, at any time the school enrollment of the said suspended

district shows twelve or more pupils of lawful school age. *Any school district that is entitled to state aid for salary of teacher according to provisions of sections* 7595 *and* 7595-1 *when such schools are not consolidated, or centralized, shall receive the same amount of state aid after such schools are consolidated or partly consolidated, but to be applied to the cost of transportation of pupils to consolidated school, or schools, or for salary of teachers and the transportation of pupils.*"

That part of said section which must be especially considered in answer to your questions is the part which I have italicised above. It is also the new matter of said section which was added by the amendment of March 21, 1917. Said new matter was made necessary by the recent practice of suspending certain schools and centralizing and consolidating such schools in the various rural school districts of this state, many of which schools, prior to such centralization or consolidation, were receiving state aid for weak school districts, and which districts, through such consolidation or centralization, were able to eliminate much expense for salaries of teachers, but which said districts after so consolidating or centralizing were subject to an added expense for the transportation of pupils, and the object of said amendment is to accomplish, as nearly as possible, the same results in consolidated and centralized schools as were accomplished through state aid to weak school districts before such consolidation or centralization was had, and not to place a hardship or penalty upon a district by refusing it state aid when the schools had been centralized or consolidated, but to give it, as nearly as possible, an amount of state aid thereafter equal to that which it enjoyed before consolidation and centralization. Aid to weak school districts, at the time said section was amended, was provided for as follows:

In section 7595 G. C. it is provided:

"* * * When a school district has not sufficient money to pay its teachers such salaries as are provided in section 7595-1 of the General Code for eight months of the year, after the board of education of such district has made the maximum school levy, at least two-thirds of which shall be for the tuition fund, then such school district may receive from the state treasurer sufficient money to make up the deficit."

Section 7596 G. C. provides:

"Whenever any board of education finds that it will have such a deficit for the current school year, such board shall on the first day of October, or any time prior to the first day of January of said year, make affidavit to the county auditor, who shall send a certified statement of the facts to the state auditor. The state auditor shall issue a voucher on the state treasurer in favor of the treasurer of such school district for the amount of such deficit in the tuition fund."

Section 7595-1 provides:

"Only such school districts which pay salaries as follows shall be eligible to receive state aid: Elementary teachers without previous teaching experience in the state, fifty dollars a month; elementary teachers having at least one year's professional training, fifty-five dollars a month; elementary teachers who have completed the full two

> years' course in any normal school, teachers' college or university approved by the superintendent of public instruction, sixty dollars per month; high school teachers not to exceed an average of eighty dollars per month in each high school."

So that, when a school district has not sufficient money to pay its teachers, the salaries provided for in section 7595-1, supra, for eight months of the year, and the board of education has made the maximum school levy, at least two-thirds of which shall be for the tuition fund, then the board of education of such district shall, on the first day of October, or at any time prior to the first day of January, make an affidavit to the amount of such deficit, and file such affidavit with the county auditor of the county in which such school district is located. The county auditor shall certify such statement to the state auditor and the state auditor shall issue a voucher for the amount of said deficit on the state treasurer in favor of the treasurer of the school district, and the deficit of such school district is thus paid. Payment only of the deficit which occurred in the tuition fund or, in other words, the fund from which teachers were paid their salaries, was permitted. That is, the state aid was extended only for the payment of teachers' salaries and if a deficit occurred in any other fund the same could not be received from the state as aid to weak school districts, but must be provided for in other manners. So that when schools which had theretofore received such state aid for the payment of teachers were suspended, and the pupils were transported to other schools, then there were no teachers' salaries for such schools and hence no state aid could be received, but there was an added expense for transportation for which no provision theretofore had been made. The legislature, therefore, endeavored to provide a means to care for such transportation expense, or, in other words, endeavored to extend state aid so that the weak school districts might continue their schools, whether the expense thereof was in the furnishing of teachers or in transportation of pupils therein, and in so doing it enacted the provision that:

> "Any school district that is entitled to state aid for salaries of teachers, according to the provisions of sections 7595 and 7595-1, when such schools are not consolidated or centralized, shall receive the same amount of state aid after such schools are consolidated or partly consolidated, but to be applied to the cost of transportation of pupils to consolidated school or schools, or for salary of teachers and the transportation of pupils."

Said provision is ambiguous and very difficult to understand. But it must mean, if it means anything, that any school district which, if teachers were employed for all the schools therein, and there would be insufficient money to pay its teachers such salaries as are provided in section 7595-1 G. C., for eight months of the year, and the board of education of such district has made the maximum legal school levy, at least two-thirds of which is for the tuition fund, and which district, upon certifying that fact, would receive from the state the amount of such deficit, but which, because schools of such district are suspended and consolidated or centralized and state aid is not needed for the salaries of teachers, as when all the schools therein were provided with teachers, but which district instead of furnishing teachers for all the schools have consolidated or centralized all or a part of the schools therein, and is compelled to pay transportation expense of pupils, and sufficient funds cannot be provided

to pay such transportation expense or to pay both the transportation expense and the teachers' salaries, then and in that event such district shall receive state aid in the "same amount," which amount is not a fixed number of dollars and cents but the amount of the deficit, and which said amount or deficit is not only received to pay teachers but also for any deficit in the transportation expenses. So that, when the schools of the district are suspended and are consolidated or centralized, or partly consolidated or partly centralized, and such district has not sufficient money to pay its teachers such salaries as are provided in section 7595-1 G. C., for eight months of the year, and to pay for the transportation of pupils, after the board of education of such school district has made the maximum legal levy, at least two-thirds of which shall be for the tuition fund, which tuition fund shall include the transportation expenses, then such school district may make affidavit to such deficit, as is provided by section 7596, supra, and such deficit shall be certified by the county auditor to the state auditor, and a warrant issued therefor and paid as aid to weak school districts. That is, there must be a district which would be entitled to state aid if the schools were all being conducted, but which said schools, or some of them, instead of being conducted, are suspended and centralized or consolidated or partly centralized or partly consolidated. The said district may, after such schools are so suspended and so centralized, or consolidated, receive the *same amount* of state aid as such district would have received had the schools not been so suspended and centralized or consolidated. In other words, it is only those districts in which schools are suspended and are centralized or consolidated and which would be entitled to state aid if such schools were not so centralized and consolidated, that may, under the provisions of this amendment, receive state aid after such schools are so centralized or consolidated and in no event in any greater amount than such district would have received had the schools been conducted instead of being centralized or consolidated. Any other construction of the language of said amendment would make it meaningless. To illustrate, it is suggested that said section might mean that where a school district has received state aid in the past, it shall receive the same amount of state aid in the future, and instead of paying the same to teachers, the amount so received might be applied to the payment of teachers and also to the cost of transportation. But will the language bear this construction? The first part of said amendment reads: "Any school district that is entitled to state aid." When is a district entitled to state aid? Only when the conditions of the statute have been met and there is a deficit, and any aid that is extended is simply for the amount of the deficit. It is not the amount which was received last year, or the year before; it does not say any district which *has received* state aid; but it must be a district which is entitled to state aid. The conditions of state aid are conditions precedent and must be found to occur before the warrant of the state auditor may issue therefor. So that it cannot mean a district which received state aid last year, or any other year in the past, but it must mean a district which is entitled to state aid for the current year, and that suggested construction must be rejected.

Another suggested construction is that when a consolidated or centralized district, or a partly consolidated or partly centralized district, is entitled to state aid and receives same, instead of applying said state aid to the payment of teachers, as the thing for which it was received, that such district could use same to pay transportation of pupils instead or could use a part to pay transportation and a part for the payment of teachers. This construction cannot follow, for if state aid is given to make up a certain deficit it must be applied to that purpose. If such state aid was only received for the payment of teachers

and was then applied to transportation expenses, how would the teachers be paid? Would you borrow money or sell bonds under section 5656 G. C. for that purpose, and if so why not borrow money or sell bonds to pay the transportation expenses? This department has held on numerous occasions that such is permitted. But why speculate? The language of the statute must be given that construction which will tend to advance the beneficial purposes for which the statute is enacted and provides that when a school district has not sufficient money "to pay its teachers," then such school district "may receive from the state treasury sufficient money to make up the deficit." So that, the money being received to pay teachers must be applied to that purpose and the second suggested construction must be rejected.

This brings us then to the conclusion that the only construction which said language permits is that any school district which is entitled to state aid for the payment of the salary of teachers when the schools of such district are conducted severally, may, when the schools of such district are suspended and are consolidated or centralized, receive the same amount of state aid not only for the payment of the salaries of teachers but also for the cost of transportation of pupils. Said construction is permitted following the general rules of construction of statutes.

It is said in Lewis' Sutherland Statutory Construction, Vol 2, section 489, that:

> "Of two constructions, either of which is warranted by the words of the amendment of a public act, that is to be preferred which best harmonizes the amendment with the general tenor and spirit of the act amended. A statute may be construed contrary to its literal meaning when a literal construction would result in an absurdity or inconsistency, and the words are susceptible of another construction which will carry out the manifest intention."

Applying said rule to the amendment of the section in question, to construe it as above suggested is to harmonize the amendment with the remainder of the section and with the chapter of which the section is a part. The subject of the legislation is the providing of funds with which to maintain the public schools of the state. Giving of state aid to weak school districts is one of the provisions made by state to assist in the maintaining of the public schools and to hold that the aid should be given for transportation, the same as for teaching, is to harmonize said language with the remainder of the section and chapter.

In section 490 of Lewis' Sutherland Statutory Construction, the author says:

> "Statutes will be construed in the most beneficial way which their language will permit to prevent absurdity, hardship or injustice; to favor public convenience, *and to oppose all prejudice to public interests. 'In construing an act of the general assembly such construction will be placed upon it as will tend to advance the beneficial purposes manifestly within the contemplation of the general assembly at the time of its passage;* and courts will hesitate to place such a construction upon its terms as will lead to manifestly absurd consequences, and impute to the general assembly total ignorance of the subject with which it undertook to deal.' "

So in the statute before us, to construe it so that it will be most beneficial would be to give it the construction that not only state aid for weak school districts may be received for the payment of a deficit in teachers' salaries, but also that state aid may be received to make up any deficit in transportation expenses. This construction would also favor public convenience and public interests. It would tend to advance the beneficial purposes of the statute, that is, the providing of funds through which aid to weak school districts is given. This was within the contemplation of the general assembly at the time of the passage of the act and was the subject upon which the general assembly was legislating.

Answering your question specifically, then, I advise you that section 7730 G. C., as amended, 107 O. L., 638, shall be construed to the effect that state aid is extended only to those districts in which schools are suspended and are centralized or consolidated, and which districts would be entitled to state aid if such schools were not so centralized or consolidated, and such district shall receive state aid only to the amount of the deficit, but in no event to a greater amount than the district would have received had the schools been conducted individually instead of being suspended and so centralized or consolidated.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

770.

INDUSTRIAL COMMISSION—AUTHORITY TO MAKE RULE RELATIVE TO EXPENDITURES FOR MEDICAL TREATMENT IN COMPENSATION CASES—DUTY OF COMMISSION RELATIVE TO KEEPING ITS MINUTES.

Under the provisions of section 1465-89 *G. C., as amended* 107 *O. L.*, 528, *the industrial commission is authorized to make a rule requiring claimants to get the approval of the industrial commission before a greater amount than two hundred dollars is expended for medical and hospital treatment in compensation cases.*

The adoption of such rule will not abrogate the duty imposed upon the industrial commission to determine and extend upon its minutes the facts justifying the increased expenditure, at the time of the payment for such medical and hospital services.

COLUMBUS, OHIO, November 8, 1917.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your favor under date of October 20, 1917, in which you ask my opinion as follows:

> "The industrial commission is desirous of having your advice on the question as to whether or not it has authority to make a rule requiring claimants to get the approval of the commission before a greater amount than $200.00 is expended for medical and hospital treatment in compensation cases.
>
> Section 1465-89 of the act creating the industrial commission of Ohio was amended during the last session of the legislature to provide for

the payment of an amount in excess of $200.00 upon a satisfactory finding of facts being made and upon unanimous approval by the commission.

I might add further that it is the desire of the commission to insist upon claimants getting the approval of the commission before a greater amount than $200.00 is expended, if it has such right."

Section 1465-89 of the General Code, the same being a part of the workmen's compensation law of this state, was amended by an act of the legislature passed March 21, 1917 (107 O. L. 528), and as amended the section reads:

"In addition to the compensation provided for herein, the industrial commission of Ohio shall disburse and pay from the state insurance fund, such amounts for medical, nurse and hospital services and medicines as it may deem proper, not however, in any instance, to exceed the sum of two hundred dollars unless in unusual cases, wherein it is clearly shown that the actually necessary medical, nurse and hospital services and medicines exceed the amount of two hundred dollars, such commission shall have authority to pay such additional amounts upon a satisfactory finding of facts being made and upon unanimous approval by such commission, such finding of facts to be set forth upon the minutes; and, in case death ensues from the injury, reasonable funeral expenses shall be disbursed and paid from the fund in an amount not to exceed the sum of one hundred and fifty dollars, and such commission shall have full power to adopt rules and regulations with respect to furnishing medical, nurse and hospital service and medicine to injured employes entitled thereto, and for the payment therefor."

Addressing myself to the precise question made by you, I note that the statute specifically provides that the industrial commission shall have full power to adopt rules and regulations with respect to furnishing medical, nurse and hospital service and medicine to injured employes entitled thereto, and I am unable to see any reason why you would not have authority under this section to make provision by rule for the approval of the industrial commission before expenditures for medical and hospital treatment in excess of $200.00 are made. Such rule would certainly be one having proper relation to the subject-matter of this section of the General Code, and would be in keeping with the manifest intent and purpose of said section to prevent expenditures for medical and hospital expenses in excess of said sum, otherwise than in exceptional cases where such expenditure is absolutely necessary. The adoption of such rule would not abrogate the duty imposed upon the industrial commission to determine and extend upon its minutes the facts justifying the increased expenditures at the time of the payment for such medical and hospital service.

The question submitted by you is answered in the affirmative.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

771.

CONTRACTOR—MAY NOT CHARGE PREMIUMS PAID TO INDUSTRIAL COMMISSION—WHEN EMPLOYED BY STATE UPON IMPROVEMENT.

Whether a state officer or department constructs an improvement upon force account or upon contract, the contractor employed on the job has no right to charge against the state premiums that may be paid by him for the protection of workmen or other employes employed on the work.

COLUMBUS, OHIO, November 10, 1917.

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

GENTLEMEN:—I am in receipt of a communication from you in which my opinion is asked as follows:

> "A state department of Ohio makes a contract for the construction of an improvement upon the basis of a force account, under the following conditions: 'The state department hereby awards the contract to the contractor upon a basis of cost plus fifteen per cent. The contractor shall render, or cause to be rendered, daily reports of all cost for that day and whenever anything of value is purchased, shall enclose in said report bills in duplicate for same,' etc. In the performance of such construction, the contractor engages a number of workmen and laborers for this particular job, and under the laws of the state he pays the industrial commission of Ohio the insurance fees required under the workmen's compensation act.
>
> Question 1. May such insurance fees legally be considered as a part of the cost under this contract and be taxed, together with fifteen per cent, against the state department.?
>
> Question 2. Will the same ruling apply on contracts of like nature made by counties, municipalities, or other taxing districts?"

It occurs to me that there is some inconsistency in the statement of facts upon which your questions are predicated. The construction of an improvement by an officer or board of the state, or political subdivision thereof, on force account and the construction of said improvement by contract are entirely different things.

In the construction of an improvement on force account, in the accurate sense, the officer or board, in legal contemplation, employs the labor and furnishes the material needed therefor and pays for the same, although it is not unusual in such cases for such officer or board to contract for the services of some experienced contractor to superintend and direct the work of said improvement and pay him a certain percentage of the cost of the improvement in consideration of such services and, in some cases, for equipment furnished by such contractor. In such cases the workmen employed on the job are employes of the state within the provisions of paragraph 1 of section 14 of the workmen's compensation act (section 1465-61 General Code), and provision is made by section 17 of said act (section 1465-64 General Code) for contribution by the state to the state insurance fund for the protection of such employes.

Instances where state officers or boards are authorized to construct improvements occurring to me at the moment are those mentioned in sections 1209 and 2329, General Code, where provision is made for the completion on force account of certain improvements after default by the contractor.

Where an officer or board of the state, or political subdivision thereof, constructs an improvement under contract such officer or board has nothing to do with the employment of labor and the furnishing of material therefor, or with the payment for same, but their only interest is in the result of the work of the contractor. In such case it is the duty of the contractor to comply with the provisions of the workmen's compensation act and, unless he elects to pay compensation direct under section 22 of the act (section 1465-69 General Code), it is his duty to protect his employes by the payment of premiums unto the state insurance fund.

Assuming, but not deciding, that a state officer or board may under any circumstances construct an improvement by contract on the basis indicated in your communication, the contractor has no more right to charge into the cost of the improvement as a contract charge against the state the premium so paid than he would have to charge against the state such premiums in a case where the contract is for the construction of an improvement for a particular sum certain to be paid to him.

Answering your questions specifically, therefore, I am of the opinion that your first question should be answered in the negative, and, in answer to your second question, that the same ruling should apply on contracts of like nature made by counties, municipalities or other subdivisions.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

772.

FALSE TAX RETURNS—CORRECTIONS—BY COUNTY AUDITOR—BY ADMINISTRATOR OR EXECUTOR.

The provisions of section 8369 *G. C., as amended by the act of March* 21, 1917, (107 *O. L.*, 31) *do not affect the provisions of section* 5389 *G. C. as to previous years. A county auditor may proceed under the latter section to correct false returns made in years prior to the year* 1917 *and subject the same to fifty per cent penalty provided therein.*

An administrator or an executor may not under the provisions of sections 5372-1 *and* 5372-2 *G. C.* (106 *O. L.*, 247-248) *correct the returns of the deceased person for the years prior to his decease without incurring any penalty.*

COLUMBUS, OHIO, November 10, 1917.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I acknowledge receipt of your letter of October 16, 1917, in which you submit for my opinion the following questions:

> "Do the provisions of section 5369 G. C., as amended by the act of March 21, 1917, 107 O. L., 31, in any way affect the provisions of section 5398 G. C., or may a county auditor proceed under the latter section to correct false returns made in years prior to the year 1917 and subject the same to the fifty per cent penalty provided therein?
>
> May an administrator or an executor under the provisions of sections 5372-1 and 5372-2 G. C., 106 O. L. 247-248, correct the returns of the deceased person for the years prior to his decease and this without incurring any penalty?"

In connection with your letter you submit a memorandum in which the following propositions are asserted:

1. That section 5369 G. C., as amended 107 O. L. 31, supersedes and "impliedly repeals" section 5398 G. C.

2. That sections 5372-1 and 5372-2 G. C., as enacted 106 O. L. 247 and at present in force, authorize a person acting in a representative capacity, including an executor or administrator, to correct the tax returns, not only for the current year, but for previous years as well; and that when such corrected or amended return is filed the taxes are to be based upon the same as filed without penalty.

The proposition upon which the first assertion is predicated is that section 5369 G. C., as amended aforesaid, covers all that is contemplated by section 5398 G. C.; and the reliance is on the principle that when a later act covers the entire subject-matter to which an earlier act relates, the later act must be taken to be the only law by which the subject-matter shall be governed.

The principle last above stated will be admitted for the purposes of this opinion and I shall inquire only as to whether in point of fact section 5369, as amended, does cover all subject-matter embraced within the provisions of section 5398; and more particularly whether or not so much of section 5398 as applies to the procedure for correcting tax returns for previous years is covered by section 5369 as amended.

The two sections are as follows:

> "Sec. 5398. If a person required to list property or make a return thereof for taxation, either to the assessor or the county auditor, in the year 1911 or in any year thereafter makes a false return or statement, or evades making a return or statement, the county auditor for each year shall ascertain as near as practicable, the true amount of personal property, moneys, credits and investments that such person ought to have returned or listed for the year 1911 or for any year thereafter *for which the inquiries and corrections provided for in this chapter are made.* To the amount so ascertained as omitted *for each year* he shall add fifty per cent, multiply the omitted sum or sums, as increased by said penalty by the rate of taxation *belonging to said year or years*, and accordingly enter the amount on the tax lists in his office, giving a certificate therefor to the county treasurer who shall collect it as other taxes.
>
> Sec. 5369. Each person required to list property for taxation shall take and subscribe an oath or affirmation that all the statements in such list are true, and that such list contains a full disclosure of all property required by law to be listed for taxation, and the true value in money of all such property; and when any person required by law to list and make return of property to the county auditor, shall wilfully fail or refuse to make such list or return within the time fixed by law, or shall refuse to take and subscribe an oath or affirmation to such list or return, or shall wilfully omit to make a full and complete list and return of all taxable property, or shall wilfully fail to give the true value of any property in such list or return, or shall wilfully fail or refuse to answer all questions contained in the blanks for listing such property, the county auditor shall cause all such property to be listed and assessed and shall add to the amount thereof the penalty provided in section 5398 of the General Code; and in case of a false oath to any such list, he shall certify the facts to the prosecuting attorney, who shall proceed as in other cases of perjury. This section shall be printed in plain type upon all blanks for the listing of any property."

It is claimed that section 5369 G. C. now states the only grounds upon which tax returns may be corrected and penalties added, and that inasmuch as under it there is no authority to add the penalty unless the misconduct of the taxpayer is "wilful," it is in conflict with section 5398, which does not employ this term.

It does not seem to me that on the face of the statutes it can be claimed that the legislature intended to repeal section 5398 when it enacted section 5369. What is known as "implied repeal" is always a question of legislative intention. No matter to what extent two statutes may cover the same subject-matter, the later is not potent to repeal the earlier, if the later by appropriate recital recognizes the continuing force and effect of the earlier.

In this case section 5369 refers expressly to the penalty provided by section 5398. In so far as the penalty provisions of section 5398 are concerned, therefore, that section is in force if for no other reason than because of the express recognition of its force by section 5369.

But the argument is not after all directed to the point that entire section 5398 has been repealed by implication, but that whatever may be its present force as determining the amount of the penalty to be added, it is not in effect so far as the authority to make the correction is concerned. In other words, the argument is that the authority to make the correction now springs from section 5369, which covers the ground; and that section 5398 may be looked to only for the purpose of determining the penalties to be charged in case the inquiries and corrections authorized under section 5369 are made.

I do not find it necessary to analyze exhaustively the two sections, nor to dwell upon the fact that the inquiries and corrections to be made under section 5398 are or were to be made by the county auditor, while those authorized by section 5369 are to be made by other officers, it being the function of the auditor to "cause" the property to be listed and assessed and then to add the penalty.

Nor do I find it necessary to determine whether in part section 5369 does not in point of fact supplant and thus impliedly amend at least section 5398, in so far as the operation of the last named section to the correction of tax returns in the current year is concerned. Neither do I mean to hold, on the other hand, that section 5369, as amended, does not narrow the effect of section 5398, in so far as the current year is concerned. I only mean to say that I do not find it necessary to determine this question, because your question relates to the effect of section 5369 upon section 5398, in so far as the latter section may afford authority to the county to correct tax returns for previous years.

Section 5369 does not purport to authorize any corrections of returns for previous years. It is a part of an act providing for the assessment and collection of taxes generally. All of its provisions are apt only as referring to the machinery of taxation for the current year.

If section 5398 G. C., in addition to any possible effect it may have had originally in authorizing the county auditor to correct returns for the current year, also authorized returns of past years to be corrected, it is obvious, I think, that section 5369 G. C. cannot be said to cover the whole ground covered by section 5398, and in deference to the rule against implied repeals it would have to be held that so much at least of section 5398 as relates to the correction of returns for previous years is still in full force and effect.

I have italicised certain words in section 5398 which suggest or express two ideas:

1. That the section is not complete in itself, but that the legislative idea therein contemplated must be filled out by reference to other provisions of "this chapter;" and

2. That its framers clearly contemplated that correction for more than one year might be made under it or under the group of sections of which it is a part.

Thus the auditor is authorized by the first sentence of the section to ascertain as nearly as practicable the personal property which a given person ought to have returned "for any year * * * for which the inquiries and corrections provided for in this chapter are made;" and in the second sentence it is provided that the omitted sum or sums as increased by the penalty shall be multiplied "by the rate of taxation belonging to said year or years."

These words take us, I think, to section 5399 G. C., which provides as follows:

> "Sec. 5399. If any person required to list property, or make a return thereof for taxation to the assessor or county auditor, or to a board, officer, or person, other than a board composed of officers of more than one county, in the year nineteen hundred and eleven, or in any year or years thereafter fails to make a return or statement, or if such a person makes a return or statement of only a portion of his taxable property, and fails to make a return as to the remainder thereof, or if he fails to return his taxable property or part thereof, according to the true value thereof in money, as provided by law, the county auditor for each year as to such property omitted and as to property not returned or taxed according to its true value in money, shall ascertain as near as practicable the true amount of personal property, moneys, credits and investments that such person ought to have returned or listed, and the true value at which it should have been taxed in his county for not exceeding the five years next preceding the year in which the inquiries and corrections provided for in this section and in the next preceding and the next two succeeding sections are made and not in any event prior to the year nineteen hundred and eleven, and multiply the omitted sum or sums by the rate of taxation belonging to said year or years, and accordingly enter the amount on the tax lists in his office, giving a certificate therefor to the county treasurer, who shall collect it as other taxes. * * *"

Reading these two sections together, it is clear that the repeated use of the phrase "year or years" does contemplate corrections for years other than the one for which the assessment is being made and corrections affecting the duplicates of more than a single year. Such is not the case in section 5369 G. C., as I have pointed out.

For these reasons, then, I come to the conclusion that section 5369, inasmuch as it does not relate to corrections for previous years, does not affect in any way the provisions of sections 5398 and 5399 G. C., under the combined operation of which the county auditor, if he finds that in a previous year a false return or statement was made or that the making of a return or statement was evaded, may not only make the inquiries and corrections provided for in both sections, but add the penalty of fifty per cent. If the return is not "false," by which is meant either wilfully false or culpably negligent (Ratterson vs. Ingalls, 48 O. S. 468), the penalty may not be imposed, but the action to be taken will be referable to section 5399, which authorizes no penalty.

As I have said, it may be that the intention of the legislature was to take away from the auditor the power to make the assessment when a wilfully false return has made so far as the current year is concerned, but I do not find in

section 5369 G. C. any evidence of an intent to deprive the auditor of this power so far as past years are concerned.

Indeed, very cogent reasons for making the distinction which the legislature apparently may have made can be suggested. So long as the assessing officers whose duty it is in the first instance to make the assessments are, as it were, on the ground, it is most appropriate that they, rather than the auditor, should reappraise the property and make the assessment. This is what is done by section 5369 G. C. But as to previous years, where the inquiry is not necessarily as to the value of property then existing, but rather as to the value of personal estate as it existed in previous years, the inquiry partakes of a character which may more appropriately be conducted by the auditor.

However that may be, I am of the opinion, as stated, that your first question must be answered by saying that however the provisions of sections 5369, as amended 107 O. L. 31, may affect the provisions of section 5398 G. C., they do not deprive the county auditor of power to proceed under section 5398 to correct false returns made in years prior to the year 1917 and subject the same to the fifty per cent penalty therein provided.

Your second question requires consideration of sections 5372-1 and 5372-2 G. C. These sections are as follows:

> "Sec. 5372-1. Personal property, moneys, credits, investments in bonds, stocks, joint stock companies or otherwise in the possession or control of a person as parent, guardian, trustee, executor, administrator, assignee, receiver, official custodian, factor, agent, attorney, or otherwise, on the day preceding the second Monday of April in any year on account of any person or persons, company, firm, partnership, association or corporation, shall be listed by the person having the possession or control thereof and be entered upon the tax lists and duplicate in the name of such parent, guardian, trustee, executor, administrator, assignee, receiver, official custodian, factor, agent, attorney or other person, adding to such name words briefly indicating the capacity in which such person has possession of or otherwise controls said property, and the name of the person, estate, firm, company, partnership, association or corporation to whom it belongs; but the failure to indicate the capacity of the person in whose name such property is listed or the name of the person, estate, firm, company, partnership, association or corporation to whom it belongs shall not affect the validity of any assessment thereof.
>
> "Sec. 5372-2. If, on or after the day preceding the second Monday of April in any year, any personal property, moneys, credits, investments in bonds, stocks, joint stock companies or otherwise become subject to the possession or control of a person as parent, guardian, trustee, executor, administrator, assignee, receiver, official custodian, factor, agent, attorney or otherwise, on account of any other person who was the owner thereof on said date, and such personal property has not been listed for taxation, such property shall be listed by such parent, guardian, trustee, executor, administrator, assignee, receiver, official custodian, factor, agent, attorney or other representative as provided in the next preceding section."

Section 5372-2 G. C. is the provision relied upon by counsel in this connection. It authorizes a person acting in a representative capacity to list "in any year" on account of the other person who was the owner thereof, on the second Monday of April, any personal property which was not listed by the owner on that date.

It is correctly argued, I think, for this section, that when the correction has been made as therein provided, no penalty can be attached on account of the omission, but I find no warrant for holding that this section authorizes the executor or administrator to list omitted property for previous years. It is argued that this provision gives to an executor or administrator "in any year" the right to correct the list of omitted property for taxation, he being the custodian thereof, and that the provision is one "for an executor or administrator to correct a deceased person's tax return for 'any year.'" I cannot discern this meaning in section 5372-2 G. C. The phrase "in any year," as therein used, describes the time when the property becomes subject to the possession or control of the representative and is not in anywise used in connection with the date on which the property should have been listed in previous years.

Paraphrased, the section would read as follows:

> If, on or after the tax listing day in any given year, personal property which has not been listed on that day by the then owner comes into the possession of a representative, the representative shall list it.

It is plain that the omitted property must come into the possession of the person acting in a representative capacity within the tax year. But this is not all; for all statutes authorizing corrections for previous years expressly provide, as does section 5399, above quoted, that corrections may be made for years "preceding the year," or at least use words like those found in section 5398 G. C., viz., "year or years." The very fact that there is no authority under section 5372-2 G. C. to do the necessary thing provided for in section 5398, for example, viz., to apply the rate of taxation for the preceding year or years to the valuation as determined by the amended return, points the way to the conclusion that it was not contemplated by section 5372-2 that the person acting in a representative capacity thereunder might correct returns for previous years.

For these reasons, then, your second question is answered in the negative.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

773.

ARTICLES OF INCORPORATION—CORPORATION FORMED FOR PREVENTION OF CRUELTY TO ANIMALS—WHAT SAID ARTICLES MUST CONTAIN.

The operation of section 10067 *providing for the formation of a society for the prevention of cruelty to animals is so far modified and controlled by the provisions of section* 10063 *that it is necessary to state in the articles of incorporation of such society the purpose for which it is formed in accordance with the latter section and to include therein the protection of children as well as animals.*

COLUMBUS, OHIO, November 10, 1917.

The Ohio Board of State Charities, MR. H. H. SHIRER, *Secretary, Columbus, Ohio.*

GENTLEMEN:—On September 26, 1917, you addressed the following communication to this department:

> "An interesting question has been submitted to us by persons interested in the organization of an association to be known as the

Animal Protective League, or some similar appropriate title.

It is the purpose of this organization to incorporate for animal protection only, but expect public financial aid as provided in sections 10071 and 10072 of the General Code.

In order not to interfere with another agency which deals exclusively with the problems of children the proposed corporation desires to incorporate for the sole purpose of the prevention of cruelty to animals.

As there is considerable doubt in our mind as to the question submitted, we respectfully request from you an expression as to whether section 10063 G. C. makes it mandatory for such organization to state in its articles of incorporation that it will care for children, although no such purpose is intended, in order that it may have public approval as set forth in sections 10071 and 10072."

What is desired is the organization of a corporation to be a society for the prevention of cruelty to animals under section 10067 and which is not to include the protection of children. The provisions of section 10067 are substantially the same as included in the first act passed upon the subject of the organization of such society which originally were for the prevention of cruelty to animals alone. This section being unrepealed it would not be in conflict with any subsequent legislation and would be full and complete authority for what you desire. The said section enacts as follows:

"Societies for the prevention of acts of cruelty to animals may be organized in any county, by the association of not less than seven persons * * * ."

Such provision, however, must be read in connection with another provision upon the same subject, and a later enactment, section 10062, provides for the Ohio state society for the prevention of cruelty to animals. Section 10063 is as follows:

"The objects of such society, and all societies organized under sections ten thousand and sixty-seven and ten thousand and sixty-eight, shall be the inculcation of humane principles, the enforcement of laws for the prevention of cruelty, especially to children and animals, to promote which objects such societies may respectively acquire property, real or personal, by purchase or gift. All property acquired by gift, devise, bequest, for special purposes, shall be vested in a board of trustees consisting of three members elected by the society,which board must manage such property, and apply it in accordance with the terms of the gift, devise, or bequest, with power to sell it and reinvest the proceeds."

This provision, acting upon former existing enactment, requires that the object of the society organized under the older laws "shall be the inculcation of humane principles, the enforcement of laws for the prevention of cruelty, especially to children and animals." This must always be the "object" for which the corporation is created. There is no reason for considering this requirement otherwise than as mandatory, so that the real object of the formation of the society is as therein stated. Whether this object be set out in the articles of incorporation or not it would still be there in legal intendment. The law which alone gives warrant for the existence of such society fixes its

object and it can exist for no other or different object. As to whether the object should be stated in the articles of incorporation we must refer to section 8625, which prescribes the contents of such articles of incorporation in five paragraphs, and states that they must contain:

" * * *

3. The purpose for which it is formed.

* * * "

It is observed that the word "purpose" is used in this section and "object" in the other. These words are not in all cases synonymous, but in the present instance they are so practically, as the purpose which must be set out in the articles of incorporation must be in the nature of the case the object of the existence of that corporation.

The history of this legislation may be found in Opinion No. 593 rendered by this department September 6, 1917, to Honorable Samuel Doerfler, prosecuting attorney of Cuyahoga county, and need not be here repeated further than as stating the sequence above of sections 10063 and 10067.

Inasmuch, therefore, as children must be included in the object of the existence of the corporation, and that object should be included in the statement of the purpose for which it was formed, the articles should include the provision as to children. It will be noted that by the express terms of the section it is not absolutely restricted to children and animals, but is generally the inculcation of humane principles and the enforcement of laws for the prevention of cruelty, especially to children and animals.

The difficulty as to the situation, however, practically disappears upon giving it a practical consideration. This society about to be organized, and which is required to include the protection of children as its object along with animals, is to accomplish its purpose and do its work practically; it is to inculcate humane principles generally and look after the enforcement of laws against cruelty, and these things it is always to do where the necessity for doing so exists. There are no requirements that it should expend half of its efforts on animals and the other half on children; or that its activities are to be restrained or governed in any other than a practical manner for the accomplishment of its humane purpose, and if it finds another society already in existence giving its care and bestowing its solicitude upon cases of children alone and fully accomplishing that work, it may give its principal or entire attention to the other branch of the subject; that is to say there could be no objection to such a division of labor between two such societies, and the occasion might arise when it will be highly desirable to the new society to have the power to extend its protection to the human race as well as to dumb animals.

You are therefore advised that the only proper and safe method of incorporating would be to state the purpose of the corporation in accordance with the requirements of section 10063 of the General Code.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

774.

WORKMEN'S COMPENSATION LAW—EFFECT OF HOUSE BILL NO. 1, (107 O. L.,) (SEC. 1465-101) UPON CONTRACTS OF INDEMNITY INSURANCE.

The legislature in the enactment of House Bill No. 1 (section 1465-101 G. C.) passed February 15, 1917, intended thereby to make void existing contracts of indemnity insurance carried by employers paying compensation direct under section 22 of the Workmen's Compensation Act (Sec. 1465-69 G. C.) as well as contracts of indemnity insurance that might thereafter be entered into; and in the enactment of the amendatory provisions of section 22 of the Workmen's Compensation Act, further limiting the right of employers within the Workmen's Compensation Law to pay compensation direct to their injured employes to those "who do not desire to insure the payment thereof or indemnify themselves against loss sustained by the direct payment thereof," the legislature intended the same to apply to employers who at the time of its enactment were paying compensation direct under the provisions of this section, as well as to those who might thereafter elect to do so.

No employer within the Workmen's Compensation Act has the right of paying compensation direct to his injured employes, or to the dependents of those who may be killed, unless as a condition to such right he does not any longer carry indemnity insurance, and this without reference to whether such indemnity insurance was procured by the employer before or since the legislation above noted.

COLUMBUS, OHIO, November, 10, 1917,

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—This department is in receipt of a communication from you in which you advise that self-insuring risks, so-called, who have re-insured are asking whether they will be able to mature their contracts with liability insurance companies, or whether their contracts with these companies automatically terminated as of the date House Bill No. 1 (107 Ohio Laws, 7) went into effect, and you ask my opinion upon this question.

In consideration of the question submitted by you I do not deem it necessary to discuss or even to note to any considerable extent the provisions of the workmen's compensation act, and in this connection I will note only a few of the provisions of said act having more or less immediate relation to the considerations suggested by your question.

With respect to the question at hand it may be noted that sections 13 and 14 of the act, by the second subdivision thereof respectively, define the term "employer" on the one hand and the terms "employe," "workman" and "operative" on the other.

Section 22 of the act requires that except as therein provided all employers shall contribute to the state insurance fund provided for in the act by the payment of premiums thereto and by way of exception to this general requirement permits certain qualified employers under the rules and regulations of your board to pay compensation direct to their injured employes or to the dependents of such as may be killed, and also in such case to pay direct for such medical, surgical and hospital services and funeral expenses as may be incurred.

Section 23 of the act provides that except as otherwise provided in the act employers who comply with the provisions of section 22 shall be exempt from

civil liability by reason of the injury or death of an employe, while by way of exception to the general provisions of section 23, section 29 provides that an employer complying with the provisions of section 22 shall nevertheless be liable civilly to the action of an injured employe or to the legal representatives of an employe who may be killed if the injury to the employe arises from the wilful act of the employer or any of such employer's officers or agents, or arises from the failure of such employer or any of such employer's officers or agents to comply with any lawful requirement for the protection of the lives and safety of employes.

Section 54 of the workmen's compensation act, the same being Section 1465-101 G. C., before repealed provided as folows:

> "All contracts or agreements entered into by any employer, the purpose of which is to indemnify him from loss or damage on account of the injury of such employe by accidental means or on account of the negligence of such employer or such employer's officer, agent or servant, shall be absolutely void, unless such contract or agreement shall specifically provide for the payment to such injured employe of such amounts for medical, nurse and hospital services and medicines, and such compensation as is provided by this act for injured employes; and in the event of death shall pay such amounts as are herein provided for funeral expenses and for compensation to the dependents of those partially dependent upon such employe; and no such contract shall agree, or be construed to agree, to indemnify such employer, other than hereinbefore designated, for any civil liability for which he may be liable on account of the injury to his employe by the wilful act of such employer, or any of such employer's officers or agents, or the failure of such employer, his officers or agents, to observe any lawful requirement for the safety of employes."

The provisions of this section were considered and construed by the supreme court in the case of State ex rel. Turner, Attorney-general, against the Employers' Liability Assurance Company, Ltd., of London, said case being No. 15089 on the docket of said court. The supreme court in this case held that section 54 of the workmen's compensation act did not repeal by implication section 9510 G. C. which, in general terms, among other things, authorizes the incorporation of liability insurance companies, but did hold that said section 54 had the effect of defining, limiting and declaring the nature and extent of the contract of indemnity that might be written by a liability insurance company in favor of employers who employ more than five employes. The court held that section 54 in various phases thereof affected contracts of indemnity drawn in favor of all classes of employers coming within the scope of the workmen's compensation act, including as well those who in one way or the other complied with section 22 of the act and those failing to comply with the act at all. As to the latter the court held that the effect of section 54 was to forbid contracts of indemnity to be written at all in favor of such employers indemnifying them against civil liability on account of injuries to employes by accidental means or on account of the negligence of such employer, his officers, agents or servants, whether such negligence be that of a wilful act or failure to comply with lawful requirements for the safety of employes or otherwise. As to employers electing and permitted to pay compensation direct to their injured employes or to the dependents of those killed, the supreme court held that contracts of indemnity in favor of such employers were required to contain a specific provision as a part of its terms for the pay-

ment to such injured employe "all such amounts for medical, nurse and hospital services and medicines and such compensation as is provided by the act of which this section is a part for injured employes, and in the event of death shall pay such amounts as provided by said act for funeral expenses and for compensation to the dependents of those partially dependent upon such employe." With respect to both classes of employers complying with the provisions of section 22 the court held that said section 54 had the effect of forbidding any agreement in contracts of indemnity in favor of such employers indemnifying such employers for civil liability on acount of injuries to such employes by wilful act of the employer or of the employer's officers or agents, or the failure of such employer, his officer or agents, to observe any lawful requirements for the safety of employes; but that as to such employers this inhibition in the contract of indemnity has application only to cases where the injured employe does not elect to receive as compensation for his injury the judgment or award of the Industrial Commission sitting as a board of awards or from the employer direct, but elects to and exercises the right to enforce his cause of action in the courts against his employer.

The decision of the court in the above case was handed down on the thirty-first day of January, 1917, and the judgment indicated was one ousting liability insurance companies from the exercise of the franchise of writing indemnity insurance policies to employers other than such as were consistent with the provisions of said section 54 as construed by the supreme court. The court in its decision made an order suspending the operation of the ouster for one hundred days in order to permit liability insurance companies to conform their policies to the court's decision, and I assume, of course, that your inquiry has reference to the effect of the act mentioned by you on existing and outstanding contracts of liability insurance, which in their terms comport with the decision of the supreme court in the case just noted.

The act to which you allude is one amending section 54 of the workmen's compensation act (section 1465-101 G. C.) passed February 15, 1917, and reads in full as follows:

"AN ACT

To amend section 1465-101 of the General Code of Ohio, making void contracts indemnifying employers against loss or liability for the payment of workmen's compensation, and agreements to pay such compensation, and making void contracts which indemnify the employer against damages when injury, disease or death arises from failure of employer to comply with lawful requirements for the protection of the lives, health and safety of employes, or when the same is occasioned by the wilful act of the employer or any of his officers or agents; prohibiting the issuance of licenses to enter into such contracts; and to repeal original section 1465-101 of the General Code of Ohio.

Be it enacted by the general assembly of the state of Ohio:

Section 1. That section 1465-101 of the General Code of Ohio be so amended to read as follows:

Sec. 1465-101. All contracts and agreements shall be absolutely void and of no effect which undertake to indemnify or insure an employer against loss or liability for the payment of compensation to workmen or their dependents, for death, injury or occupational disease occasioned in the course of such workmen's employment, or which

provide that the insurer shall pay such compensation, or which indemnify the employer against damages when the injury disease or death arises from the failure to comply with any lawful requirement for the protection of the lives, health and safety of employes, or when the same is occasioned by the wilful act of the employer or any of his officers or agents, or by which it is agreed that the insurer shall pay any such damages. No license or authority to enter into any such agreements or issue any such policies of insurance shall be granted or issued by any public authority.

Section 2. That original section 1465-101 of the General Code be and the same is hereby repealed."

In consideration of the question made by you it will be necessary to note also the amendatory provisions of section 22 of the workmen's compensation law, (sec. 1465-69 G. C.) enacted by house bill No. 506, passed March 20, 1917. As previously noted herein, section 22 of the workmen's compensation law requires that, except as therein provided, all employers shall contribute to the state insurance fund provided for in the act, by the payment of premiums thereto, and by way of exception to the general requirement permits certain qualified employers under the rules and regulations of your board to pay compensation direct to their injured employes or to dependents of such as may be killed, and also in such case to pay direct for such medical, surgical, hospital and funeral expenses as may be incurred.

Prior to the amendment of said section 22 of the workmen's compensation act by the act of March 20, 1917, three conditions precedent were required to exist before the Industrial Commission by a finding of facts could authorize an employer within the workmen's compensation law to pay compensation direct:

(1) That the applicant is of sufficient financial ability or credit to render certain the payment of compensation to injured employes or to the dependents of killed employes, and the furnishing of medical, surgical, hospital and nursing expenses and medicines, and funeral expenses to or greater than is provided for in section 31 to 42 of the workmen's compensation law.

(2) That such employer give such bond or security as the Industrial Commission may require to secure to such injured employe or to the dependents of such employes as may be killed, the payment of compensation and expenses provided for.

(3) In addition to these, such employer was required to pay into the state fund the five percentum required from all employers to be credited to the surplus fund.

By the amendment of section 22 of the act above noted, the right to pay compensation direct was further limited to employers.

> "Who do not desire to insure the payment thereof or indemnify themselves against loss sustained by the direct payment thereof."

and the question for consideration is as to the effect of this amendatory provision of section 22 of the workmen's compensation law, as well as of House Bill No. 1, upon existing and outstanding indemnity contracts written in favor of employers complying with the provisions of section 22 of the workmen's compensation law before the enactment of the legislation above noted, and upon the status of such employers in their relation to the workmen's compensation law.

The question thus presented depends, of course, primarily upon the intent

of the legislature in the enactment of the statutory provisions above noted. That is, whether in the enactment of said provisions the legislature intended them to apply to contracts of indemnity and relations then in force, or to be prospective only, operating only on contracts thereafter entered into and relations thereafter created by employers electing to pay compensation direct under section 22 of the workmen's compensation act as amended.

It is recognized that the general rule of statutory construction applicable to questions of this kind is that, excepting in the case of remedial statutes and those which relate to procedure in court, an act of the legislature will not be so construed as to make it operate retrospectively unless the legislature has explicitly declared its intention that it should so operate, or unless such intention appears by necessary implication from the nature and language of the act. It is a still more cardinal rule, however, that the intent of the legislature in the enactment of a statute is to be sought for primarily in the language used in the enactment of the statute.

Looking to the provisions of house bill No. 1 as enacted, it is obvious that the words "all contracts and agreements" as used in said section might mean all contracts and agreements made before the enactment of the law, as well as those made afterwards; and looking to the provisions of this act as a whole, when read in connection with its title and keeping in view the obvious purpose that was sought to be subserved in the enactment of this statute, I am constrained to the view that in the enactment of this statute the legislature intended its provisions to have the effect of avoiding existing contracts of indemnity, as well as those that might be entered into thereafter.

In the case of P. B. & W. Railroad Co. v. Schubert, 224 U. S., 603, the court had under consideration the provisions of section 5 of the Employers' Liability Act of April 22, 1908. The section there under consideration provided as follows:

> "That any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void; *Provided*, That in any action brought against any such common carrier under or by virtue of any of the provisions of this act, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief, benefit, or indemnity that may have been paid to the injured employe or the person entitled thereto on account of the injury or death for which said action was brought."

The court, holding that the provisions of this section were a means for the enforcement of the regulations prescribed by the employers' liability act of which said section is a part had no difficulty in reaching the conclusion that the provisions of said section were intended to apply as well to existing as to future contracts of the character described therein; and I am constrained to the view that looking to the manifest purpose of the legislature in the enactment of house bill No. 1 and the amendatory provisions of section 22, it may with as much reason be concluded that the legislature intended to apply it to existing contracts and relations.

In citing the above case I realize that congress in the enactment of laws is not limited by the same constitutional provisions limiting the legislature of this state in the enactment of laws. Nevertheless, with respect to federal legislation as well as that of a state, the rule of construction applies that such legislation is to be given a prospective operation only unless the contrary intent

clearly appears, and, in my view, the decision of the supreme court in the case just cited with respect to the construction of the statutory language before it in said case is both significant and persuasive with respect to the intention of the legislature in the enactment of house bill No. 1.

The conclusion reached by me with respect to the intent, purpose and effect of house bill No. 1 suggests, of course, the question of the constitutionality of said act, in view of the provisions of section 10, article I of the federal constitution and of section 28, article II of the state constitution. With respect to this question I must observe that ordinarily it is not within the province of this department to consider questions touching the constitutionality of statutes, and it is only in exceptional cases that this department ventures to do anything of this kind. I see no reason for departing from this policy in the instant case. However, in this connection I can not forbear to note that if the enactment of house bill No. 1 as a part of the workmen's compensation law of this state is to be considered as a legitimate exercise of the police power there is authority for upholding the constitutionality of its provisions, although they may effect existing contracts or other vested rights.

Ruling Case Law, 6, 305; 347.
Manigault v. Spring, 199 U. S., 473.
Hudson Walter Co. v. McCarter, 209 U. S., 349, 357.
Commonwealth v. Sherman Mfg. Co. 189 Mass., 76.
State v. K. M. P. R. R. Co. 99 Tex., 16.
Shields v. Clifton Hill Land Co., 94 Tenn., 129-148.
Washington v. Atlantic C. L. Ry. Co., 136 Ga., 138.
State ex rel. v. Seattle, 73 Wash., 396, 402.
State ex rel. v. District Court, 128 Minn., 221.

The amendatory provisions of section 22 of the workmen's compensation law were obviously enacted for the purpose of effectuating the same purpose disclosed in the enactment of house bill No. 1. and the same considerations that lead me to the conclusion that the legislature in the enactment of house bill No. 1 intended the same to apply to existing contracts require me to hold that in the enactment of the amendatory provisions of section 22 the legislature intended the same to apply to employers who, at the time of its enactment, were paying compensation direct under the provisions of this section, as well as to those who might thereafter elect to do so. Now even if a consideration of the constitutional provisions above noted should require us to hold either that house bill No. 1 is unconstitutional, or that it is limited in its operation to contracts of indemnity thereafter entered into, it is obvious that these considerations have no application with respect to the effect and operation of the amendatory provisions of section 22 of the workmen's compensation law above noted.

When an employer elects and qualifies to pay compensation direct under the provisions of said section he enters into no contract with the state or the industrial commission with respect to such right or privilege, as we may choose to term it, and without impairing such right or privilege of the employer, it would be perfectly competent for the legislature to wholly abrogate such right or privilege by a repeal of the provisions of section 22 of the workmen's compensation act awarding such right or privilege; or, as was done in the case at hand, it was competent for the legislature to impose an additional condition upon the right or privilege of an employer to pay compensation direct under said section, and this without violating any right of such employer protected by the constitutional provisions above noted.

It follows, therefore, that even if it should be held that any contract of indemnity insurance carried by an employer paying compensation direct under section 22 at the time house bill No. 1 went into effect is valid and subsisting, notwithstanding the provisions of said act; nevertheless, under the amendatory provisions of section 22 of the workmen's compensation act, if such employer still desires to carry such indemnity insurance he must be denied the right of paying compensation direct to his injured employes or to the dependents of such as may be killed, and is required to comply with the provisions of said section by paying premiums into the state insurance fund for the protection of his employes and their dependents.

If we are required to view the provisions of house bill No. 1 as prospective in operation only, their effect is, of course, to avoid contracts of indemnity insurance entered into after said act went into effect; and in this connection I may say that I am not convinced that liability insurance contracts in which provision is made for the payment of premiums from year to year, or other stated intervals, can be kept in force and effect by the payment and acceptance of premiums after said act became effective.

With respect to life insurance contracts, the weight of authority supports the view that in such contracts where the premium is to be paid from year to year, or other stated intervals, the contract is to be considered as an entire one rather than as a contract from year to year or other stated intervals provided for premium payments. In other words, a life insurance contract is considered to be an entire one of assurance for life, and the payment of premiums after the first is not a condition precedent but a condition subsequent.

In applying this principle of construction to contracts of life insurance the courts recognize that such contracts are *sui generis*, and I am not aware that the principle has been applied in its integrity to insurance contracts other than those of life insurance. At any rate, it is clear that much of the reasoning of the majority opinion of the court in the leading case of New York Life Insurance Co. v. Statham, 93 U. S. 24, where this principle of construction was applied to a life insurance contract, failed of application to contracts of insurance other than life.

With respect to contracts of insurance of the kinds here in question, I am inclined to the view that where all the terms thereof indicate that subsequent premiums are to be paid by the assured as a condition of continuous protection from year to year or other period of time indicated by the times of premium payments, such contracts would not be considered as entire contracts within the principle above noted with respect to life insurance contracts, but would be considered to be contracts from year to year or other specified intervals of time, and this whether said insurance contracts in the first instance were for a designated period of time or were indefinite as to duration.

See Bryant v. Bonding Company, 77 O. S., 90.

It is manifest that contracts of this kind covering employers liability insurance could not be renewed by premium payments after house bill No. 1 went into effect, as such renewal would in legal contemplation be considered a new contract.

Making specific answer to your inquiry, I am of the opinion that the effect of house bill No. 1 is to avoid contracts of indemnity insurance carried by employers paying compensation direct under section 22 at the time said house bill No. 1 went into effect. In any event, I am of the opinion that

by reason of the amendatory provisions of said section 22 of the workmen's compensation act no employer has the right of paying compensation direct to his injured employes, or to the dependents of those who may be killed, since said amendatory provisions went into effect, unless as a condition to such right he does not any longer carry indemnity insurance and this without reference to whether such indemnity insurance was procured by the employer before or since the legislation considered in this opinion.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

775.

LIFE INSURANCE POLICY—HOW TAXABLE—INTEREST OF BENEFICIARY IN MATURED POLICY DETERMINED.

The interest of the beneficiary in a life insurance policy which has matured by the death of the insured is to the amount remaining unpaid thereon taxable as a credit, whether such amount be payable in installments in a specified number or during the life of the beneficiary, or in a lump sum at the option of the beneficiary. If such amount be payable in installments at stated periods, the same should be taxable at the sum which the beneficiary at the time of listing same believes the same to be worth, as provided by section 5388 *G. C.*

COLUMBUS, OHIO, November 12, 1917.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your communication in which you ask my opinion on the following statement of facts:

> "Insurance companies issue both limited payment and straight life policies containing what is known as an 'income provision.' That is to say, a provision that the beneficiary upon the death of the insured or the maturity of the policy may elect to receive the insurance in installments, annual or otherwise, either a specified number or during the life of the beneficiary, also a provision that the insured may determine the number of installments with no option by the beneficiary. Is the beneficiary after the death of the insured or the maturity of the policy required to pay taxes upon his interest in such a policy as a credit, annuity or otherwise, first, if there is no option by the beneficiary, whether payable in a specified number of installments or during the life of the beneficiary; second, if the beneficiary has an option to receive the remaining unpaid installments at any time when an installment is due?"

The answer to the question submitted by you depends upon whether or not the legislature has made provision by statute for the taxation of the particular interests mentioned in your communication. Whatever taxing power is possessed by the legislature is so possessed as a part of the legislative power granted to it by section 1 of Article II of the state constitution. Section 2 of article

XII of the state constitution provides that laws shall be passed taxing by uniform rule all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise, and also all real and personal property according to its true value in money, except such particular property therein specifically exempted or which may be specifically exempted by the legislature, pursuant to the authority of said constitutional provision. Section 2 of article XII of the state constitution is essentially but a limitation upon the general taxing power granted by section 1 of article II of the constitution, and even in so far as the provisions of the former section of the constitution may be considered a mandate or declaration of intention that all property other than that specifically exempted shall be taxed, it still must be held, with respect to this section of the constitution, that its provisions with respect to taxation of property are not self executing, and in order to ascertain whether any particular property or interest therein is taxable, it must be ascertained whether or not statutory provision has been made for the taxation of the same.

Section 5328 General Code provides as follows:

> "All real or personal property in this state, belonging to individuals or corporations, and all moneys, credits, investments in bonds, stocks, or otherwise, of persons residing in this state, shall be subject to taxation, except only such property as may be expressly exempted therefrom. Such property, moneys, credits, and investments shall be entered on the list of taxable property as prescribed in this title."

The provision of this section, however, must be read in connection with those of section 5321 to 5327, inclusive, of the General Code, which define the particular species or kinds of property subject to taxation, and unless the given property or interest therein is comprised within some one or more of said definative sections, no authority exists for the taxation of the same.

In the case of The State Board of Tax Commissioners v. Holliday, 150 Ind., 216, it was held by a divided court that paid up nonforfeitable and partly paid up life insurance policies are not subject to taxation in the hands of persons insured for the reason that there was not, as held by the court, any statute providing any regulation for or any manner assessing or valuing such policies; and in an opinion of my predecessor, Hon Timothy S. Hogan, found in vol. 1 of the Attorney-General's reports for 1912, at page 590, it was held that a policy-holder's interest in an ordinary life insurance policy or in a limited term policy, which said interest consists merely of a right to a cash payment upon the surrender thereof, is not taxable, whether such policy be paid up or not, and this for the reason, as held in said opinion, on a consideration of the above mentioned and other sections of the General Code, that no statutory provision has been made for the taxation of such insurance policies. In the case supposed by you, however, the insurance policy has been matured by the death of the insured and the beneficiary has a present vested interest in the money to be paid on the same, and whether the amount unpaid thereon is to be paid in installments of a specified number or during the life of the beneficiary or in a lump sum at the option of the beneficiary, I see no reason why the amount remaining unpaid cannot be taxed to the beneficiary of the policy as a credit under the provisions of section 5327 of the General Code, the same, as a claim or demand, to be taxed as its true value in money as therein provided, or, if the same be payable in installments at stated periods, the same should be taxed at the sum which the beneficiary at the time of listing same believes them to be worth, as provided in section 5388 General Code.

I am therefore of the opinion that the interest of the beneficiary of a matured life insurance policy, as in the case supposed by you, is taxable in the manner above mentioned.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

776.

BOND ISSUE—UNDER SECTION 1259 G. C., QUESTION MUST BE SUBMITTED AT REGULAR ELECTION.

The question of issuing bonds under section 1259 *G. C.* (107 *O. L.* 185) *can not be submitted at a special election, but must be submitted at a regular election in such municipality.*

COLUMBUS, OHIO, Novmber 12, 1917.

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

GENTLEMEN:—Under date of October 31, 1917, you request a written opinion on the following matter:

> "We are calling your attention to section 1259 G. C., as amended 107 O. L. 185, providing that the issuance of bonds shall be submitted to a vote of the electors. We are also calling your attention to section 4840 G. C., relative to special elections.
>
> *Question.* In a case wherein the officers of a municipality are under orders from the state board of health to remedy a dangerous condition to the public health by reason of imperfect water supply, and such improvement involves the expenditure of money which is not on hand, and it is decided by the municipal council to issue bonds under authority of section 1259 G. C., may a vote of the people on such bond issue only be held at a general election, or may the question be submitted at a special election called for such purpose?"

Section 1259 G. C., as amended in 107 O. L. 185, reads as follows:

> "Each municipal council, department or officer having jurisdiction to provide for the raising of revenues by tax levies, sale of bonds or otherwise, shall take all steps necessary to secure the funds for any such purpose or purposes. The council of a municipality, by an affirmative vote of not less than two-thirds of the members elected or appointed thereto, by ordinance shall issue and sell bonds in such amounts and denominations, for such period of time, and at such rate of interest, not exceeding six per. cent. per annum, as said council shall determine and in the manner provided by law, in order to provide the funds necessary and proper to carry out and perform all of the conditions of said finding and order and to make and install any or all of the improvements and changes herein provided, and the question of the issuance and sale of said bonds shall be submitted to a vote of the electors * * * ."

Said section 1259, above quoted, which is and was the section providing for the manner of raising funds to carry out the orders of the state board of health, prior to the amendment in 107 O. L. 185 containing the following:

> "* * * The question of the issuance of such bonds shall not be required to be submitted to a vote."

In the amended section the legislature specifically requires that:

> "* * * the question of the issuance of sale of said bonds *shall* be submitted to a vote of the electors * * * ."

And in this section there is no provision as to what election, or whether general or special.

Section 4840 G. C. provides:

> "Unless a statute providing for the submission of a question to the voters of a county, township, city or village provides for the calling of a special election for that purpose, no special election shall be so called. The question so to be voted upon shall be submitted at a regular election in such county, township, city or village, and notice that such question is to be voted upon shall be embodied in the proclamation for such election."

The language of this section is too plain to need interpretation. Unless a particular statute, which provides for the submission of the question to the voters, also provides for the calling of a special election for that purpose, no special election shall be called and the question must be submitted at a regular election.

In opinion No. 563, under date of August 27, 1917, given to the State Board of Health, Columbus, O., I was called upon to construe scetion 1259 G. C., as amended by H. B. No. 262, supra, and at pages 11 and 12 of the opinion used the following language:

> "My conclusion with respect to your first question is, then, that the election to be held under section 1259 G. C., as amended (107 O. L. 185), must be held on the day of holding the regular November election. This means that there is opportunity to vote upon such a question only once in every two years, except in charter cities where the frequency with which there may be an opportunity to vote upon the question may be determined by the frequency with which municipal elections may be held under the charter.
>
> It might be argued that section 4740 G. C. authorizes the submission of a question at any regular election. I should like to bring myself to this conclusion for the purposes of your inquiry, but I can not do so. The election must be an election 'in such city or village,' and notice of it must under section 4740 G. C. 'be embodied in the proclamation for such election.'
>
> The only occasion upon which the proclamation for a regular election in a city or village is authorized or required, is when there is to be an election 'for municipal officers' (section 4837 G. C.). The proclamations for general elections are to be made by the sheriff

under section 4827, and such proclamations are to be made 'throughout the county.

Reading all the statutes together, it seems clear to me that section 4840 G. C. does not apply to any regular election, but only to an election for which a proclamation, addressed to the electors of the particular subdivision who are to vote on the question, is to be issued."

It is therefore my opinion that the question of issuing bonds under section 1259 G. C. (107 O. L. 185) can not be submitted at a special election, but must be submitted at a regular election in such municipality.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

777.

MINOR— WHOSE EMPLOYMENT IS UNLAWFUL—NOT WITHIN PURVIEW WORKMEN'S COMPENSATION LAW.

A minor child whose employment is unlawful is not within the purview of the workmen's compensation law of this state, and the industrial commission of Ohio may not legally make an award to the parents as dependents of such minor child by reason of the death of such child from an injury sustained in the course of such unlawful employment, although the employer has otherwise complied with the provisions of the workmen's compensation law.

COLUMBUS OHIO, November 13, 1917.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I am in receipt of a letter from you under date of October 26, 1917, in which you ask for an opinion on the questions indicated therein as follows:

"Under date of June 24, 1917, Quinton P. Fuerst died as a result of injuries sustained while in the employ of The Harrington Electric Company, Caxton Building, Cleveland, Ohio. Claim for an award from the state insurance fund has been filed by the parents of the deceased. The evidence on file in this case establishes that the age of deceased at the time of his death was 13 years and 8 months.

The commission desires your opinion as to whether the fact that deceased was under the age which would lawfully permit him to be employed in the employment at which he was engaged at the time of his death is sufficient to prevent the commission from making an award, under the provisions of the workmen's compensation act, in view of section 1465-93 and section 1465-61 of the General Code.

Your attention is directed to the fact that deceased, prior to entering the employ of the above named employer, had been attending

school, and that the injury causing death was sustained during the the vacation period. It was the intention of the deceased, according to the evidence, to return to school at the end of the vacation period."

Section 1465-72 General Code provides that the state liability board of awards shall disburse the state insurance fund to such employes of employers as have paid into said fund premiums applicable to the classes to which they belong who have been injured in the course of their employment wheresoever such injury has occured, and which has not been purposely self-inflicted, or to their dependents in case death has ensued.

Section 1465-61 General Code, in so far as material to the question at hand, provides that the terms "employe," "workmen" and "operative," as used in the workmen's compensation law, shall be construed to mean:

"every person in the service of any person, firm or private corporation, including any public service corporation employing five or more workmen or operatives regularly in the same business, or in or about the same establishment under any contract of hire, express or implied, oral or written, including aliens, and also including minors who are legally permitted to work for hire under the laws of the state, but not including any person whose employment is but casual or not in the usual course of trade, business, profession or occupation of his employer."

Section 1465-93 General Code provides as follows:

"A minor working at an age legally permitted under the laws of this state, shall be deemed sui juris for the purpose of this act, and no other person shall have any cause of action or right to compensation for an injury to such minor workman, but in the event of the award of a lump sum of compensation to such minor employe, such sum shall be paid only to the legally appointed guardian of such minor."

In the case of Walter Kutz, a minor, etc., v. the Acklin Stamping Company, 27 C. C., N. S., 273, decided by the court of appeals of Lucas county, it was held that a minor unlawfully employed while under sixteen years of age is not within the contemplation of the workmen's compensation law, and that an employer giving employment to a minor not legally permitted to work is amenable to all the other statutes of the state affecting employment in case of injury to such minor, notwithstanding the employer has complied with the terms of the workmen's compensation law.

In the case just cited the plaintiff, a boy between the age of fifteen and sixteen years, was injured by an unprotected ventilating fan in the course of his employment as an assistant on a stamping machine. The court held the employment of the plaintiff to be unlawful by reason of the fact that the employer had not procured the age and school certificate provided for by sections 12994, 7765 and 7766 of the General Code. The injury to the plaintiff occurred in the month of May, a time when presumably the public schools were in session, although this phase of the question is one which does not seem to have engaged the attention of the court.

On account of the age of the boy mentioned in your communication, as well as by reason of the fact that his employment and injury occurred during

the school vacation, I assume that no question with respect to the matter of the procurement of an age and schooling certificate arose in this case. On the contrary, I assume that the unlawfulness of young Fuerst's employment at the time of his injury and death arose by reason of the provisions of section 12993 General Code, which reads as follows:

> "No male child under fifteen years or female child under sixteen years of age shall be employed, permitted or suffered to work in, about or in connection with any (1) mill, (2) factory, (3) workshop, (4) mercantile or mechanical establishments, (5) tenement house, manufactory or workshop, (6) store, (7) office, (8) office building, (9) resturant, (10) boarding-house, (11) bakery, (12) barber-shop, (13) hotel, (14) apartment house, (15) bootblack stand or establishment, (16) public stable, (17) garage, (18) laundry, (19) place of amusement, (20) club, (21) or as a driver, (22) or in any brick or lumber yard, (23) or in the construction or repair of buildings, (24) or in distribution, transmission or sale of merchandise, (25) nor any boy under fifteen or female under twenty-one years in the transmission of messages.
>
> It shall be unlawful for any person, firm or corporation to employ, permit or suffer to work any child under fifteen years of age in any business whatever during any of the hours when the public schools of the district in which the child resides are in session."

Other than as is indicated by the name of the concern you do not advise as to the character of the business of The Harrington Electric Company, but with respect to this I assume from your communication that you found that the company's business and the work done by this boy came within one or more of the classes of work and employment which by the terms of this section are interdicted at all times to male children under the age of fifteen years.

Your precise question is whether or not the fact that young Fuerst was so unlawfully employed at the time of his injury and death legally prevents your commission from making an award of compensation or benefit to the parents of this boy by reason of his injury or death. I am of the opinion that such is the case.

Under the provisions of section 1465-61 General Code, above noted, it is only minors who are legally permitted to work for hire who are included within the term "employe," "workman" or "operative," as used in the workmen's compensation law, and it is only to employes or to their dependents in case of injury resulting in death that compensation or benefit can be paid under this act.

The workmen's compensation laws of the states of Minnesota and Wisconsin have provisions touching the status of minors as employes under said laws quite identical to those of section 1465-61 General Code.

In the case of Westerlund v. Kettle River Company, decided by the supreme court of Minnesota on May 18, 1917, and reported in 162 N. W., 680, the court, referring to such a provision in the workmen's compensation law of that state, says:

> "The section of the compensation statutes referred to provides that the term 'employe' shall include, among others, 'minors who are

legally permitted to work under the laws of the state'. We are satisfied that this language will permit of no construction other than as stated in Pattee v. Noyes, 133 Minn., 109, 157 N. W., 995, namely, that the legislature intended thereby to exclude from the act minors whose employment is prohibited by law. This is made too clear for controversy when viewed in the light of the legal rights of minors in this state, and of our statutes affecting such rights, known as 'child labor laws.' In the absence of legislation to the contrary, all minors may lawfully engage in such employments or work as their age and capacity fit them, and in this respect are 'legally permitted' to work, though their contracts, except as to necessities, are voidable at their election.

In fact, we have no statute expressly permitting the employment of minors, and the use of the words 'legally permitted to work' was not intended as a reference to permissive legislation. But we have statutes, and have had for many years, known as the child labor laws, by which the employment of minors of certain age is expressly prohibited in specified classes of employment deemed detrimental to their moral welfare and dangerous to their life or limb. And in making use of the language quoted it is apparent that the legislature intended to preserve the status of minors in respect to their employment in dangerous occupations, and to remove them from the compensation act when employed in violation of law. No other construction of the statute can be adopted that would not be in discord with our whole legislative policy upon the subject * * * ."

In the case of Stetz v. F. Mayer Boot and Shoe Co., 163 Wis., 151, the court held that a minor under sixteen years of age who at the time of his employment and injury has not obtained a written permit authorizing his employment as required by the statutes of that state was not

"legally permitted to work under the laws of the state"

within the meaning of the provisions of the workmen's compensation law providing that the term "employe" as used therein shall include:

"every person in the service of another under any contract of hire, express or implied, oral or written, including aliens and also including minors who are legally permitted to work under the laws of the state * * * ;"

and hence that such minor was not an employe whose rights in respect to such injury were governed by the said law.

It has likewise been held in states whose workmen's compensation laws do not specifically define the statutes of minors that such minors illegally employed at the time of the injury are not within the purview of the workmen's compensation law.

Hetzel, Jr., v. Wasson Piston Ring Co., 89 N. J. L., 201; Hillestad v. Industrial Ins. Com,, 80 Wash., 426;

I note that in the case of Foth v. Macomber and Whyte Rope Company, 161 Wis., 549, it was held that the words

"minors who are legally permitted to work under the laws of this state"

used in defining the term "employe" in the workmen's compensation law of said state are not to be restricted so as to apply only to minors permitted to be employed in the precise work in which the accidental injury in question was sustained, but that such words are to be given a broad, comprehensive meaning so as to include all minors who are permitted under the laws of the state to work at any gainful ocupation under any circumstances.

The decision of the court in this case was limited in the later case of Stetz v. F. Mayer Boot and Shoe Co., supra, and is not in accord with the other decisions noted in this opinion. In any event the decision of the court in the case of Foth v. Macomber and Whyte Rope Co. should be limited to the precise situation of facts and of the statutory law before the court at the time of this decision. At the time the workmen's compensation law of the state of Wisconsin was enacted it was provided by the statutes of that state that children of a certain tender age were not permitted to work at any gainful occupation; above that age they were divided into several classes—some were permitted to be employed to work under specified conditions and in specified occupations, and some were expressly prohibited from doing work that was considered to be extra hazardous—and the decision of the court was that any minor who is legally permitted to work at all in a gainful occupation is to be regarded as competent to contract with respect to the subjection of himself to the provisions of the workmen's compensation law, although his employment in the particular work at which he was injured was prohibited by law.

It is obvious that the broad principle of construction announced by the supreme court of Wisconsin in this case cannot be applied in the state of Ohio without bringing all minors who are able to labor within the purview of the workmen's compensation law, no matter how unlawful the employment of the minor at the time of his injury may be, for conceivably in this state every minor may be legally employed for hire in some gainful occupation at sometime or other.

I am not disposed to follow the rule of construction adopted by the court in the case of Foth v. Macomber and Whyte Rope Company, supra; and and giving effect to the case of Kutz etc. v. Acklin Stamping Company and other cases above noted, I think the test is whether the minor was legally employed in the particular work at the particular time when the injury was sustained, and applying this test to the finding made by you with respect to the employment of Quinton P. Fuerst, I am of the opinion as before indicated, that you have no legal right to make an award to his parents by reason of his death resulting from an injury sustained in said employment.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

778.

STENOGRAPHERS— IN STATE EMPLOY MAY RECEIVE COMPENSATION FOR WORK DONE OUTSIDE OF TIME EMPLOYED BY STATE.

Stenographers in the department of fish and game commission may lawfully receive compensation for work done outside of the time employed by the state and not interfering with their regular duties in said department.

COLUMBUS OHIO, November 13, 1917.

Board of Agriculture, Fish and Game Division, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your communication of October 25, 1917, wherein you request my opinion as follows:

> "We are enclosing a letter from J. T. H. Mitchell, 331 Madison Ave., New York City, in which they request a list of parties securing hunters' licenses in Ohio for the year 1917.
>
> Would it be lawful for the stenographers of this department to furnish these names by doing the work outside of the time employed by the state? Please let us have your opinion regarding the matter."

The letter from J. T. H. Mitchell enclosed with your communication reads as follows:

> "I understand that the county officials at the end of each year send you a report giving the name and address of each individual who has taken out a license to hunt, during the said year.
>
> I should like very much to secure the names and addresses of the hunters to whom such licenses have been issued, and would ask if it is possible to secure the same from your commission—also what the approximate cost would be per thousand for having these names compiled, if it is not against the law to give out this information.
>
> Possibly some one employed by you would like to make some extra money by furnishing us with the aforesaid list of hunters.
>
> About what time of the year would these records be complete for 1917?
>
> Thanking you in advance for your courtesy in replying, * * *."

Your question is:

> "Would it be lawful for the stenographers of this department to furnish these names by doing the work outside of the time employed by the state?"

I take it, however, that what you wish to know is whether or not the stenographers of your department may lawfully receive compensation from Mr. J. T. H. Mitchell for work done on the list requested outside of the time employed by the state. I base this assumption upon the implied offer in Mr. Mitchell's letter to pay for the work done on said list.

I can find no prohibition in the statutes against state employes engaging in other occupations that do not interfere with their regular duties and I can see no reason why the stenographers in your department should not receive compensation from Mr. Mitchell for work performed for Mr. Mitchell by them outside of the time employed by the state.

My predecessor, in an opinion found in Vol. I, Opinions of the Attorney-General for the year 1915, at page 450, in passing upon the question of whether or not a person holding a position under the state may accept other employment, held as follows:

> "I find no reason for holding that the employment by the federal government is incompatible with the position of registrar of vital statistics. Because the registrar is as you point out, compensated for his service to the state by his annual salary, he is not thereby precluded from pursuing any gainful occupation which will not interfere in any way with the discharge of his duties as registrar."

I agree with the opinion of my predecessor, that a state employe is not precluded from pursuing any other occupation that does not interfere with his or her regular duties. Therefore in direct answer to your question I advise you that the stenographers in your department may work on the list requested by Mr. Mitchell when not engaged at their regular duties in your department and may lawfully receive compensation from Mr. Mitchell for said work.

I am not advising upon the propriety of furnishing the list of names requested by Mr. Mitchell.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

779.

COUNTY AUDITOR—TO WHOM LIST PROVIDED FOR IN SECTION 5607 SHOULD BE MAILED—WHEN PROPERTY HAS BEEN CONVEYED TO ANOTHER PERSON BEFORE TIME FOR MAILING SAID LIST.

Where a change is made in the taxable valuation of real property standing on the tax duplicate in the name of a particular person as the owner thereof and such owner sells the same by deed of conveyance to another person, such deed being presented to the county auditor for transfer and filed with the county recorder for record before the time provided in section 5607 General Code at which the county auditor is required to mail a copy of the list showing all changes made in the assessment of real estate, such list should be mailed to the person to whose name such property has been transferred and not to the person in whose name the property stood at the time the tax duplicate for the year was made up.

COLUMBUS, OHIO, NOVEMBER 13, 1917.

HON. CLARE CALDWELL, *Prosecuting Attorney, Warren, Ohio.*

DEAR SIR:—As previously acknowledged, I am in receipt of a communication from you in which you ask my opinion on a question involved in the case of R. I. Gillmer v. J. C. Cratsley, county treasurer, et al., decided by the common pleas court of your county. With your communication you enclose a copy of the opinion of the court in this case. The question made is disclosed by your communication, which reads as follows:

"Growing out of a re-valuation which was made upon lands which for the year 1916 stood upon the auditor's duplicate in the name of Maria Heaton, but which were deeded to R. I. Gillmer, the transfer and the record of the same being made on April 26, 1916, the lands were given a new valuation for the year 1916, and the printed list containing the new valuation was sent to Maria Heaton and no notice was sent to R. I. Gillmer.

The contention of Mr. Gillmer is, that under section 5607, notice should have been given to him, and for this reason the court of common pleas has enjoined the re-valuing of the property by the auditor and the collection of taxes under the new valuation for the year 1916. I am mailing herewith a copy of the opinion of the court rendered in the case.

If we are to be bound by this opinion, it is incumbent upon the auditor to know the real owner at the time he sends out the printed list of the revalued real estate in any district. This places upon the auditor the burden of looking up each title on the records in the recorder's office before mailing out the list.

I would like an opinion from you as to whether, under the present law, it is incumbent upon the auditor to mail the notice of revaluation to the person in whose name the title stands on the day that the notice goes out. Section 5607 reads today as it did last year. However, section 5548-1, which provides for preliminary notice that revaluation is to be made, permits the notice to be sent to 'the owner of such real estate, or the person in whose name the same stands charged on the duplicate.'

Is there anything in our law which, in your opinion, permits the auditor to serve the notice upon the owner as shown on the tax duplicate for the

current year or can section 5607 be given the interpretation as to the word 'owner,' which would include the owner appearing of record on the tax duplicate for the current year?"

From your communication and the opinion of the court in the case above noted it appears that the reassessment of the real property in question was made in and for the year 1916, and from the opinion it appears that the effect of the reassessment was to increase the taxable valuation of the property from $28,550.00 to $41,300.00.

Assuming that the provisions of section 59 of the Parrett-Whittemore Law (106 O. L., 246-272), which was given General Code section 5607, apply to the change made in the assessment of this property, the court enjoined the county treasurer from collecting taxes on the increased valuation for the reason that the notice of the change in the assessment of the property was not given to Gillmer in the manner provided by said section. Said section 59 of the Parrett-Whittemore Act (section 5607 G. C.) read as follows:

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

Looking to the provisions of section 60 of said act (section 5608 General Code) it appears that it is therein provided that the provisions of section 59 of the act shall not apply to the changes made in the assessments of real estate in the year 1916 nor in any fourth year thereafter. Section 60 of the Parrett-Whittemore Act, which is now section 5608 General Code, provides that on or before the first day of September, 1916, and every fourth year thereafter the county auditor shall cause to be printed separate lists showing the assessment of all real estate in each ward in municipal corporations divided into wards and in each township and municipal corporation not divided into wards in each county. It is further provided that such lists shall be in such form and shall contain in detail such information as the tax commission of Ohio may prescribe, and that the county auditor shall cause a copy thereof to be mailed to each owner of the real estate in the ward, township or municipal corporation if known and if not known then to his agent, if known. Said section 60 of this act further provides that *in such years the county auditor shall not print and mail the lists provided for in the next preceding section.*

I am informed by the tax commission that in some of the counties of the state there was a compliance with the provisions of section 60 of the Parrett-Whittemore Law in the year 1916, while in other counties such was not the case. I am not advised as to what, if any, consideration the court gave to the provisions of section 60 of the Parrett-Whittemore Law in applying the provisions of section 59 of said law to the controversy before it, nor in reaching a decision on the merits of the case am I advised to what extent, if at all, the court considered the provisions of section 58 of the Parrett-Whittemore Law, which provides that when the board of revision has completed its work of equalization and transmitted the statements and returns to him the county auditor shall give notice by advertisement in two newspapers of opposite politics published in and of general circulation throughout the county that the statements and returns for the current year have been revised and valuations completed and are open for public inspection in his office and that complaints against valuations or assessments, excepting valuations fixed and assessments made by the tax commission of Ohio, will be heard by the county board of revision.

In any event, I do not deem it to be within my province to express any opinion with respect to the correctness of the court's decision on the case before it.

The provisions of section 59 of the Parrett-Whittemore Law (section 5607 G. C.) were repealed by the legislature by the act of March 21, 1917, and said section 5607 was re-enacted to read as follows: (107 O. L., 35.)

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

With the exceptions that the printed lists of changes in the assessment of real estate is now required to be printed and mailed on or before the 15th day of August instead of the 15th day of July, the provisions of section 5607 General Code as they now read are identical with the provisions of the same section as enacted in the Parrett-Whittemore Law.

In the case of Gillmer v. Cratsley above noted, it appears from your communication as well as from the opinion of the court of which you sent a copy, list of the changes made in the assessment of real property was sent to one Maria Heaton, who was the owner of the property in question at the time the tax duplicate for 1916 was made up, but that a copy of such printed list was not sent to Gillmer to whom Maria Heaton conveyed the property after the duplicate was made up, but before copies of the list provided for in said section 59 of the Parrett-Whittemore Act (section 5607 G. C.) were made out, though it appears that the property on the presentation of the deed of conveyance was transferred by the county auditor April 26, 1916, and that said deed was recorded on said date.

The court in construing the provisions of section 5607 General Code held that it was not a sufficient compliance with the provisions of the statute, under the facts disclosed, for the county auditor to mail a copy of the list provided for in the section to Maria Heaton, but that such copy should have been mailed to Gillmer. In thus construing the provisions of section 5607 under the facts stated I think the court was correct.

Section 2573 General Code provides that on application and presentation of title, the county auditor shall transfer any land or town lot from the name in which it stands into the name of the owner when rendered necessary by a conveyance; while section 2768 General Code provides that the county. recorder shall not record any deed of absolute conveyance of land until it has been presented to the county auditor and by him endorsed "transferred" or "transfer not necessary."

It appearing that these statutory provisions were complied with in this case, Gillmer's name appeared upon the tax list as the owner of this property at the time the county auditor sent out copies of the list of changes in the assessment of real property provided for in section 5607, and a copy of such list should have been sent to him.

I realize, of course, that by receiving a deed of conveyance of property standing on the tax list or duplicate in the name of one person, another person may become the owner of such property without presenting such deed for transfer or record, and in such case the county auditor would in all probability have no means of knowing who the owner of the property was for the purpose of the notice provided for in section 5607 of the General Code. In such case, unless the county auditor actually knows of such conveyance and the name of the real owner or his agent, the only thing he could do would be to mail a copy of such list to the person who by the tax duplicate appears to be the owner of the property, and in such case the real owner would have no reason to complain by reason of the fact that a copy of such list had not been sent

to him. Where, however, it appears that the person taking such deed of conveyance from one listed on the tax duplicate as the owner thereof does, as a matter of fact, have the property conveyed thereby transferred to his name on the tax duplicate before the county auditor sends out the copy of the list of changes in the assessed value of the real estate provided for in section 5607 of the General Code, it is the duty of the county auditor to mail such owner a copy of the list provided for in said section.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

780.

PUBLIC HIGHWAY—VACATION—REPAIR OF SAID HIGHWAY.

1. *Where the location of a public highway has been changed by the authorities having jurisdiction over the same and thereby a part of the public highway as it originally existed is rendered unnecessary for the use of the public, that part of the original road which is so rendered unnecessary by the change is vacated, even though the provisions of law in reference to the vacation of public highways have not been followed.*

2. *Neither the county commissioners nor township trustees are under any obligation, neither have they any authority to keep in repair such part of the public highway so vacated.*

COLUMBUS, OHIO, November 13, 1917.

HON. HENRY W. CHERRINGTON, *Prosecuting Attorney, Gallipolis, Ohio.*

DEAR SIR:—I have your communication of October 15, 1917, which reads as follows:

> "In 1894 the county road leading from Gallipolis to Crown City in this county, a distance of about twenty miles, was improved by paving with limestone by the county commissioners. The road, before improvement, passed directly in front of the premises and residence of one Johnson. When the road was improved the road was changed and a new route established about one-eighth of a mile from Johnson's house. There was no action taken to vacate the old road as it passed in front of Johnson's residence, and the old road remained as it had been through Johnson's premises, and one end of it has been used ever since by Johnson to reach the new county road. It is Johnson's only available outlet. The end of the road used by Johnson passes through the land of one Moore. There is no question but that Johnson has a right to use the road in question, but the query has arisen as to whether or not it is the duty of the county commissioners or township trustees to keep the old road in repair. The situation is somewhat acute."

In answering the question contained in your communication, it might be well for us to note the section of the Revised Statutes and General Code relative to this matter, especially in view of the fact that our courts have placed a construction upon the section of the Revised Statutes having reference to the matter about which you inquire.

Section 4669 R. S. reads as follows:

> "All alterations of county roads heretofore made and established, or which shall hereafter be made and established, shall be and remain part of

such roads, and so much of the original roads as is rendered unnecessary by such alterations in the opinion of the viewers and county commissioners shall be and remain vacated."

This section of the Revised Statutes became section 6924 G. C., which read as follows:

"Alterations of county roads shall be a part of such roads. So much of the original roads as is rendered unncessary by such alterations, in the opinion of the viewers and county commissioners, shall be vacated."

This section has been repealed and the matter therein contained, relative to the vacation of roads, is now found in section 6869 G. C. (107 O. L. 72) and reads as follows:

"Section 6869. * * * That part of the road, if any, made unnecessary by any change or alteration therein shall be ordered vacated. * * *."

Thus we see that ever since 1887 the provision of our law relative to the vacation of public roads, from the fact that they are no longer necessary for the use of the public, has been practically the same.

The question now is as to whether a public road might be considered vacated from the fact that it is no longer necessary for the use of the public, even though the county commissioners have taken no formal steps in the matter of vacating the same.

In Silverthorn et al. v. Parsons et al., 60 O. S. 331, the court was considering a question very similar to the one suggested by you in your communication, in which it placed a construction upon section 4669 R. S. The facts in this case were briefly as follows:

(1) A road was changed from the place where it had been originally located to other lands. The lands upon which the new road was located had been deeded to the county for a money consideration and also with the understanding that the parties deeding the land should receive the land upon which the old road was located.

(2) The county commissioners never took any action in the matter of vacating the old road.

Under these facts the circuit court held (p. 338):

"That the commissioners of the county could not by contract executed or otherwise, turn the public highway over to a private individual, so as to deprive the public of its use without proceeding in the form and manner as provided by section 4661, Revised Statutes of Ohio * * *.

That the plaintiffs have no such right in law or equity to the premises embraced in said thirty feet roadway, as would entitle them to maintain this action."

The supreme court reversed the judgment and finding of the circuit court in the case above quoted. In the syllabus the court laid down the following proposition of law:

"When the owners of land crossed by a county road enter into an agreement with the county commissioners pursuant to which they convey to the commissioners other land, with a view to affecting a necessary change in the road, and the road is by order of the commissioners opened on the lands conveyed, and is so used by the public and by the proper authorities, there is

a legal change in the location of the highway, notwithstanding the want of statutory proceedings for that purpose; and, under section 4669 of the Revised Statutes, so much of the original road as is rendered unnecessary by the change is vacated."

In the opinion (p. 339) the court say:

"Since the absence of favorable action by viewers does not prevent the change of the road to the new level, it cannot serve to defeat the result of such change, which section 4669 of the Revised Statutes defines to be that 'so much of the original road as is rendered unnecessary by such alteration * * * shall be and remain vacated.' "

This decision was based upon a case styled City of Steubenville v. King, 23 O. S. 610, which we will now consider. The first branch of the syllabus reads as follows:

"A conveyance of land to the county commissioners for a county road, the acceptance of such grant by the commissioners, the opening of the road by their order, and its subsequent use as such by the public, and by the proper authorities, constitute it a legal public highway, notwithstanding the want of statutory proceedings for its establishment."

In the opinion (p. 614) we find the court reasons as follows:

"That it *was* a legally established public highway at and before its annexation, we entertain no doubt. Because the statutes have pointed out certain methods to be adopted for the establishment of public roads, it by no means follows that they can never be established by any other means. The grant of the owner made to the county commissioners, their acceptance of the grant, the opening and working of the road by the public authorities, and its use as such by the public, were sufficient to establish it a legal public highway."

The case of City of Steubenville v. King, supra, is clearly to the point that a road may be legally established by the county without following the provisions of the statutes which relate to the establishing of a road. Using this case as authority, the court in the case of Silverthorne et al. v. Parsons et al., supra, held that an original road, rendered unnecessary by the change of the location of a road, is vacated, even though the provisions of the statute relative to the vacation of a public road are not followed.

I will cite one other case to the same point, which is found in 19 C. C. (N. S.) 62, styled Hagelbarger v. The Pennsylvania Co. The second branch of the syllabus reads as follows:

"In such case, where part of a road is vacated and a new road actually established and used by the public and the proper authorities, there is a legal change in the location of the road, even though the proceedings of the commissioners may have been informal."

In the opinion (p. 66) the court reasons as follows:

"We hold that clearly, from the evidence in this case, so much of the original road as extended from point No. 3 to point No. 2 on the plat already mentioned, was rendered wholly unnecessary by the opening of the road from

point No. 1 to point No. 2. That being true, the establishment of the new road resulted in a vacation of this last named part of the old road."

From all the above it seems clearly evident to me that the road about which you inquire has been vacated, so far as the use of the same by the public is concerned, and if it has been vacated, then it naturally and logically follows that neither the county commissioners nor the township trustees would be under any obligation to maintain, repair and improve the same.

Of course if this road is held to be vacated, then the authorities would be under no obligation further to keep the same in repair. This is clearly evident on reason and the case of McQuigg et al. v. Cullins, 56 O. S. 649, is authority for the same conclusion, the first branch of the syllabus reading as follows:

"The order of vacation of a township road by the township trustees, in a proceeding conducted under chapter III, title 7, of the Revised Statutes, has the effect to relieve the public from any duty to keep such road in repair. But such order does not authorize the closing up or obstructing of the road against the objection of one who has acquired an easement in it."

While I am of the opinion that, based upon reason and the decisions quoted, the conclusion herein reached is correct, yet I have arrived at said conclusion with some doubt. I would therefore suggest that in order to remove all doubts relative to the matter, this particular road be vacated under and by virtue of the provisions of section 6862 et seq. G. C. (107 O. L. 71). This procedure would not entail very great trouble or expense and would remove all doubts in reference to the status of said highway.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

781.

APPROVAL—FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN MAHONING, PREBLE AND SCIOTO COUNTIES.

COLUMBUS, OHIO, November 15, 1917.

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

DEAR SIR:—Your letter of November 14, 1917, received, in which you enclose, for my approval, the following final resolutions:

"Mahoning county—Section 'Y,' Canfield-Poland road, I. C. H. No. 486.
Preble county—Section 'D-1,' Eaton-Hamilton road, I. C. H. No. 180.
Scioto county—Section 'M,' Portsmouth-Lucasville road, I. C. H. No. 406."

I have carefully examined said resolutions, find the same correct in form and legal, and am, therefore, endorsing my approval thereon, in accordance with the provisions of section 1218 G. C., and returning them to you.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

782.

APPROVAL—TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE—SANDUSKY COUNTY.

COLUMBUS, OHIO, November 15, 1917.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"IN RE:—Bonds of Sandusky County, Ohio, in the sum of $32,000.00, for the purpose of paying the respective shares of said county, Sandusky township and abutting property owners of the cost and expense of improving section 'O' of I. C. H. 281."

I am herewith returning with my approval transcript of proceedings of the county commissioners and other officers relating to the above bond issue.

This bond issue is the same issue purchased by you by resolution under date of August 21, 1917, and which was later rejected by you upon an opinion of this department, holding the proceedings relating to said bond issue to be invalid for the reason that the resolution providing for the issue of the bonds extended the maturity of some of the bonds beyond the period of five years from the date of the issue of the bonds, contrary to the provisions of section 1223 of the General Code as it read prior to its amendment in the White-Mulcahy Act, which went into effect June 28, 1917, it appearing by the transcript that the resolution providing for the issue of the bonds was adopted May 18, 1917. It appears, however, that as a matter of fact the resolution providing for the issue of these bonds was adopted August 18, 1917, after the White-Mulcahy act went into effect, amending section 1223 of the General Code so as to authorize the extention of the maturity of the bonds issued under said section to a period of time not exceeding ten years from the date of issue. This correction in the transcript, of course, obviated the objection made to the transcript as first presented to this department, and finding the proceedings in all respects to be in substantial conformity to the provisions of the General Code relating to bond issues of this kind, the same are hereby approved. The transcript shows that the estimated cost and expense of this improvement is the sum of $37,000.00, while, as you will note, the bond issue by the county commissioners, covering the shares of the cost and expense of said improvement to be paid for by the county, township and abutting property owners amounts to the sum of $32,000.00, leaving only the sum of $5,000.00 to be paid by the state of Ohio. The transcript, as presented to this department, shows no reason why the state is not paying fifty per cent. of the cost and expense of this improvement and therefore does not affirmatively show any authority on the part of the board of county commissioners to issue bonds in excess of the fifty per cent. which in such case would be payable by the county, township and abutting property owners. However, an investigation of the files in the office of the state highway commissioner shows that, including the improvement to which these proceedings relate, there are four county highway improvements to be made in Sandusky county and that the cost and expense thereof is in the sum of about $80,000.00, which sum is in excess of twice the amount apportioned by the state to Sandusky county for the construction of inter-county highways, and for this reason the state is required, as to this particular improvement, to pay such amount only towards the improvement as may have been agreed upon by and between the state highway commissioners and the county commissioners, in this case a sum of $5,000.00 (see section 1213 G. C.).

On a consideration of the transcript as a whole and the facts ascertained by me from the office of the state highway commissioner, I am of the opinion that the proceedings are in all respects valid and that bonds properly prepared in accordance with the bond form submitted will, when signed by the proper officers and delivered, constitute valid and subsisting obligations of said county.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

783.

APPROVAL—LEASES OF STATE LAND TO THE STOMPS-BURKHARDT CO. OF DAYTON, AND THE OHIO LIGHT & POWER CO., NEWARK.

COLUMBUS, OHIO, November 16, 1917.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your communication of November 12, 1917, in which you enclose, for my approval, two leases in triplicate, as follows:

To The Stomps-Burkhardt Co. of Dayton, valuation of lands leased	$1,666.66
To The Ohio Light & Power Co. of Newark, valuation of lands leased	266.66

I have carefully examined these leases, find them correct in form and legal, and have therefore endorsed my approval thereon and am forwarding them to the governor of Ohio for his consideration.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

784.

APPROVAL—CONTRACT BETWEEN THE HARRISON SAFETY BOILER WORKS AND BOARD OF TRUSTEES OF OHIO STATE UNIVERSITY.

COLUMBUS, OHIO, November 17, 1917.

HON. CARL E. STEEB, *Sec'y., Board of Trustees, Ohio State University, Columbus, Ohio.*

DEAR SIR:—You have recently submitted to this department for approval contract between the Harrison Safety Boiler Works, of Philadelphia, and the Board of Trustees of Ohio State University, which contract was entered into on September 12, 1917, for the construction and completion of an exhaust steam feed water heater and meter in the new power house on the Ohio State university campus, for the sum of $4,500.00, together with bond securing the same.

There was not attached to said contract any certificate from the Industrial Commission that the said concern had fully complied with the Workmen's Compensation Law, but under date of November 9, 1917, you advised us that the heater, under the contract, is to be delivered to the university f. o. b. power house switch, the unloading from the cars and the setting on foundation already prepared to be done by the uni-

versity. In view of that fact it does not appear that there is any work of construction to be done in Ohio, but simply the delivery of the completed heater is to take place in this state. Such being the case, of course there would be no necessity for the certificate mentioned.

We have obtained from the auditor of state a certificate that there are funds available for the payment of this contract and have therefore approved the same and filed the same, together with the bond, in the office of the auditor of state.

Very truly yours,
JOSEPH McGHEE,
Attorney-General.

785.

SALARY—POLICEMEN—FIREMEN—CITY MAY ISSUE BONDS TO PAY

The salaries or compensation of duly appointed and qualified occupants of positions in the police and fire departments of a city that have been created in accordance with law, for services performed by reason of their holding and filling said positions, are existing, valid and binding obligations of said city, for the payment of which bonds may be issued to provide funds as authorized in sections 3916 *and* 3917 *of the General Code, when the corporation is unable to pay said salaries or compensation when due because of its limits of taxation, or when it appears to the council for the best interests of the corporation to extend the time of the payment of the same.*

COLUMBUS, OHIO, November 17, 1917.

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

GENTLEMEN:—I have your communication requesting my opinion on the following:

> "We are enclosing herewith a copy of communication which was addressed to you by the city solicitor of Canton, Ohio, and which was presented to this department by a representative of your department, and in view of the recommendations of said representative we respectfully request your written opinion upon the following matter:
>
> *Question.* May bonds be issued under authority of section 3916 G. C., for the purpose of extending the time of payment of indebtedness, which indebtedness results from payrolls of the police and fire departments of a municipality, which payrolls said municipality is unable to meet for want of funds?"

Section 4374 G. C. provides for the establishment of a police department in a city, and reads as follows:

> "The police department of each city shall be composed of a chief of police and such inspectors, captains, lieutenants, sergeants, corporals, detectives, patrolmen, and other police court officers, station house keepers, drivers, and substitutes, as are provided by ordinance or resolution of council."

Section 4377 G. C. contains the provisions of law for the establishment of a city fire department, and reads as follows:

> "The fire department of each city shall be composed of a chief of the

fire department and such marshals, assistant marshals, firemen, telephone and telegraph operators as are provided by resolution or ordinance of council. The director of public safety shall have the exclusive management and control of such other officers, surgeons, secretaries, clerks, and employes as are provided by ordinance or resolution of council."

I am taking it for granted that the council of the city of Canton has passed appropriate legislation for the establishment of a police department and fire department in said city, in accordance with the provisions of the above mentioned sections, and has fixed the salaries of said positions therein as the law requires. I also presume that the persons filling said position in said departments have been appointed and have qualified in accordance with law, and have performed the duties incumbent upon them as occupants of said positions.

From such presumptions it follows that the various positions in the police and fire departments have been legally created, the compensation therefor has been fixed in accordance with law, and the occupants thereof have been properly appointed and have duly qualified and have performed the duties devolving upon them in accordance with law.

Under those conditions, then, it seems clear that the claims of the occupants of the various positions in said police and fire departments for compensation for said services rendered by them are existing, valid and binding obligations of the corporation.

Sections 3916 and 3917 of the General Code provide for the funding of certain legal indebtedness of a municipal corporation, and read as follows:

"Section 3916. For the purpose of extending the time of payment of any indebtedness, which from its limits of taxation the corporation is unable to pay at maturity, or when it appears to the council for the best interest of the corporation, the council thereof may issue bonds of the corporation or borrow money so as to change but not to increase the indebtedness, in such amounts, for such length of time and at such rate of interest as the council deems proper, not to exceed six per cent. per annum, payable annually or semi-annually.

"Section 3917. No indebtedness of such municipal corporation shall be funded, refunded, or extended, unless it shall first be determined to be an existing, valid and binding obligation of the corporation by a formal resolution of the council thereof. Such resolution shall also state the amount of the existing indebtedness to be funded, refunded or extended, the aggregate amount of bonds to be issued therefor, their number and denomination, the date of maturity, the rate of interest they shall bear, and the place of payment of principal and interest."

One of my predecessors, Hon. Timothy S. Hogan, had occasion to pass on the question of the right of a municipal corporation to fund certain legal indebtedness in accordance with the provisions of the two above mentioned sections, in an opinion rendered under date of August 7, 1912, to Hon. F. G. Long, city solicitor of Bellefontaine (found in annual report of the attorney-general for 1912, Vol. 2, page 1805). At page 1809 Mr. Hogan said:

"Section 3916, General Code, provides that when it appears to the council for the best interest of the corporation the council may borrow money so as to change but not increase the indebtedness. Section 3917, General Code,

provides that no indebtedness shall be funded, until it be determined by council to be an existing, valid and binding obligation. I am aware of the fact that it has been held in the case of Herrman et al. v. The City of Cincinnati, 9 O. C. C., 357, that section 2701 Revised Statutes as it stood at the time said case was decided was not intended to authorize the issue of bonds of a municipality to meet deficiencies in its various departments, but that it was intended by such section to authorize the issue of bonds after a prior funded indebtedness of the municipal corporation existed. The statute, section 2701 R. S. as it at that time existed did not contain the provisions that are now embraced in section 3917, General Code. It is to be noted that section 3917, General Code, provides that no indebtedness of a municipal corporation shall be *funded* unless it shall first be determined to be an existing, valid and binding obligation. This addition to section 2701, Revised Statutes, was first incorporated in said section in 1896 and as it grants to a municipal corporation the right to fund an existing, valid and binding obligation, I am of the opinion that it does now authorize the issue of bonds to take care of such obligations whether the same had been a previously funded indebtedness of the corporation or not. As the salaries of the municipal officers are valid and binding obligations upon the corporation, I am of the opinion that under section 3916 and section 3917 of the General Code council may borrow money in order to pay the same when due. In reference to the other funds which have been exhausted moneys in which were not to take care of the existing, valid and binding obligations of the corporation, I am of the opinion that money cannot be borrowed in order to replenish the same, for the reason that the same is not covered by sections 3916 and 3917, General Code. The Smith law, section 5649-3d requires that all expenditures within the six months following the appropriation shall be made from and within such appropriations and balances thereof, except as to existing, valid and binding obligations of the corporation, I am of the opinion that appropriations that have been exhausted prior to the end of the six months cannot be replenished by the issuance of either deficiency bonds or by the issuance of bonds under the sections above referred to, but that as to the fixed charges of a corporation, such as salaries, which are upon services being rendered an existing, valid and binding obligation of the corporation, money may be borrowed to pay the same as provided in sections 3916 and 3917 of the General Code, supra."

I agree with the reasons advanced by Mr. Hogan in the foregoing opinion and in the conclusions reached. The facts that were considered by Mr. Hogan in that opinion are practically identical with the ones that are presented to me in the present case.

I therefore advise you that it is my opinion that the salaries or compensation of duly appointed and qualified occupants of positions in the police and fire departments of a city that have been created in accordance with law, for services performed by reason of their holding and filling said positions, are existing, valid and binding obligations of said city, for the payment of which bonds may be issued to provide funds as authorized in sections 3916 and 3917 of the General Code, when the corporation is unable to pay said salaries or compensation when due because of its limits of taxation or when it appears to the council for the best interests of the corporation to extend the time of the payment of same.

I might say, however, that from a practical standpoint it would be bad business policy for a city to avail itself of this power to issue bonds for the purpose of providing funds to pay obligations of this character, which are in reality current obligations, except in case of great emergency, since it is thereby lessening its authority to issue

bonds for permanent propositions for which the bond issuing power is usually only granted, and it is also only extending the time of payment for a service from which it receives no future benefit.

I am sending a copy of this opinion to Hon. Walter S. Ruff, city solicitor of Canton, Ohio.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

786.

PROBATION OFFICERS—SALARY—LIMITATION—CANNOT BE INCREASED OR DIMINISHED.

The provision of section 1662 *G. C. that, "the entire compensation of the probation officer in any county shall not exceed the sum of* $40.00 *for each full thousand inhabitants of the county at the last preceding federal census," is a limitation upon the total amount of compensation to be paid to such probation officer during the entire year, but does not place any further limitation on the amount to be expended in any one month.*

Section 1662 *General Code, in providing that "the compensation of the chief probation officer shall not exceed* $3,000.00 *per annum and that of t.e assistants shall not exceed* $1,500.00 *per annum" places a monthly limitation upon the amount to be paid these officers. It is therefore unlawful.to pay the chief probation officer more than* $250.00 *a month or to pay the assistant more than* $125.00 *per month.*

After the common pleas judge has appointed a probation officer and designated his compensation, such compensation cannot be increased or diminished by the court.

COLUMBUS, OHIO, November 17, 1917.

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

GENTLEMEN:—I have your letter of September 21, 1917, enclosing letter written to you by Hon. Fred. C. Becker, probate judge of Allen county, Ohio, making certain inquiries concerning which you ask me to render you my opinion. Judge Becker's letter reads as follows:

> "On the 1st day of February, 1915, G. B. was appointed chief probation officer of Allen county, Ohio, at a salary of $100.00 per month. On the 12th day of November, 1915, N. M. was appointed a probation officer at a salary of $60.00 per month; both served as such officers until April 22, 1917, when G. B. died. N. M. continues to serve as such officer. No appointment was made to fill the vacancy caused by the death of G. B.
>
> Under section 1662 of the General Code, before and since its amendment, the fund at the disposal of the juvenile judge is $40.00 for each full thousand inhabitants at the last preceding federal census, which in Allen county, Ohio, is fifty-six thousand, yielding the sum of $2,240.00 per annum.
>
> A new probation officer has been appointed and in determining his salary under section 1662 G. C., as amended in Vol. 1 of the supplement of the General Code, may we take the calendar year of 1917, for which the sum of $2,240.00 is available, and deduct the amounts paid G. B. and N. M. to date, and then proportion the remainder between N. M. and the new appointee for the balance of the calendar year of 1917? For example: N. M. has drawn or will have drawn, on September 12th, $540.00, and G. B. drew, up to the

date of his death, $377.00, or in all the sum of $917.00, leaving a balance out of the $2,240.00 of $1,223.00. Can, then, this $1,223.00 be apportioned between the new appointee and N. M. for the balance of the calendar year of 1917, or must the $2,240.00 be taken as a yearly payment for all, regardless of calendar years, so that in any one month the total payable to both officers shall be but one-twelfth of $2,240.00."

Section 1662 General Code, to which you refer, was again amended in 107 O. L., p. 19, and now reads:

"The judge designated to exercise jurisdiction may appoint one or more discreet persons of good moral character, one or more of whom may be a woman, to serve as probation officers, during the pleasure of the judge. One of such officers shall be known as chief probation officer and there may be one or more assistants. Such chief probation officer and assistants shall receive such compensation as the judge appointing them may designate at the time of the appointment, but the compensation of the chief probation officer shall not exceed three thousand dollars per annum and that of the assistants shall not exceed fifteen hundred dollars per annum. The judge may appoint other probation officers, with or without compensation, but the entire compensation of all probation officers in any county shall not exceed the sum of forty dollars for each full thousand inhabitants of the county at the last preceding federal census. The compensation of the probation officers shall be paid by the county treasurer from the county treasury upon the warrant of the county auditor, which shall be issued upon itemized vouchers sworn to by the probation officers and certified to by the judge of the juvenile court. The county auditor shall issue his warrant upon the treasury and the treasurer shall honor and pay the same, for all salaries, compensation and expenses provided for in this act, in the order in which proper vouchers therefor are presented to him."

From a reading of this section I am satisfied that the limitation "the sum of $40.00 for each full thousand inhabitants of the county" is not a limit upon the amount to be expended in any one month of the year, but a limitation upon the amount to be spent during the entire year and the expenditure of more than one-twelfth of this sum in any one or more months of the year will not violate this provision providing the total amount spent during the entire twelve months does not exceed "the sum of $40.00 for each full thousand inhabitants of the county at the last preceding federal census."

However, attention is called to the fact that this section also provides:

"The compensation of the chief probation officer shall not exceed three thousand dollars per annum and that of the assistants shall not exceed fifteen hundred dollars per annum."

This provision, I think, would make it unlawful to pay the chief probation officer more than $250.00 per month or to pay the assistants more than $125.00 per month.

With these considerations in mind I am of the opinion that in the case you refer to the balance of $1,223.00 may be used as compensation for the two probation officers mentioned, with this limitation, that the chief probation officer may not be paid more than $250.00 and the assistant probation officer, or officers, not more than $125.00 per month.

I wish, however, to call your attention to the provision of section 1662 General Code to the effect that "such chief probation officer and assistants shall receive such-

compensation as the judge appointing them may designate at the time of the appointment." It will be noted that this section does not merely provide that the salary of the probation officers shall be fixed at the time of their appointment, but provides that the compensation which they shall receive shall be "as the judge appointing them may designate at the time of the appointment." The words "as the judge may designate at the time of the appointment" is descriptive of the salary which the probation officers are to receive, and to my mind makes it impossible for the court to alter the compensation of the probation officer or officers after it has once been fixed at the time of the appointment. If such compensation were altered by the judge later, it is clear that the probation officers would not thereafter be receiving a compensation which the judge appointing them had designated at the time of the appointment.

It is therefore my opinion, in the case you present, that the balance of the fund cannot be used for any increased compensation for the probation officer appointed on the 12th day of November, 1915, and whose compensation was at that time fixed at $60.00 per month.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

787.

OFFICES COMPATIBLE—MAYOR—JUSTICE OF THE PEACE—WHEN ELECTED.

1. *The same person can be elected to and hold the offices of mayor of a village and justice of the peace, provided the duties of such offices are not so numerous as to render the performance of same physically impossible.*

2. *Justices of the peace are to be elected in the odd numbered years.*

COLUMBUS, OHIO, November 19, 1917.

HON. W. D. FULTON, *State Supervisor of Elections, Columbus, Ohio.*

DEAR SIR:—Under date of November 12, 1917, Mr. Harry McGrew of Sharonville, Ohio, submitted a question to me, upon which, owing to its public interest, I am rendering an official opinion to you, and will send a copy of same to Mr. McGrew.

The following questions are submitted in said communication:

> "1. Can one and the same person legally be elected to the offices of mayor of a village and justice of the peace at the same election?
>
> 2. Can such person legally hold these two elective offices at the same time?
>
> 3. Is the election of justice of the peace valid if he is elected in uneven numbered year?"

Section 4255 G. C., which provides for the election, term, qualification, powers and duties of a mayor of a village, prescribes as the only qualification that: "He shall be an elector of the corporation."

Section 1711-1 G. C. (103 O. L. 214) establishes the office of justice of the peace, giving to such justice of the peace such jurisdiction, powers and duties as were provided by the laws in force on September 3, 1912. This creation of the office by the legislature was rendered necessary by the schedule to Article IV of the Constitution,

which provided for the abolition of the office of justice of the peace upon the adoption of Article IV, sections 1, 2 and 6 as amended. It was held In re Hesse, 93 O. S. 230, that since the adoption of Article IV, sections 1 and 9 of the Constitution of Ohio, on September 3, 1912, justices of the peace are no longer constitutional officers in Ohio.

Section 1712 et seq. G. C., providing for the election and duties of justice of the peace, do not prescribe any qualifications for that office, although section 1714, providing for a vacancy, states that the appointee to fill such vacancy shall be a qualified resident of the township.

An examination of the statutes pertaining to mayors of villages and justices of the peace will not disclose any statutory prohibition against one and the same person holding the two offices. Neither does the constitution of the state prohibit a person from holding said offices at the same time. In absence of constitutional and statutory inhibitions against persons holding more than one office or holding two designated offices, we are relegated to the common law to discover whether or not the offices are incompatible.

As stated in State ex rel. v. Gebert, 12 C. C. (N. S.) 274, offices are considered incompatible when one is subordinate to or in any way a check upon the other, or when it is physically impossible for one person to perform the duties of both. Physical impossibility to perform all the duties pertaining to more than one office was not strictly a ground of incompatibility under the common law. It consisted more of inconsistencies in the functions of the two offices.

An examination of the laws governing the offices of mayor and justice of the peace will not show any inconsistency in the functions of the two offices, nor is one, as far as I can see, in any way a check upon or over the other.

Under date of June 5, 1913, one of my predecessors, Hon. Timothy S. Hogan, had the question before him as to whether or not the same person could legally hold the positions of mayor and justice of the peace. Mr. Hogan held that there was nothing in the statutes providing any duties as to either of these offices, which would in any way compel the incumbent of one to supervise or act as a check upon the other, nor were there any such conflicting duties attached to these offices as would cause the holding of both by one individual to contravene public policy. He held that if the duties of neither of these offices were so numerous as to make it impossible to faithfully discharge the obligations of both at the same time, they could be held simultaneously by one individual.

I fully concur in Mr. Hogan's decision, which is found in Vol. I of Annual Report of the Attorney-General for 1913, p. 284, and, answering the first and second questions in the communication, I hold that the same person can legally be elected to the offices of mayor and justice of the peace, and that he may legally hold these two elective offices at the same time, if the duties of the two offices are not so onerous as to render such holding physically impossible.

Coming now to the third question: Article XVII, section 1 of the Constitution provides:

> "Election for state and county officers shall be held on the first Tuesday after the first Monday in November in the even numbered years; and all elections for all other elective officers shall be held on the first Tuesday after the first Monday in November in the odd numbered years."

Section 4831 G. C. provides:

> "Township officers and justices of the peace shall be chosen by the electors of each township on the first Tuesday after the first Monday in November in the odd numbered years."

By virtue of the above constitutional and statutory provisions, I can not see how there would be any question as to the validity and legality of electing justices of the peace in the odd numbered years. Consequently it is my view that a justice of the peace must be elected in the odd numbered years.

Section 4963 G. C. (107 O. L. 400), which is found in the primary election laws, provides among other things that primaries for all elective state, district and county offices shall be held in the even numbered years, and primaries to nominate candidates for township and municipal offices and justices of the peace shall be held in the odd numbered years.

In the communication reference is made to H. B. No. 75, found in 103 O. L. 23. As this was an amendment to section 4826 G. C., providing for the time of holding elections for elective state and county offices and for the office of judge of the court of appeals, I can not see what application it has to the questions submitted. This section does provide:

> " * * * All votes for any judge for an elective office except a judicial office, under the authority of this state, given by the general assembly, or by the people, shall be void."

But this has no reference to the office of justice of the peace or mayor.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

787½.

APPROVAL—DEED OF LANDS TO COUNTY COMMISSIONERS OF LICKING COUNTY.

COLUMBUS, OHIO, November 20, 1917.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your communication of November 17, 1917, in which you enclose a form of deed from the state of Ohio to the board of county commissioners of Licking county, Ohio, to be executed in pursuance of certain proceedings had by your department.

In passing upon this matter, I am taking the introductory statements of the deed to be true, to the effect that you have determined these lands not to be necessary for the maintenance and operation of any of the canals of the state; that you appraised the said lands at the sum of $1,221.33; that they were duly advertised for sale for not less than thirty days prior to the date of the sale, in two newspapers of opposite politics and of the general circulation in Licking county, and that the board of county commissioners of Licking county bid the sum of $916.00 for the said lands, they being the highest and best bidders.

I am of the opinion that the proceedings by your department, leading up to the making of the deed, are in all respects regular and in conformity to law and I therefore approve the sale of said lands and have endorsed my approval on the form of deed and am forwarding the deed to the Governor of Ohio for his approval in reference to the sale. This he must give under the provisions of the statute before he signs the deed.

I might say in passing that the deed submitted is in the nature of a quit-claim, rather than a warranty, but if the county commissioners are satisfied therewith, there is nothing irregular in this.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

788.

COUNTY COMMISSIONERS—MAY DRILL GAS WELL—TO SECURE FUEL FOR COUNTY INSTITUTIONS.

A board of county commissioners has the legal right to contract for drilling a gas well on land belonging to the county, with a view to securing a fuel supply for the institutions of the county.

COLUMBUS, OHIO, November 20, 1917.

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

GENTLEMEN:—I have your communication of November 7, 1917, which reads as follows:

> "We respectfully request your written opinion upon the following question:
>
> Has a board of county commissioners the legal right to contract for the drilling of a gas well on the infirmary farm, with a view to securing fuel supply for said institution?"

In connection with this communication I also have a letter from the prosecuting attorney of Columbiana county in which he states that this matter refers particularly to Columbiana county, and that the county commissioners of said county are not about to enter upon any "wild-cat" scheme of speculation in drilling for gas, but that it is necessary for them to secure more gas for the uses of the infirmary buildings or they will be compelled to equip the furnaces at a great expense for coal instead of gas, and hence their desire to drill for gas if same may be done legally.

In answer to your question it will be necessary for us to note a number of sections of the General Code. Section 2522 G. C. reads as follows:

> "The board of county commissioners shall make all contracts and purchases necessary for the county infirmary and prescribe such rules and regulations as it deems proper for its management and good government, and to promote sobriety, morality and industry among the inmates. The commissioners shall keep a separate book in which the clerk, or if there is no commissioner's clerk, the county auditor, shall keep a separate record of their transactions respecting the county infirmary, which book shall at all times be open to public inspection."

It will be noted from this section that the county commissioners may make all contracts necessary for the county infirmary.

Sections 2529 and 2530 General Code read as follows:

> "Sec. 2529. On the first Monday of March in each year, the board of county commissioners shall certify to the county auditor the amount of

money they will need for the support of the infirmary for the ensuing year, including all needful repairs thereof. The county auditor shall place the amount so certified on the tax duplicate of the county, and the county commissioners shall have full control of the poor fund and shall be held responsible therefor.

Sec. 2530. When in any county the funds applicable for the support of the poor are insufficient, the county commissioners may levy for such purposes in addition to those otherwise authorized any rate not exceeding six-tenths of a mill on the dollar of valuation."

By virtue of these sections provision is made for the securing of necessary funds with which the county commissioners are enabled to carry out the contracts which they make for the county infirmary. While these sections do not specifically provide for the matter of entering into contracts to drill for gas, yet they do provide that the county commissioners may make all contracts necessary for the county infirmary. One of the necessities, of course, of the county infirmary is heat and light, and if the county commissioners should deem it proper and necessary for the best management of the county infirmary to enter into a contract with a person or corporation to drill for gas, the gas to be used for heating and lighting the infirmary, I can see no legal objection to such a contract. It could hardly be held that the county commissioners would not have authority to drill for water to supply the infirmary with that commodity, and yet water is no more necessary for the uses and purposes of the infirmary than is heat. To be sure, the element of risk enters into the matter in that the county commissioners might spend quite an amount of money and not secure gas, but this same question could be raised even with other matters which pertain to the management of the county infirmary.

Section 2435-1 General Code provides that the commissioners of any county may invite bids and award contracts for supplying county buildings with light, heat and power. If they can enter into contracts with persons to furnish light, heat and power I am of the opinion that they could also have the power to enter into a contract with a person or corporation to drill for the commodity which will furnish the light, heat and power for the county buildings.

Furthermore, I know of no principle of law which would prevent the county commissioners' making use of any kind of mineral substances which might be under the soil of the property belonging to the county.

Hence, answering your question specifically, it is my opinion that the county commissioners would have authority to enter into a contract for the drilling of a gas well on the infirmary farm, with a view to securing fuel supply for the said institution.

Of course, it is hardly necessary for me to suggest that the county commissioners should use sound discretion as to the wisdom of drilling or not drilling for mineral substances inasmuch as the expense connected with such a procedure is generally large.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

789.

FINDING FOR PLAINTIFF AGAINST INDUSTRIAL COMMISSION FOR "DAMAGES" INSTEAD OF "COMPENSATION" NOT SUFFICIENT GROUND ON WHICH TO REVIEW CASE ON ERROR.

The mere fact that the jury in the trial of a case against the industrial commission found in favor of the plaintiff for so much "damages" instead of for so much "compensation" is not a sufficient ground on which to take the case to a higher court for review on error.

COLUMBUS, OHIO, November 20, 1917.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I have your request for my opinion on the following matter:

> "IN RE:—Claim No. 61873, Sylvester Hodges, Dec.
> We attach hereto copy of statement of facts in connection with the above numbered claim. This statement sets forth in detail the proceedings which have taken place in this claim. We desire an opinion from you as to whether the use of the word 'damages' in the verdict given by the jury in the court of common pleas of Cuyahoga county instead of the word 'compensation' is sufficient ground on which to base an appeal to the higher courts. The commission desires your opinion on this point before taking further action with respect to paying the judgment rendered."

I have examined the papers that you submitted to me with your request, and after considering them in connection with the question which you submit I have come to the conclusion that the mere fact that there has been an error in describing the verdict in question as one for "damages" instead of for "compensation" would not be prejudicial error, since it would be merely an inaccuracy in description which could not be said to be detrimental to the defendant. The following quotation from 23 Cyc., 790, supports this view:

> "But an entry of judgment for the right sum, although it is inaccurately named 'damages' instead of 'debt,' or so much debt and so much damages, is not reversible error."

I therefore advise you, in direct answer to your question, that the mere fact that the jury in the trial of a case against the industrial commission found in favor of the plaintiff for so much damages instead of for so much compensation is not a sufficient ground, in my opinion, on which to take the case to a higher court for review on error.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

790.

COUNTY COMMISSIONERS—MISDEMEANOR CASES—FEES OF OFFICERS —ATTEMPT SHOULD BE MADE TO COLLECT COSTS FROM DEFENDANT BEFORE COMMISSIONERS MAKE ALLOWANCE.

Under section 3019 *G. C. it is necessary that a person charged with a misdemeanor be tried, convicted and sentenced or plead guilty and have sentence passed upon him and that an attempt be made to collect the costs from him before the commissioners would be warranted in making the allowance in place of fees.*

HON. HARRY M. RANKIN, *Prosecuting Attorney, Washington C. H., Ohio.*

DEAR SIR:—I have your letter of October 23, 1917, as follows:

"General Code section 3019 provides that 'in felonies *wherein the state fails:* and in misdemeanors *wherein the defendant proves insolvent,* the county commissioners * * * may make an allowance to any such officers in place of fees.'

Your department has heretofore rendered an opinion as to the meaning of the phrase 'wherein the state fails.' I have been unable to find anything, however, which defines what is meant by 'in misdemeanors wherein the defendant proves insolvent.'

From a reading of this section alone it would seem that the commissioners can make an allowance in lieu of fees only in cases where the fees can not be collected from the defendant because of his insolvency.

The insolvency of a defendant, it would seem, could only be *proven* in a case where there has been a final hearing in a court of competent jurisdiction, the defendant found guilty and the sentence of the court pronounced against him.

Is it necessary, therefore, that a person charged with a misdemeanor be tried, convicted and an attempt made to collect the costs from him before the commissioners are warranted in making an allowance in place of fees?"

On February 15, 1915, my predecessor, Hon. Edward C. Turner, rendered an opinion, found in opinions of the attorney-general for 1915, Vol. I, p. 148, in which is found the following statement:

"Under the provisions of this section (3019 G. C.) no allowance can be made to the officers in misdemeanor cases, unless the defendant 'proves' insolvent. It may be a matter of common knowledge that a defendant is insolvent and that a judgment against him for fine and costs would be worthless, but within the meaning of the statute it could hardly be said that a defendant has been *proven* insolvent until there has been a conviction or a plea of guilty and until sentence has been passed and there is a commitment for failure to pay the penalty assessed."

I agree with this statement and in answer to your question would advise you that it is necessary that a person charged with a misdemeanor be tried, convicted and sentenced or plead guilty and have sentence passed upon him and that an attempt be made to collect the costs from him before the commissioners would be warranted in making the allowance in place of fees.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

791.

JUVENILE COURT—WHEN JUDGE ENTITLED TO FEES IN DELINQUENCY CASE UNDER SECTION 1602 G. C.

A "case" is filed in the juvenile court within the meaning of section 1602 *G. C. when the original affidavit charging delinquency, dependency or neglect is filed with the court, and as long as the jurisdiction acquired upon that charge continues the filing of any additional affidavits or charges, or the making of any new orders by the court, does not constitute a new "case" within the meaning of section* 1602 *G. C., and the judge of the juvenile court can, therefore, receive no additional fees therefor.*

Provided, however, that if the affidavit is filed against a boy who has been given an absolute discharge from the Boys' Industrial School, to which institution he was formerly committed by the juvenile court, the filing of such affidavit constitutes a new "case" and the fee provided for in section 1602 *G. C. may be allowed.*

COLUMBUS, OHIO, November 20, 1917.

HON. H. H. NEEDLES, *Juvenile Judge, Sidney, Ohio.*

DEAR SIR:—I have your letter of October 26, 1917, as follows:

"Under section 1602 G. C. the probate court receives fees when acting as a judge of the juvenile court 'for each case filed against a delinquent, dependent or neglected child, two dollars and fifty cents.'

The question I would like your opinion on is, if a child is brought into court, found delinquent, made a ward of the court and committed to, say the Boys' Industrial School, is paroled and finally discharged, and later is brought into the court again and recommitted to the Boys' Industrial School, is the court entitled to two fees of $2.50 each or is the last proceeding expected to be had without charge?

And would it make any difference if complaint was filed in the latter case rather than to just pick the child up and under the continuing jurisdiction make the commitment?

I would like your opinion on the charge of all later proceedings in such cases after the first, which make the child a ward of the court, when it is necessary to rehear the matter for failure to observe the terms of parole, etc."

Section 1602 G. C. reads in part:

"The fees enumerated in this section shall be paid to the probate judge out of the county treasury upon the warrant of the county auditor * * * ; when acting as a judge of the juvenile court, for each case filed against a delinquent, dependent or neglected child, two dollars and fifty cents; * *"

Section 1647 G. C. provides:

"Any person having knowledge of a minor under the age of seventeen years who appears to be either a delinquent, neglected or dependent child, may file with the clerk of the court of the judge exercising the jurisdiction, an affidavit, setting forth the facts, which may be upon information and belief."

Section 1643 G. C. provides:

> "When a child under the age of eighteen years comes into the custody of the court under the provisions of this chapter, such child shall continue for all necessary purposes of discipline and protection, a ward of the court, until he or she attains the age of twenty-one years. The power of the court over such child shall continue until the child attains such age."

It will be noted that the only provision made for the filing of any charge against a minor in the juvenile court is an affidavit charging the child to be a delinquent, dependent or neglected child and that after the court has once found the child to be delinquent, dependent or neglected, its jurisdiction continues until after the child has become twenty-one years of age. This being so, any hearing given a child later or any order made concerning it subsequent to the original finding that the child was delinquent, dependent or neglected, is founded upon the continuing jurisdiction of the court and not upon any new jurisdiction arising from a new charge or complaint. This being true, I am of the opinion that a "case" is filed within the meaning of section 1602 G. C., supra, when the original affidavit charging delinquency, dependency or neglect is filed with the court and that as long as the jurisdiction acquired upon that charge continues, the filing of any additional affidavits or charges, or the making of any new orders by the court, does not constitute a new "case" within the meaning of section 1602 G. C.

Attention is called, however, to an opinion rendered by my predecessor, Hon Timothy S. Hogan, and found in the Annual Reports of the Attorney-General, 1914, Vol. 2, page 1757, in which it was held:

> "When a boy is committed to the boys' industrial school by the juvenile court, the jurisdiction of the juvenile court ceases. Such boy can only be released from the industrial school by the board of administration upon the recommendation of the superintendent."

In that opinion it was stated:

> "It will be noticed that section 1643 provides that 'when a child under the age of eighteen years comes into the custody of the court' such child shall 'continue for all necessary purposes of discipline and protection, a ward of the court, until he or she attain the age of twenty-one years.' The boys' industrial school at Lancaster is a reform school, the object of which is to bring about the reform of the boys committed to it. Owing to this fact, it seems to me that when a boy is committed to the boys' industrial school by the juvenile court, it is no longer necessary for the juvenile court to retain jurisdiction over the child, since the child could be properly disciplined and protected by the authorities of the boys industrial school. Therefore, inasmuch as the two reasons mentioned in section 1643 for the continuing jurisdiction of the juvenile court do not exist after the boy's commitment to Lancaster, it is my opinion that the jurisdiction of such court terminates when the boy is committed to the boys' industrial school."

Section 2091 G. C. authorizes the parole of boys committed to the boys' industrial school, and section 2092 provides for the return of boys who have violated their parole.

This department in Opinion No. 608, rendered under date of September 10, 1917, held that the act of creating the Ohio Board of Clemency, found in 107 O. L., 598

in no way affects the jurisdiction of the Ohio Board of Administration over the boys' industrial school. It follows, therefore, from the ruling of former Attorney-General Hogan, above quoted,that when a boy is committed by the juvenile court to the boys' industrial school at Lancaster, the jurisdiction of the juvenile court ceases and exclusive jurisdiction concerning such boy is vested in the authorities of the school and the Ohio board of administration. Should the board parole such boy, any violation of such parole should be called to the attention of the parole board, since that board and not the juvenile court has the authority to revoke the parole and return the boy to the institution. In cases where the boy has been given an absolute discharge from the boys' industrial school, neither the superintendent of that institution nor the Ohio board of administration has any jurisdiction over such boy. Neither has the juvenile court any jurisdiction over such boy founded upon any former jurisdiction. In such a case the only manner in which the juvenile court can acquire jurisdiction concerning the boys upon an affidavit being filed under section 1647 G. C., charging the boy with being a delinquent, dependent or neglected child. In that case, even though the boy was formerly committed by the same court to the boys' industrial school, the filing of the affidavit under section 1647 G. C. constitutes, I think, a new "case" and the juvenile court may, therefore, be allowed an additional fee under section 1602 G. C.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

792.

CANDIDATE—WHERE VOTES CAST FOR JUDGE OR CLERK OF ELECTION WHO IS NOT A CANDIDATE—HOW COUNTED.

Where votes are cast for a person for office, who has not been regularly nominated therefor, and who has not sought or aspired to such office, such votes should be counted for such person, even though he is a judge or clerk at the election at which said votes are cast, and such person so receiving the highest number of votes would be eligible to the office to which he was elected, notwithstanding the provisions of section 5092 G. C.

COLUMBUS, OHIO, November 20, 1917.

HON. W. D. FULTON, *State Supervisor of Elections, Columbus, Ohio.*

DEAR SIR:—I have an inquiry from Hon. J. Parsons, mayor of Stockport, Ohio, under date of November 9, 1917, wherein he states that at the municipal election held in that village on November 6, 1917, one of the judges, whose name did not appear on the official ballot, was elected mayor by having his name written in on the ballots by the electors; that another judge in the same manner was elected village clerk, and still another judge in like manner was elected assessor. He states that no question is made as to the fairness of the count, and desires to know whether or not the election is valid. I am addressing an opinion thereon to you and will send Mr. Parsons a copy of same.

Under section 5070, subsection 6, G. C., if an elector desires to vote for a person whose name does not appear on the ticket, he can substitute the name by writing it in black lead pencil or in black ink in the proper place, and making a cross mark in the blank space at the left of the name so written.

Under section 5071 G. C., if there were no nomination for a particular office, or if by inadvertence or otherwise the name of the candidate regularly nominated is

omitted from the ballot, the elector also may write in the name of a person for whom he desires to vote and properly mark it.

However, in the question under consideration it appears that all of the persons for whom votes were thus cast were election officers at said election, and section 5092 G. C. apparently makes a judge or clerk of elections ineligible to hold an office to which he may be elected at an election at which he is serving as such election officer. Said section 5092 provides:

> "No person, being a candidate for an office to be filled at an election, other than for committeeman or delegate or alternate to any convention, shall serve as deputy state supervisor or clerk thereof, or as a judge or clerk of elections, in any precinct at such election. A person serving as deputy state supervisor or clerk thereof, judge or clerk of elections contrary to this section shall be ineligible to any office to which he may be elected at such election."

This section, prior to its amendment, as found in 103 O. L. 496, did not contain the exception "other than for committeeman or delegate or alternate to any convention," and in consequence was general in its terms.

Said section 5092 prohibits a person, *being a candidate* for an office, to be filled at an election, other than those named, to serve as a judge or clerk of elections in any precinct at such election. The word "candidate" must be given its popular meaning The legislature must have so intended when using this term throughout the election laws. Lexicographers usually define a candidate as one who seeks or aspires to some office or privilege, or who offers himself for the same. A candidate has also been defined as one who offers himself or is offered by others for a place.

Section 5092 supra further provides that a person serving as judge or clerk of elections, contrary to the section, shall be ineligible to any office to which he may be elected at such election.

Now, while it is true that these persons who were serving as election officers received a sufficient number of votes to elect them to the particular offices, there is nothing in the facts before us to show that any of these parties were seeking or aspiring to the office, or were candidates in the usual acceptation of the term.

In the compilation of election laws prepared by the state supervisor of elections, there is a note under section 5092 G. C. which reads as follows:

> "* * * * While a judge or clerk of elections can not be a candidate, where such a person has received a sufficient number of votes by electors writing his name on the ballot for a particular office, and such votes are in conformity to law in all other respects, such person should be declared elected to that office."

This was the interpretation placed upon section 5092 by one of the former secretaries of state, in his capacity as state supervisor of elections.

Without passing on the question whether or not a person, whose name was not printed upon the ballot, might become a candidate in the true sense of the word, if he electioneered for the office and importuned electors to vote for him, as the facts in the present case do not show that there was any electioneering or that the parties were candidates in any sense, and as they merely show that the voters wrote in the names on the ballots, and on a count it was disclosed that the election officers had received a sufficient number of votes to elect them, it is my view that under such circumstances their election was valid.

I am inclined to the view that the word "candidate" in said section 5092 means a candidate as provided for under the election laws. But in any event I am of the opinion that the persons inquired about in the communication of mayor Parsons were eligible to the offices to which they were elected, even though they were election officers at such election, and that they do not come within the inhibition of section 5092 G. C.

Very truly yours,
JOSEPH McGHEE,
Attorney General.

793.

MONEY TAKEN BY POLICE IN RAID OF PLACE OF GAMBLING—DISPOSITION THEREOF.

Money taken by the police department in the raid of a place of gambling may be applied to the payment of fines and costs assessed against the owners thereof and the balance remaining after paying such fines and costs is to be delivered to the owner as provided in section 4400 General Code, or to the person from whom taken, if not claimed by the owner within thirty days as provided in section 4399 General Code. If such money is not claimed for a period of one year after its seizure, then it shall be turned over to the police relief fund in municipalities having such fund and to the treasurer of the municipality that has no police relief fund.

COLUMBUS, OHIO, November 20, 1917.

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

GENTLEMEN:—Your favor of October 10th, 1917, is received, in which you state as follows:

> "We are enclosing herewith question, together with brief of the city solicitor of Lorain, Ohio, and respectfully request your written opinion upon the following matter:
>
> QUESTION:
>
> What is the proper disposition of moneys taken by the police department in the raid of places of gambling?"

The brief referred to in your request, calls attention to the provisions of sections 4398 to 4401 inclusive of the General Code, and to the case of Englehardt Administrator, v. Kumming, 10 O. N. P., n. s., page 609.

Section 4398 General Code provides as follows:

> "Stolen or other property recovered by members of the police force shall be deposited and kept in a place designated by the mayor. Each such article shall be entered in a book, kept for that purpose with the name of the owner, if ascertained, and the person from whom taken, the place where found with general circumstances, the date of its receipt and the name of the officer receiving it."

Section 4399 G. C. reads as follows:

> "An inventory of all money or other property shall be given to the party from whom taken, and in case it is not claimed by some person within thirty

days after such arrest and seizure it shall unless otherwise ordered by the board be delivered to the person from whom taken, and to no other person, either attorney, agent, factor, or clerk, except by special order of the mayor."

Section 4400 General Code reads as follows:

"If within thirty days such money or property is claimed by another person it shall be retained by such custodian until after the discharge or conviction of the person from whom taken and so long as it may be required as evidence in any case in court. If such claimant establishes to the satisfaction of the police judge that he is the rightful owner, it shall be restored to him, otherwise it shall be returned to the accused person, personally, and not to any attorney, agent, factor or clerk of such accused person, except upon special order of the mayor after all liens and claims in favor of the municipality, against it have first been discharged and satisfied."

Section 4401 General Code provides:

"Property unclaimed for the period of one year shall be sold by the chief of police or marshal at public auction, after giving due notice thereof, by advertisement published three times in a newspaper of general circulation in such county. In municipalities where there is a police relief fund and trustees and officers thereof the proceeds from such sale shall be paid to the treasurer of such fund and be placed to its credit. In municipalities where there is no police relief fund and trustees and officials thereof, such proceeds shall be paid to the treasurer of the municipality, and be credited to the general fund."

These four sections provide what shall be done with stolen or other property recovered by the police force and also covers money or other property taken by the police department in raids on places of gambling.

It is provided in section 4399 General Code that if such property is not claimed by some person within thirty days after the arrest, it shall, unless otherwise ordered, be delivered to the person from whom taken.

Section 4400 General Code provides the manner in which the rightful owner may have the property restored to him.

In section 4401 General Code there is provision for the disposition of property which has not been claimed for a period of one year. Such property shall be sold as therein provided, and in municipalities where there is a police relief fund the proceeds of such sale shall be paid to the treasurer of such fund. In other municipalities the proceeds are paid to the treasurer of the municipality.

There is no provision of statutes which declares a forfeiture of money which has been taken in a gambling raid. Sections 13054 to 13082, inclusive, of the General Code provide various penalties for offences connected with various devices and schemes of gambling. In none of these is there found any provision for the forfeiture of money recovered from gamblers.

Section 13489 General Code provides as follows:

"Upon conviction of a person for keeping a room or place to be occupied or used for gambling or knowingly permitting gambling to be conducted therein, or permitting a game to be played for gain or a gaming device to be

kept in a house or other place, or exhibiting a gaming device for gain, money or other property or for betting or gambling, or permitting such device to be so used, or for being without a fixed residence and in the habit of gambling, if money or other property, won in gaming, be found in his possession, it shall be liable for a judgment which may be rendered against him growing out of such violation of law."

It is specifically provided in this section that money or other property won in gaming and found in possession of a person engaged in gambling, that such money shall be liable for a judgment which may be rendered against him growing out of such violation of the law.

In the case of Englehardt, Administrator, v. Kumming, 10 O. N. P., n. s., 609, the syllabus reads:

"Where the record of a magistrate shows that at a trial held before him he finds from the evidence that certain slot machines are gambling devices, his action in ordering them destroyed is lawful.

When the record shows the action of such magistrate to be under a search warrant his action is in the nature of a proceeding 'in rem.'

The law does not recognize any property rights as existing in gambling devices."

This case upholds the right of a magistrate to destroy gambling devices. It also appears on page 611 of the opinion that money found in the slot machine had been applied by the magistrate towards the payment of the costs of the proceedings against the owner of the slot machines. The court sustains this application and says at page 611:

* * * "there was no abuse of discretion on the part of the mayor, such as to render him liable for the repayment of the money, in interpreting the statutes to permit him to apply this sum towards payment of the costs of the proceedings under the search warrant."

This case is authority for the application of money recovered in a gambling raid to the payment of fines and costs assessed against the owner of such money. It is also authority for the destruction of paraphernalia or other property used for gambling purposes.

However, all property recovered in a gambling raid is not subject to destruction, only such property as may be described as gambling devices may be destroyed. The rule, as stated at page 920 of Vol. 20 of Cyc. is as follows:

"Under most statutes gaming apparatus seized as kept and used for gambling should be retained by the police authorities as evidence against the accused, subject to the order of the court or justice trying him, and upon his conviction in a proper proceeding should be ordered destroyed, if it is such as is of no substantial or practical use or value except in connection with gambling or if the use to which it is customarily devoted is gambling, even though the actual owner of the property did not consent to or know of its unlawful use; or it should be returned to its proper owner if the alleged offender is discharged. Some statutes authorize the court upon proper information to issue a warrant or order for the summary seizure and destruction of such apparatus kept and used for gaming purposes, if it is of such character that it can be put to no legitimate use and that the law will not recognize it as property entitled to its protection under any circumstances; but if they are not

of such character, they cannot be destroyed without affording the owner an opportunity to be heard upon the subject of their lawful use and to show whether or not they are intrinsically useful or valuable for some lawful purpose."

Money is not subject to destruction as a gambling device even though recovered in a gambling raid. In the case of Miller v. State ex rel. 149 Pac. Rep., (Okla.) 364, the syllabus reads:

"Sections 2506 and 2507 Revised Laws, 1910, do not furnish authority for the seizure and destruction of money, as being 'an article or apparatus suitable to be used for gambling purposes.'"

In the absence of any statute authorizing the forfeiture of money recovered in a gambling raid, there would be no authority to transfer such money to the police relief fund or to the treasurer of a municipality. Such money may be applied to the payment of the costs and fines assessed against the owner thereof. If any remains after fine and costs are paid, it should be returned to the owner as provided in section 4400 General Code, or to the party from whom taken as provided in section 4399 General Code. If such money remains unclaimed for one year, it would come under the terms of section 4401 General Code, and should be paid to the police relief fund in municipalities having such fund, or to the treasurer of the municipality having no such relief fund.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

794.

SECTION 6455—AS AMENDED BY S. B. 14, PASSED MARCH 21, 1917, IS IN FORCE.

Section 6455 *G. C. as amended by Senate Bill* 14 *passed March* 21, 1917, *is in force and is the law to the exclusion of the same section as found in House Bill* 140, *passed March* 20, 1917, *which latter section is not in effect.*

COLUMBUS, OHIO, November 20, 1917.

HON. DONALD F. MELHORN, *Prosecuting Attorney, Kenton, Ohio.*

DEAR SIR:—On October 22, 1917, you make the following request for an opinion from this office:

"It appears from Vol. 107 Ohio Law, that the last legislature twice amended code section 6455. The first amendment, passed March 20th, appears at page 606; the second, passed March 21st, appears at page 616.

Please advise whether or not both sections are to be taken together as constituting code section 6455, and if not, which amendment is now effective."

The two acts you mention were passed in two consecutive days by the legislature and signed by the governor on the same day. In order to give full consideration to the subject both sections may be here copied in full to advantage. The first is found in 107 O. L., 606, and is house bill 140, and is as follows:

"The county commissioners, by such order, shall direct the county surveyor or engineer to make and return a schedule of the lots and lands, and public or corporate roads or railroads that will be benefited, with an apportionmen of the cost of location, and the labor of constructing the improvement, in money, according to the benefits which will result to each. In apportioning the costs of such improvement, the benefits to any lots or lands by diking them, in whole or in part, shall be considered with other benefits, and labor performed by a landowner on the line of the improvement prior to its location may be considered and a reasonable allowance made therefor in the assessment against such landowner, if in the judgment of the engineer such labor has caused a ma erial reduction in the cost of constructing the proposed improvement, and a specification of the manner in which the improvement shall be made and completed, the number of floodgates, waterways, farm crossings, and bridges necessary, including kinds and dimensions thereof, and all county and township lines and railway crossings."

The other is senate bill No. 14 (107 O. L., 616), and is as follows:

"Section 6442. The word 'ditch' as used in this chapter shall be held to include a drain or water course. The petition for any such improvement shall be held to include any side, lateral, spur or branch ditch, drain or water course necessary to secure the object of the improvement, whether the same is mentioned therein or not, but no improvement shall be located unless a sufficient outlet is provided. The words 'according to the benefits' as used in this chapter in directing boards of county commissioners to assess lands for ditches, and in directing engineers to report assessments for the same, shall not be held to authorize any assessment for benefits conferred upon lands by nature nor the right of easement of the owners of superintendent lands to pass the water therefrom through natural watercourses, except as provided in section 6455, and the commissioners may change either terminus of said ditch before its final location if the object of the improvement will be better accomplished thereby."

"Section 6455. The commissioners shall, also by their order direct the county surveyor or engineer to make and return a schedule of all the lots and lands, and public or corporate roads or railroads that will be benefited, with an apportionment of the cost of location, and the labor of constructing the improvement, in money, according to the benefits which will result to each, and in making such apportionment the amount of such improvement found necessary by reason of the artificial construction or improvement of ditches, drains and water courses on superincumbent lands and leading therefrom into such improvement, shall be considered as a benefit to such superincumbent lands, and the benefits to any lots or lands by diking the same in whole or in part, shall be considered with other benefits, and a specification of the manner in which the improvement shall be made and completed, the number of flood gates, waterways, farm crossings and bridges necessary, including kinds and dimensions thereof, and all county and township lines and railway crossings."

Both of these acts, of course, were pending before the legislature at once—the former, house bill No. 140, was passed March 20, 1917; the latter, senate bill No. 14, was passed the following day, March 21, 1917. Both were approved by the governor on March 21, 1917. There is no record in the governor's office from which can be determined the order in which these two acts were given approval, nor does anyone

now know the fact as to which was first approved. Both were delivered to the secretary of state at the same time, and with a number of other laws all were filed at once. In the secretary of state's office, and for the purposes of that office alone, house bill No. 140 is endorsed with "No. 162," while senate bill 14 is endorsed with "No. 169." This, however, is purely accidental, and arose from the order in which the clerk making the endorsement happened to pick them up, and therefore indicates nothing as to the priority of the filing there.

Under this state of facts one of two conditions exists: either both of said laws are in force in so far as one is not repealed by the other by implication, or only one is in force upon the theory that the latter of the two—whichever that might be—was intended to supersede and be a substitute for the former. The rule is against repeal by mere implication, and in favor of giving effect to every provision of two laws on a given subject, the latter of which does not expressly repeal the former, as it is possible to reconcile the one with the other, and consistently with the apparent legislative intention.

If house bill No. 140 ever became a law this rule would prevail. As to when a bill becomes a law, section 16 of article II of the constitution determines, the provisions being as follows:

> "Every bill passed by the general assembly shall, before it becomes a law, be presented to the governor for his approval. If he approves, he shall sign it and thereupon it shall become a law and be filed with the secretary of state."

There is a further provision as to its becoming a law without his approval, not here important. If this section governs to the extent of being absolutely final and conclusive without any regard to rules of construction for obtaining the legislative intent, then it would be impossible that anyone could ever know which of these acts, so far as they are inconsistent, operates to repeal the other.

Let us now pause in this branch of the discussion to compare the two sections as they appear, with a view to what, if any, contradiction, there is.

In house bill No. 140 there is a provision in favor of a land owner who has already performed labor on the line of the improvement upon which he owns land. This upon casual consideration, might be thought merely declaratory. It, however, turns out not to be so. Practically this would work no innovation in the application of the law and rarely, if ever, be in conflict with the section as subsequently enacted, because the land owner doing such work would ordinarily receive the benefit of it to the extent that he had completed it, and therefore his benefit from the new improvement would be correspondingly reduced and consequently his apportionment of the cost of the construction according to the benefit would be reduced in like measure. It is possible, however, that such adjacent land owner might have done a great deal of work that would very much lessen the cost of the new improvement, and yet not have been of any benefit at all to his own land. This would arise if the land owner had begun an improvement and completed it along a part of his land adjoining the stream, supposing it to be a dike, but had left a part of it open at the time of the new improvement so that his lands were still flooded to the same extent as they had been without any improvement. In such case his benefit from the new improvement would be the whole benefit received by his land, including his own work.

Now, under house bill No. 140 he would be allowed on his apportionment the amount which his work has reduced the cost of public work, or the proportion of the improvement based upon such amount, so that if that be in conflict with the provisions of senate bill No. 14 we have the case where we must decide which is in effect.

In like manner the latter act contains a provision not found in the former and which is an innovation in the drainage laws of the state, as follows:

> "And in making such apportionment the amount of such improvement found necessary by reason of the artificial construction or improvement of the ditches, drains and water course on the superincumbent land and leading therefrom to such improvement, shall be considered as improvement to such superincumbent land, * * *."

Our supreme court has recently decided that an owner of land upon which were located ponds and marshes might drain those into a natural course on his own land without becoming liable to any portion of the cost of the improvement of a stream or drain into which such water course empties.

Mason v. Commissioners, 80 O. S., 151.

The opinion in this case is very interesting and is an exhaustive thesis upon the subject of riparian rights as between upper and lower proprietors. It might follow from the law as laid down in that case to the effect that each owner has a property right in the privilege of drainage across servient land that the giving full application and effect to this provision in senate bill No. 14 would render it unconstitutional. However, that question need not be here considered, and no opinion on it is intended to be suggested. Attention is called to it here because no similar provision is found in house bill No. 140, and it furnishes an instance in which the two are contradictory, so that we have one provision in each which is not found in the other and which either is or is not the law as it may turn out, as to whether both or only one of these sections is in force. There is therefore such conflict as renders the determination of the question necessary.

If we suppose house bill 140 to have gone into effect and then come to the consideration of the effect upon it of the enactment of the other bill, we find this qualification of the rule above stated against repeals by implication, that is, that where the new law in its evident intent is a substitute for the old in its entirety the repeal takes place.

Lorain Plank Road Co. v. Cotton, 12 O. S. 263.
State ex rel. Cuneo v. Commissioners, 16 C. C. 218.
Goff v. Gates, 87 O. S. 142.

In Lorain Plank Road Company v. Cotton the acts in question were in reference to the Plank Road Company. Section 2 of the syllabus, referring to a section of the latter act under consideration, is as follows:

> "Said section, which revises the whole subject matter of the amendatory act of March 10, 1836 * * * ' for the regulation of a turnpike companies,' and is evidently intended as a substitution for it, is to be regarded as *superseding* the latter act, and not as furnishing an *additional* or *cumulative* remedy."

Peck, J., in the opinion, at page 272, quotes approvingly from Curwen's Introduction to Vol. 1, Rev. Stat., as follows:

> "A subsequent statute revising the whole subject matter of the former act, and evidently intended as a substitute for it, although it contains no express words to that effect, operates to repeal the former."

Ex rel Cuneo v. Commissioners is a circuit court case decided, however, by Price, J., who afterwards sat in the supreme court, and the decision was affirmed by the supreme court without report. On page 222 he quotes approvingly the same quotation above given in the Lorain, etc. v. Cotton case from Curwen's statutes and gives it a like application to the case before the court.

The first syllabus in Goff v. Gates, supra, is as follows:

> "An act of the legislature that fails to repeal in terms an existing statute on the same subject matter must be held to repeal the former statute by implication if the later act is in direct conflict with the former, or if the subsequent act revises the whole subject matter of the former act and is evidently intended as a substitute for it."

The first clause of this statement only makes the repeal where there is a direct conflict; the latter clause, however, extends it to those cases where the new act is evidently intended as a substitute for the old even though there be no such conflict. Doanahue, J., on page 151, again cites Lorain, etc. v. Cotton with approval; and also on page 152 cites State ex rel. Cuneo v. Commissioners and mentions the fact that Price, J., who rendered the opinion in that case was later a judge of the supreme court, and follows his brief collation of authorities with this sentence:

> "We have no doubt whatever that this is a correct statement of the law."

In applying this doctrine let us now revert to the effect of the approval of an act by the governor. The statement in the constitution above quoted is that that approval makes it a law. This statement, however, only refers to the time at which a law shall go into effect, not what its construction shall be or its operation with reference to other legislative enactments. For instance, the governor signed house bill No. 140. If the legislature had in the meantime repealed that section while it was in the hands of the governor and before he had signed it, his signature to it could not give it the force of law. The senate bill, however, does not expressly repeal section 140—the repealing clause in senate bill 14 is that original section 6455 of the General Code is repealed. This, of course, was true because at the time of its enactment the original section was still in force, house bill No. 140 had not become a law nor was it certain that it would become a law at any time. The presumption, which presumption by-the-way is only a fiction, is that each member of both houses of the legislature was fully aware of both of these provisions in every respect and acting intelligently and with express intention in reference to the same. They actually act by houses, and a law is passed when it has been passed by that house into which it comes from the other, so that senate bill 14 became the act of the legislature when it was passed by the house. Of course, under the above rule or presumption each member of the house in voting for it knew that house bill 140 was pending in the senate, or had been passed by it, but taking the two houses together the combined intent of the whole legislature is expressed in the act last passed. Therefore, when the governor placed the stamp of his approval upon senate bill 14 and it became a law, what thereby was its effect as to other legislation upon the same subject not expressly repealed?

While it became a law upon the governor's approval it became the law that the legislature intended it should be, such approval having no effect whatever upon the intent, construction or operation of the law. The legislature having passed senate bill No. 14 last intended that it should supersede house bill 140, at least so far as there was any conflict between the two.

Under the principles above announced and the authorities cited, I believe it went further and became section 6455 of the General Code. It seems to be apparent not only that the legislature intended its provisions to be the law, but that it intended its provisions to be the whole law, that is, to be the only section 6455 that was to be in force. True, they repealed only the original section, but as above explained they could not repeal that section as amended because the amendment had not yet gone into effect, and was not certain to go into effect; therefore the repealing clause repealed the law that was in effect at the time it passed, and as to the other law it never went into effect.

It may be urged against this view that the cases above cited partly went upon the fact of there being some conflict, or apparent conflict, between the provisions of the former and latter enactments. However, the statements of the law in the syllabi and opinions of the court go further and not only do they do so verbally but also logically.

There are many instances where section numbers of the General Code are duplicated under circumstances similar to this—that is, they are printed as such in the compilation of the laws. Whether they both be in force or not in any given instance is another matter, but we cannot presume that the same legislature at about the same time meant to have two separate sections in force as one and under the same number. Where they expressly enacted that the section so numbered shall read as they enacted, and the mere fact that the repealing clause only mentions the original section, whether the same be explained as above or whether it be purely accidental should not have the effect of keeping the provisions of the section in force as it stood in a prior or intermediate enactment. It cannot be said that house bill No. 140 ever went into effect; it cannot be said that it did not; but the intention of the legislature is plain that for it senate bill No. 14 should be substituted. If the governor had vetoed the latter bill, it is true that house bill No. 140 would have become the law, but that is because the latter bill would then have clearly and distinctly had the governor's approval added to the intention of both houses of the legislature. This it never had, except at the same instant that the other bill had which the legislature intended should supersede it. The fact that the senate bill also re-enacted section 6442 also makes clear the intention of the legislature that that act and not the house bill should become the law. Section 6442 is amended by reason of the amendment of section 6455, and naturally by reason of the amendment contained in that section, because section 6455 is expressly mentioned in it, and certainly the 6455 was referred to, which was there included with it.

You are therefore advised that section 6455 as amended in senate bill 14, passed March 21, 1917, is the law to the exclusion of the same section in house bill 140 passed the day before.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

795.

CIVIL SERVICE COMMISSION—APPEAL LIES FOR REDUCTION—LAY-OFF, ETC.—REDUCTION OF SALARY OF EMPLOYE BY HEAD OF DEPARTMENT—HEAD OF DEPARTMENT MAY REQUIRE SERVICES OF EMPLOYE IN DIFFERENT LOCALITIES.

1. *Under the provisions of the civil service law an appeal lies to the civil service commission from orders of reduction, lay-off or suspension. The civil service commission is warranted in sustaining such appeal only when it is clearly and affirmatively shown that such reduction, lay-off or suspension was on account of political or religious affiliation, or was made from other motives not founded upon the efficiency of the administration or the good of the public service. Unless such state of facts be clearly shown,—the presumption in favor of the propriety of official acts requires the dismissal of such appeals.*

2. *The heads of departments may reduce the salary of an employe in the classified civil service whose position does not fall within any of the groups for which the legislature has established salary schedules, provided such reduction be not made for any of the improper motives prohibited by the civil service law.*

3. *An employe appointed from a state-wide eligible list is under the control of the head of the department who, in the proper management of the affairs of such department, may require the services of such employe in different localities from time to time as the exigency of public service requires, so long as the transfer is not from one department to another in violation of section* 16 *of the civil service law.*

4. *Where a state has been divided into districts by a department for its own administration, employes in one district may be removed to another district by the head of such department without the approval of the civil service commission, but subject to the rules above given as to the reasons for such transfer if the same amount to any discrimination in position against such employes.*

COLUMBUS, OHIO, November 20, 1917.

Civil Service Commission of Ohio, Columbus, Ohio.

DEAR SIRS:—I am in receipt of the following communication from you under date of October 23, 1917:

> "Section 486-17 of the civil service law provides in part:
>
> 'In all cases of reduction, layoff, or suspension of an employe, whether appointed for a definite term or otherwise, the appointing authority shall furnish such employe or subordinate with a copy of the order of layoff, reduction, or suspension, and his reasons for the same, and give such employe or subordinate a reasonable time in which to make and file an explanation. Such order, together with the explanation, if any, of the subordinate, shall be filed with the commission. Nothing in this act contained shall limit the power of an appointing officer to suspend, without pay, for the purpose of discipline, an employe or subordinate for a reasonable period, not exceeding thirty days; provided, however, that successive suspensions shall not be allowed, and provided further that the provisions of this section shall not apply to temporary and exceptional appointments made under the authority of section 486-14 of the General Code.'
>
> Paragraph 6 of section 486-7 of the law provides that the commission shall:
>
> 'Hear appeals from the decisions of appointing officers of persons in the

classified service who have been reduced in pay, or position, laid off, suspended, discharged, or discriminated against by such appointing authority.'

Section 486-16 of the law provides in part:

'With the consent of the commission, a person holding office or position in the classified service may be transferred to a similar position in another office, department or institution having the same pay and similar duties; but no transfer shall be made from an office or position in one class to an office or position in another class, nor shall a person be transferred to an office or position for original entrance to which there is required by this act or the rules adopted pursuant thereto, an examination involving essential tests or qualifications, or carrying a salary different from or higher than those required for original entrance to an office or position held by such person.'

Your advice and opinion is respectfully requested as follows:

1. Is paragraph 6 of section 486-7 intended to give the civil service commission jurisdiction for the consideration of appeals from orders of reduction, layoff or suspension, in the absence of specific provision to that effect in section 486-17? If so, what grounds would warrant the commission in sustaining or refusing to sustain a reduction by an appointing officer? In other words, what is the scope of jurisdiction of the civil service commission in cases of reduction, layoff, or suspension, and the method of procedure in such cases?

2. Can the salary of a classified employe whose position does not fall within any of the groups for which the legislature has established salary schedules be reduced by an appointing officer without restriction?

3. Can an employe appointed from a state-wide eligible list to such a position, for instance, as foreman of canals in the department of public works where it is customary to designate the appointment and assignment as foreman of a certain section of the canal system of the state, be transferred from one section of the canal system to another, without the approval of the state civil service commission, or the consent of the employe transferred? If so, can such transfer be made at a reduction in salary? Section 486-16 seems to have provided for transfers from one department to another rather than transfers within a department.

4. Can an appointing officer in a department where the state has been districted for the purpose of administration, transfer an employe who has been appointed from a state-wide eligible list to service in a designated district, from one district to another without the consent of the civil service commission, or the employe transferred? If so, can such transfer be arbitrarily made, or must it be done for the purpose of increasing the efficiency of administration, or for some other good and sufficient reason?"

In answering your questions the various provisions of the civil service act are to be kept in view together and the whole act to some extent considered. It is one entire legislative scheme with a definite and declared object. Its provisions were all enacted at once, and all intended to be operative in that the whole law should have the harmonious operation conducive to said object. This is true in reference to your first question. It is necessary to consider section 7 in connection with section 17, and it seems that you have further taken into consideration section 17-a. The sixth paragraph of section 7 alone would raise no doubt. The whole of said section is upon the powers and duties of the commission and the particular paragraph in question

gives them the power and imposes upon them the corresponding duty of hearing appeals of persons in the classified service who have been

reduced in pay or in position,
laid off,
suspended,
discharged, or
otherwise discriminated against,

by the appointing authority.

When it is said that there is no doubt of its application what is meant is that there is no doubt of the authority and duty of the commission to hear such appeals when they may lawfully be made. Referring, then, to section 17 we find a prohibition against the exercise of authority by the appointing power in reference to the above list of subjects as applied to religious or political reasons or affiliations.

Construing this portion of section 17 with other paragraphs might raise the inference that the appeal referred to in section 6 is confined to whom the reduction, etc., are connected with such reasons. Such limitation, however, disappears in reading the succeeding portions of section 17, for it is immediately provided that in all cases of reduction, lay-off, or suspension, the appointing power shall furnish the employe with a copy of the order and his reasons, and give a reasonable time for an explanation. This does not expressly apply to a discharge or to any other discrimination than reduction, lay-off or suspension. The reason for omitting a discharge is because that is provided for in detail in the succeeding section—17a. The omission of the other discrimination may have been because it is too indefinite in terms to permit of the exact treatment prescribed for other cases, or it may be the result of mere oversight on the part of the legislature. Your question, however, refers to a reduction, and it may be safely concluded that an appeal lies from such reduction either in pay or in position. The fact that the proceedings and machinery for conducting such appeal are not as definitely provided and prescribed as it is for appeals in the case of discharge is not sufficient to overcome the express authority to hear such appeal in paragraph 4 of section 6 and the requirement of notification of such reduction to the commission by the appointing power found in section 16. And, as above intimated, the reason of your doubt upon the subject probably arises from a consideration of the definite provisions of section 17a in reference to appeals in cases of removals.

The exact method of proceeding in case of appeals for the removal is laid out definitely in the latter section, and no corresponding directions are given in case of appeals from the other actions in which it is permitted. The reason of this is probably because the subject of removal or discharge is of so much more importance than any of the others that it was deemed necessary to provide for a definite proceeding in the case of the removal. It occasions doubt, for instance, as to what time an appeal should be taken from the order of reduction or lay-off when an appeal in the case of discharge is expressly required to be within ten days; but as above observed these considerations are not sufficient to take away the express authority given to hear such appeals. It would happen in most cases of appeal from a lay-off or suspension that before the appeal could be heard the period of suspension would end. This would not apply to a reduction, and if it were necessary to determine when such appeals should be taken in the case of a reduction, the ten-day limitation applied for appeals in the case of removals would have no application and therefore it would either be unlimited or some other limitation would have to be deduced from the logic of the case—a question not here necessary to determine.

It being therefore determined that there is a right of appeal in the case of such reduction in pay or position, the question proceeds as to what grounds would warrant

the commission in sustaining or refusing to sustain such reduction. The answer to this question can not be definitely given but must be founded upon general considerations to be drawn from the whole Civil Service law and its evident and declared spirit and intent, and must be governed by a well known rule in reference to the control of official authority. Clearly, if the reduction were on account of religious or political considerations, upon that state of affairs being thoroughly disclosed or undisputed the commission would sustain the appeal, but it would seem that the authority to extend it is not limited to those grounds alone, for as above noticed the provision in reference to religious and political grounds of reduction or discrimination is simply a declaration of a principle, and not a limitation of authority.

Broadly speaking, then, if it be shown clearly or admitted that such reduction is upon any ground not properly connected with the efficiency and good of the public service, at least in a broad sense, the appeal should be sustained. Such a multitude of instances might be imagined that no specific answer can be given as to what ground would warrant the commission in sustaining or refusing an appeal, but the same would have to be governed by the most general considerations applied to particular cases as they might arise. However, such action of the commission should always be in view of the other rule alluded to above governing the control of official conduct, which is in substance that the presumption of right action always prevails in favor of such officer, and the contrary should be clearly shown. In the case of mere difference of opinion official conduct should not be controlled by the civil service commission, but in respect to those matters committed to the commission by the civil service law violations of such law should be clearly established before such interference, by way of maintaining an appeal, should be used.

The presumption is that the head of a department or appointing power in reducing an official in pay or position is acting for the public good, and for the efficiency of the public service, and this presumption should be clearly rebutted by convincing evidence before the commission should sustain an appeal.

Answering your second question, it seems to refer to that class of cases where an appropriation is made for certain service by a department and for the pay of certain employes in that service other than those comprised in the "groups and grades" mentioned in the appropriation act, and with salaries therein provided. The amount appropriated for such employes is intended as a maximum. In this case I know of no limitation upon the heads of departments preventing changes in the compensation of individual employes when in their judgment the same is equitable and just. In such case if a given employe is receiving more than the head of the department considers his services are worth, there seems to be no restriction upon his right to reduce the same. This, of course, is subject to the provisions of the civil service law above mentioned against reduction and discrimination for improper reasons, and in the event of any such improper reason controlling such reduction the appeal would lie as above provided, subject to all that is above stated with reference thereto as to presumptions in favor of the act of the department and otherwise.

The answer to the third question seems to have application to the fourth. so far as the reduction of salary is concerned. As to the transfer of the employes, the opinion expressed by you in your question is correct, that section 16 of the civil service law has reference to transfers from one department to another and not to mere transfers from one position to another in the same department. Therefore, if the department of public works saw fit to change the locality of the activities of a given employe on the canals it would be a matter entirely within his judgment to make such transfer. In so far as such transfer results in a reduction of salary or position, it would be subject to all the considerations mentioned in the answer to the second question above.

Answering your fourth question in like manner upon the same considerations, the state department can make the transfer from one district to another of employes ap-

pointed from a state-wide eligible list without authority from the civil service commission, and employes so transferred would be required to comply. Plainly, however, such transfer could not be arbitrarily made, but must be done in the interest of the efficiency of the administration. If such transfer were an unjust discrimination, an appeal might lie therefrom, and in the same manner and subject to the same rules and presumptions indicated above, the appeal could be either sustained or refused by the commission.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

796.

STATE HIGHWAY COMMISSIONER—COUNTY SURVEYOR—MAPS—COPYRIGHT.

The following principles of law are based upon the provisions of sections 1187 *General Code, and* 2284-1 *and* 2284-2 *General Code.*

1. *The state highway commissioner has a right to require a county surveyor to furnish the original tracing of a map which is to become the property of the state.*

2. *The county surveyor has no right to copyright a map which he makes for the state.*

3. *The county surveyor has no right to reproduce copies of maps he furnishes the state highway commissioner for the state, excepting for his office use.*

4. *The county surveyor has no right to sell, distribute or give away publicly or privately copies of maps made for the state.*

5. *The state highway commissioner has no right to copyright the uncolored maps made by the county surveyors. The copyright must cover the complete set as published by the state highway commissioner.*

6. *The state highway commissioner has no authority to give to the public prints made from the maps furnished him by the county surveyor; neither has he any authority to lend out tracings or negatives of the same.*

7. *The state highway commissioner has authority to furnish prints of such maps to employes of his department to be used by them in the course of their employment.*

8. *In making application for the copyright the following style should be used. "Clinton Cowen, State Highway Commissioner, for the State of Ohio."*

COLUMBUS, OHIO, November 20, 1917.

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

DEAR SIR:—I have your communication of October 2, 1917, in which you ask me to place a construction upon sections 1187, 2284-1 and 2284-2 General Code with a view to answering nine questions submitted by you. The sections to which you refer read as follows:

> "Section 1187. The state highway commissioner or chief highway engineer, may call upon the county highway superintendent, at any time, to furnish a map or maps of the county showing distinctly the location of any rivers, railroads, streams, township lines, cities, villages, public highways, road improvements, and deposits of road material, together with any other information that may be required by said commissioner or engineer. It shall be the duty of the county highway superintendent to furnish such information in such form as the state highway commissioner may require. A copy of such maps, plats or other information shall be kept on file in the office of the county highway superintendent."

"Section 2284-1. Highway maps shall be published by the state and shall be officially designated as 'Highway Maps of Ohio.' The state highway commissioner is hereby authorized to designate the improved roads by color, and to revise such maps from time to time as the improvement of the roads may justify. He shall secure a copyright of the said maps from time to time then so published. * * * "

"Section 2284-2. An edition of five thousand copies of the highway maps of Ohio shall be published as soon as information regarding the character of improved roads has been compiled and plates showing the same have been prepared. Future editions of not to exceed five thousand copies each, may thereafter be published when ninety per cent. of the last preceding edition has been sold. The commissioners of public printing shall have charge of the printing and binding of the editions of the highway maps of Ohio. They shall be printed upon a suitable quality of paper and shall be bound in such styles and quality of binding as to them may seem advisable. The commissioners shall advertise for bids as provided by law and shall let the contract to the best and lowest responsible bidder. The contract for printing and binding the highway maps of Ohio shall not be considered to be a part of the general contract for printing, and shall not be classed as any one of the classes of public printing but shall be a separate and distinct contract. When such maps are completed they shall be delivered to the secretary of state and shall be sold by him at the cost of the paper, printing, binding and delivering plus twenty-five per cent. additional. The money derived from their sale shall be turned over to the state treasury in the same manner as provided for the payment of other moneys paid into the state treasury."

I will take up your questions in the order in which they are given in your communication and answer them in the same order. Your first question is as follows:

"(1) Has the state highway commissioner a right, under the provisions of section 1187 G. C., to require a county surveyor to furnish the original tracing of a map which is to become the property of the state?"

Section 1187 General Code provides that "it shall be the duty of the county highway superintendent to furnish *such information in such form* as the state highway commissioner may require." This section also provides that "the state highway commissioner, or the chief highway engineer, may call upon the county highway superintendent, at any time, to furnish a map or maps of the county."

From this provision it is my opinion that the state highway commissioner has a right to require a county surveyor to furnish the original tracing of a map, and this for the reason that the section provides that the latter shall be furnished *in such form* as the state highway commissioner may require.

Your second question is as follows:

"(2) Has the county surveyor a right to copyright a map which he makes for the state highway commissioner under the provisions of section 1187 G. C.?"

It is my opinion that the county surveyor has no right to copyright a map which he makes for the state. The very fact that the state highway commissioner is authorized and commanded to secure a copyright of the maps furnished by the county surveyors when published would seem to negative the idea that the county surveyor should have authority to copyright the maps of his county; further, the work done by the county surveyor is for the use and benefit of the state and not for his own use;

for this work he is paid under the provisions of section 7181 General Code (107 O. L., 110), which section provides as follows:

> "Provided, however, that in no case shall the annual salary paid the county surveyor exceed six thousand dollars. Such salary shall be paid monthly out of the general county fund upon the warrant of the county auditor and shall be instead of all fees, costs, per diem or other allowances, and all other perquisites of whatever kind or description which any county surveyor may collect or receive."

Hence, in view of the fact that the county surveyor receives a full consideration under the provisions of this section, and in view of the fact that the work which he furnishes is to be copyrighted by the state, it is my opinion that the county surveyor has no right or authority to copyright the maps prepared by him.

Your third question reads as follows:

> "(3) Has the county surveyor a legal right to reproduce copies of the map he furnishes the state highway commissioner under the provisions of section 1187 G. C., other than the copy he is required to keep on file?"

The answer to your second question really answers your third. The county surveyor does this work for the state, for which he is paid under section 7181 General Code (107 O. L. 110); the state highway commissioner is then to have the same copyrighted when it is published with the maps of the other counties. This copyright is meant to enure to the benefit of the state, and would prevent any one other than the state from publishing or reproducing the matter or any part of it contained in the completed work.

Hence, it is my opinion that a county surveyor has no right to reproduce copies of maps he furnishes to the state highway commissioner, excepting for use in his own office.

Your fourth question reads as follows:

> "(4) Has the county surveyor a right, under the provision of section 1187 G. C., or any other law, to sell, distribute, or give away, publicly or privately, copies of the map made for the highway commissioner under the provisions of section 1187 G. C.?"

This question is answered by the answer given to your third question, namely, that he has no such right.

Your fifth question reads as follows:

> "(5) Would it be permissible for the state highway commissioner to copyright the uncolored maps made under the provisions of section 1187 G. C., either singly or in separate sets, before all the maps are completed, when it is the intention later to publish such maps in colors showing improvements under the provisions of sections 2284-1 and -2 G. C. after all maps are completed and the improvement information obtained? Or is the copyrighting of maps, made under the provisions of section 1187 G. C. limited by section 2284-1 G. C. to the time when all the maps are completed showing improved roads by color, and ready to be published?"

Section 2284-1 General Code provides:

"Highway maps shall be published by the state and shall be officially designated as 'Highway Maps of Ohio.' The state highway commissioner is hereby authorized to designate the improved roads by color, and to revise such maps from time to time as the improvement of the roads may justify. He shall secure a copyright of the said maps from time to time when so published. * * *"

From the provisions of this section two things are provided for, namely:

1. Highway maps shall be published and designated as "Highway Maps of Ohio."

2. The state highway commissioner shall secure a copyright of *said maps from time to time when so published.*

From these provisions it is my opinion that there is no authority to copyright the maps, either singly or in separate sets until the time when all of the maps are completed showing the improved roads by color, and are ready for publication as the Highway Maps of Ohio."

Your sixth and seventh questions read as follows:

"(6) Is it permissible for the state highway commissioner to give away prints made from the maps furnished him under the provisions of section 1187 G. C.,

(a) If the map is copyrighted?

(b) If the map is not copyrighted?"

(7) Is it permissible for the state highway commissioner to lend out tracings or negatives made from tracings, for the purpose of permitting prints to be made from the original maps, furnished under the provisions of section 1187 G. C.,

(a) If the map is copyrighted?

(b) If the map is not copyrighted?"

These two questions may be answered together. As I view it, the answer will be the same whether the uncolored maps are copyrighted or not. The fact remains that the maps when colored and completed are to be copyrighted, and under section 2284-2 General Code the profits are to enure to the benefit of the state. Hence, the state highway commissioner would not have authority to distribute the matter that goes into the copyrighted work. The same rule would apply to him as applies to the county surveyor as before stated in this opinion. Furthermore, section 2284-1 General Code specifically states how the first edition of the published maps shall be distributed, and section 2284-2 General Code provides how further editions shall be handled. This seems to negative the idea that there is to be any other distribution of the matter when it becomes the official publication.

Your eighth question reads as follows:

"(8) Would prints of such maps furnished to engineers, division engineers, resident engineers or other employes of this department for departmental business, constitute an exception to your answers to points (6) and (7) above?"

In answering this question it must be borne in mind that section 2284-1 and 2284-2, and section 1187 General Code are not parts of one and the same act. The

former sections were enacted into law on April 27, 1910, while the latter section forms a part of the Cass Highway act, and was enacted into law on May 27, 1915. For this reason it cannot be held that the same purpose runs through all of the sections. It is undoubtedly true that the results secured under the provisions of section 1187 General Code are to be used in carrying out the provisions of sections 2284-1 and 2284-2 General Code, but the provisions of section 1187 General Code were also evidently intended to serve another purpose. The state highway commissioner is given authority to ask for the information therein set out from the county surveyors for the use and purposes of his own department.

Hence it is my opinion that you would have authority and be warranted in law in giving the information you secured from the county surveyors to the employes of your department to be used by them in the performance of their official duties.

Your ninth question is as follows:

> "(9) In applying for a copyright for a map, made by the county surveyor under the provisions of section 1187 G. C., what entry is proper to make by this department in blank space (3) of the official form for application for copyright (hereto attached)?"

The answer to this question must be given in the light of a decision rendered by the supreme court of the United States, styled Banks v. Manchester, 128 U. S. 244. The court in this case affirmed the decision of the circuit court of the southern district of Ohio, found in 23 Fed. Rep. 143.

From these two decisions I am of the opinion that you should make application for a copyright in the following words:

> "Clinton Cowen, state highway commissioner for the state of Ohio."

In giving you this answer I am not at all passing upon the question as to the right which the state of Ohio would have under such a copyright, but whatever right the state can secure by virtue of a copyright will be secured, in my opinion under and by virtue of an application such as is above set out. The language in 128 U. S. 244, and on page 253 of the opinion, renders the question as to the right of a public official to secure a copyright of the work performed by him somewhat uncertain. The court in this case rather held that inasmuch as the official draws a salary for the work he performs as a public official, his work should be for the use and benefit of the public and not subject to copyright.

But that court, in another case styled Callaghan v. Myers, 128 U. S. 761, rendered a decision more specific in reference to this point. On page 647 of the opinion the court says:

> "Even though a reporter may be a sworn public officer, appointed by authority of the government which creates the court, of which he is made the reporter, *and even though he may be paid a fixed salary for his labors*, yet, in the absence of any inhibition forbidding him to take a copyright for that which is the subject of a lawful copyright in him or reserving a copyright to the government as assignee of his work, he is not deprived of the privilege of taking out a copyright which would otherwise exist."

This case would seem to hold that a public official, even though he is paid a salary, may secure a copyright upon the product of his labors. The benefit of the copyright will then vest in the state under and by virtue of the provisions of our statutes.

Relative to the copyright referred to in your communication, I desire to suggest that it will be necessary for your department and the county surveyor to be very careful as to the manner in which the copies of the maps are used, for the reason that the courts have been unanimous in holding that if any matter subject to copyright has been dedicated to the use of the public by publishing the same, then the author can no longer have the same copyrighted.

For instance, in 68 L. R. A. 591 the court say:

> "Thus in case of a book, ordinarily the sole practical benefit to the author is in the right to multiply copies. The exhibition or private circulation of the original or of printed copies is not a publication unless it amounts to a general offer to the public. The unrestricted offer of even a single copy to the public implies the surrender of the common law right."

In 212 Fed. Rep. 301, the court say in the opinion:

> "If there be such a dissemination of the thing under consideration among the public as to justify the belief that it took place with the intention of rendering the work common property, then publication occurred."

If publication has occurred, the courts are unanimous that the matter can no longer be copyrighted.

Hence, while your department has the undoubted right to use the maps secured from the county surveyor for the use of the department, yet the maps should be so used and returned to the office and kept there in such a way as in nowise to indicate to the public that the matter contained in the maps has been dedicated to public use.

I would suggest that you stamp upon the maps used by your department something to the effect that they are merely for the use of the department and that there is no intention whatever, upon the part of the department or any one else, to dedicate the same to the use of the public.

It might also be well for the county surveyor, in filing the copy of the map in his department, to indicate upon the same that it is filed merely in compliance with the law and for the use of his department, and is not in anywise for the uses and purposes of the public.

This suggestion I feel to be important and request therefore that you give the same your careful consideration.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

797.

COLLATERAL INHERITANCE TAX—DOES NOT APPLY TO SHARES OF STOCK OF DOMESTIC CORPORATION OWNED BY NON-RESIDENTS —DOES APPLY TO REAL ESTATE—BY WHOM AMOUNT OF TAX DETERMINED—TAX COMMISSION HAS NO JURISDICTION.

The Ohio collateral inheritance tax law does not apply to bequests or intestate successions of shares of stock in domestic corporations passing from the estates of deceased persons residing in other sates (Greves v. Shaw, 173 Mass., 205 contra not followed).

Such laws do, however, apply to devises or intestate inheritances of real estate belonging to the estates of such non-resident decedents when such real estate is located in this state.

Primarily, the auditor of the county in which ancilliary administration is had or the foreign will is probated, and ultimately the probate court of such county determines the amount of the tax on account of such real estate, and the same is payable to the treasurer of said county.

The tax commission of Ohio has no authority or jurisdiction whatsoever over the administration of the collateral inheritance tax law.

COLUMBUS, OHIO, November 20, 1917.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I acknowledge your letter of recent date in which you enclosed a letter written on behalf of the executor of the estate of a person who at his death was a resident of the state of New Hampshire. The letter contains a copy of the will of the decedent and a copy of a supplemental inventory of the estate, showing that the testator was the owner of undivided interests in certain tracts of real estate located in the city of Cleveland, Ohio, and of certain shares of stock in a corporation organized under the laws of this state.

You ask the following questions in connection with this letter:

> "Please advise the commission whether any of the property included in the supplemental inventory is subject to inheritance tax in this state.
>
> If any of this property is subject to inheritance tax in this state, what authority is to determine the amount of the same and to whom is it to be paid?
>
> What is the jurisdiction of the tax commissioner of Ohio over the administration of the collateral inheritance tax law?"

The first question is devisible on the facts stated into two parts: that relating to the real estate, and that relating to the shares of stock. As to the former no serious question exists. Under all inheritance tax laws, excepting those the scope of which is expressly limited to the taxation of the succession to the property of residents of the state, it has been uniformly held that devises and intestate inheritances of real property located within the state are taxable, though the testator or intestate at the time of his death was a resident of another state.

The express language of section 5331 of the General Code admits of no other answer to this question. It provides as follows:

> "All property within the jurisdiction of this state, and any interests therein, *whether belonging to inhabitants of this state or not*, and whether tan-

gible or intangible, which pass by will or by the intestate laws of this state, or by deed, grant, sale or gift, made or intended to take effect in possession or enjoyment after the death of the grantor, to a person in trust, or otherwise, other than to or for the use of the father, mother, husband, wife, lineal descendant or adopted child, shall be liable to a tax of five per cent. of its value above the sum of five hundred dollars. Fifty per cent of such tax shall be for the use of the state; and fifty per cent. of such tax shall go to the city, village or township in which said tax originates. All administrators, executors and trustees, and any such grantee under a conveyance made during the grantor's life, shall be liable for all such taxes, with lawful interest as hereinafter provided, until they have been paid, as hereinafter directed. Such taxes shall become due and payable immediately upon the death of the decedent and shall at once become a lien upon the property, and be and remain a lien until paid."

The nature of this part of your first question does not require further comment upon the machinery of collection and assessment of the tax at this time, and I advise without further discussion that the devises of the real estate mentioned in the supplemental inventory submitted to me are subject to the collateral inheritance tax of this state. In so advising I assume, of course, that the devisees are not within the degrees of relationship mentioned in section 5331 and that the value of each separate interest vesting under the will exceeds the sum of five hundred dollars. In passing I point out that though the property in question represents merely undivided interests in real estate, the phrase "any interests therein" as used in section 5331 is broad enough to make the section applicable thereto.

The question as to the taxability of the bequests of the shares of stock mentioned in the inventory is of very different character. It has heretofore been held in this department that shares of stock in an Ohio corporation belonging to the estate of a non-resident decedent are not subject to the collateral inheritance tax. So far as I am advised, the uniform practice of the state in the administration of the collateral inheritance tax law has been in accord with this view. I have felt disposed, however, to re-examine the question with some care in answering your letter and not to dismiss it from consideration on the authority of the precedents available in this department.

It must be admitted that if the question could be considered as one of general law, or as one involving merely the power of the state to impose a tax upon such successions as are involved in the second part of your first question, it would have to be said that the overwhelming weight of authority—indeed the unanimous doctrine of the courts of the several states—would support the exaction and sustain the taxation of the succession to stock owned by a non-resident decedent in a corporation of the state imposing the tax, whether or not the certificates for such stock are or ever have been in the state, and although they have been actually transferred in the foreign jurisdiction before the tax is collected.

People v. Griffith, 245 Ill., 532;
In re Bronson, 150 N. Y., 1;
In re Culver, 145 Iowa, 1;
Neilson v. Russell, 76 N. J. L., 655;
Dixon v. Russell, (N. J.) 73 Atl., 51;
Douglas County v. Kountze, 84 Neb., 506;
State v. Probate Court, 128 Minn. 371, L. R. A., 1916a, 901;
Blackstone v. Miller, 188 U. S., 189;
Greves v. Shaw, 173 Mass., 205;
See 46 L. R. A., n. s., 1168, Note.

Many of these cases can be distinguished on the ground that they arose under statutes substantially different from the Ohio law. One of them, Greves v. Shaw, supra, can not be so distinguished, and is exactly in point so far as the language of the two statutes is concerned, though there may be other distinctions between the cases which will be hereinafter dwelt on. In spite of this imposing array of authorities, however, I regard the question as at least an open one in Ohio, and shall proceed to discuss it as such, developing as the discussion progresses my reasons for the doubt which I entertain and ultimately the conclusions at which I feel obliged to arrive.

The Ohio Constitution, Article XII, section 2, requires that all property shall be taxed, as such, by a uniform rule, and so precludes the double taxation of any thing as property. Nevertheless, inheritance taxes have been sustained in Ohio, as in other states, not as property taxes but as privilege or excise taxes—the word "privilege" referring to the basis of the tax and the word "excise" to the method thereof.

State v. Ferris, 53 O. S., 314;
Hagerty v. State, 55 O. S., 613;
State v. Guilbert, 70 O. S., 229;
Executors of Eury v. State, 72 O. S., 448.

In each of the first two of these cases—the one dealing with the first direct inheritance tax law and holding it unconstitutional for reasons which are not important in the present connection, and the other dealing with the original form of the present collateral inheritance tax law—the court had before it a statute in form like section 5331 of the General Code, which, it will be observed, in terms enacts that "all property within the jurisdiction of this state * * * shall be liable to a tax," etc. So far as the words of the statute were concerned, then, the tax was laid upon property yet the court sustained the tax as against the main objection in both cases on the ground that it was not in substance such a tax, but, as stated, was a tax on a privilege.

Burket, J., in State v. Ferris, supra, used the following language at page 326:

> "It must be conceded that the language used in the statute is upon its face clearly a taxation of the property itself, and not of the right to acquire property. And for myself, I think this is the true construction of the act. Others of the court, however, think that when the operation and effect of the statute are considered, that it may be regarded as taxing the right or privilege rather than the property. Certain it is that the only thing that can be constitutionally taxed is the right or privilege of succession. * * *."

The other two cases cited dealt with the second direct inheritance tax law of the state, since repealed, which in terms imposed a tax, not upon property itself but upon the right to succeed to or inherit property within the jurisdiction of this state "and any interests therein."

We have it, therefore, that despite the language of section 5331, the collateral inheritance tax must be regarded as a tax on a privilege and not as a tax on property.

It seems to me that the next question which obviously arises is as to the nature or identity of the privilege which is taxed. It must be admitted that this is not the usual attitude of the courts of other states in dealing with questions like the one under consideration. They have chosen, in some instances, to ignore this fundamental question and to deal at the outset with the distinct, though also important, question as to what is meant by "property within the jurisdiction of the state." Thus Knowlton, J., in Greves v. Shaw, supra, confines his discussion of the entire question as to the taxability of the succession to shares of stock in Massachusetts corporations belonging to non-residents of the state to the following:

"There can be no doubt that stock in corporations organized under the laws of this commonwealth * * * is property within the jurisdiction of the commonwealth, within the meaning of this statute. * * * Such a corporation, being in a sense a citizen of this state, and having an abiding place here akin to the domicile of a natural person, is subject to the jurisdiction of the commonwealth, and is in fact within the commonwealth. The stockholders are the proprietors of the corporation, which is itself the proprietor of the property owned and used for the ultimate benefit of the stockholders. While the corporation has a full and complete legal title to the corporate property, its ownership is in a sense fiduciary; for on winding up its affairs the surplus, after the payment of debts, must be divided among the stockholders."

Whether or not these propositions of law are correct, it is submitted that they are not enough in themselves to support the court's decision but that it must likewise appear that the privilege taxed, though relating to property within the jurisdiction of the state, is the privilege exercised by the legatee or inheritor of such shares.

Though our own supreme court has held, as I have stated, that the tax rests upon a privilege and that therefore some words must be read into the statute, we have no accurate judicial definition of what the privilege is or recital of what the interpolated words must be. Some things, to be sure, are decided. Thus it is not the privilege of transmitting by will or descent that is taxed but that of receiving or succeeding to.

Burket, J., in State v. Ferris, supra, said:

"Properly understood, it is not the right to transmit, but the right and privilege to receive, that is taxed. * * * .

It is clear that the right is distinct and separate from the property itself, and the state may tax this right to receive property, * * * ."

Again, it is the privilege of succeeding to the property right and not that of acquiring through the machinery of the laws of the state the possession or enjoyment of the thing devised or bequeathed that constitutes the taxable privilege.

Summers, J., in Executors of Eury v. State, supra, said:

"The right so given either to devolve or to succeed to property is subject to the power of the state to tax, and generally is taxed. To use a homely simile it may be likened to the taking of toll from the grist that is sent to the mill, and aside from considerations of convenience it is immaterial whether the whole toll be taken as soon as the grist is received or proportionately as the flour is delivered. Generally, * * * the amount of the tax is measured by the value of the property. Our state, however, * * * has imposed it upon the right of succession, * * *.

But while the tax has been likened to the toll that is taken from the grinding of a grist, it must not be overlooked that it is the *right* to devolve or to succeed to property that is taxed, and that an additional exaction might be made as is done in some states for the service in passing the property, sometimes, as in England, called probate duties. So that the right of the state to and the liability of the successor for the tax generally arises upon the death of the owner of the property and is not dependent upon the right of succession ripening into possession or enjoyment, * * *."

(Compare State v. Probate Court, supra, in which it was held that the state's power to exact an inheritance tax may rest upon the privilege of taking over and securing the possession or enjoyment of property.)

Again, it is reasonably clear—and indeed it has been decided in Ohio by some of the lower courts—that the succession to which the privilege taxed relates is not the universal succession of the executors or administrators, but the singular succession of the ultimate takers, the value of which, for example, is to be arrived at by determining what they receive, in the case of personality, after the debts are paid and the costs of administration are deducted. The distinction between the two kinds of succession is pointed out by Mr. Justice Holmes, in Blackstone v. Miller, 188 U. S., 189, and the following definition of one of the two terms is therein framed by the learned justice:

> "Universal succession is the artificial continuance of the person of a deceased by an executor, heir, or the like, so far as succession to rights and obligations is concerned. It is a fiction, the historical origin of which is familiar to scholars, and it is this fiction which gives whatever meaning it has to the saying *mobilia sequuntur personam.*"

The opinion in the case last cited refers to the singular succession throughout the discussion and refers also to what is believed to have been repudiated by the Ohio supreme court as a basis of the privilege taxed by the collateral inheritance tax law, namely, the practical succession by the securing of possession and enjoyment. There may be, and doubtless are, more than one distinct privilege which might be termed the "singular succession" for the purposes of this opinion, and perhaps, inaccurately, the term may be held as definitive of the separate interest of the devisee, legatee or inheritor as distinguished from the estate as a whole or any aggregate part of it.

So far, then, it appears that the Ohio collateral inheritance tax rests upon the privilege of receiving—not transmitting; upon the privilege of acquiring a property right, rather than upon the privilege of securing the possession or enjoyment of the thing to which the right pertains; and upon the separate privilege of each person in whom such rights are ultimately vested, rather than upon the privilege of universal succession as it has been defined.

What possibilities remain? It is suggested that there are at least the following:

(1) That privilege which the law of the taxing state affirmatively confers upon the person whose interest is liable to the tax; and

(2) That privilege which is conferred upon the person whose interest is liable to the tax by the mere fact that the law of the state imposing it recognizes his rights, protects them as property rights and gives effect to the succession.

To be more concrete, the first kind of a privilege is the one that is created directly by the statute of wills or the statute of descent and distribution of the taxing state, in connection with which the inheritance tax law may be conceived of as a sort of exception to such statutes. That is to say, the joint effect of both statutes might be expressed by some such formula as the following:

In the case of the death of a person, a resident of this state, leaving neither wife, children nor parents, his brothers and sisters shall succeed to his personal property, over and above the amount thereof necessary to pay his debts, excepting that the state will take out the tax, if the share of any brother or sister or their representatives exceeds five hundred dollars in value.

The second of these two possible views may be illustrated by supposing the case of personal property located in Ohio, as livestock on a farm, belonging to a nonresident intestate. The law of the state where the intestate resided may provide that the uncles and aunts of a person dying under the circumstances supposed for the purpose of the first illustration shall be preferred to the brothers and sisters of

the decedent. That law as a matter of fact will govern, for Ohio does not attempt to regulate the distribution of personal property within its borders, as such. But in case a wrongdoer should get possession of these cattle, a foreign administrator would have to have his title recognized by the courts of Ohio before he could obtain relief in the courts, and in awarding him relief Ohio recognizes and thereby, in effect confers the privilege.

Nay more, Ohio might—though on principles of comity she has not—assume to control the devolution by death of property located within her borders. Therefore, by her acquiescence in the laws of another state she confers the privilege of succession, such acquiescence having the legal effect of an adoption of the foreign law. As put by Mr. Justice Holmes in Blackstone v. Miller, supra:

> "No one doubts that succession to a tangible chattel may be taxed wherever the property is found, and none the less that the law of the situs accepts its rules of succession from the law of the domicile, or that by the law of the domicile the chattel is part of a *universitas* and is taken into account again in the succession tax there."

In a word then, the two privileges may be described and distinquished from each other by referring to one of them as that which the taxing state affirmatively creates and to the other as that which the taxing state negatively accepts.

As pointed out by Mr. Justice Holmes in the case cited and by the writer of the exhaustive note in 46 L. R. A., n. s., supra, both privileges are within the reach of the taxing power of the state, and though the assertion of that power against both at the same time involves an element of inconsistency, in that in the one case the maxim *mobilia sequuntur personam* is relied upon and in the other case it is ignored, such inconsistency does not defeat the tax on constitutional grounds.

I think we may without discussion accept the conclusion that the Ohio tax, though directed against what, for purposes of this opinion, has been called the singular succession, does reach in its entirety the first of these privileges, unless qualified by the further language of the section, viz.: "within the jurisdiction of this state." That is to say, if property is within the jurisdiction of this state, in the sense in which that term is to be defined, and it passes by virtue of the statute of wills or by the statute of descent and distribution of this state, the tax is payable on that behalf.

As stated by Burket, J., in the opinion from which quotation has already been made:

> "This right to receive property is under the control of the legislature, and it has the power to regulate and lay such burdens thereon as it may see fit, within the provisions of the constitution."

Again, in State v. Guilbert, supra, Spear, C. J., quotes with approval from Magoun v. Illinois Trust & Savings Bank, 170 U. S. 283, as follows:

> "The right to take property by devise or descent is a creature of the law, and not a natural right—a privilege, and therefore the authority which confers it may impose conditions upon it."

Without at this time determining whether or not tangible personal property, for example, located in another state but belonging to the estate of a deceased resident of this state is subject to our collateral inheritance tax, I assume, then, that generally speaking the proposition just laid down is correct.

But so far as the general nature of the tax is concerned substantially the same justification is found for its application to the second kind or class of privileges as has

just been found for its application to the first kind thereof. Indeed so long as the state possesses the unquestioned right, as it does, to determine by its laws the manner in which title to tangible property, both real and personal, within its limits may be acquired and divested, and so long as by its control over the person of the debtor in the manner pointed out by Mr. Justice Holmes elsewhere in his opinion in Blackstone v. Miller, supra, the state can virtually do likewise as to most classes of intangible personal property, such as choses in action, it does seem as if all succession to such property or property rights may be said in the truest sense to owe its existence to the laws of the state, even though those laws consist merely of silent acquiescence in the statutes of wills and descent and distribution of other states. I can not conclude, therefore, that the Ohio law, which it will be observed is silent on the point as to precisely what privilege is intended to be reached by it, discriminates between the two classes of privileges which I have defined by anything that is merely to be implied from the decisions in the Ohio cases which have been cited.

But I must not stop here, for the statute does express some qualifications as to the subject of the tax and these must now be dealt with.

A careful examination of section 5331 of the General Code will disclose two such qualifications:

> "*First*: The privilege which is taxed must relate to property within the jurisdiction of the state; and
>
> *Second*: That privilege must relate to property which passes 'by will or by the interstate laws of this state, or by deed, grant, sale or gift, made or intended to take effect in possession or enjoyment after the death of the grantor."

For the purposes of this opinion I shall consider these two qualifications in their inverse order.

The latter of them may be merely another way of saying that the privilege taxed is that of succeeding to property by virtue of a will or the intestate laws of this state etc. What is the force and effect of the phrase "of this state" herein found? It can not be ignored, for it is expressed in the statute. Yet it qualifies but one of the three modes of passing title to property, viz.: by intestate laws. The grammatical construction of the sentence in which it is found is such that, strictly speaking, it can not be held to modify anything else in the section. Let it be assumed, then, for present purposes, that we are dealing only with intestate succession (although your question relates to succession by will). It is to be remarked at the outset that many of the decisions which were cited in the opening paragrphs of this opinion were rendered under statutes in which this qualifying clause did not appear or under statutes expressing exactly the opposite meaning. The statute involved in In re Bronson, supra, was described in the opinion of Gray, J., as follows:

> "By section one, a tax is imposed on the transfer of any real or personal property * * * when the transfer is by will or by the intestate laws *of this state* from a resident decedent; when the transfer is by will or intestate law, of property within the state and the decedent was a non-resident at the time of his death."

Obviously, the New York law thus described does not mean the same thing as the Ohio law now under consideration. There the qualifying words "of this state" applied only in case the transfer was from a resident decedent. They were omitted in dealing with transfers of property within the state when the decedent was a non-resident. This is made clear by the dissenting opinion of Vann J., who agreed with the majority of the court on the point which is of interest to us. His analysis of section 1 is as follows:

"Two classes of cases are thus provided for: 1. The property of residents, passing under the laws of this state, without regard to where the property may be; 2. The property of non-residents, *passing under the laws of another state*, when the property is within this state."

The statute of Iowa construed in the case of In re Culver read as follows:

"All property within the jurisdiction of this state, and any interests therein, whether belonging to the inhabitants of this state or not and whether tangible or intangible, which shall pass by will or by statutes of inheritance of this *or any other state*, or by deed, grant, sale or gift, made or intended to take effect in possession or in enjoyment, etc., shall be subject to a tax."

I call attention to the remarkable similarity of the Iowa statute to section 5331 of the General Code in all respects save in the use of the italicised language in the Iowa statute. The same thing will be found to be true of all the statutes involved in the other cases cited excepting the Massachusetts act of 1891, interpreted in Greves v. Shaw, supra. That statute was word for word the same as the Ohio law. The Ohio law was passed in 1893 and may be regarded as modeled after the Massachusetts statute. Nevertheless, Greves v. Shaw was not decided until 1898, after the law was adopted in Ohio. Therefore, it is not a controlling decision upon the principle that when the legislature of one state adopts a statute of another state it is deemed to have adopted with it such judicial interpretation of the latter as has been placed upon it by the courts of that state. (See argument of Carter, J., in People v. Griffith, supra).

As I have pointed out, Judge Knowlton in the Massachusetts case ignores whatever effect might be given to the words "of this state," and because he ignores these words the authority of his decision is, I believe, weakened.

Still dealing for the purpose of the argument with the case of intestate succession alone, and observing that the Ohio statute is essentially different so far as such successions are concerned from those of most of the other states, I now inquire what is meant by property passing "by the intestate laws of this state." Putting it in another way, the question may be phrased as follows:

When may property be said to pass by the intestate laws of Ohio?

Obviously, in the case of real property located in Ohio, "the intestate laws of this state" in the narrowest sense in which that phrase might be interpreted govern the devolution or "passing" of such property in case of death. Suppose, however, the question were as to tangible personal property, such as the livestock referred to in the illustration chosen; would such property be held to pass by the *intestate* laws of this state? I have already pointed out that in a sense the property may be said to pass by or under the sanction of the laws of this state—such laws, for example, as recognize the rights of foreign administrators, or provide for ancillary administration upon such property through the courts of this state. But are such laws "intestate laws?" This, as I see it, is the question which must be answered.

Without pausing to deal with the question of tangible personal property located in this state and passing by intestate laws from a decedent who was at the time of his death not a resident of Ohio, I pass directly to the question which you raise respecting shares of stock in an Ohio corporation, in so far as such shares of stock might pass by intestate laws.

On this point Greves v. Shaw, as I have pointed out, is silent, but Neilson v. Russell, supra, decided under an earlier New Jersey statute, contains pertinent reasoning. I quote somewhat fully from the opinion of Swayze, J., in that case:

"In a case like this the temptation is strong to pass an opinion up on the fundamental and important questions which were exhaustively discussed at the bar, * * *. We prefer, however, to confine our discussion to the exact point presented by the case, which, we think, is the much narrower one of the proper interpretation of the statute. For that purpose we assume that shares of stock in a New Jersey corporation have a situs in this state, and that succession thereto or transfer thereof, may be taxed by our legislature; and that the tax imposed by the act of 1894 is either a legacy or a succession tax and not a property tax. * * *. The question we have to decide is, then, simply whether the statute reaches the present case.

An examination of the act shows that it imposes a tax (1) upon all property which passes by will or the intestate laws of this state from any person * * * while being a resident of the state; (2) upon all property which shall be within this state which shall be transferred by inheritance, distribution, bequest, devise, deed, grant, sale or gift, made or intended to take effect in possession or enjoyment after * * * death * * *. The first class obviously affects the succession of residents of this state only. If the present tax is to be sustained, it must be because the succession sought to be taxed comes within the second class.

Our act was modeled after the New York act of 1885, and, if we had made no change in that act, we should be held upon well settled principles to have adopted with the act the construction previously placed thereon by the New York courts * * *. In fact, however, we modified the language of the New York act by inserting at the beginning of the clause the words 'all property' in place of the mere relative 'which' and by adding the words 'inheritance, distribution, bequest, devise.' We are not therefore concluded by that decision.

It is clear that the legislature did not intend to tax all successions of non-residents. If it had meant that, it would have taxed all property within this state which should be transferred from a decedent by will or intestacy. (We disregard as quite inapplicable to the present case, transfers by deed, grant, sale or gift intended to take effect after death.) Instead of using the general language, which was naturally suggested by the use of the words 'by will or by the intestate laws of this state,' employed in the previous clause, the act limits the tax upon transfers of the property of non-residents to transfers by inheritance, distribution, bequest or devise. * * * What is to be taxed, therefore, as far as the present case is concerned, is a transfer by bequest from Mills (the testator) to his legatees, or * * * it is the singular succession of the legatee, not the universal succession of the executors. That this is the true construction of the act is indicated further by the provisions of section 6 * * * authorizing the executors to deduct the tax from the legacy or property for distribution. The tax is not a general charge against the estate, but a charge upon the legacies. * * *"

(In this respect ,of course, the New Jersey law was interpreted by the court in the same way in which the Ohio law has always been interpreted.)

"This succession is a succession under English law, by which the validity and amount of the bequest must be determined. * * * The succession to the legacy is complete only in a foreign jurisdiction, and it would certainly be anomalous to tax that succession here. The case differs from those arising under the New York act of 1892, and statutes modeled thereon, which assume to tax the transfer of property within the jurisdiction; under those

statutes it is the situs of the property which justifies the taxation of the transfer. Our statute of 1894 does not undertake to tax all transfers of property within our jurisdiction, but only transfers by inheritance, distribution, bequest or devise. * * * The Massachusetts cases are not in point for a like reason. There the statute imposes a tax on 'all property within the jurisdiction of the commonwealth and any interest therein, whether belonging to inhabitants of the commonwealth or not, and whether tangible or intangible.' Grewes v. Shaw, 173 Mass. 205."

(Of course, as pointed out, the scope of the Massachusetts statute is not accurately indicated by the language quoted by the New Jersey court, but is further limited by a clause ignored alike by the Massachusetts court in reaching its decision and by the New Jersey court in distinguishing the case; which clause is present in the Ohio statute.)

"In short our statute imposes a legacy duty and not a transfer or succession tax. * * *."

(If this were the sole ground of the court's decision it would possibly be distinguishable upon grounds suggested by the decision in Executors of Eury v. State, supra; but more follows in the opinion of the New Jersey court.)

"We reach the same result if we * * * look at this tax as a succession tax. * * *

The ground upon which this extraordinary exaction, * * * is sustained, is, as stated, in the opinion of the supreme court, that 'the rights of testamentary disposition and of succession are creatures of law upon the exercise and operation of which the lawmaker may impose terms.' We think it follows logically that the only law which can impose the terms is the law that creates the right. In this case it is the English law. The title to the stock passed by virtue of the will to the executors from the moment of the testator's death, and probate was operative only as the authenticated evidence, not as the foundation of the executors' title. * * * However convenient it may have been to take out letters testamentary in New Jersey, such a course was not essential under our laws to vest the title in the executor; it was only of consequence as a matter of procedure. * * *."

While the New Jersey statute thus interpreted was, as I have parenthetically pointed out, quite different from the Ohio law, the reasoning of the court is certainly applicable to the phrase "by the intestate laws of this state" as found in our statute. This is the only case I have been able to find in which anything like the question which I have last raised and am now discussing has been carefully considered. As I have shown, there was no occasion to consider such a question in most of the cases.

Was the New Jersey court right in giving to the equivalent of our phrase "by the intestate laws of this state" the restricted meaning which it applied? To hold otherwise would involve, I submit, the following consequences:

It is true that the Ohio law which creates Ohio corporations and gives to them and their stockholders all the rights which they severally may enjoy defines the terms upon which a share of stock may pass from one shareholder to another.. If it does not do this expressly it does it by necessary implication. If it is a part of the law of Ohio that a share of stock shall be regarded as personal property and subject to devolution on death the same as any other personal property; and if the law of Ohio permits such

property to pass on death according to the laws of the state in which the intestate decedent resided at the time of his death, then it could be well said that the share of stock passed at intestate death under the laws of Ohio. But to reach a result opposite to that suggested by the reasoning of the New Jersey court would be to hold that the corporation laws of Ohio, both express and implied, are "intestate laws." It seems to me that this would be going too far. We are dealing with a privilege tax, which, however just may be its basis, is in the nature of an extraordinary exaction. Such tax laws are generally supposed to be subject to strict interpretation, though it must be admitted that the attitude of some of the courts toward them has been quite the opposite. But it would not only be a liberal interpretation of the Ohio statute to say that a share of stock in an Ohio corporation belonging to the estate of a deceased intestate resident of another state would pass by the intestate laws of Ohio—it would be indeed a forced and artificial interpretation thereof.

In my opinion, so far as intestate succession is concerned, the general assembly of Ohio by the use of the phrase "of this state" has clearly evinced the intention to limit the privilege taxed to the first of the two kinds of privileges above pointed out. I come, therefore, to the conclusion that if the question which you ask related to an intestate estate the tax would not apply to the shares of stock in question.

But how different is it with respect to property passing by will? As a matter of statutory interpretation, and regardless of the grammatical structure of section 5331 of the General Code, I am of the opinion that the same limitation runs throughout the whole section, and that the Ohio statute is to be interpreted according to the principles set forth in the decision of the New Jersey court.

I am of the opinion, therefore, in answer to the second part of your first question that as a matter of interpretation under section 5331 of the General Code and because of the presence therein of the qualifying phrase "of this state" the succession to the shares of stock in the Ohio corporation in question owned by the non-resident testator is not taxable under said section.

This conclusion does no violence to the phrase "whether belonging to inhabitants of this state or not" in section 5331, because that phrase still has application at least to real property located in Ohio. The conclusion at which I have arrived makes it unnecessary for me to consider the meaning of the phrase "within the jurisdiction of this state" as also used in said section, although if the answer to your question depended upon its interpretation I should be obliged to hold, consistently with all the cases which I have cited, that such shares of stock may be regarded as property within the jurisdiction of this state.

My conclusion on this question is fortified by certain other considerations which are apparent on the face of section 5331 of the General Code and other sections of the inheritance tax law.

In the first place, the machinery of the law makes no express provision for the collection of any such tax. The sections involved are sections 5336, 5339, 5340, 5343, 5344 and 5347 of the General Code. I will briefly abstract the provisions of these sections:

Section 5336 makes it the duty of the administrator, executor or trustee to deduct the tax from the property or collect the tax thereon from the legatee or person entitled to the property.

Section 5339 authorizes such administrators, etc., to sell so much of the estate of the deceased as will enable them to pay the tax in like manner as they are empowered to do for the payment of debts.

Section 5340 begins the machinery of valuation and provides, in substance, that the inventory of the estate filed in the probate court shall be the basis of the appraisal.

Section 5343 provides for judicial proceedings to determine the value, which may be instituted either by the prosecuting attorney of the proper county or by any person interested in the succession to the property.

Section 5344 vests in the probate court, having either principal or auxiliary jurisdiction of the settlement of the estate, jurisdiction to hear and determine all questions relating to the tax.

Section 5347 provides that the probate court shall not accept or allow any final settlement of the account of an executor, administrator or trustee unless it shows and the judge of the court finds, that all taxes imposed by the provisions of the law have been paid.

Nowhere is there any prohibition against the transfer of stock on the books of the corporation without the payment of the tax, and at the very least there is no machinery for the collection of the tax inquired about in the second part of your first question unless there should be ancillary administration in a probate court of Ohio for the purpose of procuring such transfer, or otherwise. It is true that in order that there may be a perfect devolution of personal estate there must be some administration or execution of a will. The question, however, is whether the stock of a domestic corporation requires such ancillary administration or executorship.

Section 8682 of the General Code, which is applicable to shares of stock issued prior to 1911, provides that

> "Shares of stock in a corporation shall be personal property, and when fully paid up, be subject to levy and sale upon execution against the owner."

Under this section it has been held that while the share of stock is property distinct from the capital or property of the corporation, and belongs to the stockholder and not to the corporation, and for the purpose of property taxation takes its situs from the domicile of the owner (Bradley v. Bauder, 36 O. S. 28), it is to be regarded as in the possession of the corporation for the purpose of garnishee process and proceedings in aid of execution (Norton v. Norton, 43 O. S. 509; Ball v. Manufacturing Company ,67 O. S., 306). In that state of the law it would seem that despite the doctrine last referred to the legal title of a foreign executor or administrator to the stock for the purpose of further administration would be perfect, though as a matter of choice domestic letters of administration or executorship might be taken out. (See Cook on Corporations, Vol. I, Sec. 329, page 929, Note 5).

On the whole, there may be some doubt as to whether the probate court in which such ancillary administration as might be procured by a foreign executor or administrator for the purpose of securing the proper transfer of the stock, and to protect the same as against, for example, proceedings in aid of execution, were pending would not have adequate machinery under the sections which have been abstracted for the collection of the tax.

But since 1911 the uniform stock transfer law has been in effect in this state (sections 8673-1 to 8673-22, inclusive, of the General Code, 102 O. L. 500.) The provisions of this act virtually reverse some of the decisions referred to. (See section 8673-13 General Code.) True, it is provided by section 8673-2 that

> "Nothing in this act shall be construed as enlarging the powers * * * of a trustee, executor or administrator, or other fiduciary, to make a valid indorsement, assignment or power of attorney;"

but this section does not affect the right of a trustee, executor or administrator to acquire legal title to the share of stock.

Section 8673-1 provides, in part, that

> "Title to a certificate and to the shares represented thereby can be transferred only,
> * * * * * * * * *

(b) By delivery of the certificate and a separate document containing a written assignment of the certificate or a power of attorney to sell, assign, or transfer the same or the shares represented thereby signed by the person appearing by the certificate to be the owner of the shares represented thereby."

And section 8673-18 provides that

"In any case not provided for by this act, the rules of law and equity, including the law merchant, and in particular the rules relating to the law of principal and agent, executors, administrators and trustees * * * shall govern."

I do not undertake to give an interpretation of this law save to point out that it clearly has some effect upon the inherent nature and location of a share of stock. The certificate of stock, formerly merely evidence of the share, which for some purposes at least was regarded as in the possession of the corporation, has under this act acquired a larger significance, and it seems, though I can not so decide, that domestic administration could no longer be considered as necessary for any purpose to protect the title of the foreign executor or administrator, inasmuch as the interest of the stockholder could not be reached by attachment against the corporation.

It is true, however, that the mere failure of the inheritance tax law to provide express machinery for the collection of the tax as a condition precedent to transferring stock is not of determining force in itself. Other inheritance tax laws have such machinery, but our own law lacks so much essential machinery which has to be supplied in order to make it workable, that if it was the intention of the legislature to impose the tax under the circumstances considered in answering the second part of your first question I would have no difficulty in arriving at the conclusion that such machinery could be supplied. For example, the law provides that an estate liable to the tax shall not be delivered by the executor or administrator to the legatee or inheritor unless the tax has been paid. Should, therefore, the foreign executor or administrator, assuming his power to do so, attempt to secure the transfer on the books of the company to a legatee or inheritor without paying the tax, it might be held that the company would be liable to the state in damages for permitting an unauthorized transfer.

See note, 45 L. R. A., n. s., 1076;

Cook on Corporations, Vol. 1, section 329, page 930, notes 4 and 5, citing Attorney-General v. New York, etc., Co., 1899 A. C. 62.

Therefore, I do not feel that I can attach great significance to the mere failure of the law to provide specific and detailed machinery for the collection of the tax under such circumstances as are now being considered. Such failure is at the most but slight cumulative evidense to be considered in connection with the matters already referred to and those to which I shall hereinafter refer.

In the second place, amended section 5331, conformably to article XII, sections 7 and 9 of the constitution as amended September 3, 1912, requires that fifty per centum of the collateral inheritance tax shall "go to the city, village, or township in which such tax originates." The only manner in which this provision of the constitution can be given any effect is to regard the tax as having originated in the taxing district in which the property on which the privilege taxed is predicated has its situs or location. (Opinions of Attorney-General, 1915, Vol. 1, page 132; Report of the Attorney-General, 1914, Vol. 1, page 333.) Unless it be held that such stock is lo-

cated, or to be regarded as located, at the principal place of business of the domestic corporation within this state for the purpose of this section, I can not see how this paramount and constitutional requirement can be satisfied. While the reasoning in some of the cases cited might support such a conclusion, I entertain grave doubt as to whether, in the absence of positive legislative enactment on the subject, I would be justified in holding that such is the case. Here again we have a consideration which, though not absolutely conclusive in itself, rather tends to support the interpretation of the operative provisions of the law which I have felt obliged to make.

For all of these reasons, then, I am of the opinion that in their present form the statutes of this state do not impose the collateral inheritance tax thereof upon the succession to shares of stock in a corporation organized under the laws of this state and belonging to the estate of a non-resident decedent.

The answer to your second question has been suggested by the citation of the machinery provisions of the statutes. As to real estate located in Ohio, which I have held to be subject to the collateral inheritance tax, it is plain that the probate court of Cuyahoga county, wherein such real estate is located, would have the authority to determine the amount of the tax were any question raised, and that the treasurer of said county is to collect the same. If no question is raised, and an inventory is filed in the probate court of Cuyahoga county in connection with the probate of the will therein, such inventory, in so far as it can be conveniently separated and show the value of the undivided interests in the real estate in question, may be taken as the value of the estate and certified as such by the county auditor to the county treasurer under the provisions of section 5340 of the General Code. If this can not be done, however, or if any question is raised as to the actual market value of the taxable interests, such question, as above pointed out, must be determined by the probate court of Cuyahoga county under sections 5343 and 5344 of the General Code.

Your third question may be answered, first, by the statement that the inheritance tax law itself gives no power or jurisdiction to the tax commissioner respecting the administration of its provisions; nor can I find in the general powers of the tax commissioner enumerated in sections 1465-1 to 1465-36 of the General Code any express provision authorizing the commission to administer the collateral inheritance tax laws or to issue orders and instructions concerning the administration of the same. There is repeated reference in this group of sections to "the laws which the commission is required to administer," but to find out what those laws are one must turn to the specific tax laws of the state. Of those at present in force the following only seem to require consideration:

Section 5623 *General Code*—Section 70 of the so-called Parrett-Whittemore Law of 1915 (106 O. L. 265):

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

Section 5624 *General Code,* enacted as section 71 of the Parrett-Whittemore Law:

> "The tax commission of Ohio shall, from time to time, prescribe such general and uniform rules and regulations and issue such orders and instructions, not inconsistent with any provision of law, as it may deem necessary,

respecting the manner of the exercise of the powers and discharge of the duties of any and all officers, relating to the assessment of property and the levy and collection of taxes. It shall cause the rules and regulations prescribed by it to be observed, the orders and instructions issued by it to be obeyed and the forms prescribed by it to be observed and used."

Section 5624-6:

"The tax commission of Ohio shall compile the laws of the state relating to the assessment of property for taxation and the levy and collection of taxes, with such annotations, instructions and references to the decisions of the courts concerning the same, as it may deem proper. The commission shall cause a sufficient number of copies of the same to be printed and distributed to the several county boards of revision, prosecuting attorneys, county auditors, and county treasurers in the state and to such other officers and persons as the commission may deem proper. The commission shall, from time to time, designate, by order to the supervisor of public printing, the number of copies of the same required by it, and copies shall be printed in the manner provided by law for other public documents and distributed by the commission."

Section 5624-8:

"For the purpose of protecting the public interests, the tax commission of Ohio is authorized to appear and upon its application, entitled to be heard in any court or tribunal, in any proceeding involving the appraisement, valuation or equalization of property for the purpose of taxation, or the assessment or collection of taxes, and it shall be the duty of the clerk of any court of record, to immediately transmit to the commission, by registered letter, a copy of the petition filed in any such action, and charge the fee therefor in the costs."

Section 5624-9:

"The tax commission of Ohio may cause to be instituted proceedings to remedy improper or negligent administration of the taxation laws of the state."

Section 5624-10:

"The tax commission of Ohio may remit taxes and penalties thereon, found by it to have been illegally assessed, and such penalties as have accrued or may accrue, in consequence of the negligence or error of an officer required to perform a duty relating to the assessment of property for taxation, or the levy or collection of taxes. It may correct an error in an assessment of property for taxation or in the tax list or duplicate of taxes in a county, but its power under this section shall not extend to taxes levied under the provisions of subdivision 2 of chapter 15 of title 2, part second of the General Code."

(All these sections were last amended as sections of the Parrett-Whittemore Law, above referred to, and are now in force).

Throughout these sections is found frequent repetition of the phrase "the assessment of property and the levy and collection of taxes." In section 5623 the phrase

"the assessment, levy or collection of taxes" occurs alone, but in all other contexts it occurs in conjunction with language respecting property taxes (except in Section 5624-9).

These provisions were originally found in the Warnes Law of 1913, though some of them go back to the Hollinger Law of 1911 and the Langdon Law of 1910 for their genesis. They have never appeared in acts the scope of which was otherwise broader than property taxes and certain particular excise and franchise taxes. It is my opinion that none of these sections is of broad enough scope to give to the commission any authority to administer in any way the machinery of the collateral inheritance tax laws of the state. So far as deciding actual questions under the law is concerned, there is certainly nothing as specific in any of these sections as is found in section 5344 of the General Code, conferring jurisdiction to decide such questions upon the probate court. There being no express repeal of this section, I am of the opinion that even if the sections which have just been quoted were susceptible to an interpretation broad enough to give to the commission such power as that conferred upon the probate court by section 5344, such sections would have to be otherwise construed.

It is my opinion, therefore, that your third question must be answered by saying that the tax commission has nothing whatever to do with the administration of the collateral inheritance tax laws of the state, nor with the decision of any questions that may arise in connection therewith.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

798.

FEES—COUNTY AUDITOR AND TREASURER—UNDER SECTIONS 2624 AND 2685—CANNOT BE INCLUDED IN COST OF SPECIAL ASSESSMENT FOR PUBLIC IMPROVEMENT.

The fees provided for collections by the county auditor, under section 2624 General Code, and for the county treasurer, under section 2685 General Code, cannot be included in the cost of a special assessment for a public improvement, to be levied against abutting property owners.

COLUMBUS, OHIO, November 20, 1917.

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

GENTLEMEN:—Under date of October 23d you submitted the following for answer and opinion:

> "We are referring to you section 3896 G. C. providing what the cost of a special assessment improvement shall include. We also wish to state that the assessment bonds should be paid out fully, if possible, by assessments and interest collected.
>
> *Question.*—Can the fees which are deducted for collection by the county auditor under section 2624 G. C. and the fees deducted for the county treasurer under section 2685 G. C. be legally estimated and included in the cost of a special assessment improvement and taxed in the assessment?"

This question calls for construction of the provisions of section 3896 General Code. This section reads as follows:

"The cost of any improvement contemplated in this chapter shall include the purchase money of real estate, or any interest therein, when acquired by purchase, or the value thereof as found by the jury, when appropriated, the costs and expenses of the proceeding, the damages assessed in favor of any owner of adjoining lands and interest thereon, the costs and expenses of the assessment, the expense of the preliminary and other surveys, and of printing, publishing the notices and ordinances required, including notice of assessment, and serving notices on property owners, the cost of construction, interest on bonds, where bonds have been issued in anticipation of the collection of assessments, and any other necessary expenditure."

There is no specific provision in this section covering the cost of collecting a special assessment, where such special assessment has been certified to the county auditor for collection. If the cost of such collection can be included in the cost of the improvement, it must be under the words "and any other necessary expenditure."

The fees charged for the services of the county auditor and the county treasurer, are provided respectively in sections 2624 and 2685 General Code.

Section 2624 General Code provides as follows:

"On all moneys collected by the county treasurer on any tax duplicates of the county, other than the liquor and cigarette duplicates, the county auditor on settlement semi-annually with the county treasurer and auditor of state, shall be allowed as compensation for his services the following percentages:

On the first one hundred thousand dollars one and one-half per cent.; on the next two million dollars five-tenths of one per cent; on the next two million dollars four-tenths of one per cent.; and on all further sums, one-tenth of one per cent. Such compensation shall be apportioned ratably by the county auditor and deducted from the shares or portions of the revenue payable to the state as well as to the county, townships, corporations and school districts."

Section 2685 General Code reads:

"On settlement semi-annually with the county auditor, the county treasurer shall be allowed as fees on all moneys collected by him on any tax duplicates other than the liquor and cigarette duplicates, the following percentages. On the first one hundred thousand dollars, one and one-half per cent.; on the next two million dollars, five-tenths of one per cent.; on the next two million dollars, four-tenths of one per cent.; and on all further sums, one-tenth of one per cent. Such compensation shall be apportioned ratably by the county auditor and deducted from the shares or portions of the revenue payable to the state as well as to the county, township, corporations and school district; and on all moneys collected on liquor and cigarette duplicate, one per cent. on all moneys collected otherwise than on the said duplicates, except moneys received from the state treasurer or his predecessors in office, or his legal representatives or the sureties of such predecessors, and except moneys received from the proceeds of the bonds of the county or of any municipal corporation, five-tenths of one per cent. on the amount so received, to be paid upon the warrant of the county auditor out of the general fund of the county."

It will be observed that the fees of the county auditor and the county treasurer

are fixed upon a sliding scale and that it would be difficult to determine in advance the exact cost of making collection of a special assessment.

The question now under consideration has not been determined by the courts, but the supreme court has passed upon the validity of adding the costs of collecting special assessments in three instances.

In the case of Jonas v. City of Cincinnati, 18 Ohio 318, the syllabus reads:

> "The council of the city of Cincinnati are prohibited by their charter from assessing and collecting a tax in 1848, for lighting a street in 1845.
>
> The city council can create no debts of the kind beyond the fiscal year.
>
> Were such tax legal, a penalty for collector's fees could not be added to it, nor the costs of the proceedings before the mayor."

The reasons for this holding are given by the court on page 323, where Caldwell, J., says:

> "Another objection has been taken to the adding of three per cent. on the amount of the tax for the collector's fees.
>
> The city council have no authority for levying and collecting special taxes, except for specific purposes. In this instance, they were only authorized to collect taxes for lighting the city. They must act strictly within the provisions of their charter—they can add nothing to the tax by implication.
>
> The collector is an officer of the city, and his services may be paid out of the general revenue of the city, unless otherwise provided for by the charter. The same may be said of the mayor's fees. Neither could have been collected, in this way, if the tax had been legal."

It will be observed that in this decision the court held the entire tax illegal, and it was not necessary in order to decide the question at issue to determine the validity of adding the collector's fees. The reasoning of the court, however, is applicable to the question now in hand.

In the case of Butler v. The City of Toledo, 5 O. S., 225, it is held:

> "Where the corporate authorities of a city had, in pursuance of its charter, levied a local assessment on lots bounding on and near certain streets, for the purpose of grading said streets, and from mistake in the preliminary estimate of cost, and extraordinary expense attending the collection of said assessment, the assessment proved insufficient to discharge the cost and expenses; a subsequent amendment of the charter, authorizing a reassessment on the same lots 'sufficient in amount to meet said deficiency, and the cost and expenses of such reassessment, and all other expenses incidental to said improvements' is not in contravention of any provision of the constitution of 1802, and is a valid law, binding on all property within its purview, although the owner may have acquired title intermediate the assessment and reassessment."

This case upholds the right to add to the cost of the improvement and to be included in the amount to be assessed against abutting property, the cost of collecting the assessments. It does not appear from the report whether or not the cost of collection had been definitely ascertained.

After holding that interest might be included in the special assessments, Brinkerhoff, J., says at page 232:

"* * * that the city authorities had a legal right to allow interest, and that it is rightfully included in the reassessment, as one of the 'expenses incidental to said improvement.'

The same may be said with respect to other items—such as costs, attorney's fees, printer's bills and compensation of city officials for superintending the work, making measurements, defending suits instituted to restrain the collection of the assessment, and the levying and collection of the assessment. None of these items would have accrued had it not been for the improvement, and they are, we think, legitimately classed among the 'expenses incidental' to it."

In this case the court holds that the cost of collecting an assessment is a part of the "expenses incidental to said improvement."

This provision is like that contained in section 3896 General Code, supra, where it is provided "and any other necessary expenditure," may be included in the cost of the improvement.

In the case of Spangler v. Cleveland, 35 O. S., 469, the fourth branch of the syllabus reads:

"So, it is error to add to the cost of an improvement an estimated percentage to pay for collecting an assessment placed thereon."

The reason for this holding is given by Johnson, J., on page 472, where he says:

"In these assessments are included an item of one per cent. upon the cost of the improvement to pay for collection.

It is not claimed that this percentage has been or will be paid. It is at least only an estimate, and not an actual expense that has been or will be incurred.

Treasurer's fees are based on a sliding scale, according to amounts collected or disbursed. Whether fees actually paid, or for which the city would be liable under the statute, could be included, we need not determine.

The statute furnishes other modes of collecting such assessments, and this need not be resorted to, and, if not, there is not necessarily any cost for collection.

The amount should be ascertained and fixed, on the supposition that the owner will pay without litigation or other expense. These items must be omitted from the several assessments."

The reason for striking out the percentage paid for collecting is, that it is not claimed that this percentage has been or will be paid. It does not determine, however, that such an expense could be, or could not be included in the cost of the improvement to be assessed against the abutting property owner.

In section 3905 General Code, there is a provision for adding ten per cent. penalty to cover interest and cost of collection. This section, however, does not cover a case where a special assessment is levied, to be paid for in installments, through the office of the county treasurer.

This section reads as follows:

"The council may order the clerk or other proper officer of the corporation to certify any unpaid assessment or tax to the auditor of the county in which the corporation is situated, and the amount of such assessment

or tax so certified, shall be placed upon the tax list by the county auditor, and shall with ten per cent. penalty to cover interest and cost of collection be collected with and in the same manner as state and county taxes, and credited to the corporation. Such ten per cent. penalty shall in no case be added unless at least thirty days intervene between the date of the publication of the ordinance making the levy and the time of certifying it to the county auditor for collection."

The other method of collecting a special assessment is provided for in section 3892 General Code, which reads:

"When any special assessment is made, has been confirmed by the council, and bonds, notes or certificates of indebtedness of the corporation are issued in anticipation of the collection thereof, the clerk of the council, on or before the second Monday in September, each year, shall certify such assessment to the county auditor, stating the amounts and the time of payment. The county auditor shall place the assessment upon the tax list in accordance therewith and the county treasurer shall collect it in the same manner as other taxes are collected, and when collected pay such assessment to the treasurer of the corporation, to be by him applied to the payment of such bonds, notes or certificates of indebtedness and interest thereon, and for no other purpose. For the purpose of enforcing such collection, the county treasurer shall have the same power and authority as allowed by law for the collection of state and county taxes."

The above sections provide for two distinct methods of making collections of special assessments.

This was the holding of Hon. Edward C. Turner, attorney-general, in an opinion to your department, under date of July 21, 1915, and reported in Vol. II, page 1291 of the Opinions of the Attorney-General for the year 1915.

There is no specific provision for the addition of a penalty where bonds, notes or certificates of indebtedness are issued in contemplation of the collection of a special assessment, and such special assessment is certified to the county auditor for collection.

In the case of Longworth v. The City of Cincinnati, 34 O. S. 101, the second branch of the syllabus reads:

"Where the surveying and engineering of such improvement by the chief engineer of the city and his assistants, who were officers appointed for a definite period, at a fixed salary, which the law required to be paid out of the general fund of the city, the reasonable cost to the city, of such surveying and engineering, can not be ascertained and assessed upon the abutting property, as a necessary expenditure for the improvement."

This case holds, that where services are performed by officers of the city, who are paid on a monthly salary, which salary is paid out of the general funds of the city, the reasonable value of such services performed upon a public improvement cannot be included in the cost of such improvement to be levied against abutting property owners.

This situation is similar to the cost of collecting the special assessment. The county auditor and the county treasurer are paid an annual salary and the fees provided for in sections 2624 and 2685 General Code, are the basis of the charge for their services, but such fees are paid into the county treasury to the credit of the fee fund

of the respective offices. Furthermore, it is not possible to determine in advance the cost of collecting a special assessment. The cost of such collection in any event must be estimated, and where such cost is estimated, it would come within the holding of the case of Spangler v. Cleveland, supra.

In some cities an option is given to the property owner to pay his amount in full before the same is certified to the county auditor for collection. If the property owner elects to pay such assessment to the treasurer of the municipality there would be no added costs for making such collection.

In view o the holdings of the supreme court and the impracticability of determining the exact cost of making collections, I am of the opinion that the cost of collection cannot be included as a part of the co t o" the improvement which may be assessed against the abutting property owners.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

799.

FEDERAL ESTATE TAX—AMOUNT PAID ON FEDERAL TAX DEDUCTED FROM VALUE OF ESTATE SUBJECT TO COLLATERAL INHERITANCE TAX—HOW COLLATERAL INHERITANCE TAX FIGURED.

1. *The federal estate tax (Act September* 8, 1916, 39 *U. S. Statutes at Large* 463, 777) *attaches to the universal succession or the general privilege of inheritance the Oh o collateral inheritance tax is assessed upon the singular succession or the particular privilege of each inheritor. The amount paid to the federal government on account of t_e former tax is to be treated like debts and costs of administration, and deducted in determining the value of the estate subject to the latter tax.*

2. *The Ohio collateral inher tance tax should be figured upon the value of the estate at the date of the death of _e decedent, except in case of future interests not vested as of that date.*

COLUMBUS, OHIO, November 20, 1917.

HON. BERNARD M. FOCKE, *Prosecuting Attorney, Dayton, Ohio.*

DEAR SIR:—

You have requested my opinion upon the following questions submitted by counsel for the administrator or executor of an estate on the legacies or devises of which collateral inheritance taxes are to be collected:

> "*First*—Is the amount payable to the federal government as an estate tax exempt from the payment of the state collateral inheritance tax?
>
> *Second*—Should the collateral inheritance tax be figured upon the value of the decedent's estate at the time of his death, or upon the value of the property at the time it is distributed?"

The first question that you submit, as it would have been raised under statutes like the war revenue act of June 13, 1898, 30 Statutes at Large 464, repealed April 12, 1902, c. 500, 32 Stat. 97, is discussed in Blakemore and Bancroft on inheritance taxes as follows:

"Sec. 371. FEDERAL INHERITANCE TAX. The federal tax cannot be deducted before appraisal for the state tax in New York. The court reasons that it is not true that the federal taxes are payable primarily out of the estate; and the court finds that the federal tax is exactly the same in nature as the state tax and is a tax not on property but on succession. The federal tax is on the legacy and not on account of the estate. The fact that this may result in great hardship does not alter the rule, but results from the rate of taxation prescribed by the federal statutes.

In Massachusetts the federal tax was to be deducted under the act of 1891, although that act contains no express exception. The court proceeds on the theory that the words of the act most naturally signify the property which the legatee actually would get were it not for the state tax imposed, and that as a matter of justice he would not be taxed for more. The Massachusetts rule would seem to be the fairer and the New York rule the more accurate."

I assume that this discussion is responsive to the question submitted, although the words of the question are:

"Is the amount payable to the federal government as an estate tax exempt," etc.

In other words I assume that the question which is in the mind of counsel is as to whether or not the amount of the federal or state tax can be deducted from the value of the estate in determining the value of the latter for the purpose of the Ohio collateral inheritance tax law.

The nature of the federal tax, about the effect of which under state inheritance tax laws the division of authority, shown by the above quotation, arose was, however, not the same as that of the estate tax imposed by the act of September 8, 1916, 39 Statutes at Large, 463, 777.

The former tax imposed by the federal government (and this is true of all the federal inheritance taxes that had ever been imposed by the federal government prior to 1916) were legacy or succession taxes, the real subject of which was the privilege of inheriting possessed by the individual inheritor. As stated by Mr. Justice Holmes in Blackstone v. Miller, 188 U. S., 189, this tax, like the majority—if not all— of state inheritance taxes, was imposed on the singular succession of the legatee, heir or distributee rather than upon the so-called universal succession of executors or administrators.

The act of 1916, however, imposes the tax upon the universal succession, or, looking at it in another way, on the privilege of transmitting title to property by death rather than upon the privilege of succeeding to such property at death unless the latter privilege be predicated upon the technical interests of the executors, administrators or trustees. The words of the act are as follows: (Section 201)

"A tax * * * equal to the following percentages of the value of the net estate * * * is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this act * * * whether the succession provides the gross estate of the decedent to determine the net estate."

This fundamental difference between the act of 1916 and the previous acts, the effect of which upon the application of the state inheritance taxes, was referred to in the text quoted, makes it clear that those cases are not applicable to the present situation.

In contemplation of law two steps take place in the devolution of title to personal property by death whether by distribution or under the statutes of wills, viz.:

1. The immediate vesting of the assets of the estate in the quasi officer who, in theory, steps into the shoes of the decedent and represents his right and succeeds to his liabilities. This step is called the "universal succession."

2. The ultimate vesting of the distinct distributive shares of those who take under the will or under the law as legatees or distributees. This step is known as the "singular succession."

It is, of course, unnecessary to determine which of the two conflicting rules would be correct if the present federal tax were as formerly imposed upon the singular succession. Being imposed, however, upon the universal succession and the effect of its execution being to diminish the assets of the personal estate as a whole, and indeed to make it possible for any real estate belonging to the estate to be sold to satisfy the tax. (Section 208), it is clear that what I have designated as "singular succession" never, in point of law or fact, can take place as to so much of the estate as is diverted. The legal consequences of this principle are not altered by the fact hereinafter referred to that for the purpose of the Ohio collateral inheritance tax law the estate of the ultimate taker vests in contemplation of law as of the death of the testator and its value is to be determined as of that date, for in spite of this provision common to all the inheritance tax laws based on the singular succession, it is universally held that costs of administration and debts of the decedent, which are charged against the estate as a whole—that is to say, are exacted of the universal succession, are to be deducted in appraising the value of the various singular successions.

The principle upon which this is done can be broadly stated as follows: Whatever legal charges exist against the estate as a universal succession and are paid out of it as such can never enter into the singular succession, and therefore are to be deducted in appraising the value of the separate estates which constitute the latter.

Proceeding upon this principle I have reached the conclusion that the amount of the federal estate tax is to be deducted in determining the value of an estate taxable under the Ohio collateral inheritance tax law.

The general question submitted to me does not require me to go into detail as to just how the necessary calculations should be made, nor to attempt to work out the proper assessment in case it has been necessary to sell real estate of the estate specifically devised in order to pay the debts of the estate as a whole or to pay the federal tax.

In answering this question I have, of course, assumed that the federal estate tax about which inquiry is made is that imposed by the act of September 3, 1916. If the estate has been long in settlement and the federal tax actually accrued under the act repealed in 1902, a different result would be reached. I do not pass upon that question in the absence of specific information that such is the case, but I would be inclined to favor the New York rule if it should appear to be so.

I assume also that it is the act of 1916 and not the amendments thereof embodied in the act of October 3, 1917, that is called in question, although section 900 of that act imposes a tax identical in legal significance with that of the act of 1916.

In answering your second question, I beg to advise that it is my opinion that the collateral inheritance tax should be computed upon the value of the estate at the time of the death of the decedent, except in the case of future interests not vested as of the death of the testator, in which event the whole machinery of assessment must be postponed until the vesting of such interests and the value of the estate must be determined as of the latter date.

The controlling principle here is, of course, that the state inheritance tax is a tax upon succession and not upon property. Therefore the value of the estate at the time the property "passes," to use a word found in section 5331 General Code, is the criterion which governs. In all cases, save those of future interests not vested, the prop-

erty passes, in contemplation of law, as of the death of the testator; and this is true even though for some purposes the personal estate of the decedent remains in law that of his personal representatives until distribution.

See Blakemore and Bancroft, Inheritance Taxes, sections 334-335 and the cases cited.

See, also, section 5331 General Code, providing that the taxes shall be due and payable "immediately upon the death of the decedent;" and,

Section 5333 General Code, providing a method for the valuation of remainders after life estates; both of which show that the Ohio statute is framed upon this general theory.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

800.

STREET IMPROVEMENT—SEPARATE RESOLUTION, ORDINANCE, AND ADVERTISEMENT FOR EACH IMPROVEMENT.

In street improvement procedure on the assessment plan there should be a separate esolution, ordinance and legal advertisement for the improvement of each street or combination of two or more streets which are in reality one street or thoroughfare, and there should not be a combination of two or more separate and distinct improvements in one assessment proceeding.

COLUMBUS, OHIO, November 20, 1917.

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

GENTLEMEN:—I have your communication in which you submit for my opinion the following request:

> "We submit herewith copy of letter written by a former deputy supervisor of this department as follows:
>
> 'March 1, 1916.
>
> *Mr. W. R. Hare, Village Solicitor, Upper Sandusky, Ohio.*
>
> DEAR SIR:—Replying to yours of the 28th ult., we believe the resolution of necessity and the ordinance determining to proceed, may contain more than the improvement of one street. In other words, several streets, if the same be enumerated in the caption of the ordinance or preamble of the resolution, may be expressed in one resolution or ordinance.
>
> (Signed) JOS. T. TRACY.'
>
> This method saves much expense in legal advertising and like matters, and while we can see no objection to it, we think best to submit to your department:
>
> *Question:* Can the ordinance, resolution, and legal advertising connected with the special assessment portion of improvements, be combined so that the ordinance, resolution and advertisement contain two or more improvements so long as each improvement is specifically set forth in detail?"

I presume that your request has reference only to street improvement procedure and I will consider your question only in that connection.

Section 3812 G. C. provides, in part, as follows.

"Each municipal corporation shall have special power to levy and collect special assessments, to be exercised in the manner provided by law. The council of any municipal corporation may assess upon the abutting, adjacent or contiguous or other specially benefited lots or lands in the corporation, any part of the entire cost of an expense connected with the improvement of any *street, alley,* * * * road, or place by grading," etc.

Section 3814 G. C. provides, in part, as follows:

"When it is deemed necessary by a municipality to make a public improvement to be paid for in whole or in part by special assessments, council shall declare the necessity thereof by resolution, * * *."

Section 3815 G. C. reads, in part, as follows:

"Such resolution shall determine the general nature of the improvement, what shall be the grade of the *street, alley,* or other public place to be improved, * * *'.

Section 3816 G. C. reads, in part, as follows:

"* * * council shall have on file * * * specifications, estimates and profiles of the proposed improvement, showing the proposed grade of the *street* and improvement * * *."

Section 3822 G. C. provides as follows:

"When a special assessment for the improvement of a *stree'* or other public place has been levied and paid, the property so assessed shall not again be assessed for more than one-half the cost and expense of repaving or repairing such *street* or other public place unless the grade thereof is changed."

Section 3826 G. C. provides, in part, as follows:

"In setting forth specifically the lots and lands abutting upon the improvement and to be assessed therefor, it shall be sufficient to describe them as all the lots and lands bounding and abutting upon such improvement between and including the termini of the improvement, * * *."

Section 3836 G. C. provides, in part, as follows:

"When a petition subscribed by three-fourths in interest of the owners of property abutting upon a *street* or highway of any description between designated points, in a municipal corporation, is regularly presented to the council for that purpose, the entire cost of any improvement of such *street* or highway, * * * may be assessed * * *."

It is noted from the foregoing sections, which have reference to street improvement procedure on the assessment plan, that the improvement of a street is always referred to in the singular number. At no place in any of these sections is an improvement referred to as being one of streets, but it is always provided that the improvement is one of a street.

When we turn to some of the other provisions of law for assessments or the doing of other things by a municipality we find that the authorization refers not only to a street but to streets. For example, section 3839 G. C. provides, in part:

> "Municipal corporations may sprinkle with water, sweep, and clean any *streets* or *alleys*, or parts thereof, * * *."

Express authority is also found in the statutes for the combining in one ordinance of legislation for sprinkling, sweeping and cleaning several streets. Section 3842 G. C. provides for this and reads, in part, as follows:

> "* * * For the purpose of carrying out the provisions of this section and of the three next preceding sections, one ordinance may be made to include one or more streets or alleys, or parts thereof, and one or more of the powers granted by such sections."

The following provisions of law are found with respect to the construction of sidewalks on the assessment plan:

Section 3853 G. C. reads, in part:

> "The council of municipal corporations may provide by ordinance for the construction and repair of necessary sidewalks, curbing, or gutters, or parts thereof, * * *."

Section 3861 G. C. reads:

> "In the passage of the resolution declaring that certain specified sidewalks, curbing or gutters shall be constructed or repaired and in all the subsequent procedure necessary to secure the construction or repair of sidewalks, curbing or gutters, and collect the assessment therefor, sidewalks, curbing or gutters, although upon different streets and abutting upon lots or land owned by different persons, may be provided for in the same resolution, notice, contract, and ordinance or other step in such procedure."

The situation, then, is presented where the legislature has provided expressly in certain cases that municipality may provide in one ordinance for sprinkling, sweeping or cleaning several streets and may provide in one ordinance for the construction of sidewalks on one or more streets, and in both of the above mentioned matters has referred to streets in the plural; while in the case of the improvement proper of streets the law is silent as to the right to combine the improvement of two or more streets in one ordinance, and the improvement is always referred to in the statutes as of a single street.

As to the requirement that there shall be an ordinance for each distinct improvement, the following is said in section 1879, volume 4 of McQuillan on Municipal Corporations:

> "Generally speaking, each separate and distinct improvement requires a separate proceeding and ordinance. Thus, under authority to lay out 'any one street' between certain termini, etc., only one street may be included in one proceeding. * * *
>
> Under the usual charter power, a single ordinance may provide for the improvement of a single street, or a part thereof, or for several streets. * *
>
> And in the same state (Illinois) it has been held that where streets and parts of streets are similarly situated, and are to be paved in the same manner

and with the same material, they may be treated as a single improvement, and hence, such improvement may be authorized by one ordinance."

In *The City of Cincinnati* v. *Corry*, 2 W. L. B. 337, 7 O. Dec. 415, it is said in the head note:

"Where a street called Hammond street, laid out by an owner in subdividing, is practically continued by McLean street in another subdivision, there being a jog, or offset of a few feet at their junction, but forming a continuous line of travel, a municipal corporation can proceed to improve them both in the same proceedings as one work, calling it the improvement of Hammond and McLean streets, and an assessment cannot be defeated on that ground."

In *Wilder* v. *The City of Cincinnati et al.*, 26 O. S. 284, the first branch of the syllabus reads:

"An ordinance to improve a street between designated points may properly except an intermediate portion thereof, which, by any existing contract is to be contemporaneously improved according to the plan and grade established, without expense to the city; and the separated parts may be improved and assessed as if they were contiguous."

In Irwin v. City of Greenville, 1 Iddings Term Rep., 140, it was held:

"Where a council by a single ordinance provides for the improvement of several streets, or parts of streets, said ordinance is nevertheless valid, since it relates to but one subject matter, to wit, the whole improvement."

In *City of Springfield* v. *Green et al.*, 120 Ill., 269, 11 N. E., 261, it was said by the court:

"The ordinance is also assailed on the ground that it embraces more than one improvement. We do not think this is true in point of fact. While many streets and parts of streets are embraced in the scheme of improvement adopted by the city, yet we regard them all as but parts of the same improvement. The city authorities, in adopting the ordinance, must have found, as a matter of fact, that those streets and parts of streets were so similarly situated with respect to the improvement proposed to be made as to justify treating them as parts of a common enterprise and single improvement, and from the record before us we think they were justified in doing so. They were all to be paved with the same material, and in the same way, and the fact that there was a difference of a few feet in the width of some of them, and that the cost of paving the railway tracks in others was to be excluded from the estimate, should, in our opinion, make no difference in this respect. The similarity of the improvement proposed to be made, and the situation of the property to be assessed, with respect to it, afford a more satisfactory test as to whether they might all be embraced in a common scheme, as one improvement, than their actual connection or physical contact with one another. It is true, expressions are to be found in one or two cases looking in a contrary direction, but these expressions were made *in arguenno* merely, and not for the purpose of laying down any rule on the subject. So far as the actual decisions of this court go, they support the contrary view, and are in perfect harmony with what is here said. Prout v. People, 83 Ill. 155; People v. Sherman, Id. 167; Ricketts v. Hyde Park, 85 Ill., 110."

In *Arnold* v. *City of Cambridge*, 106 Mass. 352, the syllabus reads:

"Under a statute authorizing the mayor and aldermen to construct sidewalks in any street of a city, and assess the expense in just proportion upon the abutters, they have no right to join in a single assessment the expense of constructing sidewalks in different streets."

At page 354 the court says:

"The vote, under which the proceedings in this case have been had, provides for a sidewalk from Harvard square to the end of the bridge connecting Cambridge and Boston. It is treated in all the preliminary proceedings, and in the final assessment, as a continuous and single sidewalk, but it is really a sidewalk part of which is in Harvard and part in Main Street. We do not undertake to decide what weight we should attach to any objection on this account, if it were merely the case of one single street called by different names in different portions of its course or length. But Harvard street and Main street are two entirely distinct and separate highways, which, although they unite at one point, yet form two lines of travel nearly parallel to each other for about two miles. We do not think that the statute was intended to give the mayor and alderman the power to include sidewalks in two different streets in one single assessment. If two streets may be so assessed, it is difficult to see why three or more may not be included in one single assessment, or why all the sidewalks in the city may not be included in one comprehensive assessment.

It was evidently intended by the legislature that the case of each street should be considered separately, and with a view to its own special circumstances. Each estate is liable to assessment, not necessarily for the expense of the edgestones and covering materials laid down on that portion of the sidewalk upon which it adjoins or fronts, but according to a just proportion of the collective amount of all that kind of expense incurred on the same side of the same street. We cannot know that this proportion might not be very different if other streets were to be included in the same assessment. It may be that practically there would be no danger of any injustice or inequality in the assessment; but the legislature have only given to the board of aldermen a limited authority over the subject matter. The power to treat two sidewalks in two distinct streets as one, for the purposes of assessment, is not given by the statute."

Section 4226 G. C. provides in part:

"No ordinance, resolution or by-law shall contain more than one subject, which shall be clearly expressed in its title. * * *."

Our supreme court had occasion to pass upon a similar provision in *Heffner* v. *The City of Toledo*, 75 O. S. 413, and held as follows in the syllabus:

"1. The statutory requirement that 'No by-law or ordinance shall contain more than one subject, which shall be clearly expressed in its title,' was intended to prevent the uniting in one ordinance of diverse subjects or measures and effecting its passage by uniting in its support all those in favor of any, and to prevent the adoption of ordinances by the votes of councilmen ignorant of their contents.

2. Whether an ordinance is violative of the statutory requirement that 'No by-law or ordinance shall contain more than one subject, which shall be clearly expressed in its title,' is to be determined not by its form, but in the light of the mischief the statute was intended to prevent.

3. An ordinance to provide for the issuing of bonds to pay the city's part of the cost of thirty-two street and sewer improvements, entitled: 'An ordinance to provide for the issue of general street improvement bonds of the city of Toledo, state of Ohio, to pay said city's part of the cost and expense of improving sundry streets and alleys by paving, repaving, grading and macadamizing, and by constructing sewers therein and to pay the said city's part of the cost and expense of constructing such sewers,' is not in conflict with the statutory requirement that 'No by-law or ordinance shall contain more than one subject, which shall be clearly expressed in its title.' "

In view of the last mentioned decision of our supreme court it would seem that the combining in one resolution or ordinance of the improvement of several streets does not amount to the setting forth of more than one subject in one piece of legislation. It then remains for us to determine whether the provisions of law which authorize the improvement of streets by a municipality on the assessment plan contemplate a separate procedure for each individual street.

The case of *Irwin* v. *City of Greenville*, supra, seems to hold that the improvement of several streets may be provided for in one ordinance or resolution, since the action of council relates to but one subject matter, to wit, the whole improvement. However, in the case of *City of Cincinnati* v. *Corry*, supra, the court evidently considered that the legislature intended that there should be a separate procedure for each street, since it goes into detail to show that the two named streets that were to be improved in one assessment proceeding were in fact parts of one street, and that in reality the improvement of both together constituted only the improvement of one street.

In *Wilder* v. *City of Cincinnati*, supra, reference is made by the court in its opinion to the case of Arnold v. City of Cambridge, supra, and at page 283 it is said:

"The case before us is not similar, and therefore the case cited (Arnold v. City of Cambridge) is not applicable. Here a single street only was to be improved between designated points. An intermediate portion, between the designated termini, under contract with the land-owner, was to be contemporaneously improved according to the established grade, without expense to the city. It was deemed necessary to make the improvement the entire distance named, and the fact that a portion of it would be made without expense to the city, or other abutters, would not render the improvement less valuable to the public or the abutters upon it. Under these circumstances, we think, it was competent for the city, in the ordinance and contracts for the improvement, to except the intermediate portion, for the improvement of which it had made other provisions, and to join the parts thus separated for the purpose of improvement and assessment for the expense of it. If the intervening portion was not to be improved, the case might be different; but as it is, this objection is untenable."

It is noted from the foregoing cases, where the question has been directly raised, that some courts have taken the view, as expressed in the Illinois case, supra, that one improvement may be made up of several streets, and that the legislation for the improvement on the assessment plan of more than one street may be set forth in one ordinance or resolution; while, on the other hand, other courts have taken the view,

as expressed by the Massachusetts supreme court in the city of Cambridge case, supra, that the improvement of each individual street required a separate proceeding and that two or more streets could not be provided for in one piece of legislation

Section 3814 G. C., as heretofore quoted, requires that when it is deemed necessary to make an improvement on the assessment plan coumcil shall declare the necessity thereof by resolution.

Sections 3824 and 3825 G. C. provide, in effect, that if council determines that it will proceed with a proposed improvement on the assessment plan an ordinance containing its determination to proceed with the improvement shall be passed.

Section 3833 G. C. provides for the letting of the contract, and reads:

> "The contract for any such improvement shall be let by the director of public service, in the same manner as other contracts, and in case all bids be rejected such director in cities and the council in villages may order a re-advertisement for bids."

Section 3833 has reference in its operation to section 4328 G. C., which provides that contracts involving an expenditure of more than five hundred dollars shall only be let to the lowest and best bidder after there has been a public advertisement of the work to be done, and section 4403 G. C., which provides that if said contract is for an amount in excess of five hundred dollars it shall only be awarded on the approval of the board of control.

In view of all the foregoing, and particularly the fact that the legislature in its various enactments for street improvements on the assessment plan has referred to the improvement in the singular number, as being of a single street, while in speaking of other work to be done on streets on the assessment plan refers to streets in the plural and authorizes expressly the combination of two or more streets in one assessment proceeding, I feel convinced, using the language of the supreme court of Massachusetts in the City of Cambridge case, supra, that "it was evidently intended by the legislature that the case of each street should be considered separately and with a view to its own special circumstances," and therefore advise you, in direct answer to your question, that there should be a separate resolution, ordinance and legal advertisement for the improvement of each street or a combination of two or more streets which are in reality one street or thoroughfare, and that there should not be a combination of two or more distinct and separate street improvements in one assessment proceeding.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

801.

COUNTY COMMISSIONERS—MAY NOT FARM OUT TO PRIVATE CONTRACTING COMPANY COUNTY JAIL PRISONERS—FOR CONSTRUCTION OF INFIRMARY.

It is unlawful for the county commissioners to farm out to a private contracting firm engaged in the construction of a county infirmary the labor of prisoners confined in the county jail for non-payment of fines and costs.

It is also unlawful for the court to suspend the sentences of prisoners sentenced to jail on the condition that they perform labor for some private contracting concern, the firm paying the county so much per day for the labor.

COLUMBUS, OHIO, November 21, 1917.

HON. E. D. FRITCH, *Judge, Court of Common Pleas, Akron, Ohio.*

DEAR SIR:—I have your letter of October 31, 1917, as follows:

"Summit county is the owner of a county farm, consisting of several hundred acres, on which the county commissioners are erecting a new county infirmary. This county infirmary is being erected by a contractor, under a contract with the county commissioners.

The courts of common pleas of this county, in the case of minor offenses, punishable by imprisonment in the county jail or workhouse, or a fine, have imposed sentence in the manner provided by law, and then suspended sentence on condition that the person sentenced would perform a certain number of days' labor, under the jurisdiction of the county commissioners, the prisoner not making any objection, but taking the privilege which was offered to him, of working under the jurisdiction of the county commissioners, as prescribed by the court, instead of serving the penalty prescribed by law. Prisoners whose sentences were suspended in this way were then taken by the county commissioners, to the county farm, and, at the direction of the commissioners, performed work for a contractor, who, by agreement with the county commissioners, agrees to pay to the county commissioners the sum of $2.50 per day, for each day of labor performed by these prisoners. Out of this $2.50 per day, by agreement between the contractor and the commissioners, the commissioners allow the contractor the sum of $1.00 per day, per person, for boarding the prisoners. They are housed in a farm house on the premises.

Under sections 12376 and 12377, persons have also been committed, by the courts, to hard labor in the jail of the county, for non-payment of fines and costs, and in working out the fines and costs, they did so under the same arrangement between the board of commissioners and the contractor. Under section 12377 the sheriff of the county collects from the contractor the proceeds of the labor of such convicts and pays it into the treasury, in the manner provided by law.

The agent of the local building trades council objects to this practice of the local courts, on the ground, as he claims, that it is violation of the laws of this state, and takes the position that the convicts may only be employed at labor directly for the county, notwithstanding that section 12377 G. C. provides that the sheriff shall collect the proceeds of the labor of such convicts and pay it into the treasury.

I desire to get your opinion of this matter.

It seemed to me that where a convict works, as I have indicated, under the jurisdiction of the commissioners of his own volition, under suspension of sentence, no valid objection could be raised, and inasmuch as General Code 12377 provides that the sheriff of the county shall collect the proceeds of the labor of such convicts and pay it into the treasury, the statute contemplates that the convict might be hired by the board of commissioners to someone else, for the benefit of the county. Otherwise, there never would be any case in which the sheriff could collect the proceeds of the labor of such convict and pay it into the treasury."

Sections 2227-1, 2227-2, 2227-3 and 2227-4 of the General Code read:

"*Sec.* 2227-1. The labor or time of any person confined in any workhouse or jail in this state shall not hereafter be let, farmed out, given, sold or contracted to any person, firm, corporation or association.

Section 2227-2. Such persons so confined may be employed in the manufacture of articles used by any department or public institution belonging to or controlled by the political subdivision or subdivisions supporting or contributing to the support of any such workhouse or jail or to any political subdivision of the state.

Section 2227-3. The board, officer or officers, in charge of any such workhouse or jail may provide, prepare and procure machinery, power and shoproom for the purpose of the manufacture of the articles specified in section two of this act, and employ such persons as may be necessary to instruct persons confined in such workhouses or jails in such manufacture.

Section 2227-4. No other articles than those specified in section 2 of this act shall be manufactured but nothing herein shall prevent the employment of any person so confined, elsewhere than within the jail or workhouse where he has been committed by any political subdivision, nor impair or affect any contract heretofore made."

These sections were originally sections 1, 2, 3 and 4 of an act passed April 16, 1913, entitled "An Act to prohibit the employment under contract to any persons, firm or corporation of any persons confined in any workhouse or jail in this state." It is clear that under section 1 of this act (2227-1 G. C.) the arrangement referred to in your letter is illegal. A claim might be set up that inasmuch as the county is crediting the $1.50 a day to the prisoner, it is not selling his labor to the contractor but simply allowing him to work for such contractor instead of being employed in the jail. However, the fact remains that the county is receiving $1.50 for this labor, which they would probably not receive if the prisoner were engaged in other work, although the county would, nevertheless, be obliged in that instance to credit the prisoner with the proper rate per day for his labor. It will be noted that the provisions of the statutes prohibiting the farming out of convict labor do not only apply to prisoners sentenced to jail, but also to prisoners committed to jail for non-payment of fine and costs. Since the prohibition of section 2227-1 is against the farming out of "the labor or time of any person confined in any workhouse or jail in this state," it may be urged that although section 2227-1 prohibits the farming out of the labor or time of any person confined in any workhouse or jail in this state, it does not prohibit such employment outside of the workhouse or jail. This construction of the statute would, in my opinion, be entirely too narrow, and would be contrary to the views frequently expressed by the courts. It has often been held that a prisoner sentenced to the penitentiary is confined within such institution even when such prisoner is out on parole or working on state farms, upon the theory that in such case the penitentiary walls are extended to the state line.

Following this view it seems clear to me that prisoners under sentence or commitment to the county jail are "confined" in such jail within the meaning of the word as used in section 2227-1 G. C., even though they may be working outside and away from the jail. This conclusion is strengthened by section 2227-4 G. C., which provides that nothing in the act of which these sections are a part shall prevent the employment of any person *so confined*, elsewhere than within the jail or workhouse where he has been committed by any political subdivision. The words "so confined," used in section 2227-4, refer to the prisoners confined in a workhouse or jail as mentioned in section 2227-1 G.C.U.C. section 2227-4 G.C. though allowing these prisoners to be employed by a political subdivision "elsewhere than within the jail or workhouse" still refers to them as prisoners "so confined," showing clearly that the legislature views jail prisoners as being confined within the jail even in cases where they are being employed on farms or at places away from the jail. In those cases to which you refer, where sentence is suspended, the prisoners are not confined in jail but have been sentenced to jail and then have had their sentences suspended on condition that they perform a certain number of days labor for these private contractors in the construction of the county infirmary, and the county receives the sum of $1.50 per day for their labor. If they had been committed to jail after sentence, these prisoners could not have been so employed. The arrangement you refer to, viz., the suspension of sentence with the condition annexed that the prisoner shall perform such labor in the construction of the county infirmary, is an attempt to do indirectly what the law prohibits being done directly.

Sections 12376 and 12377 G. C., to which you call attention, read as follows:

> *Section* 12376. "When, under the provisions of law, a convict may be imprisoned in the county jail, the court, upon the recommendation of the prosecuting attorney, may sentence such convict to hard labor therein; and when a person may be committed to jail for the non-payment of fines and costs, the court may commit him to hard labor therein until the value of his labor at the rate of one dollar and fifty cents a day equals such fine and costs, provided that no commitment under this section shall exceed six months, and this section shall not affect the laws relating to workhouses."

> *Section* 12377. "Persons committed to jail by a court or magistrate for non-payment of fines or costs, or convicts sentenced to hard labor in the jail of the county, which for this purpose is co-extensive with the county, shall perform labor under the direction of the commissioners of the county, who may adopt such orders, rules and regulations in relation thereto, as they deem best, and the sheriff or other officer having the custody of such persons or convicts shall be governed thereby. The sheriff of the county shall collect the proceeds of the labor of such convicts, pay it into the treasury, take the treasurer's duplicate receipts therefor and forthwith deposit one of them with the county auditor."

These sections were passed long before the act of April 16, 1913, above referred to, and therefore could hardly be construed as authorizing any farming out of convict labor when such arrangement is so clearly prohibited in positive terms in the act of April 16, 1913. Neither is it necessary to hold that jail prisoners may be worked on private contracts to give meaning to the provision of section 12377, to which you refer, which reads:

> "The sheriff of the county shall collect the proceeds of the labor of such convicts, pay it into the treasury, take the treasurer's duplicate receipts therefor and forthwith deposit one of them with the county auditor."

Section 7507 G. C. provides that:

> "The state highway commissioner, the county commissioners, or the authorities having charge of the streets of any city or village may provide for the use of prison labor in connection with contracts let to private individuals for the construction, maintenance and repair of such roads and streets. * * *"

This is an exception to the general rule laid down in the statutes that county commissioners cannot contract with private contractors for the employment of convict labor, and according to the terms of the act of which it was originally a part, this special authority is to be strictly construed.

Section 7514 General Code, which was originally enacted along with section 7507 above quoted, provides:

> "Nothing herein shall be held to repeal or modify any other provision of law applying to prisoners, and prison labor."

So that there is some statutory provision for the farming out of convict labor to which section 12377 can still be held to apply, viz.: the provision of section 7507.

In conclusion, therefore, I advise you that it is my opinion that the prisoners you refer to may not be employed in the construction of the county infirmary.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

802.

POLICE CHIEF—DUTY TO SERVE SUBPOENAS IN STATE CASE BEFORE MAYOR—EXPENSES.

It is the duty of the chief of police to serve subpoenas upon witnesses in connection with the preliminary examination before the mayor in state cases, though there is no provision of law allowing the chief of police any fees for such service or expenses incurred by him in making such service in any state cases other than those enumerated in section 13423 *G. C.*

COLUMBUS, OHIO, November 22, 1917.

HON. J. H. MUSSER, *Prosecuting Attorney, Wapakoneta, Ohio.*

DEAR SIR:—I have your letter of October 29, 1917, as follows:

> "A prosecution was commenced in a state criminal case in the mayor's court in the city of Wapakoneta, about ten days ago, and the defendant demanded a preliminary examination, and thereupon a precipe was filed for witnesses on behalf of the state, and these witnesses were served with subpoenas by the chief of police of Wapakoneta. The witnesses subpoenaed lived about ten or twelve miles from the city, and it was necessary for the chief of police to hire a conveyance in order to obtain service.
>
> Because of the decision of the case of Haserodt, Clerk of Court, v. State of Ohio, ex rel., E. R. Wilcox, City Solicitor, decided on May 18, 1917, by

Judges Middleton, Walter and Sayre, of the court of appeals, the mayor and chief of police have requested that I obtain from you an opinion as to the manner in which the chief of police can be reimbursed for the amount expended by him for vehicle hire in serving these subpoenas, as this amount was paid from his own funds.

The decision above referred to seems to hold that no fees can be allowed the chief of police for serving subpoenas, and I would like to have your opinion as to whether or not he can collect for actual expenditures in making service, or is he compelled to make such expenditures if necessary because of the fact that he holds the office of chief of police?"

Section 4534 of the General Code reads:

"In felonies, and other criminal proceedings, not herein provided for, such mayor shall have jurisdiction and power, throughout the county, concurrent with justices of the peace. The chief of police shall execute and return all writs and process to him directed by the mayor, and shall by himself or deputy attend on the sittings of such court, to execute the orders and process thereof and to preserve order therein, and his jurisdiction and that of his deputies in the execution of such writs and process, and in criminal cases, and in cases of violations of ordinances of the corporation, shall be coextensive with the county, and in civil cases shall be coextensive with the jurisdiction of the mayor therein. The fees of the mayor in all cases, excepting those arising out of violation of ordinances, shall be the same as those allowed justices of the peace for similar services and the fees of the chief of police or his deputies in all cases, excepting those arising out of violations of ordinances shall be the same as those allowed sheriffs and constables in similar cases."

The decision in the case of Haserodt v. State, reported in the Ohio Law Bulletin, August 20, 1917, page 266, to which you refer, held that the chief of police could not collect fees for services in state cases in the police court because of the indefinite provision of section 4581, General Code, to the effect that:

"Other fees in the police court shall be the same in state cases as are allowed in the probate court, or before justices of the peace, in like cases, and in cases for violation of ordinances such fees as the council, by ordinance, prescribes, not exceeding the fees for like services in state cases."

The case you present relates to the fees of the chief of police in the mayor's court, but it is evident from a reading of section 4534, above quoted, that the provision of this section concerning the fees of the chief of police is open to the same objections as that found by the court of appeals to the provision of section 4581, since section 4534 provides that the fees of the chief of police or his deputies should be the same as those allowed sheriffs or constables in similar cases.

In passing I think it proper to refer to section 13436 of the General Code, which provides:

"In pursuing or arresting a defendant and in subpoenaing the witnesses in such prosecutions, the constable, chief of police, marshal or other court officer shall have like jurisdiction and power as the sheriff in criminal cases in the common pleas court, and he shall receive like fees therefor."

It will be noted that this section provides that in certain cases the fees of the chief of police in pursuing and arresting a defendant and in subpoenaing the witnesses shall

be the same as the fees of the sheriff in criminal cases in the common pleas court. This provision, it will be noted, is a definite one and not open to the objection raised by the court of appeals in the case of Haserodt v. State, supra. However, it is clear from a reading of section 13423, in connection with section 13436, and an examination of the legislative history of the two sections, that the cases to which section 13436 applies are those enumerated in section 13423. I take it from your communication that the case you present is not such a "case", since you state that the defendant demanded a preliminary examination. The case you refer to then not being one of those enumerated in section 13423, section 13436 will not apply.

I therefore advise you that by reason of the decision in the case of Haserodt v. State, I am of the opinion that there is no authority in law for the payment of any fees to the chief of police for serving subpoenas upon witnesses in connection with the preliminary examination before the mayor in stated cases other than those enumerated in section 13423 General Code, neither do I know of any provision of law allowing the chief of police expenses in connection with the services of such subpoenas.

It being the duty of the chief of police to serve these subpoenas, I am of the opinion that regardless of the fact that no fee has been provided for such service, he is obliged to render the same.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

803.

NEWSPAPER PUBLICATION—WHEN LAW REQUIRES PUBLICATION IN ONE PAPER AND SAME HAS BEEN PUBLISHED IN MORE THAN ONE PAPER, FUNDS ILLEGALLY SPENT MAY BE RECOVERED—LIABILITY OF OFFICERS AUTHORIZING EXCESS PUBLICATION.

Where the law provides that publication shall be made in a newspaper of general circulation and publication is had in more than one newspaper for the required number of times only in each paper, and said papers have been paid for said publication, HELD:

(1) *That said publication in more than one paper is illegal and the amount of money paid out in excess of the cost of the legally required amount of publication is illegally expended within the meaning of section* 286 *G. C.*

(2) *That a contract must be made with the publisher for said publication service to make the municipal corporation liable for said publication and if contracts are made with more than one publisher for the same service the first one in point of time would be the legal one and the others would be void ab initio, and any public funds paid out on said void contracts would be illegally expended and could be recovered on the authority of the Vindicator Printing Co. case.*

(3) *That the officer or officers of the municipality authorizing said excess publication and the city auditor, whose duty it is to refuse to issue his warrant for the expenditure of public funds for an illegal and unauthorized purpose, are liable for said misapplication of public funds and may be held responsible for said illegal payment to the same extent as the publisher receiving same.*

COLUMBUS, OHIO, November 22, 1917.

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

GENTLEMEN:—I have your communication requesting my opinion on the following:

> "Where the law specifies that publication shall be made in 'a newspaper,' as, for illustration, in section 4328 G. C., if a publication is made in more than

one newspaper, who should be held liable for the money expended in excess of the proper amount authorized by law, the paper, or papers receiving such money, or the officer authorized to direct such publication?

In case it is held that the newspaper, or newspapers, should be held liable, what method may be used in ascertaining which newspaper was legally entitled to the publication?"

Section 4328 G. C., which is referred to in your communication by way of illustration, provides in part as follows:

"* * * the director of public service shall make a written contract with the lowest and best bidder after advertisement for not less than two nor more than four consecutive weeks in *a newspaper* of general circulation within the city."

In the case of Vindicator Printing Co. v. State of Ohio, 68 O. S. 362, the first branch of the syllabus reads:

"Where the number of publications of a sheriff's election proclamation or other public notice, is fixed by statute, there is no authority in the board of county commissioners, or other county officer, to contract for publications in excess of the number directed by statute. The board is also without authority to allow a claim for such excessive publications, and the allowance of such claim does not bind the county. Nor is authority to adjudicate and allow such claim given by the fact that with the charge for unauthorized publications there is, on the same paper, a charge for a publication which is authorized by statute."

It is evident from the foregoing case that our supreme court has taken the view that the authority to publish a legal notice is limited to the one provided in the particular statute and no discretion is vested in the publishing authority to give additional notice. In the above mentioned case the Vindicator Printing Co. had printed the notice in question in excess of the number of times provided by statute and had received pay for the excessive publication as well as for the legally required amount. The court permitted a recovery from said printing company for the amount in excess of that due for the publication for the legal number of times, less that portion of excess which had been paid prior to the going into effect of the law which authorized the prosecuting attorney to recover back for the use of the county all such county moneys that have been misapplied or illegally drawn out of the county treasury.

From the holding of the court in the Vindicator Printing Company case two general principles may be drawn as follows:

1. Whenever provision is made in a statute for the number of legal publications it controls and publications in excess of the limit fixed are unauthorized;

2. Whenever the law has provided for the recovery of public money illegally expended any public money paid out for legal publications in excess of the limit fixed by statute may be recovered, even in the absence of fraud or a mistake of fact.

In McCormick v. City of Niles, 81 O. S. 246, it was held in the first branch of the syllabus:

"The liability of a municipal corporation to pay for the publication of ordinances, resolutions and legal notices required by law to be published must rest on an express contract and not upon a mere account for the rendition of such services."

In accordance with the holding of the court in the Niles case it is necessary for the officer authorized to have a legal notice published to enter into a contract with the publisher, and if no such contract is made the municipality is not liable to said publisher even though he may have rendered the service in question. In other words, the duty is placed upon the publisher to see that a valid contract is made by and between himself and the city, represented by the proper officer.

The general principles of law with respect to the power and authority of the officers of a municipality to contract on behalf of the municipality and with respect to the duties of private parties relative to municipal contracts are set forth in Vol. II of Dillon on Municipal Corporations, 5th edition, section 777:

"And it is a general and fundamental principle of law that all persons contracting with a municipal corporation *must at their peril inquire into the statutory power of the corporation*, or its officers, to make the contract, and a contract beyond the scope of the corporate power granted or conferred by the legislature expressly, or by fair implication, is void, although it be under the seal of the corporation. This principle is more strictly applied, and properly so, than in the law of private corporations. So, also, those dealing with the agent of a municipal corporation are likewise bound to ascertain the nature and extent of his authority. This is certainly so in all cases where this authority is special and of record, or conferred by statute."

Section 284 G. C. provides in part:

"The bureau of inspection and supervision of public offices shall examine each public office. * * *"

Section 286 G. C. provides in part:

"The report of the examination shall set forth, in such detail as may be deemed proper by the bureau, the result of the examination with respect to each and every matter and thing inquired into * * *. If the report sets forth that any public money has been illegally expended * * * the city solicitor shall institute * * * civil actions in the proper court * * * for the recovery of the same and shall prosecute * * * the same to final determination. * * *"

It would seem, therefore, in view of the foregoing that a municipality is not authorized to have a legal publication made in excess of the number of times that is prescribed by statute; and if such legal publication is had and the public money of said municipality is expended therefor the same may be recovered. This would seem to be true particularly in view of the fact that under section 286 G. C. the city solicitor is authorized, in effect, to bring the same kind of a proceeding on a finding made by the bureau of inspection and supervision of public offices as the prosecuting attorney is authorized to do on his own initiative under the section in question in the Vindicator Printing Company case.

Under the statement of facts that you present the publication is authorized for not less than two nor more than four times in one newspaper, but there has been a publication made in two or more newspapers for not less than two nor more than four

times. In other words, the excess publication has not been in regard to the number of times of insertion but in regard to the number of newspapers used. Under the law, as has been stated, the officer making said publication on behalf of said municipality has authority only to contract with one publisher and if one contract has been made the authority of said officer would then end and he could not bind the municipality by any arrangement made subsequently with another publisher since on the general and familiar principles above quoted from Dillon the later publisher would be required, at his peril, to inquire into the power and authority of said officer to make said contract and the act of said officer in making the original agreement with the first publisher would make him *functus officio*, as has heretofore been held, and said later contract would therefore be void *ab initio*. It would follow, then, that any funds of the municipality received by said publisher in accordance with said void contract would be illegally received for an illegal publication and be subject to recovery on the authority of the Vindicator Printing Co. case.

We come now to the question of the liability of the officers of the municipality for the unauthorized and unnecessary publication.

Section 4666 G. C. provides:

> "Each officer of the corporation, or of any department or board thereof, whether elected or appointed as a substitute for a regular officer, shall be an elector within the corporation, except as otherwise expressly provided, and before entering upon his official duties shall take an oath to support the constitution of the United States and the constitution of Ohio, and an oath that he will faithfully, honestly and impartially discharge the duties of the office. Such provisions as to official oaths shall extend to deputies, but they need not be electors."

Section 4667 G. C. provides:

> "The official bonds of all municipal officers shall be prepared by the solicitor. Except as otherwise provided in this title, they shall be in such sum as the council prescribes by general or special ordinance and be subject to the approval of the mayor, except that the mayor's bond shall be approved by the council, or, if it is not legally organized, by the clerk of the court of common pleas of the county in which the corporation or the larger part thereof is situated."

Section 4668 G. C. reads in part:

> "In each such bond, the condition that the person elected or appointed shall faithfully perform the duties of the office shall be sufficient * * *"

The foregoing sections impose upon the officers of a municipal corporation the obligation of faithfully, honestly and impartially discharging the duties of their office. They are also required to give bond for the faithful performance of the duties of their office in such amount as council may prescribe. It seems clear that the duty of faithfully, honestly and impartially discharging their duties would require them to authorize the expenditure of public funds only for properly authorized purposes under the law, and if they should violate their obligation in that respect the law is plain and clear that they would be responsible to the municipality for such breach of duty.

Section 4285 G. C. provides:

> "The auditor shall not allow the amount set aside for any appropriation to be overdrawn, or the amount appropriated for one item of expense to be

drawn upon for any other purpose, or unless sufficient funds shall actually be in the treasury to the credit of the fund upon which such voucher is drawn. When any claim is presented to him, he may require evidence that such amount is due, and for this purpose may summon any agent, clerk or employe of the city, or any other person, and examine him upon oath or affirmation concerning such voucher or claim."

It is seen from the latter section that the city auditor is charged with the duty of seeing that funds duly appropriated are only drawn upon for a legal and proper use. He, as well as the authority in the municipality incurring a particular obligation and executing a voucher for its payment, has the obligation imposed upon him of seeing that public funds are expended only for legally authorized purposes.

The principles of law involved in regard to the situation in hand are stated in Vol. II of McQuillin on Municipal Corporations, section 540, as follows:

> "Where funds are disbursed illegally by public officers or upon their authority, they are personally liable therefor. And such an act of a public officer cannot be legalized by the council. * * *
>
> The fact that funds expended illegally were expended for a useful purpose is no defense to an action for their recovery against the officer who disbursed them wrongfully."

The following cases, among others, are cited as authority for the above proposition:

> Russell v. Tate, 52 Ark. 541, 13 S. W. 130;
> People v. Bender, 36 Mich. 195;
> Blair v. Lantry, 21 Neb. 247, 31 N. W. 790;
> East St. Louis v. Flannigan, 34 Ill. App. 596;
> McCracken v. Soucy, 29 Ill. App. 619.

In view of all the foregoing, then, I advise you that where the law provides that publication shall be made in a newspaper of general circulation and publication is had in more than one paper, for the required number of times only in each paper, and said papers have been paid for said publication, it is my opinion:

(1) That said publication in more than one paper is illegal and the amount of money paid out in excess of the cost of the legally required amount of publication is illegally expended within the meaning of section 286 G. C.

(2) That a contract must be made with the publisher for said publication service to make the municipal corporation liable for said publication and if contracts are made with more than one publisher for the same service the first one in point of time would be the legal one and the others would be void *ab initio*, and any public funds paid out on said void contracts would be illegally expended and could be recovered on the authority of the Vindicator Printing Co. case.

(3) That the officer or officers of the municipality authorizing said excess publication and the city auditor, whose duty it is to refuse to issue his warrant for the expenditure of public funds for an illegal and unauthorized purpose, are liable for said misapplication of public funds and may be held responsible for said illegal payment to the same extent as the publisher receiving same.

Very truly yours,
JOSEPH McGHEE,
Attorney-General.

804.

APPROVAL—SALE OF STATE LANDS LOCATED IN AKRON, OHIO.

COLUMBUS, OHIO, November 22, 1917.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your communication of November 21, 1917, in which you enclose blank form of deed for certain real estate located in Akron, Ohio, and ask my approval of the sale of said lands. In passing upon this matter, I am assuming that the introductory statements set forth in the deed are correct, especially to the effect that the lands were appraised at ten thousand dollars; that they were duly advertised for sale for more than thirty days prior to the date of the sale, in two newspapers of opposite politics and of general circulation in Summit county, and that the grantee, The Robinson Clay Product Company of Akron, Ohio, was the highest and best bidder in making its bid of seventy-five hundred dollars.

I find the proceedings leading up to the making of the deed correct in form and legal in every respect and therefore am endorsing my approval of the same upon the form of deed submitted to me.

I might say the deed is in the nature of a quit-claim and not a general warranty but if the grantee is satisfied with such a deed, there is nothing irregular in this respect.

I am forwarding said deed to the governor of Ohio for his consideration.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

805.

POLICE CHIEF, ETC.—ENTITLED TO COMPENSATION FOR ARRESTING AND RETURNING TO ANOTHER COUNTY PERSON CHARGED WITH FELONY—SHERIFF'S FEE MUST BE TURNED INTO FEE FUND.

The chief of police, constable or other officer is entitled to receive compensation under section 13493 *G. C. for services rendered in arresting and returning to another county persons charged with felony. This compensation may be retained personally by the chief of police or constable, but must be paid by the sheriff into the sheriff's fee fund.*

COLUMBUS, OHIO, November 23, 1917.

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

GENTLEMEN:—I have your letter of November 9, 1917, as follows:

"We would respectfully request your written opinion upon the following questions:

May the county auditor legally issue his warrant in favor of the chief of police, or other officer, in payment of expenses incurred by them and reasonable compensation in arresting and returning a person charged with a felony under section 13493 General Code?

Is the chief of police, or any other officer, drawing a regular salary, entitled to the compensation in said section in addition to his salary?"

Section 13493 of the General Code reads:

"When a felony has been committed, any person without warrant, may arrest another whom he has reasonable cause to believe is guilty of the offense, and detain him until a warrant can be obtained. If such warrant directs the removal of the accused to the county in which the offense was committed, the officer holding the warrant shall deliver the accused to a magistrate of such county, to be dealt with according to law. The necessary expense of such removal, and reasonable compensation for his time and trouble, shall be paid to such officer, out of the treasury of such county, upon the allowance and order of the county auditor."

This section was originally section 3 of an act entitled "An act defining the duties of sheriffs and coroners in certain cases," passed February 25, 1824, 29 O. L., p. 112. This section reads:

"That if any person or persons, who may be charged with the commission of a crime or offense, made punishable by the laws of this state, shall abscond or remove from the county in which such crime or offense be charged to have been committed, it shall be lawful for any sheriff, constable or other person, to apprehend the person or persons so charged, and forthwith remove him, her or them, to the county in which the alleged crime may be said to have been committed, and deliver such person or persons, to any judge or justice of the peace, in said county; who shall cause the person or person so delivered, to be dealt with as the law may direct; and it shall be the duty of the auditor of the county, to which such removal is made, to allow the officer or other person causing such removal, all necessary disbursements and expenses, together with a reasonable compensation for his time and trouble; and the amount so allowed shall be paid on the order of the auditor aforesaid, out of the county treasury."

On May 6, 1869. an act was passed entitled "an act to establish a code of criminal procedure for the state of Ohio" and found in 66 O. L., p. 287. Section 22 of this act reads: (p. 291).

"Any person not an officer may, without warrant, arrest any person if a petit larceny or offense has been committed, and there has been reasonable ground to believe the person arrested guilty of such offense and may detain him until a legal warrant can be obtained."

In Revised Statutes these two sections were combined and made to read as follows:

Section 7130. "When a felony has been committed, any person may, without warrant, arrest another who he believes, and has reasonable cause to believe, is guilty of the offense, and may detain him until a legal warrant can be obtained; if such warrant directs the removal of the accused to the county in which the offense was committed, the officer holding the warrant shall deliver the accused to some magistrate of such county, to be dealt with according to law; and all the necessary expense of such removal, and reasonable compensation for his time and trouble, shall be paid to such officer, out of the treasury of such county, upon the allowance and order of the county auditor."

They appear in substantially the same form in section 13493 of the General Code, above quoted.

It has been suggested that because the first sentence of the section refers only to "persons," the provision in the last sentence of said section, to the effect that "necessary expense of such removal and reasonable compensation for his time and trouble shall be paid to such *officer*," might not apply to any one but the persons mentioned in the first sentence of the section. However, the history of this section clearly shows that as originally enacted it compensated officers, and it is my opinion that the compensation provided for in section 13493, therefore, may be paid to officers rendering the services mentioned.

It will be noted that this section only applies to cases where prisoners are removed from one county to another and that the expense of removal is to be paid by the county into which the prisoner is removed. I know of no reason to hold that the chief of police or constable receiving such compensation may not retain the same, but it might be mentioned in passing that any such compensation received by the sheriff is received by him in his official capacity and must be paid into the sheriff's fee fund.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

806.

APPROVAL—TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE—WYANDOT COUNTY.

COLUMBUS, OHIO, November 24, 1917.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

IN RE: Bonds of Antrim township rural school district, Wyandot county, in the sum of $27,500.00, issued for the purpose of creating a fund to purchase a site for and erecting a school house in said school district.

I have carefully examined the transcript of the proceedings of the board of education of Antrim township rural school district relating to the above bond issue, and find said proceedings to be in conformity to the provisions of the General Code of Ohio relative to bond issues of this kind.

I am, therefore, of the opinion that bonds properly prepared covering said issue will, when signed by the proper officers and delivered, constitute valid, binding and subsisting obligations of said school district.

The transcript submitted to me contains no bond form, and I am, therefore, holding said transcript until such time as the officials of said school district shall forward to me for approval a copy of such bond form. When the same is received and approved it will be attached to the transcript as a part thereof and the transcript forwarded to you.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

807.

APPROVAL—TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE—AUGLAIZE COUNTY.

COLUMBUS, OHIO, November 24, 1917.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

RE:—Bonds of Auglaize county, Ohio, in the sum of $10,000.00, for the purpose of paying the shares of the said county, St. Mary's township, and abutting property owners, of the cost and expense of improving section A-2, intercounty highway 165.

I am herewith returning with my approval transcript of the proceedings of the county commissioners and other officers of Auglaize county, Ohio, relating to the above bond issue.

A careful examinntion of the said transcript shows that said proceedings are in substantial conformity with the provisions of the General Code relating to bond issues of this kind.

I am, therefore, of the opinion that properly prepared bonds covering said issue according to the bond form submitted will, when signed by the proper officers and delivered, constitute valid and binding obligations of said county.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

808.

CORPORATION—ORGANIZED UNDER LAWS OF THE DISTRICT OF COLUMBIA—TO WHICH THE PRESIDENT OF THE UNITED STATES HAS DELEGATED CERTAIN POWERS—AND WHICH TRANSACTS NO OTHER BUSINESS—NOT SUBJECT TO STATE LAWS RELATING TO FOREIGN CORPORATIONS.

A corporation organized under the laws of the District of Columbia, to which the President of the United States has delegated certain authority reposed in him by acts of congress, and which transacts no other business than that falling within the purview of the authority so delegated, is an agency of the federal government and as such is not subject to state laws prescribing the conditions upon which foreign corporations generally may transact business in the state. The fact that such corporation was organized by the members of a board of officers of the United States under direct authority of congress, and that the United States owns all or a majority of the stock of said corporation, though supporting the same conclusion, need not be considered in arriving at the result.

COLUMBUS, OHIO, November 24, 1917.

HON. W. D. FULTON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—You have requested my opinion upon the following question:

The United States Shipping Board Emergency Fleet Corporation is a corporation organized under the laws of the District of Columbia for the purpose of—

"the purchase, construction, equipment, lease, charter, maintenance, and operation of merchant vessels in the commerce of the United States."

Is the corporation required to comply with the laws of Ohio before pursuing any of those objects in this state, under the following facts?

By act of congress, approved September 7, 1916, entitled:

"An act to establish a United States shipping board for the purpose of encouraging, developing, and creating a naval reserve and a merchant marine to meet the requirements of the commerce of the United States with its territories * * * and for other purposes,"

there was created (section 3) a board "to be known as the United States Shipping Board," to be composed "of five commissioners to be appointed by the President by and with the advice and consent of the senate."

Among the other powers granted to this board was the following:

"Section 11. That the board, if in its judgment such action is necessary to carry out the purposes of this act, may form under the laws of the District of Columbia one or more corporations for the purchase, construction, equipment, lease, charter, maintenance and operation of merchant vessels in the commerce of the United States. The total capital stock thereof shall not exceed $50,000,000. The board may, for and on behalf of the United States, subscribe to, purchase, and vote not less than a majority of the capital stock of any such corporation, and do all other things in regard thereto necessary to protect the interests of the United States and to carry out the purposes of this act. The board, with the approval of the president, may sell any or all of the stock of the United States in such corporation, but at no time shall it be a minority stockholder therein: PROVIDED, That no corporation in which the United States is a stockholder, formed under the authority of this section, shall engage in the operation of any vessel constructed, purchased, leased, chartered or transferred under the authority of this act unless the board shall be unable, after a bona fide effort, to contract with any person a citizen of the United States for the purchase, lease, or charter of such vessel under such terms and conditions as may be prescribed by the board.

* * * * * * * *

At the expiration of five years from the conclusion of the present European war the operation of vessels on the part of any such corporation in which the United States is then a stockholder shall cease and the said corporation stand dissolved. The date of the conclusion of the war shall be declared by proclamation of the president. The vessels and other property of any such corporation shall revert to the board. The board may sell, lease, or charter such vessels as provided in section seven and shall dispose of the property other than vessels on the best available terms and, after payment of all debts and obligations, deposit the proceeds thereof in the treasury to its credit. All stock in such corporations owned by others than the United States at the time of dissolution shall be taken over by the board at a fair and reasonable value and paid for with funds to the credit of the board. In case of disagreement, such value shall be determined in the manner provided in section ten."

An appropriation to the President of the United States was made and the President was authorized to expend it as follows:

"The President is hereby authorized and empowered, within the limits of the amounts herein authorized:

(a) To place an order with any person for such ships or material as the necessities of the government, to be determined by the President, may require during the period of the war and which are of the nature, kind and quantity usually produced or capable of being produced by such person.

(b) To modify, suspend, cancel, or requisition any existing or future contract for the building, production, or purchase of ships or material.

(c) To require the owner or occupier of any plant in which ships or materials are built or produced to place at the disposal of the United States the whole or any part of the output of such plant, to deliver such output or part thereof in such quantities and at such times as may be specified in the order.

(d) To requisition and take over for use or operation by the United States any plant, or any part thereof without taking possession of the entire plant, whether the United States has or has not any contract or agreement with the owner or occupier of such plant.

(e) To purchase, requisition, or take over the title to, or the possession of, for use or operation by the United States any ship now constructed or in the process of construction or hereafter constructed, or any part thereof, or charter of such ship.

* * * * * * * * *

The President may exercise the power and authority hereby vested in him, and expend the money herein and hereafter appropriated through such agency or agencies as he shall determine from time to time: Provided, That all money turned over to the United States Shipping Board Emergency Fleet Corporation may be expended as other moneys of said corporation are now expended. All ships constructed, purchased, or requisitioned under authority herein, or heretofore or hereafter acquired by the United States shall be managed, operated, and disposed of as the President may direct.

* * * * * * * * *

All authority granted to the President herein, or by him delegated, shall cease six months after a final treaty of peace is proclaimed between this government and the German Empire."

By executive order under date of July 11, 1917, the President acted as follows:

"By virtue of authority vested in me in the section entitled 'Emergency shipping fund' of an act of congress entitled 'An act making appropriations to supply urgent deficiencies in appropriations for the military and naval establishments on account of war expenses for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes,' approved June 15, 1917, I hereby direct that the United States Shipping Board Emergency Fleet Corporation shall have and exercise all power and authority vested in me in said section of said act, in so far as applicable to and in furtherance of the construction of vessels, the purchase or requisitioning of vessels in process of construction, whether on the ways or already launched, or of

contracts for the construction of such vessels, and the completion thereof, and all power and authority applicable to and in furtherance of the production, purchase, and requisitioning of materials for ship construction."

The certificate of incorporation of the United States Shipping Board Emergency Fleet Corporation was dated and filed April 16, 1917. The incorporators and initial trustees therein designated include all the members of the United States Shipping Board and two other persons. The capital stock of the corporation is $50,000,000.00.

The business now being done or about to be done by the corporation in the state of Ohio is that referred to in the executive order above quoted and no other, and the moneys expended by the corporation in doing such business and by way of investment of capital stock (thus far) are moneys appropriated by the congress of the United States and no other.

In answering the question which is submitted, I shall not undertake to define, for the present purposes, the phrase "doing business" as used in the Ohio act, requiring compliance, on the part of foreign corporations, with certain conditions, before exercising their franchises in this state; nor shall I consider the provisions of the Ohio law, with a view to interpreting them as applied to the facts above stated, nor for any other purpose.

I have chosen to disregard what the Ohio law might by any interpretation be held to mean, because as I see it the question which has been submitted to me must be disposed of upon broader grounds. In my opinion, no law, which the general assembly of the state of Ohio could pass, could attach any condition whatsoever to the transaction of the business described, on the part of the corporation referred to, in this state.

Whether or not regard is had to the fact that the incorporators of this company in its organization acted as officers of the United States under direct authority of an act of congress, and whether or not regard is had to the fact that the United States is at least a majority stockholder therein, I am of the opinion that the facts as stated clearly show that the corporation is an agency of the United States, within the meaning of the principle which has been developed by the supreme court of the United States in decisions beginning with McCulloch v. Maryland, 4 Wheat. 316, and concluding with Choctaw, etc., R. R. v. Harrison, 235 U. S. 292. The principle is that a state may not tax nor in any way condition the activities of an agency of the United States government, without the express consent of the United States, evidenced by act of congress. The principle is so well established and is so obvious in its implications that I do not feel called upon to quote from the authorities which enunciate it.

In the present case we have it that all the business which the company is doing is done for the federal government, not under contract with the government, but as the direct agent or instrumentality of the government.

The President of the United States has delegated certain of his authority to the corporation, which must be assumed, for the present purposes, to be competent to receive such authority and to act as his delegate. That being the case, nothing further is required to establish the essential fact and it is not necessary to look behind the fiction of corporate personality and observe further that the United States, through its appropriate officers, is really the proprietor and manager of the company.

For the foregoing reasons I deem it best to advise you that the United States Shipping Board Emergency Fleet Corporation is not required to comply with the laws of Ohio applicable to foreign corporations as such.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

809.

LEGAL SETTLEMENT—PERSONS NOT PREVENTED FROM OBTAINING BECAUSE CHILDREN ARE MAINTAINED AND SUPPORTED BY COUNTY IN CHILDREN'S HOME.

The fact that the children of parents have been committed to the county children's home and are maintained and supported by the county, would not prevent the parents from obtaining a legal settlement in a county and thus entitle them to the relief provided for in section 2544 G. C.

COLUMBUS, OHIO, November 24, 1917.

HON. E. E LINDSAY, *Prosecuting Attorney, New Philadelphia, Ohio.*

DEAR SIR:—I have your communication of October 24, 1917, which reads as follows:

> "Something like four years ago a family with children residing in an adjoining county had a part of their children committed to the children's home. The county in which they resided at that time had no children's home and they were committed to the children's home of this county under an agreement with the commissioners of the two counties and they have been in custody and under the control of the children's home of this county ever since.
>
> About three years ago the parents of these children moved to this county and have resided here ever since and the parents are now certified to the county infirmary. The question now arises as to the residence of these parents under the poor laws of our state. Ordinarily they would be residents of this county, having lived here two years or more without public relief so far as they were concerned individually, but during all this time the adjoining county has been maintaining some of their children at the children's home as above set forth. Should these parents now in your opinion be treated as residents of this county or the adjoining county for maintenance at public expense?"

Briefly stated, the facts, as I gather them, are as follows:

1. A father and mother with children formerly lived in a county adjoining Tuscarawas county.
2. Within the time they lived there some of their children were committed to the children's home of Tuscarawas county by agreement, the county in which the family resided not having a children's home.
3. The children are still in the Tuscarawas county children's home, the expense of keeping them there being paid by the county from which they were committed to said home.
4. The parents moved to Tuscarawas county about three years ago and have lived there ever since and supported themselves during this period without any relief whatever, under the provisions of law for the relief of the poor.
5. The parents have lately been certified to the infirmary of Tuscarawas county by the township trustees of the township in which the parents have resided.

The question of law is as to whether the parents are entitled to relief at the expense of Tuscarawas county, or whether the county in which they formerly resided

should furnish the relief. This question arises from the fact that while the parents have never been a charge upon Tuscarawas county nor upon any other county during more than twelve months last past, yet their children or part of them have been a charge upon the county in which they formerly resided, during the time the parents have resided in Tuscarawas county.

Under the above facts we will look into the law which controls in such matters.

Section 2544 G. C. reads as follows:

> "In any county having an infirmary, when the trustees of a township, after making the inquiry provided by law, are of the opinion that the person complained of is entitled to admission to the county infirmary, they shall forthwith transmit a statement of the facts to the superintendent of the infirmary and if it appears that such person is legally settled in the township or has no legal settlement in this state, or that such settlement is unknown, and the superintendent of the infirmary is satisfied that he should become a county charge, they shall forthwith receive and provide for him in such institution or otherwise, and thereupon the liability of the township shall cease. The superintendent of the infirmary shall not be liable for any relief furnished, or expenses incurred by the township trustees."

Under this section, one condition under which a person is entitled to admission to a county infirmary is that he is legally settled in the township the trustees of which certify him for admission to the county infirmary.

We will now turn to section 3479 G. C. and note the requirements for a legal settlement in a township. Said section reads as follows:

> "A person having a legal settlement in any county in this state shall be considered as having a legal settlement in the township, or municipal corporation therein, in which he has last resided continuously and supported himself for three consecutive months without relief, under the provisions of law for the relief of the poor."

Under this section a person must have a legal settlement in the county before he can obtain a legal settlement in some township of the county. Therefore we will turn to section 3477 G. C., in order to ascertain the conditions under which a person may obtain a legal settlement in a county. Said section reads in part as follows:

> "Section 3477. Each person shall be considered to have obtained a legal settlement in any county in this state in which he or she has continuously resided and supported himself, or herself for twelve consecutive months, without relief under the provisions of law for the relief of the poor * * *."

Under this section, two conditions must obtain before one can secure a legal settlement in a county, namely, (1) he or she must have continuously resided therein for twelve consecutive months, and (2) must have supported himself or herself for twelve consecutive months, without relief under the provisions of law *for the relief of the poor.*

The question immediately arises whether the parent would be compelled not only to support himself or herself, but also his or her family, during the time mentioned in said section, before he or she could secure a legal settlement in a county. While I do not pass upon this question in rendering this opinion, yet for the purposes of the opinion I am assuming that the parent would be compelled to support his or her family, as well as himself or herself, during the time set out in said section, without relief under

the provisions of law for the relief of the poor, before he or she could obtain a legal settlement in a county.

Assuming that the words "himself or herself" would include his or her family as well, it must be noted that this section provides as follows: "without relief under the provisions of law *for the relief of the poor.*" It provides for a particular kind of relief which is "under the provisions of law for the relief of the poor."

Possibly this will be made clearer if we refer to the act as it was passed in 73 O. L., 233, entitled: "An act for the relief of the poor * * * ," section 12 of which act reads as follows:

> "Every person shall be considered to have obtained a legal settlement in any county in this state, in which he or she shall have continuously resided and supported himself or herself for twelve consecutive months, *without relief, under the provisions of this act,* * * * ."

It will be noted that originally the act was plain to the effect that the relief mentioned in section 12 of the act, which afterwards became section 1492 R. S. and then section 3477 G. C., was such as was provided for in the act itself. And while the language has been modified to read as we now find it in section 3477 G. C., still it is my opinion that the construction to be placed upon the language is the same as that which would have been placed upon the section as it stood in the original act.

Furthermore, the provisions of law relative to county children's homes do not deal primarily or necessarily with "the relief of the poor."

Section 3089 G. C. reads in part as follows:

> "The home shall be an asylum for children under the age of eighteen years, of sound mind and not morally vicious and free from infectious or contagious diseases, who have resided in the county not less than one year, and for such other children under such age from other counties in the state where there is no home, as the trustees of such home and the persons or authority having the custody and control of such children, by contract agree upon, who are, in the opinion of the trustees, *suitable children for admission by reason of orphanage, abandonment or neglect by parents, or inability of parents to provide for them.* * * * "

From this language it is quite clear that a children's home is not primarily an institution designed for the relief of the poor. Furthermore, when the children's home takes charge of the children of a parent, the home, in a measure at least, steps in and takes the place of the parent and assumes the obligations which the parent would otherwise owe to the children, and while under the law the parent is responsible for the care and support of his or her children, yet when the home assumes jurisdiction over them, this duty of the parent for the time ceases. So that even though we assume the words "himself or herself," as found in section 3477 G. C., would include his or her family, the mere fact that his or her children are in the county children's home would not prevent the parents from gaining a legal settlement in a county, for the reason that the relief furnished the children is not furnished them under the provisions of law for the relief of the poor.

Hence, answering your question specifically, it is my opinion that the parents to whom you refer in your communication have obtained a legal settlement in the county of Tuscarawas, though the children of the same are confined in the Tuscarawas county children's home and maintained at the expense of the county in which the parents originally resided.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

810.

NOTICE OF ELECTION—BOARD OF EDUCATION—FAILURE TO PUBLISH—WHEN TREATED AS IRREGULARITY ONLY.

1. *Failure to publish notice of an election for board of education as required by section 4839 G. C. will be treated as an irregularity only, where there is no showing that the result of the vote would have been in any way changed had publication been made as provided by law.*

2. *Where there was failure to publish notice of an election for school board and a regular election was held under section 4838 G. C., and where there were three members of the board to be elected and the names of six candidates appeared on the ballot, the three candidates receiving the highest number of votes were duly elected members of the board and are entitled to qualify thereon.*

COLUMBUS, OHIO, November 24, 1917.

HON. ROBERT M. NOLL, *Prosecuting Attorney, Marietta, Ohio.*

DEAR SIR:—In your communication of November 7, you state:

> "The clerk of the board of education of the Matamoras rural school district failed to give notice as required by section 4839 of the General Code of Ohio for the election held on the 6th day of November, 1917.
>
> There were three members of the board to be elected and six candidates as follows, and each receiving the number of votes set opposite their names:
>
> | | |
> |---|---|
> | Charles Ellis, | 132 votes |
> | Walter Laufer, | 151 votes |
> | A. W. Reece, | 84 votes |
> | E. May, | 270 votes |
> | Dr. E. J. Gautchi, | 224 votes |
> | Donald Whetstone | 159 votes. |
>
> The members of the present board whose terms would expire when their successors are duly elected and qualified are Charles True, J. D. Cline and Charles Ellis.
>
> I would appreciate your advising me whether the present members of the board hold over and if so for what period of time, or if the three candidates receiving the highest number of votes are the newly elected members of the board and entitled to qualify."

From the facts appearing in your communication I take it that about the usual vote was cast in the school district and that there is no complaint that electors sufficient in number to change the result of the election were deprived of an opportunity to cast their ballots, by reason of the failure to give the notice required by the statute.

Your inquiry is to be determined by a consideration of the provisions found in section 4839 G. C. This section reads as follows:

> "The clerk of each board of education shall publish a notice of all school elections in a newspaper of general circulation in the district or post written or printed notices thereof in five public places in the district at least ten days before the holding of such election. Such notices shall specify the time and place of the election, the number of members of the board of education to be elected, and the term for which they are to be elected, or the nature of the question to be voted upon."

Under the above section it was the duty of the clerk of the board of education to publish a notice of the school election in the manner therein provided, and prior to the election he could have been mandamused by any elector to make the legal publication.

State v. Brown, 38 O. S. 344.

But after the election a different situation is presented, especially since section 4838 G. C. provides that all elections for members of boards of education shall be held on the first Tuesday after the first Monday in November in the odd numbered years.

In 15 Cyc. 320, the general proposition is laid down that when the time and place of holding regular elections are prescribed by public law, the rule is that an omission to give the prescribed statutory notice will not vitiate an election held at the time and place appointed by law. The provisions for notice are then considered directory and not mandatory.

In State ex rel., v. Taylor (Scarff v. Foster), 15 O. S. 137, the fourth paragraph of the syllabus reads:

> Though the neglect of a sheriff, by proclamation, to give notice of an election, may be competent evidence, in connection with other circumstances, to prove fraud or conspiracy on the ground of which an election is contested, such neglect is not conclusive of the invalidity of an election."

The same parties were before the supreme court, as found in 15 O. S. 532, and the court found that the attempted election was irregular and invalid under the peculiar circumstances and facts presented.

Brinkerhoff, C. J., at p. 537, uses the following language:

> "In deciding this case, however, we do not intend to go beyond the case before us, as presented by its own peculiar facts. We do not intend to hold, nor are we of opinion, that the notice by proclamation, as prescribed by law, is *per se* and in all supposable cases, necessary to the validity of an election. If such were the law, it would be in the power of a ministerial officer, by his misfeasance, always to prevent a legal election. We have no doubt that where an election is held in other respects as prescribed by law, and *notice in fact* of the election is brought home to the great body of the electors, though derived through means other than the proclamation which the law prescribes, such election would be valid."

In Fike v. State, 4 C. C. (N. S.) 81, the circuit court had before it a question arising under the municipal local option law and in the first paragraph of the syllabus adopts the well recognized principle that election laws are to be construed liberally so as to preserve, if possible, and not defeat, the choice of the people as expressed at an election.

Hull, J., at p. 84 says:

> "The general doctrine is that mere irregularities, that do not go to the foundation of the election, will not invalidate the election, although the provisions of the statute have been technically violated, if it appears that there has been a fair election and a comparatively full vote and no fraud or attempt to deceive or mislead."

At p. 86 he quotes from Dishon v. Smith, 10 Ia., 212, as follows:

> "And it has been remarked, further, that the people are not to be disfranchised, to be deprived of their voice, by the omission of some duty by an officer, if an election has in fact been held at the proper time; and that such penalty ought not to be visited upon them for the negligence or willfulness of one charged with similar duties. Upon considerations like these the courts have held that the voice of the people is not to be rejected for a defect, or even a want of notice, if they have in truth been called upon and have spoken. In the present case whether there were notices or not, there was an election and the people of the county voted, and it is not alleged that any portion of them failed in knowledge of the pendency of the question, or to exercise their franchise."

In Libby v. Paul, 17 N. P. (N. S.) 433 and Scrivens v. Paul, an unreported case of the court of appeals, eighth circuit, under date of June 22, 1914, the court had before it the question of the effect of the failure to publish the notice of an election as to a proposed incorporation of a village, for the full ten days required by the statute, and it was decided that such failure would be treated as an irregularity only where there was no showing that the result of the vote would have been in any way changed had publication been made for the full time.

In Libby v. Paul, supra, Estep, J., quotes the language used by Winch, J., in the Scrivens case, as follows:

> "In this case the will of the people was clearly and decisively expressed at the polls, and it should not be thwarted by the courts. Rather is it the duty of the courts to sustain the will of the people on all occasions, unless that will plainly undertakes to override some provision of the constitution or laws duly enacted by the people's representatives."

Following the above quoted authorities, it is my opinion that the failure to give the notice required by section 4839 G. C. is to be treated as an irregularity which does not vitiate nor render invalid the election so held on November 6, 1917, since there is nothing in the facts given that manifests there was not a full vote out at said election or that the result would have been in any way different had the legal notice been given.

Hence answering your question specifically, it is my opinion that the three candidates who received the highest number of votes for members of said board of education at said election were duly elected and are entitled to qualify for said offices.

Very truly yours,
JOSEPH McGHEE,
Attorney-General.

811.

ELECTION OFFICER—MUST MAKE RETURNS TO CLERK OF BOARD OF EDUCATION—OF ELECTION FOR SCHOOL PURPOSES—NOT ENTITLED TO COMPENSATION THEREFOR.

Under section 5120 G. C. it is the duty of the election officers of each precinct to make returns, to the clerk of the board of education of the district in which such precinct is situated, of the election for school purposes held therein, but the election officer so making such returns is not entitled to compensation therefor under section 5043 or other sections of the General Code.

COLUMBUS, OHIO, November 24, 1917.

HON. HARRY S. CORE, *Prosecuting Attorney, Ottawa, Ohio.*

DEAR SIR:—Under date of November 7 you submit for opinion the following question:

> "Union township, Putnam county, Ohio, has six separate and distinct boards of education. At this election elections were held in each of the said school districts for the choosing of members for its boards. Is a judge of election in said township authorized or required to carry the returns to the clerk of said boards of education, and if said returns are so delivered to the clerk of the board of education is the judge carrying the same entitled to compensation of $2.00 for each of the returns so made to the different boards of education?"

Section 5120 G. C. provides:

> "In school elections, the returns shall be made by the judges and clerks of each precinct to the clerk of the board of education of the district, not less than five days after the election. * * *"

Section 5043 G. C. provides:

> "The judge of elections called by the deputy state supervisors to receive and deliver ballots, poll books, tally sheets and other required papers, shall receive two dollars for such service, and, in addition thereto, mileage at the rate of five cents per mile to and from the county seat, if he lives one mile or more therefrom.
>
> The judge of elections carrying the returns to the deputy state supervisors, and the judge carrying the returns to the county or township clerk, or clerk or auditor of the municipality, shall receive like compensation.
>
> In cities where registration is required, the chairman selected at the meeting for organization shall receive one dollar for calling for the sealed package of ballots."

In view of section 5120, supra, it is by statute made the duty of the judges and clerks to make returns of the vote in their precinct to the clerk of the board of education.

Section 5043, supra, is the only section that provides for compensation to an election officer for carrying the returns to anybody. In the absence of any statutory provision, an officer performing the duties devolving upon him by law is deemed compensated therefor by whatever salary or compensation the law provides. Our supreme

court has repeatedly held that the compensation of public officers can not be enlarged by implication beyond the terms of the statute.

A similar question was considered by my predecessor, Hon. Edward C. Turner, in an opinion found in Vol. I, Opinions of the Attorney-General for 1915, p. 253, wherein he decided that no compensation is authorized by law to be paid to election officers for making returns to the clerk of the board of education in school elections.

At p. 254 he says:

> "It may be difficult to suggest a satisfactory reason for the apparent discrimination by the legislature between the duty of carrying the election returns to the clerk of the board of education in one case and to the clerk of the township or clerk or auditor of a municipality in another, but the reason or lack of reason for such discrimination is immaterial. The legislative expression alone will control."

Concurring in the decision of my predecessor, it is my view that the election officers referred to in your inquiry are bound under the law to deliver the election returns to the clerk of the board of education, but they are not entitled to any compensation therefor.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

812.

APPROVAL—ARTICLES OF INCORPORATION—THE GREAT AMERICAN MUTUAL INDEMNITY COMPANY—MUTUAL INSURANCE COMPANIES—KINDS OF INSURANCE THEY MAY TRANSACT.

Under the provisions of the act found in 107 *O. L.*, 647, *a mutual insurance company may transact either the first kind of insurance set out in section* 6907-2 *G. C., contained in said act, or it may transact any or all of the other kinds of insurance therein set out, as it may elect to do.*

COLUMBUS, OHIO, November 24, 1917.

HON. WILLIAM D. FULTON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I have your communication of October 23, 1917, in which you enclose articles of incorporation of The Great American Mutual Indemnity Company of Mansfield, Ohio, and request my approval of the same.

The act under which these articles of incorporation are drawn is found in 107 O. L. 647. Section 9607-2 G. C., contained in said act, provides that:

> "A domestic mutual company may be organized by a number of persons, not less than twenty, to carry on the business of mutual insurance and to reinsure and to accept reinsurance as authorized by law and its articles of incorporation. * * * ."

This same section provides for seven different kinds of insurance, namely:

1. Fire insurance.
2. Liability insurance.
3. Disability insurance.

4. Automobile insurance.
5. Steam boiler insurance.
6. Use and occupancy insurance.
7. Miscellaneous insurance.

This section further provides:

" * * * A mutual or a stock insurance company may transact only the first kind of insurance, or may transact such as it may elect of the other kinds of insurance * * * " (as set out in the section, namely, those above mentioned in this opinion).

The articles of incorporation presented to your department provide that:

"Said corporation is formed for the purpose of insuring and protecting its members against the following risks."

Following this, the articles set out all the different kinds of insurance mentioned in said section and hereinbefore stated, excepting the first kind, viz., fire insurance, the exact languape of the statute being copied into the articles of incorporation. These articles are signed by twenty persons, residents of Mansfield, and there seems to be no question whatever about their regularity and legality, excepting as to one point and that is as to whether a mutual insurance company can elect to transact more than one kind of insurance, as set out in said section and hereinbefore mentioned, provided it elects not to transact the business of fire insurance.

The persons executing these articles of incorporation claim that they have the right to elect to transact as many of the different kinds of insurance set out in said section as they desire, providing they do not wish to transact the business of fire insurance. It has been urged, however, by others high in insurance circles, that a mutual company can, if it so desires, transact the business of fire insurance, being the first set out in the statute, or, if it does not desire to transact the business of fire insurance, it can then elect to transact only one of the other kinds of insurance mentioned in the statute and numbered from two to seven inclusive.

Inasmuch as this is a late enactment of the legislature and those having different views of the construction which should be placed upon the same, relative to the above matter, have urged their views with more than ordinary diligence, I feel that I should give very careful consideration to this question.

Before considering the act as a whole, I will note the exact language used in section 9607-2 G. C., contained in said act, which is as follows:

" * * * A mutual or a stock insurance company may transact only the first kind of insurance, or may transact such as it may elect of the other kinds of insurance * * * (set out in said section)."

In construing this provision, the first thing to which I desire to call attention is the word "only," found in said provision. It is stated that a mutual company may transact *only* the first kind of insurance. This word is an emphatic one and places emphasis upon the theory that the company is limited strictly to the first kind of insurance, in so far as the first part of the alternative proposition is concerned. When we come to the second part of this alternative proposition, the word "only" is not found, which would seem to indicate that the idea of one kind of insurance is dropped from the latter part of the alternative proposition. If the second part of the proposi-

tion were intended by the legislature to have the same construction as would be placed upon the first, then it seems to me the legislature would have provided as follows in the latter part:

"or may transact only one of the other kinds of insurance as it may elect."

There is another word to which I desire to call particular attention, viz., "such" This is an adjective and as it stands in the sentence is an adjective used as a noun. In order to make this sentence complete, we will supply the noun following "such," which would be either the word "kind" or "kinds." If the word "kind" is supplied' then the company would be limited to one of the other kinds of insurance mentioned in the section; but if "kinds" is supplied, it could elect to transact any or all of the other kinds of insurance therein set out.

Which is the correct word in connection with "such," is the question. It is to be noted that "such" always modifies a plural noun, unless it be followed by "a" or "an," in which case it modifies a singular noun. Especially is this the case when the noun which "such" modifies is followed by the pronoun "as;" for example:

You may select such animals as you desire;
You may select such an animal as you desire; or
You may purchase such machines as I select;
You may purchase such a machine as I select; or
Such guides as you have chosen will get you nowhere;
Such a guide as you have chosen will get you nowhere.

The rule above set forth, relative to the use of the word "such" is universally true, in the correct use of the language, unless "such" is preceded by an indefinite adjective, such as "all," "some," "few," "many," etc., which is not the case in the language before us.

It seems to me that it is only fair to assume that the legislature intended to use "such" in the same connection in which it is ordinarily used in correct language, and that the noun to be supplied is "kinds" and not "kind." If this be true, the company could elect, as stated before, to transact any or all of the kinds of insurance, other than the first, set out in said section.

However, we are not left entirely to the construction to be placed upon the above mentioned sentence, in order to reach a conclusion as to what the legislature had in mind in the enactment of this law, for in section 9607-5 G. C., contained in said act (107 O. L. 648), we find the following provision:

"No such domestic company shall issue policies or effect insurance until the superintendent of insurance has, by his license, authorized it to do so * * * ."

Then immediately follows this provision:

"nor shall such license be issued or renewed unless the company shall comply, *as to each kind of insurance which it shall effect*, with the following conditions: * * * ."

The language to which I desire to call attention is the italicised part of the quotation. The words "as to each kind of insurance which it shall effect" would be meaningless, and indeed would be absurd, in the statute, if we were to place such a construction upon the language used in section 9607-2 that the company could transact

only the first kind of insurance or might transact only any one of the other kinds therein set out, because if the company under any event could transact only one kind of insurance, what would be the use in providing in section 9607-5 that the company must comply with the conditions set out in said section, as to *each kind* of insurance which it shall effect? It seems to me that the language used in this section drives one almost irresistibly to the conclusion that a company may engage in more than one of the kinds of insurance named in section 9607-2, provided it does not elect to transact the first therein mentioned.

Along the same line, I desire to call attention to language used in the first condition set out in section 9607-5 G. C., with which each company must comply before a license can be issued to it by the superintendent of insurance. This condition reads as follows:

> "1. It shall hold bona fide applications for insurance upon which it shall issue simultaneously, or it shall have in force, at least twenty policies to at least twenty members for the same kind of insurance upon not less than one hundred separate risks, each within the maximum single risk described herein."

There are two separate and distinct propositions set out in this condition. The one is "it (the company) shall hold *bona fide applications* for insurance upon which it shall issue simultaneously" "upon not less than one hundred separate risks, each within the maximum single risk described therein." The other proposition is "or it (the company) shall have in force at least twenty policies to at least twenty members *for the same kind of insurance.*"

What is the significance of the phrase "for the same kind of insurance?" As said in reference to the other language above quoted, if we should place such a construction upon section 9607-2 that the company could not transact more than one kind of business, if it elected not to transact the first kind, then the phrase "for the same kind of insurance" would be meaningless and indeed absurd. This language also tends so strongly to the conclusion that the legislature intended that the company might engage in more than one of the other kinds of business set out in subsection 2, that I feel no hesitancy in arriving at such a conclusion and placing such a construction upon the language therein used.

There is one provision in section 9607-5 that might be construed to indicate the intention of the legislature to have been that a mutual company should be limited to the first kind of business or to only one of the other kinds of insurance as it might elect, as mentioned in section 9607-2. This language is found in the third condition therein set out, which reads as follows:

> "3. It shall have collected a premium upon each application, which premium shall be held in cash or securities in which insurance companies are authorized to invest and shall be equal, in case of fire insurance to not less than twice the maximum single risk assumed subject to one fire nor less than ten thousand dollars, and in any other kind of insurance to not less than five times the maximum single risk assumed."

The language to which I call especial attention is:

> "* * * and in any other kind of insurance to not less than five times the maximum single risk assumed."

That is, in case of fire insurance, the company must hold in cash or securities not less than twice the maximum single risk assumed subject to one fire nor less than

ten thousand dollars, and in any other kind of insurance the company must hold in cash or securities not less than five times the maximum single risk assumed. "Any other kind of insurance," as used therein, might be construed to indicate that the company could engage in only some one kind of insurance other than fire; but in view of the plain language of the other parts of the act, I do not feel that such a construction should be placed upon said clause. This clause evidently provides that if a company engages in more than one kind of business, other than fire, then it must hold in cash or securities an amount sufficient to be at least equal to five times the maximum single risk in all the kinds of insurance which the company elects to transact. This places a reasonable construction upon said clause and at the same time gives the rest of the statute its full and natural meaning.

While for the purposes of this opinion I am not construing the third condition set out in section 9607-5 G. C., yet it is my view the above is a correct construction to be placed thereon, and, to say the very least, this language ought not to be so construed that it will defeat the plain language of the other parts of the act.

Hence it is my opinion that the articles of incorporation submitted to you by The Great American Mutual Indemnity Company are in every respect in conformity to law, and I am, therefore, placing my approval upon the same, in accordance with the provisions of said act.

In passing I desire to say that in this opinion I am not considering a domestic stock insurance company, but simply a domestic mutual insurance company. I am not passing upon the question as to whether the provisions of the law, found in 107 O. L. 647, would permit a domestic stock insurance company to insure in more than one of the kinds of insurance enumerated in section 9510 G. C. This opinion is limited strictly to the question of the legality of the articles of incorporation of The Great American Mutual Indemnity Company.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

813.

JUSTICE OF THE PEACE—TERM OF PERSON APPOINTED BY TRUSTEES TO FILL VACANCY.

A person appointed by the trustees to fill a vacancy in the office of justice of the peace in May, 1917, will serve until his successor is elected and qualified and until the term for which such successor is to commence. Such successor was properly chosen at the November election, 1917, and will be entitled to a commission for four years, beginning on the 1st day of January, 1918.

COLUMBUS, OHIO, November 26, 1917.

HON. W. D. FULTON, *State Supervisor of Elections, Columbus, Ohio.*

DEAR SIR:—Under date of November 10, 1917, I received a communication from Robert H. Zehring, attorney-at-law, Miamisburg, involving the question of the term of office of a justice of the peace elected at the November election. I am addressing an opinion thereon to you and a copy will be sent to Mr. Zehring. His communication reads as follows:

"In May of the current year, the trustees of Miami township appointed the undersigned as justice of the peace to fill the unexpired term of Wm.

Hughes. Mr. Hughes' term expired January 1, 1920. Later it was learned but too late to get a name on the judicial ballot, that the appointment was legal only until the next regular election, which took place a few days ago.

At this election, I had my name written in on the judicial ballot and was elected to the office.

QUESTION: Is my election to the office of justice of the peace for the balance of the unexpired term of Mr. Hughes, towit, to January 1, 1920, or is such election for the term of four years, the statutory term of justice of the peace?"

The appointment to fill the unexpired term of the justice of the peace who had vacated was made under the authority of section 1714 G. C., which reads as follows:

"If a vacancy occurs in the office of justice of the peace by death, removal, absence for six months, resignation, refusal to serve, or otherwise, the trustees within ten days from receiving notice thereof, by a majority vote, shall appoint a qualified resident of the township to fill such vacancy, who shall serve until the next regular election for justice of the peace, and until his successor is elected and qualified. The trustees shall notify the clerk of the courts of such vacancy and the date when it occurred."

It will be noted that such appointee is to fill such vacancy and "shall serve until the next regular election for justice of the peace, and until his successor is elected and qualified." It was therefore proper to have elected a justice of the peace at the November election, to succeed said appointee.

Section 1715 G. C. provides:

"At the next regular election for such office, a justice of the peace shall be elected in the manner provided by law, for the term of four years commencing on the first day of January next following his election."

So the term of the justice of the peace elected at the November election would be for four years, commencing on the 1st day of January next.

In the communication it is said that Mr. Zehring's name was written in on the judicial ballot and that he was elected to the office. There having been no nominations made for this office, it was proper, under section 5071 G. C., for the elector desiring to vote for some one to fill such office, to do so by writing in the name of the person for whom he desired to vote.

Answering the question specifically, then, it is my opinion that the person receiving the highest number of votes for the office of justice of peace on the judicial ballot of said Miami township was elected for the term of four years beginning January 1, 1918; but there could not be an election for the balance of the unexpired term of Mr. Hughes; and that the appointee, having been appointed to the office to serve until the next regular election for justice of the peace and until his successor is elected and qualified, would serve under such appointment until the date at which the term of the successor would commence under the law, towit, January 1st, 1918.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

814.

APPROVAL—BOND ISSUE—VILLAGE OF EAST COLUMBUS—FRANKLIN COUNTY.

COLUMBUS, OHIO, November 26, 1917.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN—

IN RE: Bonds of the village of East Columbus, Franklin county, Ohio, in the sum of $6,000.00 in anticipation of the collection of special assessments for the construction of sidewalks.

I have carefully examined the transcript of the proceedings of the village council and other officers of the village of East Columbus, Franklin county, Ohio, relating to the above bond issue, and find said proceedings to be in conformity to the provisions of the General Code relative to bond issues of this kind.

I am therefore of the opinion that bonds properly prepared according to the bond form submitted will, when signed by the proper officers of the village of East Columbus, constitute valid and binding obligations of said village.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

815.

APPROVAL—LEASE OF CANAL LANDS TO A. H. HEISEY & CO., NEWARK, OHIO—LUTHER L. BIDLE, CELINA, OHIO—THE LOWE BROTHERS COMPANY, DAYTON, OHIO.

COLUMBUS, OHIO, November 27, 1917.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your communication of November 24, 1917, in which you enclose three leases, in triplicate, of certain canal lands, said leases being as follows:

	Valuation.
A. H. Heisey & Co., Newark, Ohio, pipe line on outer slope of embankment of North Fork Feeder at Newark, Ohio. ------	$1,900 00
Luther L. Bidle, Celina, Ohio, lands west of Lake St. Marys----	1,200 00
The Lowe Bros. Co., Dayton, Ohio, railway crossing over Mad River Feeder Canal in Dayton, Ohio ----------	1,666 66⅔

I have carefully examined these leases, find them to be in accordance with law in every respect and am therefore endorsing my approval thereon and forwarding them to the Governor of Ohio for his consideration.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

816.

"TO PROSECUTE" AS USED IN SECTION 13440 G. C. DEFINED—ATTORNEY EMPLOYED BY HUMANE SOCIETY—WHEN ENTITLED TO FEES.

1. *The words "to prosecute" as used in section* 13440 *G. C. embody all the means adopted to bring a supposed offender to justice and punishment by due course of law, beginning with the affidavit or charge filed against him and ending with the acquittal or conviction of the supposed offender.*

2. *An attorney employed by the humane society would be entitled to fees for services rendered in matters relating to the progress of the prosecution, beginning with the affidavit or charge and ending with the acquittal or conviction of the accused.*

COLUMBUS, OHIO, November 27, 1917.

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

GENTLEMEN:—I have your communication of November 16, 1917, in which you submit the following inquiries:

> "What is meant by the words 'To prosecute,' as used in section 13440, General Code, and what is an attorney required to do in order to be entitled to his fees under the provisions of this section?"

Section 13440 G. C. about which you inquire, provides:

> "A humane society or its agent may employ an attorney to prosecute the following cases, under this section, who shall be paid for his services out of the county treasury in such sum as the judge of the court of common pleas or the probate judge of such county or the county commissioners thereof may approve as just and reasonable:
>
> 1. Violations of law relating to the prevention of cruelty to animals or children;
>
> 2. Violations of law relating to the abandonment, non-support or ill-treatment of a child by its parent;
>
> 3. Violations of law relating to the employment of a child under fourteen years of age in public exhibitions or vocations injurious to health, life or morals or which cause or permit such child to suffer unnecessary physical or mental pain;
>
> 4. Violations of law relating to neglect or refusal of adult to support destitute parent."

Your communication involves two different questions, viz., (1) what is the meaning of the word "prosecute," and (2) what is an attorney required to do in order to be entitled to his fees under section 13440?

In arriving at an understanding as to the meaning of the word "prosecute," it might be well for us to follow the definition laid down by lexicographers and our courts. Bouvier gives the following definition of the word:

> "The means adopted to bring a supposed offender to justice and punishment by due course of law."

In State v. Williams, 34 La. Ann. 1198, the court had under consideration the term "prosecution" and used the following language in reference thereto:

"As soon as the affidavit or charge against an accused and other proceedings had in the case before the committing magistrate are forwarded to the proper criminal court, the prosecution must be construed as having been instituted in the latter court."

In the opinion on p. 1199, the court used this language:

"Under our system of criminal law a prosecution has several phases or steps of proceeding: The first being usually an affidavit or charge; next a warrant of arrest, and so on through the hands of the committing magistrate, whose committal transfers the prosecution to the proper criminal court, where it undergoes the other phases of presentment, arraignment, trial and conviction or acquittal. * * * The inception of the prosecution before the criminal court dates from the day that the affidavit and other proceedings coming from the committing magistrate are filed or returned into the criminal court. * * * If the proceedings had before the committing magistrate are not a 'prosecution' in the legal sense, where would be the authority for detaining the accused in legal custody, or what would be the legal value of the bond furnished by the accused for his appearance before the criminal court? It is elementary, in our jurisprudence, that such proceedings are the basis and primary inception of the prosecution."

In Kemper v. State, 138 S. W. 1025, we find the following in the head notes quoted from Words and Phrases:

"A 'criminal prosecution' is the mode of formally accusing offenders or the means adopted to bring a supposed offender to justice and punishment by due course of law."

While it must always be borne in mind that the court, in placing an interpretation upon a word or words, does so in the light of the statute in which the particular words are used, yet it is my opinion that the above definitions and holdings would apply to the words "to prosecute" as used in section 13440. From the above the following definition might be framed: The term "prosecution" involves all the means adopted to bring a supposed offender to justice and punishment by due course of law, beginning with the filing of an affidavit or charge before the proper magistrate, and ending with the conviction or acquittal of the supposed offender, either before the proper magistrate or in the court to which he may have been bound over by a committing magistrate.

It will be well for us to also notice that the language used in section 13440 G. C is "to prosecute the following *cases*." The legislature evidently had in mind that the matter for which the attorney should be employed would be relative to cases pending in some court having jurisdiction over the matter set out in section 13440 G. C. Of course a case could not be pending in the court until some kind of a writing was filed therein, as an affidavit. This simply strengthens the idea that the words "to prosecute" would begin with the filing of an affidavit before the proper magistrate.

Your second question relates to what an attorney would be required to do in order to entitle him to fees under the provisions of said section.

Inasmuch as the prosecution of a supposed offender begins with the filing of an affidavit or a charge against him and ends with the conviction or acquittal of the person charged, an attorney employed by the humane society would be entitled to fees for services rendered in the progress of the prosecution. In other words, it would not be essential that the attorney employed should carry the prosecution through from

the beginning of the same to an acquittal or a conviction, but if he rendered services, after having been employed by the humane society, relative to a prosecution as defined above, he would be entitled to such fees as might be allowed him by a judge of the court of common pleas or the probate court of the county, or the county commissioners of the same. To be sure, the amount of the fees which should be allowed would depend entirely upon the amount of work performed by the attorney so employed by the humane society. But in accordance with the construction herein placed upon the words "to prosecute," their being used in connection with the word "cases," it is my opinion that an attorney would not be entitled to be paid for services rendered, unless it should be relative to cases pending before the court of competent jurisdiction.

To be sure, if an affidavit were filed and a case thus begun in a court, the court or the county commissioners might, in fixing the amount that should be paid for services rendered, take into consideration the fact that the attorney gave legal advice and assisted in the preparation of the affidavit. The attorney employed would also be entitled to fees in the prosecution of any error proceedings that might arise in the progress of the case.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

817.

APPROVAL—BOND ISSUE—BEXLEY VILLAGE SCHOOL DISTRICT.

COLUMBUS, OHIO, November 28, 1917.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

IN RE: Bonds of Bexley village school district in the sum of $5,000, for the purpose of purchasing lands for play ground purposes.

I have carefully examined the transcript of the proceedings of the board of education and other officers of Bexley village school district relating to the above bond issue and find said proceedings to be in conformity with the provisions of the General Code of Ohio relating to bond issues of this kind.

I am therefore of the opinion that bonds properly prepared according to bond form submitted, will, when they are properly signed and delivered, constitute valid and binding obligations of said school district.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

818.

STATE HIGHWAY COMMISSIONER—MAY NOT PAY CONTRACTORS THE RETAINED 15% BEFORE COMPLETION OF CONTRACT.

The state highway commissioner would not be warranted in law in paying the retained fifteen per cent. to contractors before the completion of the contracts merely because the federal government has issued an order prohibiting the use of open cars in the shipment of road material.

COLUMBUS, OHIO, November 28, 1917.

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

DEAR SIR:—I have your communication of November 21, 1917, in which you make the following request for opinion:

> "Several requests have come in from contractors, asking for payment of a part or all of the retained 15% required under the law on contracts in force and operating.
>
> In every instance these contractors have been stopped from work on account of Priority Order No. 2 of the federal government, denying the use of open top cars for shipments of road materials, and they present the argument that the public is depriving them of the proper handling of their contracts, and, therefore, they are entitled to consideration as an emergency. We are, therefore, requesting your opinion as to whether or not we may legally offer any relief to contractors who are requesting the release by this department of a part or all of the 15% we are retaining on contracts in force."

We will first note the provisions of our statutes relative to the payment of the cost and expense of the construction of an inter-county highway or main market road.

Section 1212 G. C. (107 O. L. 127) reads in part as follows:

> " * * * The payment of the cost of the construction of such improvement shall be made as the work progresses upon estimates made by the engineer in charge of such improvement, and upon approval of the state highway commissioner. Except as hereinafter provided no payment by the state, county or township, on account of a contract for any improvement under this chapter shall before the completion of said contract exceed eighty-five per cent. of the value of the work performed to the date of such payment, and except as hereinafter provided, fifteen per cent. of the value of the work performed shall be held until the final completion of the contract in accordance with the plans and specifications. In addition to the above payments on account of work performed, the state highway commissioner may also, if he deems it proper, allow and pay to a contractor a sum not exceeding eighty-five per cent. of the value of the material delivered on the site of the work but not yet incorporated therein, provided such material has been inspected and found to meet the specifications. When an estimate is allowed on account of material delivered on the site of the work but not yet incorporated therein, such material shall thereupon become the property of the state; but in case such material is stolen or destroyed or damaged by casualty before being used, or for any reason becomes unfit for use, the contractor will be required to replace the same at his own expense. * * * ."

Under this section payment is made, as the work progresses, upon estimates

made by the engineer, but no payment shall exceed 85 per cent. of the value of the work performed to the date of such payment, before the completion of the contract, and 15 per cent. of the value of the work performed shall be held until the final completion of the contract, in accordance with the plans and specifications.

You inquire whether you could under the law pay to contractors all or any part of this retained 15 per cent. before the completion of their contracts. You state that the reason contractors are asking that this be done is that the federal government has, through an order issued, forbidden the use of open cars upon all railroads for the delivery of road material, which radically interferes with the progress of the work under contract and works a hardship upon contractors, in that they do not have the use of the money retained for a long period of time.

There is no provision of law which would permit the payment of more than 85 per cent. of the value of the work done from time to time, up until the final completion of the contract, when the retained 15 per cent. shall be paid. There is no stipulation or condition set forth in the contract itself which would warrant the state highway commissioner in paying this retained 15 per cent. before the contract is fully completed. The provisions of the statute are practically read into the contract and such a provision could not legally be placed therein. So if there is any warrant in law for the state highway commissioner's paying this retained 15 per cent. before the contract is fully completed, it must be found elsewhere than in the contract or in the statute.

The contractors undoubtedly have in mind a principle which is well established in the common law, viz., that either party to a contract may be relieved from its conditions and obligations when the government makes it impossible for either or both of the parties thereto to comply with its obligations. I shall therefore note this principle of law in its application to the facts contained in your communication.

In 10 L. R. A. (N. S.) 415, in a note, the following proposition is laid down:

> "The authorities are almost unanimous in holding that, where the act contracted for is rendered unlawful by the enactment of a statute before the expiration of the time for performance, the obligation is thereby discharged."

This proposition is undoubtedly sound, and another proposition as equally sound is to the effect that whenever the government renders it impossible to perform the obligations of a contract, the one entering into it is discharged from the performance of the obligations of the same. But the proposition is equally clear and is correctly stated in L. R. A. 1916, F. p. 66, as follows:

> "It should be observed, however, that the rule that non-performance is excused if after the making of the contract, by reason of the change in the law, performance becomes impossible, does not apply where performance is thereby not made impossible but only more difficult."

It must be remembered, however, that in the cases submitted by you the order of the federal government has not in any sense made the contracts entered into illegal; neither has said order made the performance of the contracts impossible. The performance of the contracts may be impossible for an indefinite period only, but they are not rendered wholly impossible of performance.

In Baylies v. Fettyplace, 7 Mass. 325, the court say:

> "The laws of the United States laying an embargo for an unlimited time, and afterwards repealed, did not extinguish a promise to deliver de-

bentures, but operated a suspension only during the continuance of those laws."

On p. 331 in the opinion the court say:

"An embargo, considered as a temporary suspension of commerce, does not operate a dissolution of any mercantile contract. If the embargo enacted by congress in 1807 was to be considered a perpetual prohibition of congress, as for a time it was apprehended to be, I am not satisfied that the defendants would have been, in that event, entirely discharged from their promise. It is true, the law will not compel impossibilities. * * * It may be further observed, that in the case at bar there was nothing unlawful in the contract itself originally; nor was it made unlawful by the embargo."

In Baker et al. v. Johnson, 42 N. Y. 126, the court say:

"In an action to recover damages against the defendants, they having refused to perform the contract. HELD: That performance had not been rendered impossible by the act of the law, and the defendants were not excused.

The fact that performance of the contract is rendered more burdensome and expensive, by a law enacted after it is entered into, has never been held to even exonerate a party from its obligations."

In Hadley v. Clarke et al., 8 T. R. 259, the court say:

"The defendants contracted to carry the plaintiff's goods from Liverpool to Leghorn. On the vessel's arriving at Falmouth in the course of her voyage, an embargo was laid on her 'until the further Order of Council'; HELD: That such embargo only suspended, but did not dissolve, the contract between the parties; and that even after two years, when the embargo was taken off, the defendants were answerable to the plaintiff in damages for the non-performance of their contract."

On p. 263 in the opinion, the court say:

"Therefore, admitting it to be as imperative on the parties as an act of parliament, yet it is not like a general unlimited prohibition, making that unlawful which was before lawful, but at most operated as a suspension only, and not as a dissolution, of the contract. * * * It is true that in a case like this hardships may arise to both parties from the long continuance of an embargo; but when it is considered that it must be known to them at the time of entering into the contract, that an embargo may lawfully be laid in time of war, they must be taken to have made their contract subject to the operation of the law, in that respect."

I am aware that the cases above cited relate to the entire discharge of a party from the obligations of the contract, but the principle is exactly the same in the matter submitted by you, in that the contractors are asking that certain conditions and obligations of the contracts and the law be modified, due to an act of the federal government.

Hence, answering your question specifically, it is my opinion that you would not be warranted in law in paying to contractors the retained 15 per cent. before the completion of the contracts, merely because the federal government has issued an order prohibiting, for the present, the use of open cars for the shipment of road materials.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

819.

APPROVAL—FINAL RESOLUTION FOR ROAD IMPROVEMENT IN PICKAWAY COUNTY.

COLUMBUS, OHIO, November 28, 1917.

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

DEAR SIR:—I am in receipt of your letter of November 24, 1917, in which you enclose final resolution, in duplicate, upon the following improvement:

> Pickaway county—Section "A," Cincinnati-Zanesville road, I. C. H. No. 10.

I have carefully examined said resolution, find the same correct in form and legal, and am, therefore, endorsing my approval thereon, in accordance with the provisions of section 1218 G. C.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

820.

COMMON PLEAS JUDGE—ELECTION—CONSTRUCTION OF SECTION 1532 AS AMENDED 107 O. L., 164.

The provision of section 1532 G. C., as amended 107 O. L., 164, fixing the dates for holding "the next election" for common pleas judge in the several counties is not to be interpreted as prohibiting an election in any county at a date other than therein fixed if required under Article IV, section 13 of the constitution to fill a vacancy for the remainder of the unexpired term of a common pleas judge.

COLUMBUS, OHIO, November 28, 1917.

HON. EMMET L. SAVAGE, *Judge of the Court of Common Pleas, Paulding, Ohio.*

DEAR SIR:—I have previously acknowledged receipt of your letter of November 6th requesting my opinion upon the following question which I quote from your letter:

> "At the general election in the fall of 1914, Hon. John S. Snook was elected common pleas judge for this county, for a term of six years, beginning January 1, 1915, as then provided under section 1532 G. C., Page and Adams Supplement; and was duly qualified and entered upon his duties.
>
> At the general election in November, 1916, said Snook was elected to congress from the fifth district, and in order to accept his new office, he resigned as such common pleas judge on February 19, 1917.
>
> On the day of his resignation I was appointed by Governor Cox to fill the vacancy thus caused, to serve until my successor was duly elected and qualified. And I have been serving since said date.
>
> After my appointment and qualification by an act passed March 21, 1917, and approved March 29, 1917, 107 Ohio Laws 164, the legislature repealed said section 1532 G. C. and enacted another section which has been given the same number, providing additional qualifications for common pleas judges.

and providing that the times for the next election of a common pleas judge and for the beginning of his term, 'shall be as follows: In Paulding county, in 1920, one judge, term to begin January 1, 1921.'

Will it be necessary that a common pleas judge be elected in and for Paulding county at the general election in the fall of 1918, or will my appointment of February 19, 1917, continue me in said office until January 1, 1921?"

The act of 1917 to which you refer, section 1532 G. C., was last previously amended in 1914, 104 O. L., 243, and was enacted in its present general form 103 O. L. 673. The purpose of this section as enacted in 1913 and amended in 1914 was to adjust the common pleas judgeships in the state to the requirements of the amendment of article IV, section 3 of the constitution requiring one resident judge of the court of common pleas, and such additional resident judge or judges as may be provided by law, to be elected in each county of the state by the electors of such county, and the schedule thereof. It fixed the times for the "next election of common pleas judges in the several counties and for the beginning of their terms" at dates ranging from 1914 to 1918, inclusive, in the even numbered years, and provided for Paulding county that one judge should be elected therein in 1914, whose term was to begin January 1, 1915. This is the term for which your predecessor was elected.

As you say, section 1532 was amended in 1917 primarily for the purpose of providing additional qualifications for the position of common pleas judge. In making this amendment the legislature might well have repealed the entire schedule showing when the "next election" should be had in the several counties because that part of the section, as I have pointed out, was merely the legislation necessary to carry into effect the change in the constitution, and was in truth in the nature of a schedule and was a completely executed law when the legislature acted in 1917. Article IV, section 12, as amended September 3, 1912, provides for a term of office of six years, and section 13 of the same article provides as follows:

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

So that having fixed the starting point for the election of the various county common pleas judges by the legislation of 1913, and the amendment of 1914, any further legislation fixing the time of subsequent elections was wholly unnecessary. Indeed, any legislation fixing the time of elections so as to disturb the succession of terms fixed by the constitution would be beyond the power of the legislature and therefore unconstitutional. So far as Paulding county is concerned the amendment of 1917 but declares the constitutional rule; but if it did not, it would have to yield to the constitution; so that given an initial election in Paulding county in 1914, the term then started would have to last until January 1, 1921, any attempted amendment of the statute by the legislature to the contrary notwithstanding.

Instead, however, of letting the constitution execute itself as it does, the legislature conceived that it was necessary in amending section 1532 to move some of the dates previously fixed therein six years forward, so that the statute might speak from the date of its enactment and so speaking fix the "next election" in each county. As stated, this was wholly unnecessary and in point of fact might be regarded as a mere nullity save in so far as it declares what would otherwise be the law.

Nothing, however, can be predicated of this legislation other than the intention to fix the date for holding what might be termed an election to fill the next succeeding term. This I believe to have been the legislative intention. I do not think that section 1532 fairly interpreted is open to a construction that would forbid the holding of any election for common pleas judge in Paulding county before the fall of 1920. This is because, as I see it, the legislature was considering merely the normal course of events and did not have in mind the possibility of filling vacancies.

But even if we regard section 1532 as an attempt upon the part of the legislature to make it impossible to hold an election for the office of common pleas judge in Paulding county before the fall of 1920, or in any other county therein named before any of the dates therein mentioned excepting the fall of 1918, the same result is reached; for in my opinion the legislature was without power to make it impossible to hold an election for common pleas judge in a given county until a stated date if in accordance with the constitutional provision applicable thereto it should become necessary to fill a vacancy in any judgeship prior to the date so fixed. I have quoted article IV, section 13. In connection with this section of the constitution article XVII, section 1 must be considered. By this article it is provided generally that elections for state and county officers shall be held in even numbered years. In my opinion the effect of the seventeenth amendment to the constitution is to make it impossible to hold an election for common pleas judge other than in an even numbered year. Hence, the word "annual" in section 13 of article IV is now to be read "biennial" in accordance with the controlling purpose of article XVII which is to separate elections of state and county officers including common pleas judges on one hand from municipal, township and school officers on the other hand.

With this implied amendment, however, section 13 of article IV remains in force and is perfectly self-executing. It has the effect in my opinion of making mandatory the holding of an election in an even numbered year to fill a vacancy occurring more than thirty days prior thereto in the office of common pleas judge in any county. Should the legislature attempt to make it impossible to do this by the simple expedient of declaring that the "next election" for common pleas judge in a given county shall be held at a date later than that which under the facts in a particular case would be the date required by the constitution for the election to fill a vacancy, the conflict between the legislative will and the will of the people would be plain; for the only reasoning upon which the impossibility of filling the vacancy at the time suggested by the constitution could be based would be that the act of the legislature in effect prohibited any election at a date earlier than that named by it. We would have it then that the legislature would have attempted to prohibit the doing of a thing which the constitution had commanded. Reduced to these terms the problem solves itself.

There is still another reason, however, for the result at which I have arrived. Section 1532, save in that paragraph thereof now completely executed and obsolete in which provision is made for the filling of a vacancy occurring in the office of any judge of the court of common pleas, in office or elected thereto prior to January 1, 1913, and which was intended to provide for a particular class of cases which can never again arise, does not deal with the filling of vacancies at all. Indeed, the chapter providing for the election and qualification, etc., of common pleas judges is silent respecting the matter of filling vacancies. Section 10 of the General Code makes a general provision for filling vacancies in cases not otherwise provided for. This section, however, does not apply to the present case because article IV, section 13 is self-executing and affords complete machinery for filling such vacancies. But whether the case be regarded as covered by section 10 of the General Code or by section 13 of article IV of the constitution, or by both, it is clear that it is not covered nor was it intended to be covered by section 1532 of the General Code. In other words, aside from the one particular which has been mentioned section 1532 is not to be regarded as dealing in any way with the filling of vacancies. Therefore if we find that a pro-

vision for the filling of vacancies apparently conflicts with section 1532, we must regard such provision as stating the exception and section 1532 as embodying the general rule. This is an application of a familiar principle. Of course, in the present instance, as I have pointed out, even a square conflict between article IV, section 13, and section 1532 of the General Code would have to be resolved in favor of the constitutional provision instead of the statute.

For all these reasons, then, I conclude that under the executive appointment referred to by you, you may hold until your successor is elected and qualified; and that his election must take place in November, 1918. Of course when elected and qualified such successor will hold by virtue thereof only until January 1, 1921, at which time his successor, elected in November, 1920, will take office with a term extending to January 1, 1927.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

821.

PERSONS ENGAGED IN BUSINESS OF TAKING DEPOSITS FOR TRANSMISSION TO FOREIGN COUNTRIES, ETC.—WHEN BOND IS GIVEN—MAY ESTABLISH BRANCH OFFICES—LIABILITY OF SURETY ON BOND FOR DEFAULTS OCCURRING AT BRANCH OFFICE.

When a bond is given by a person engaged in the business of taking deposits for transmission to foreign countries and in selling transportation to and from foreign countries he may establish offices in as many places as he desires.

Surety on such bond is liable for defaults occurring at a branch office established after bond was given.

COLUMBUS, OHIO, November 28, 1917.

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

DEAR SIR:—I am in receipt of your communication of recent date wherein you ask my opinion as follows:

> "On July 25, 1911, Max Levin, then doing the business of selling steamship and railroad tickets for transportation to and from foreign countries at No. 3336 Woodland Avenue, Cleveland, Ohio, furnished a bond in the sum of $5,000.00 as required by section 291 G. C. Thereafter he opened up a second place of business in the city of Cleveland. He now advises us that his office at No. 3336 Woodland avenue has been closed and he desires to open up a branch office in the city of Akron and makes application for an additional certificate permitting him to do business at that place.
>
> The law under which these certificates are issued is so vague that we are undecided as to our powers in the matter, i. e., whether the bond given at the time he was doing business in Cleveland could be enforced against him and his sureties for transactions occurring at a branch office in Summit county.
>
> We desire an opinion from you advising us whether we may issue this further certificate to him authorizing him to do business in Akron without furnishing an additional $5,000.00 bond.
>
> For your information we hereto attach the form of bond and certificate now in use."

The provisions of the General Code relating to your inquiry are as follows:

"Section 290. No person, firm or corporation shall engage in selling steamship or railroad tickets for transportation to or from foreign countries, or in the business of receiving deposits of money for the purpose of transmitting the same, or the equivalent thereof, to foreign countries, until it has obtained from the auditor of state a certificate of compliance with the provisions of the two sections next following. The certificate shall be conspicuously displayed in the place of business of such person, firm or corporation."

"Section 291. Such person, firm or corporation shall make, execute and deliver a bond to the state of Ohio in the sum of five thousand dollars, conditioned for the faithful holding and transmission of any money, or the equivalent thereof, delivered to it for transmission to a foreign country, or conditioned for the selling of genuine and valid steamship or railroad tickets for transportation to or from foreign countries, or both if to be engaged in both of such businesses,"

"Section 292. The bond shall be executed by such person, firm or corporation as principal, with at least two good and sufficient sureties, who shall be responsible and owners of real estate within the state. The bond of a surety company may be received, if approved, or cash may be accepted in place of surety. The bond shall be approved by the auditor of state, and filed in his office. Upon the relation of any party aggrieved, a suit to recover on such bond may be brought in a court of competent jurisdiction."

"Section 293. The auditor of state shall keep a book to be known as a 'bond book' wherein he shall place in alphabetical order all such bonds received by him, the date of receipt, the name or names of the principals and place or places of residence, and place or places for transacting their business, the names of the surety upon the bond, and the name of the officer before whom the bond was executed or acknowledged. Such record shall be open to public inspection. The auditor of state shall collect a fee of five dollars for each bond so filed."

Under the above quoted sections of the General Code a person, firm or corporation desiring to engage in the business of taking deposits for transmission to foreign countries or selling transportation to or from foreign countries must give a bond. Thereupon the auditor of state may issue a certificate to such person, firm or corporation showing that he or it has complied with the law governing such business. These sections of the General Code do not limit a person, firm or corporation, so engaged, to transact such business at one particular place, but rather the opposite. Section 293 contemplates that such person, firm or corporation may engage in such business in more than one place. This section provides that "the auditor shall keep a book to be known as a 'bond book' wherein he shall place" the "place or places for transacting their business."

Section 291 provides that such person "shall make, execute and deliver a bond to the state of Ohio in the sum of five thousand dollars."

Section 293, as above pointed out, contemplates that persons may engage in business in more places than one, and if it had been the intention of the legislature to compel a person transacting such business to give a bond for each place where he conducts such business it would have specifically provided for the same. This was not done. The legislature simply said that a person desiring to engage in such business must give a bond.

I am therefore of the opinion that when a person desiring to engage in this business gives a bond to the auditor of state in the sum of five thousand dollars he is com-

plying with the law and may engage in said business in as many places within the state as he desires.

In coming to this conclusion I am not unmindful of an opinion rendered by my predecessor, Hon. Timothy S. Hogan, found in Vol. I, page 143, Reports of the Attorney-General for 1913, wherein he holds:

> "The statute does not require a separate bond for each place of business run by the principal. It does require that the 'certificate shall be conspicuously displayed in the place of business of such person, firm or corporation.'
>
> One bond could be made to cover two places of business, but if in the opinion of the auditor of state a bond of five thousand dollars is not sufficient to secure the public, where a person is running two or more places of business, he could require a bond for each place of business or require a larger single bond. The auditor is not required to issue more than one certificate upon one bond, but he may do so."

I agree with the opinion of Mr. Hogan wherein he holds that the law does not require a separate bond for each place of business run by the principal, but can find no authority in law to warrant his holding that the auditor of state, if he deems it necessary, may require a larger bond than five thousand dollars. The statute provides that such person, etc., shall give bond in the sum of five thousand dollars and does not give the auditor any discretion in the matter of fixing the amount of the bond. Therefore, I must disagree with the latter part of Mr. Hogan's opinion above quoted.

Having arrived at the conclusion that upon the execution and delivery of a bond to the state of Ohio in the sum of five thousand dollars a person, firm or corporation is entitled to transact business in two or more places, it will be necessary here to examine the bond form submitted by you to determine whether or not the surety thereon will be liable for transactions occurring at a place subsequently opened by the principal.

It is a well recognized principle of law that the liability of a surety is never to be extended beyond the strict letter of his obligation. The blank form submitted by you is as follows:

"BOND

STATE OF OHIO.

Know all men by these presents:

That we.....
residing at..... St.....
doing business at ..... St.....
as principal, and.....
.....
as suret....., are hereby held and firmly bound unto the State of Ohio, in the just and full sum of Five Thousand Dollars, for the payment whereof well and truly to be made, we bind ourselves, and each of us, our heirs, executors, administrators, successors and assigns, and each of them firmly by these presents.

The Condition of the Above Obligation is Such, That, whereas, the said
.....
is engaged in the business of selling steamship or railroad tickets for transportation to or from foreign countries and in the business of receiving deposits of money for the purpose of transmitting the same, or the equivalent thereof, to foreign countries.

Now, Therefore, If the said.....
shall faithfully and honestly hold and transmit any money, or the equivalent

thereof, which shall be delivered to_____for transportation to a foreign country, or if such steamship or railroad tickets for transportation to or from foreign countries so sold or offered for sale by_____ shall be genuine and valid, or if_____ shall faithfully and honestly perform both such obligations, if engaged in both businesses, then this obligation shall be void, otherwise to be and remain in full force and effect.

Witness our hands and seals this_____day of_____, 191__

_____(L. S.)
_____(L. S.)
_____(L. S.)
_____(L. S.)
_____(L. S.)
_____(L. S.)

The State of Ohio, }
_____County} ss.

Sworn to and subscribed before me, a_____in and for the county aforesaid, this_____day of_____, 191__

_____

Although the above bond form has a space for the name of the principal's place of business (and I presume in the bond furnished by Mr. Levin he has named 3336 Woodland avenue, Cleveland, Ohio, as his place of business), the condition of the bond makes no mention of the place where the principal is to transact his business and does not limit his business to any particular place. The statement at the beginning of the bond that the principal is engaged in business at a certain place has no effect whatever on the condition in said bond. It is merely descriptive of the person for whom the surety is signing.

In the case of Kellogg, et al. v. Farquhar, et al., 8 N. Y. Supp., 208, the defendant became surety for an agent who engaged to sell goods for plaintiff. The bond recited that the agent was to sell goods in the territory of New York and Brooklyn. A letter from the principal to plaintiff, enclosing the bond, stated that the latter was to sell no goods that would conflict with the principal's trade in New York and Brooklyn or Jersey City, or in competition with him, and the principal agreed to handle no other goods but plaintiff's. Held: "There is nothing in the agreement which restricted the sales made by Farquhar to any locality whatever. In the absence of a positive restriction thereon the surety is not in any position to interpose the objection now, that his obligation was not to answer generally for the failure of Farquhar to pay for the several shipments at ninety days."

Applying the rules of law laid down in the above case to the facts presented in your inquiry I am led to the conclusion that the surety on the bond furnished by Mr. Levin to the state of Ohio is liable for any default of the principal occurring at any place of business he may see fit to establish within this state. The bond in this case, as in the case above cited, does not limit the business to any particular place. Therefore the surety on this bond is liable generally for any default of the principal.

The case of Helt v. Whittier, 31 O. S. 475, although not exactly in point on the proposition here submitted, lays down a rule which I think can well be applied to this case. The court therein held:

> "Suit may be maintained against a surety, when his liability is shown to be within the terms of his agreement; and the contract must be construed in connection with the statutes, if any, relating to the same matter."

The statutes applicable to the subject matter here, as above pointed out, give the principal the right, upon furnishing a bond, to engage in said business at as many places as he may see fit. Therefore, construing the contract of suretyship in the present case in connection with the above statutes, according to the rule laid down in the case just quoted we must come to the conclusion that the contract was made to cover any default of the principal occurring while engaged in such business within this state regardless of the place where the default occurs.

Therefore, answering your question specifically, I advise you that there is no authority in law by which you may require Mr. Levin to furnish an additional bond of five thousand dollars to establish a branch office in another city and that the bond given at the time he was doing business in the city of Cleveland can be enforced against him and his sureties for any default occurring in the transaction of his business in another county.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

822.

APPROVAL—SALE OF STATE LANDS—IN CLEVELAND TO C. H. GALE.

COLUMBUS, OHIO, November 30, 1917.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus Ohio.*

DEAR SIR:—I have your communication of November 24, 1917, in which you enclose a record of proceedings leading up to the sale of certain state lands located in the city of Cleveland, Ohio, to C. H. Gale, for the sum of $4,320.00.

The proceedings relative to the sale and the sale of said lands to C. H. Gale are made under and by virtue of a special act of the general assembly found in 107 O. L. 620. This act gives the superintendent of public works the authority to sell the lands set out in the record of proceedings, to C. H. Gale, at private sale, at the appraised value thereof, and in fixing the appraised value the fact that it is now encumbered by a lease to C. H. Gale is not to be taken into consideration.

I have carefully examined said record of proceedings which lead up to the sale of this property and find the same correct in form and in conformity to the provisions of said act. I note that you have appraised the same at $4,320.00, which sum is satisfactory to me. I have therefore endorsed my approval upon the said proceedings and am forwarding the same to the Governor of Ohio for his consideration.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

823.

CONSTABLE, ETC.—POLICE CHIEF, ETC.—FEES—STATE CASES BEFORE MAYOR, ETC.

A constable, chief of police, marshal or other court officer is entitled to the same fees for services in pursuing or arresting a defendant, and in subpoenaing the witnesses in those state cases enumerated in section 13423 brought before the justice of the peace, police judge or mayor, as the sheriff receives in criminal cases in the court of common pleas.

COLUMBUS, OHIO, December 3, 1917.

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

GENTLEMEN:—I have your letter of November 14, 1917, as follows:

"On September 19, 1917, this department issued circular No. 347, calling attention to the decision of Middleton, Walters and Sayre, judges of the fourth district, sitting by designation, in the place of Grant, Carpenter and Leighley, judges of the eighth district, in the case of Edmund B. Haserodt, Clerk of Court of Common Pleas, etc., et al., Plaintiff in Error, v. The State of Ohio, ex rel., E. R. Wilson, City Solicitor, etc., Defendants in Error, in which the court held that because of the uncertainty and indefiniteness of the sections of the General Code, purporting to permit fees to be taxed for chiefs of police in state criminal cases, that no fees could be taxed in police courts. Because of the same defect in sections 4387 and 4534, General Code, the bureau held that there could be no fees legally taxed for marshals or chiefs of police in mayors' courts in state criminal cases. The bureau is of the opinion that the court's decision and the bureau's attitude is correct as to ordinary state criminal cases, but we wish to call your attention to the provisions of section 13436, General Code, which reads as follows:

'In pursuing or arresting a defendant, and in subpoenaing the witnesses in such prosecutions, the constable, chief of police, marshal, or other court officer shall have like jurisdiction and power as the sheriff in criminal cases in the common pleas court, and he shall receive like fees therefor.'

If the words 'such prosecutions' as used in this section have reference to any of the offenses enumerated in section 13423, General Code, we are of the opinion that marshals and chiefs of police can have legally taxed for them sheriff's fees for the two classes of service mentioned in section 13436, General Code, viz.: 'For pursuing or arresting a defendant and in subpoenaing the witnesses.'

We respectfully address this letter to you for the purpose of calling your attention to certain kinds of state criminal cases in which we believe that chiefs of police and marshals have their fees definitely fixed for the particular services mentioned, and we would like to have your opinion as to the correctness of our view in this matter.

We refer you to opinion of Attorney-General Hogan to be found in the annual reports of attorney-general for 1912, Vol. 1, page 258."

Section 13423, as amended in 103 O. L., 539, reads:

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

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

2. The prevention of cruelty to animals and children.

3. The abandonment, nonsupport or ill treatment of a child by its parent.

4. The abandonment or ill treatment of a child under sixteen years of age by its guardian.

5. The employment of a child under fourteen years of age in public exhibitions or vocations injurious to health, life or morals, or which cause or permit it to suffer unnecessary physical or mental pain.

6. The regulation, restriction or prohibition of the employment of minors.

7. The torturing, unlawfully punishing, ill treating, or depriving anyone of necessary food, clothing or shelter.

8. The selling, giving away or furnishing of intoxicating liquors as a beverage, or keeping a place where such liquor is sold, given away or furnished, in violation of any law prohibiting such acts within the limits of a township and without the limits of a municipal corporation.

9. The shipping, selling, using, permitting the use of, branding or having unlawful quantities of illuminating oil for or in a mine.

10. The sale, shipment or adulteration of commercial feed stuffs.

11. The use of dust creating machinery in workshops and factories.

12. The conducting of a pharmacy, or retail drug or chemical store, or the dispensing or selling of drugs, chemicals, poisons or pharmaceutical preparations therein.

13. The failure to place and keep in a sanitary condition a bakery, confectionery, creamery, dairy, dairy barn, milk depot, laboratory, hotel, restaurant, eating house, packing house, slaughter house, ice cream factory, or place where a food product is manufactured, packed, stored, deposited, collected, prepared, produced or sold for any purpose.

14. Offenses for violation of laws in relation to inspection of steam boilers, and of laws licensing steam engineers and boiler operators.

15. The prevention of short weighing and measuring and all violations of the weights and measures laws."

Section 13436 G. C. reads:

"In pursuing or arresting a defendant and in subpoenaing the witnesses in such prosecutions, the constable, chief of police, marshal, or other court officer shall have like jurisdiction and power as the sheriff in criminal cases in the common pleas court, and he shall receive like fees therefor."

The provisions now contained in section 13423 and 13432 to 13440 were originally found in section 3718-a of the Revised Statutes. On May 10, 1902, an act was passed entitled "An act to amend section 3718-a of the Revised Statutes of Ohio, 95 O. L. page 517, which read in part:

"*Section* 1. That section 3718-a of the Revised Statutes of Ohio be amended so as to read as follows:

"*Section* 3718-a. Any justice of the peace, police judge, or mayor of any city or village, shall each have jurisdiction within his county, in all cases of violation of the laws to prevent the adulteration of food and drink, the adulteration or deception in the sale of dairy products, or any other foods, and drugs and medicines, and any violation of the law for the prevention

of cruelty to animals or children, or under section 3140-2, 4364-24, 4364-25, 6984, 6984a of the Revised Statutes of Ohio. In any such prosecution where imprisonment may be a part of the punishment, if a trial by jury be not waived, the said justice of the peace shall, not less than three nor more than five days before the time fixed for trial, certify to the clerk of the court of common pleas of his county that such prosecution is pending before him. Thereupon said clerk shall proceed to draw, in the presence of representatives of both parties, from the jury wheel or box containing the names of persons selected to serve as petit jurors in the court of common pleas in said county, twenty ballots or names, whfch shall be drawn and counted in the same manner as for jurors in said court of common pleas. * * *

In all cases prosecuted under the provisions of this act, no costs shall be required to be advanced or be secured by any person or persons authorized under the law to prosecute such cases; and if the defendant be acquitted or discharged from custody, by nolle or otherwise, or if he be convicted and committed in default of paying fine and costs, all costs of such case shall be certified by said justice of the peace under oath to the county auditor, who, after correcting any errors in the same, shall issue a warrant on the county treasury, in favor of the person or persons to whom such costs and fees shall be paid. * * *

In pursuing or arresting any defendant and in subpoenaing the witnesses, the jurisdiction and powers of the constable or other court officer acting in such capacity, in all such cases, shall be the same as that of the sheriff of the county in criminal cases in the common pleas court and he shall receive the same fees therefor as are allowed said sheriff. Jurors in all such cases and witnesses subpoenaed in all such cases shall be entitled to like mileage and fees as are allowed in criminal cases in the court of common pleas, and in all other respects, in so far as the same may be applicable, the procedure provided for in criminal cases in the common pleas court not otherwise inconsistent herewith, shall be followed. * * *"

The codification commission carried into section 13423 G. C. the various offenses which were enumerated in the first paragraph of section 3718a Revised Statutes, and into section 13436 G. C. that part of section 3718a R. S. relating to jurisdiction, powers and fees of constables and chiefs of police, marshals or other court officers, in such prosecutions.

It is clear from a reading of section 3718a that the provision now contained in section 13436 G. C. clearly referred, in the Revised Statutes, to the cases enumerated in the first paragraph of section 3718a R. S., which are now found in section 13423 G. C. While section 3718a R. S. has been subdivided into several sections of the General Code, some of which have been placed in separate chapters, yet there is nothing to show any intent to affect the relation of the provisions of the various sections. I am convinced, therefore, that the provisions of section 13436 G. C. apply to all the cases enumerated in section 13423 of the General Code. This conclusion is the same as that reached by former attorney-general in an opinion rendered to your bureau and found in Annual Report of the Attorney-General for 1912, Vol. 1, page 258, to which you call my attention. Mr Hogan held:

"From the arrangement of the statutes before their codification, the intent is clear that the words 'such prosecution,' as they appear in section 13436 General Code, making fees of constables, chiefs of police and marshals similar to those of sheriff's fees in criminal cases * * * refer to all cases coming under the jurisdiction of justice of the peace, police judges and mayors, as enumerated in section 13423 General Code."

In the opinion of the court of appeals, to which you refer (Haserodt v. State, decided in the court of appeals on May 8 1917, Ohio Law Bulletin Aug. 20, 1917, page 266) the court held that the chief of police was not entitled to any fees for services rendered in state cases in the police court because the provisions of section 4581 G. C, concerning such fees, were too indefinite. This section provided:

> "Other fees in the police court shall be the same in state cases as are allowed in the probate court, or before justices of the peace, in like cases, and in cases for violation of ordinances such fees as the council, by ordinance prescribes, not exceeding the fees for like services in state cases."

The court was of the opinion that in effect this section attempted to provide that the fees of a chief of police should be the same as those of a sheriff or constable in the probate court or before justices of the peace. This provision the court thought too indefinite and therefore held that no fees could be collected by the chief of police.

It will be noted that section 13436 General Code, above quoted, provides:

> "The constable, chief of police, marshal or other court officer shall have like jurisdiction and power as the sheriff in criminal cases in the common pleas court, and he shall receive like fees therefor."

It will be seen at once that this provision of the statute, allowing the constable, chief of police, marshal and other court officers, fees in the state cases enumerated in section 13423, when tried before the justice of the peace, police judge and mayors of cities and villages, is not open to the objection found by the court in the case of Haserodt v. State, supra, since the provision of section 13436 is definite and certain in that the fees there allowed are to be the same as received by the sheriff in criminal cases in the common pleas court. The court in the Haserodt case did not consider this statute.

From a consideration of the above sections I am of the opinion that the constable, chief of police, marshal or other court officer is entitled to the same fees as the sheriff in criminal cases in the common pleas court for services rendered before a justice of the peace, police judge or mayor of a city or village, in pursuing or arresting a defendant and in subpoenaing the witnesses in all the fifteen classes of state cases enumerated.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

824.

MUNICIPAL BONDS—WHEN ALLOWANCE MADE TO BOND FIRM FOR ATTORNEY FEES, ETC., WITH INTENT TO CIRCUMVENT THE LAW AND EFFECT A SALE OF SUCH BONDS AT LESS THAN PAR AND ACCRUED INTEREST—RECOVERY MAY BE HAD AGAINST SAID BOND FIRM.

Where a bond firm has offered at least par and accrued interest to date of delivery for a particular municipal bond issue and is the highest bidder, and its offer has been accepted by said municipality and said firm has paid for said bonds in accordance with its bid, but it was understood by said bond firm and by the officers of said municipality who had charge of said sale, that, indirectly, said bond firm was to receive a rebate through the payment of a certain amount to said firm for attorney fees and for other fees for effecting the sale of said bonds to itself and an exorbitant price for furnishing the printed bonds, and that the allowances for said attorney fees and said other fees for making the sale and of said exorbitant price for printing the bonds were only a subterfuge and were made by said municipal officers and accepted by said bond firm with the plain purpose and intent of circumventing the law and effecting a sale of the bonds for less than par and accrued interest.

HELD: *That findings for recovery should be made against said bond firm for said allowances that have been made and received by it for said attorney fees and for said fees in making sale of said bonds to itself, and for the difference between the exorbitant price paid for the printing of said bonds and the reasonable market price of having them printed and furnished, since said amounts have been expended out of the public funds without authorization of law.*

COLUMBUS, OHIO, December 3. 1917.

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

GENTLEMEN:—I have your communication submitting for my opinion the following matter:

> "In view of the laws providing that municipal bonds cannot be sold for less than par and accrued interest, together with section 2295-3 G. C., providing for the transcript which must be furnished bidders, and opinions of the attorney-general that the municipality may not pay any other fees for preparing such transcripts nor for passing upon the legality of such bonds, we have found in our work that a certain bond firm of this state has been purchasing bonds from small municipalities and has induced the officers of such municipalities to allow them a discount upon the par value of such bonds and to pay them attorneys' fees and other fees for passing upon the legality of the bonds, and has charged exorbitant prices for furnishing printed bonds, which could be purchased at a very moderate price, with the plain purpose and intent of circumventing the law and thus obtaining the bonds for less than par and accrued interest. We have made a number of findings for recovery against this firm in cases of this nature, but it seems to have no effect upon their procedure.
>
> *Question:* Can any action be taken by this department against such firm for such procedure?"

In addition to the facts contained in your request your Mr. Blau has advised me verbally that the bond firm in question in bidding for said particular bond issues has offered at least par with accrued interest to date of delivery, as the law provides, and that said offers have been accepted by the various municipal councils issuing said

bonds and said firm has paid for said bonds in accordance with its bid; but that it was understood by said bond firm and by the officers of said municipalities who were selling the bonds, that, indirectly, said bond firm was to receive a rebate through the payment of certain amounts to said firm by said municipalities for the fees of attorneys who were to pass upon the legality of the bond proceedings and of certain amounts for other fees for effecting the sale for said municipalities, which said allowances for attorney fees and for other fees were only a subterfuge, but were made by said municipal officers and accepted by said bond firm with the plain purpose and intent of circumventing the law and thus, in effect, amounting to a sale of the bonds for less than par and accrued interest.

Under date of May 2, 1912, one of my predecessors, Hon. Timothy S. Hogan, in an opinion found in Volume I of the Annual Report of the Attorney-General for the year 1912, at page 249, considered the following question contained in one of your requests:

> "1. In the issuance and sale of bonds by a city, is it a legal expense of the municipality to furnish the purchaser a transcript of the proceedings leading up to the sale of the bonds?"

At page 250 in said opinion it is said:

> "The statutes concerning the issue and sale of bonds for municipal street improvements, and the duties of the various city officers in relation thereto, do not diclose that the bond buyer is entitled, as a matter of right, to receive, without payment therefor, a copy of such transcript, or that any officer or department of the city government is in duty bound to furnish the same and receive compensation therefor from the city treasury in addition to his regular salary. The successful bidder at a bond sale takes the bonds at his own risk, and if he deems it necessary to have a transcript of the proceedings, in order to determine their validity, the expense thereof must be borne by himself.
>
> I conclude, therefore, in answer to your first question, that it is not a legal expense, chargeable against a city, to furnish a transcript to the purchaser of municipal bonds."

It was evidently considered by the legislature that the conclusion reached in this opinion that a municipality was not authorized at its own expense to furnish a transcript of the proceedings of a bond issue to the purchaser of said bonds, was correct, since in the following year, in 103 Ohio Laws, page 179, it provided, in what is now section 2295-3 General Code, that a certified transcript of the proceedings of a bond issue should be furnished by the proper officers of the municipality to the successful bidder. Said section reads as follows:

> "Section 2295-3. That it shall be the duty of the clerk, or other officer having charge of the minutes of the council of any municipal corporation, board of county commissioners, board of education, township trustees, or other district or political subdivisions of this state, that now has or may hereafter have, the power to issue bonds, to furnish to the successful bidder for said bonds, a true transcript certified by him of all ordinances, resolutions, notices, and other proceedings had with reference to the issuance of said bonds, including a statement of the character of the meetings at which said proceedings were had, the number of members present, and such other information from the records as may be necessary to determine the regularity and validity of the issuance of said bonds; that it shall be the duty of the

auditor or other officer, having charge of the accounts of said corporation or political subdivision, to attach thereto a true and correct statement certified by him of the indebtedness, and, of the amount of the tax duplicate thereof, and such other information as will show whether or not said bond issue is within any debt or tax limitation imposed by law."

Under date of March 9, 1914, my said predecessor, Mr. Hogan, in an opinion addressed to Hon. L. C. Brodbeck, city solicitor of St. Marys, Ohio, (found in Annual Report of the Attorney-General for the year 1914, Volume I, page 338) considered the question of the authority of a municipality to reimburse a successful bond bidder for fees paid out by it to attorneys for services rendered in passing upon the validity of the particular bond issue. In concluding this opinion Mr. Hogan said:

"Nowhere in the statute is the municipality given any authority to reimburse the bidders for fees paid to attorneys by them in passing upon the validity of the bonds, and this department has frequently held that this may not be done. Accordingly, it is my opinion that the city of St. Marys is without authority to pay the sum of two hundred and sixty dollars to Spitzer-Rorick & Company for the services rendered by the attorneys to whom they submitted transcript of the proceedings in connection with the issue and sale of the bonds."

It is noted ther, that this department has held heretofore that there was no authority on the part of a municipality, prior to the enactment of the enabling act by the legislature, to expend public funds for the purpose of furnishing to the successful bidder for a municipal bond issue, a transcript of the proceedings in connection therewith, and that there is no authority to appropriate public funds and pay them out to a successful bidder to reimburse him for expenses that he has been put to in employing attorneys to pass upon the validity of proceedings in regard to said bond issue.

These conclusions were reached on statements of facts in which there was no showing of bad faith or intent to violate the provisions of law, which require that public bonds shall not be sold for less than par with accrued interest. However, in the case that you present you state there was a plain intent to circumvent the law and that the allowance of said sums for attorney fees was only a subterfuge and was not in reality for that particular service. As to the amounts that were paid to said bond firm for effecting a sale to itself, it is clear on the face that the payment for this particular purpose was a plain intent to violate the provisions of the statute and would amount to fraud *per se.*

I am aware that the supreme court of Tennessee, in the case of *Miller et al.* v. *Park City et al.*, 150 S. W., 90, has held in the first branch of the syllabus as follows:

"1. The prohibition, under Priv. Acts, 1911, c. 127, against sale of funding and street improvement bonds of Park City at less than par, was not violated by a sale of $25,000 bonds at their par value and accrued interest to the date of delivery, though an allowance of $1,000 for attorney's fees and other expenses incident to the sale, such as printing, lithographing the bonds, postage, etc., was made to the purchaser; it not appearing that the allowance was a subterfuge to cover an unlawful sale."

The court in reaching its conclusion in the above mentioned case considered that the particular municipality had implied power to use all reasonable means and incur all proper and necessary expenses to effectuate a sale. However, I do not believe that the view of the law as taken by the Tennessee supreme court, that a municipal-

ity has implied power to expend public funds for reimbursing the bond purchaser for expenses incurred by it in paying its own attorneys for services rendered in passing on the bond issue proceeding, would be good law in Ohio, since it would amount to the expenditure of public funds for a private purpose.

However, in regard to a case where there is bad faith, as in the one referred to by you, the court in the above case said: (Page 92.)

> "It is needless to say that if charges of this kind (attorney's fees, etc.) are sought to be made the cover for an actual sale at less than par, or if they are grossly unreasonable and attended by marks of bad faith, the court would not hesitate to declare such transaction fraudulent and void."

You also state in your communication that the amounts paid for the printing of said bonds by said municipalities to said bond firm were for grossly exorbitant prices and that same were allowed by the officials in bad faith and with the intent thereby to sell the bonds in reality for less than par. Such transactions, then, as far as printing of said bonds is concerned are tainted with fraud and show bad faith on the part of both the officials and the bond firm.

Section 286, General Code, as amended 103 Ohio Laws, 506, authorizes you to make an examination of the affairs of a municipality, and provides that if your report shows that any public money has been illegally expended the city solicitor of a city shall institute, and the mayor of a village shall cause to be instituted, a civil action in the name of the political subdivision or taxing district to which said public money is due for the recovery of same, and shall prosecute, or cause to be prosecuted, the same to final determination. The mayor of a village is authorized in this section to employ counsel, and the village is obligated to pay same, even if the council refuses to appropriate money or levy funds therefor.

I therefore advise you that it is my opinion, on the facts as presented by you, that findings should be made against said bond firm for said public funds that have been illegally expended and received by said bond firm for said attorney's fees and for said fees in making sale of said bonds to itself, and for the difference between the exorbitant price paid for the printing of said bonds and the reasonable market price of having them printed and furnished

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

825.

COUNTY COMMISSIONERS—MAY NOT EMPLOY INSPECTORS TO ASSIST COUNTY SURVEYOR.

Under section 2411 *G. C. the county commissioners can not employ inspectors to assist the county surveyor in the work of his office, the regular office force of the county surveyor being provided for by sections* 2787 *and* 2788 *G. C.* (107 *O. L.*, 70).

COLUMBUS, OHIO, December 3, 1917.

HON. JOHN L. CABLE, *Prosecuting Attorney, Lima, Ohio.*

DEAR SIR:—I have your communication of October 27, 1917, asking me to place a construction upon section 2411 G. C., relative to the matter therein set out, as follows:

"The local surveyor, on account of the amount of work to be performed, namely, an extraordinary amount of road construction, has need of additional inspectors than those appointed by him by virtue of section 2788, General Code.

Kindly advise if in your opinion, section 2411 G. C. permits the county commissioners, upon the written request of the county surveyor, when, on acount of the amount of work to be performed, such board deems it necessary they may employ inspectors without first employing a competent engineer?

In event the court refuses an additional allowance to a surveyor, under section 2787, would the commissioners then have a right to employ inspectors without first employing an engineer?"

It will be necessary for me to note the provisions of three sections of the General Code. One of course is section 2411 G. C., which reads as follows:

"Section 2411. When the services of an engineer are required with respect to roads, turnpikes, ditches or bridges, or with respect to any other matter, and when, on account of the amount of work to be performed, the board deems it necessary, upon the written request of the county surveyor, the board may employ a competent engineer and as many assistant engineers, rodmen and inspectors as may be needed, and shall furnish suitable offices, necessary books, stationery, instruments and implements for the proper performance of the duties imposed on them by such board."

Another is section 2787 G. C. (107 O. L. 70), which reads in part as follows:

"Section 2787. On or before the first Monday of June of each year, the county surveyor shall file with the commissioners of such county a statement of the number of all necessary assistants, deputies, draftsmen, inspectors, clerks or employes in his office for the year beginning on the first Monday of September next succeeding and their aggregate compensation. The county commissioners shall examine such statement and, after making such alterations therein as are just and reasonable, fix an aggregate compensation to be expended therefor for such year. Provided, however, that if at any time any county surveyor requires an additional allowance in order to carry on the business of his office, such county surveyor may make application to a judge of the court of common pleas of the county wherein such county surveyor was elected; and thereupon such judge shall hear said application, and if upon hearing the same said judge shall find that such necessity exists he may allow such a sum of money as he deems necessary to pay the salaries of such assistants, deputies, draughtsmen, inspectors, clerks or other employes as may be required. * * *"

And section 2788 G. C. (107 O. L. 70) reads in part as follows:

"Section 2788. The county surveyor shall appoint such assisstants, deputies, draughtsmen, inspectors, clerks or employes as he deems necessary for the proper performance of the duties of his office, and fix their compensation, but compensation shall not exceed in the aggregate the amount fixed therefor by the county commissioners or allowed by a judge of the court of common pleas of the county. After being so fixed such compensation shall be paid to such persons in monthly installments from the general fund of the county upon the warrant of the county auditor. * * *"

Section 2787 G. C. provides that on or before the first Monday of June of each year the county surveyor must file with the commissioners of the county a statement setting forth the number of *all* necessary assistants, deputies, draughtsmen, *inspectors*, clerks or employes in his office for the year beginning on the first Monday of September next succeeding and their aggregate compensation. Then the county commissioners, upon this statement being filed, shall fix an aggregate sum, within which sum the county surveyor must keep, in the appointments he makes for the year beginning on the first Monday of September.

Section 2788 G. C., above quoted, provides that the county surveyor shall appoint such assistants, deputies, draughtsmen, inspectors, clerks or employes as he deems necessary for the proper performance of the duties of his office, but the compensation paid to these employes must not exceed in the aggregate the amount fixed by the county commissioners.

The third provision to be noted is that if the county surveyor at any time requires an additional allowance in order to carry on the business of his office, then he may make application to a judge of the court of common pleas of his county for an additional allowance, and if the judge finds the necessity to exist, he may allow such additional sum as he deems necessary.

These two sections were evidently meant to take care of all the regular office help of the county surveyor. His application to the county commissioners so states. The amount fixed by the county commissioners is fixed with this end in view, and the only exception that is made is the one that the court may grant an additional allowance for assistants to the county surveyor.

Section 2411 G. C. merely holds that when, on account of the amount of work to be performed, the board of county commissioners deems it necessary, upon the written request of the county surveyor, it may employ a competent engineer and as many assistant engineers, rodmen and inspectors as may be needed to perform the duties imposed upon them by such board of county commissioners.

Under section 2411 G. C. the assistants employed are not really assistants to the county surveyor at all, but they are assistants to the engineer employed under section 2411. They are not employes of the county surveyor in any sense, but employes of the county commissioners.

In an opinion rendered August 7, 1917 (No. 500) to Hon. Robert P. Duncan prosecuting attorney, Columbus, Ohio, I held as follows:

> "The engineer is employed for some specific matter or duty in reference to roads, turnpikes, ditches or bridges. He is employed for some particular work on account of the inability of the county surveyor to perform the same due to the amount of work which he already has on hand to perform. Further, the county surveyor must make a written request for assistants. The engineer so selected upon the request of the county surveyor has certain duties imposed upon him, as is evidenced by the latter part of the section, which provides that he shall be furnished with suitable offices, necessary books, stationery, instruments and implements for the proper performance of the *duties imposed on him by such board of county commissioners.*
>
> In other words, he is the employe of the county commissioners at the request of the county surveyor to perform some certain specific duties. He is a sort of assistant to the county surveyor, selected not by the county surveyor but by the county commissioners."

Further along in said opinion I held as follows:

> "In my opinion section 2411 General Code was enacted for the purpose merely of taking care of an emergency. For all the ordinary help which the

county surveyor needs he himself appoints assistants and deputies, but when an emergency arises for which his ordinary office help is not sufficient, the county commissioners may, upon the request of the county surveyor, appoint assistants to take care of the emergency. Hence the engineer and the assistants provided for in section 2411 General Code are practically assistants to the county surveyor selected not by himself under section 2788 General Code, but by the county commissioners."

That is, in my opinion section 2411 G. C. was not intended to cover the general office help of the county surveyor, but merely to take care of an emergency which might exist at any particular time in reference to the work which the county surveyor had to do.

Hence answering your question specifically, it is my opinion that section 2411 would not permit the county commissioners to employ additional inspectors to assist the county surveyor in the work he has to do, but that inspectors provided for in section 2411 G. C. are to be assistants in the performance of some particular work which the county surveyor found it impossible for him to do. My view is that this would hold even in a case where the court would refuse to allow additional compensation under section 2787 G. C.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

826.

APPROVAL—BOND ISSUE—BOARD OF EDUCATION OF LIBERTY UNION VILLAGE SCHOOL DISTRICT.

COLUMBUS, OHIO, December 3, 1917.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"IN RE:—Bond issue of Liberty union village school district, in the sum of $60,000.00, for the purpose of purchasing a site for erecting, constructing and equipping school building for elementary grades and high school in said school district. "

I have carefully examined the transcript of the proceedings of the board of education of Liberty union village school district relating to the above bond issue, and find said proceedings to be in conformity to the provisions of the General Code of Ohio relative to bond issues of this kind.

I am, therefore, of the opinion that properly prepared bonds covering said issue according to the bond form submitted will, when signed by the proper officers and delivered, constitute valid and binding obligations of said school district.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

827.

TOWNSHIP TAX—ROAD IMPROVEMENT—WHERE SAME SHOULD BE PAID * * * TOWNSHIP TREASURER—FEES * * * COMPENSATION—LIMITATION.

Where a township tax has been levied by the county commissioners to cover the township's share of the cost of the construction or improvement of a county road, such money should be collected and paid into the county treasury to meet the bonded indebtedness assumed by the county. No fees can be paid the township treasurer for paying this money over to the county treasurer, even though such money has, in some manner, gotten into the township treasury and been paid by the township treasurer over to the county treasurer upon the order of the township trustees.

Where the township trustees levied a tax under the Cass highway act to pay the township's proportion of the cost of the improvement of an inter-county highway, such money was rightfully paid into the township treasury and then paid out of the township treasury into the county treasury upon the order of the township trustees, and in such case the township treasurer was entitled to the two per cent. allowed him in section 3318 General Code.

The limitation on the township treasurer's compensation, found in section 3318, as amended in 107 O. L. 651, apply to the payment of such moneys raised by a tax levy under the Cass highway act only since the amendment of the section has become effective.

COLUMBUS, OHIO, December 3, 1917.

HON. BENTON G. HAY, *Prosecuting Attorney, Wooster, Ohio.*

DEAR SIR:—I have your letter of October 12, 1917, as follows:

"Section 3318 G. C. provides in part that 'the treasurer shall be allowed and may retain as his fees for receiving, safe keeping and paying out moneys belonging to the township treasury, two per cent. of all moneys paid out by him upon the order of the township trustees.'

"Is the township treasurer entitled to any fees for moneys which are first collected by the county treasurer from taxes derived by a levy made on all the property of the township to provide for the township's share of a road improvement, and which money is turned over to the township treasurer and then turned back to the county treasurer and used by the county to pay the bonded or other indebtedness incurred or assumed by the county for such improvement?

Is such moneys 'moneys paid out by him upon the order of the township trustees' as mentioned in section 3318, even though the trustees make an order to the township treasurer to pay such money over to the county?

The bureau of inspection and supervision of public offices, in a letter of date of March 16, 1917, holds 'it is the opinion of this office that on moneys of this nature which are simply turned over to the county treasurer, the township treasurer is not entitled to any fees whatever.' "

Section 3318 G. C. reads:

"The treasurer shall be allowed and may retain as his fees for receiving, safe keeping and paying out moneys belonging to the township treasury, two per cent. of all moneys paid out by him upon the order of the township trustees, but in no one year shall he be entitled to receive from the township treasury more than one hundred and ffity dollars, except that in a township wherein a city is located and such city ia a part of such township, a township

treasurer shall be entitled to receive from the township treasury not more than three hundred dollars in one year."

I assume that the case you have in mind arose prior to the enactment of the White-Mulcahy law (107 O. L. 69) and while the Cass highway act was in effect. I shall therefore in this opinion consider the statutes as they read prior to the enactment in 107 Ohio laws.

Section 6906 as enacted in 106 O. L. p. 574, read:

"The board of commissioners of any county shall have power, as hereinafter provided, to construct a public road by laying out and building a new public road, or by improving, reconstructing or repairing any existing public road or part thereof by grading, paving, draining, dragging, graveling, macadamizing, resurfacing or applying dust preventives, or by otherwise improving the same. The county commissioners shall have power to alter, vacate or widen any part of such road in connection with the proceedings for such improvement."

Section 6907 G. C. provided that a petition might be presented to the board of commissioners in any county, asking for the improvement.

Section 6927 G. C. reads:

"For the purpose of providing by taxation a fund for the payment of the proportion of the cost and expenses of such improvement to be paid by the township or townships interested, in which such road may be in whole or part situated, the county commissioners are hereby authorized to levy a tax not exceeding three mills in any one year upon all the taxable property of such township or townships. Such levy shall be in addition to all other levies authorized by law for road purposes, but subject to the limitation on the combined maximum rate for all taxes now in force."

It is evident from these sections that where a petition was presented to the county commissioners and the road constructed by them the township's share of the expense was met by the levy upon the taxable property of the township by the county commissioners. In such case the township treasurer has no duty at all in connection with the collection of such taxes. Taxes are levied by the county commissioners to meet a county indebtedness and when collected are to go into the county treasury and not the township treasury.

The Cass highway act, found in 105-106 O. L. 575, provided in section 215, page 641, that:

"For the purpose of providing a fund for the payment of the proportion of the cost and expense to be paid by the township or townships for the construction, improvement, maintenance or repair of highways under the provisions of this chapter, the township trustees are authorized to levy a tax, not exceeding two mills, upon all taxable property of the township in which such road improvement or some part thereof is situated; such levy shall be in addition to all other levies authorized by law for township purposes and shall be outside of the limitation of two mills for general township purposes, but subject, however, to limitation upon the combined maximum rate for all taxes now in force."

Section 216 of the Cass law provided in part:

> "The county commissioners, in anticipation of the collection of such taxes or assessments * * * are hereby authorized to sell the bonds of any such county in which such construction, improvement or repair is to be made to an amount necessary to pay the respective shares of the county, township or townships, and the lands assessed for such improvement. * * *"

Section 209 of this same act provides:

> "The township trustees shall certify the assessments so made to the county auditor, who shall place them upon the tax duplicate against the several properties benefited as shown by said assessment list. The county treasurer shall collect such assessments in the same manner as other taxes are collected. *The township trustees shall pay to the county the portion of the cost and expense apportioned to the township, in the same manner as other claims against the township are paid.*"

It will be noted that section 209 of the Cass Highway act, last quoted, provides that the "township trustees shall pay to the county the portion of the cost and expense apportioned to the township, in the same manner as other claims against the township are paid." From this provision it is clear that the money raised by taxation by the township trustees for the purpose of providing a fund for the payment of the township's proportion of the cost and expense of the improvement is paid into the township treasury and then paid out of the township treasury to the county upon order of the township trustees, the same as other township moneys, and it is therefore my opinion that the township treasurer was entitled, under the former law, to the two per cent of this money paid out by him on the order of the trustees.

Section 3318 of the General Code was amended in 107 O. L., page 652, to read as hereinbefore quoted.

On August 27, 1917, this department held in opinion No. 565 that:

> "When the amendment relating to the compensation of the township treasurer went into effect, it immediately applied to the compensation of the township treasurers then in office."

Attention might therefore be called in passing to the fact that while the limitation placed upon the compensation of the township treasurer by this section, as amended, would not apply to the case to which you refer, yet it does apply to all payments made by the township treasurer to the county of money raised by taxation for the purpose in question, since the amendment referred to has become effective.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

828.

ADOPTION—FOSTER PARENTS ESTOPPED FROM ASSERTING THAT PROCEEDINGS HAD IN NEW YORK WERE NOT VALID BECAUSE THEY WERE NON-RESIDENTS.

1. *The record of an adoption proceeding in New York is conclusive as to the status of the child and foster parents in this state.*

2. *Such adoption can not be invalidated except by clear proof that the proceedings were irregular in some essential particular.*

3. *Where the foster parents appeared personally before tha surrogate in Erie county, New York, made application to adopt a child, and alleged that they were residents of said county and state, they are estopped from asserting a claim lhal the adoption was invalid because they were not residents of such county and state.*

COLUMBUS, OHIO, December 3, 1917.

HON. HECTOR S. YOUNG, *Prosecuting Attorney, Marion, Ohio.*

DEAR SIR:—On August 13, 1917, you made the following request for my opinion:

"On September 10, 1907, a child was born to an inmate of the Marion county infirmary. Its mother's name was E. R. and its reputed father was V. D. On April 6, 1909, the child was committed to the Marion county children's home by the infirmary directors under the name of J. H. R. A few days after the child was committed it was indentured by the home officials to J. E. C., a professional man and a resident of Marion, Ohio. In October of 1912, Mr. C. took a vacation and went with his wife on a trip through some of the eastern states, taking the child with them. While on the trip they stopped a few days in Buffalo and while there they went before the surrogate of Erie county, N. Y., to adopt the child. Immediately after the proceedings before the surrogate they returned to Marion, Ohio, where they have resided ever since. The proceedings in Buffalo were bona fide both on the part of J. E. C. and the home officials, the proceedings being had in Buffalo to escape publicity. Circumstances are now such that Mr. C. wishes to return the child to the home. The home officials want to know the status of the child.

I wish to submit to your office for an opinion thereon the question as to the status of the child, that is whether or not the child was adopted.

My opinion to the board of trustees of the Marion county children's home, together with a copy of the proceedings before the surrogate of Erie county, New York, are enclosed herewith."

The copy of the record of the proceedings before the surrogate of Erie county, New York, submitted by you, is as follows:

"Whereas, an application is about to be made to Hon. Louis B. Hart, surrogate of Erie county, for an order allowing the adoption of D. H., a minor child who is under the age of twelve years, by J. E. C. and D. M. C., his wife, pursuant to the statute in such case made and provided.

Now, therefore, we, the children's home of Marion county, Ohio, the corporation having the care and custody of said child as appears from the attached consent of said children's home, and J. E. C., the person adopting said child, and D. M. C., his wife, do hereby consent to such adoption, and we, the said J. E. C. and D. M. C. do hereby agree to adopt and treat the said

D. H. as our own child at all times in consideration of the consents hereto, the premises stated and the order of the judge or surrogate hereupon to be made, assuming and undertaking the duties and obligations which shall flow from this act of adoption upon the order being made allowing the same.

In witness whereof, we, the persons whose consent and agreements are necessary hereto, have hereunto set our hands and seals this 3rd day of October, in the year of our Lord one thousand nine hundred and twelve.

J. E. C. (L. S.)
D. M. C. (L. S.)

State of New York,
Erie County, ss.

Before me, the undersigned, this 3 day of Oct., A. D. 1912, personally appeared J. E. C. and D. M. C., his wife, and being by me examined and evidence having been taken by me, and the several persons being made known to me to be the same persons described in and who executed the foregoing consent and agreement, and each having acknowledged that he executed the same before me, I do hereby certify to the said fact, and that the said D. H., minor child, appears to be of the age stated in said instrument, and that the birthday of said minor as near as can be ascertained is September 10, 1908.

LOUIS B. HART,
Surrogate. (Seal.)'

"Whereas, application is about to be made to Hon. Louis B. Hart, surrogate of Erie county, state of New York, for an order allowing the adoption of D. H., a minor child, who is of the age of 4 years, by J. E. C. and D. M. C., his wife, now therefore, we the Waddell children's home of Marion county, Ohio, the institution having lawful custody of said child by virtue of its having been born out of wedlock in said institution and surrendered to said institution by its mother, do hereby consent to the adoption of said minor child by said J. E. C. and D. M. C., his wife, and do hereby by these presents surrender all rights to said child to said parties and consent that an order of adoption may be granted in any court having proper jurisdiction without notice to us.

Witness our hand and seal of said institution at Marion, Ohio, this first day of October, 1912.

M. WADDELL,
President of Board of Trustees, Marion County, Ohio. (L. S.)

Subsdribed before me this 1st day of October, A. D. 1912.

W. W. KLINEFETTER,
Clerk of Court.

State of Ohio,
County of Marion, ss.
City of Marion.

On the first day of October, in the year 1912, before me personally came M. Waddell, president board of trustees Marion county Ohio children's home, to me known, who, being by me duly sworn, did depose and say that he resides in city of Marion, Marion county, Ohio; that he is the president of the board of trustees of Marion county Ohio children's home, the corporation described in and which executed the above instrument; that the said corporation has no seal; that he signed his name thereto by order of the board of directors of said corporation.

W. W. KLINEFETTER,
Clerk of Court.'

(Seal.)

"There having appeared before me, this day D. H., a minor child under the age of twelve years, and J. E. C. and D. M. C., his wife, and the children's home of Marion county, Ohio, having the lawful custody of said child, by virtue of said child having been born out of wedlock and surrendered to said home by its mother, and they, the said J. E. C. and D. M. C. and the children's home of Marion county, Ohio, having signed the acknowledged instruments containing the consents and agreements required by statute in such case made and provided, and an application having been made to me for an order allowing the adoption of said minor child by said J. E. C. and D. M. C., his wife, and I having examined such persons and heard the proofs and taken evidence offered before me on such application, it appearing that the said foster parents reside in the county of Erie, and the further facts following appearing as reasons for allowing said adoption, viz:

That said child was a waif, I, therefore, after due deliberation had it appearing that the moral and temporal welfare of D. H., the said minor, will be promoted by his adoption by said J. E. C. and D. M. C., under the statute do, by virtue of the authority conferred upon me,

Order that the said adoption be allowed and do hereby confirm the adoption as aforesaid and do further order and direct that the said D. H. shall henceforth be regarded and treated as the child of the said J. E. C. and D. M. C., and shall henceforth be known as D. C.

Let this order and the accompanying consent and agreement endorsed by me, be recorded by the county clerk of Erie county.

LOUIS B. HART,
Surrogate. (Seal.)"

I understand that it is now claimed that this adoption is void for the following reasons:

(1) That the child was adopted under the name of D. H. and not J. H. R. This is immaterial if there is no question of identity, as, by the order of the surrogate, the child, from the date of said order, was to be known as D.C.

(2) That the consent given by the children's home for the adoption was not certified to in the manner required by the statutes of New York.

If the record given discloses all the acknowledgment, it is only defective because no certificate is attached as to the official character and genuineness of the signature of the officer taking the acknowledgment. It was taken before the clerk of courts of Marion county, an official authorized to take such acknowledgments by the laws of New York, and if accepted by the surrogate without the certificate which might have been required, that is the end of it, as there is no contention but that the acknowledgment was genuine.

It is also claimed that the consent to the adoption was not properly given. It seems that the laws of New York clearly contemplate the adoption of a child which is in the custody of an institution in another state.

Section 112 of the chapter of domestic relations in the New York Code, as quoted by you, provides:

"1. The foster parents or parent, the minor and all the persons whose consent is necessary under the last section, must appear before the county judge or the surrogate of the county where the foster parent or parents reside, and be examined by such judge or surrogate, except as provided by the next subdivision.

2. They must present to such judge or surrogate an instrument containing substantially the consents required by this chapter, an agreement on the part of the foster parent or parents to adopt and treat the minor as

his, her, or their own lawful child, and a statement of the age of the child, as nearly as the same can be ascertained, which statement shall be taken as prima facie true. The instrument must be signed by the foster parent or parents and by each person whose consent is necessary to the adoption and severally acknowledged by said persons before such judge or surrogate; but where a parent or person or institutuion having the legal custody of the minor resides in some other country, state or county, his or their written acknowledged consent, or the written acknowledged consent of the officers of such institution, certified as conveyances are required to be certified to entitle them to record in a county in this state, is equivalent to his or their appearance and execution of such instrument."

You will note that the consent in this case is signed by the president of the board of trustees, purports to be the consent of the home, and shows that the president signed it by order of the board of directors; and while the form of the consent and certificate may be subject to criticism, it is clear that it fully complies with the requirement of the New York law—that it be the "acknowledged consent of the officers of such institution." The question as to whether or not consent was given to an adoption is always material, and the requirement that it must be given is strictly enforced—but here is no rule to the effect that the *form* of the consent must be followed with the certainty that is required in an indictment. If the instrument fairly complies with the statute it is sufficient. Thus it has been held, under a statute requiring such consent to be signed by the "principal officer" of an institution, that the consent by a matron of such institution was a substantial compliance with the statute (Fisher v. Gardner, 183 Mich. 660).

(3) It is further contended that the proceeding in New York was void because the foster parents at the time of said proceedings before the surrogate were not residents of Erie county, New York, but were residents of Marion county, Ohio.

The judgment, or order made by the surrogate, and of record in that court, recites that the surrogate heard the proof and took the evidence upon the application made by said foster parents, and it appeared that *"the said foster parents reside in the county of Erie."* This finding is conclusive as to said foster parents who made the application and had it granted by the court on their representation that they were residents of Erie county, New York—they are forever estopped from disputing this finding. Nor can it be collaterally attacked—if any of the facts found by the court were not true, correction should have been made in that court. It may be that the minor is not barred from contesting the regularity of the proceeding, but so far as every one else is concerned the determination of all facts within its jurisdiction is conclusive. If the court had no jurisdiction its action would be void—but neither of the foster parents, nor the children's home of Marion county can deny such jurisdiction, nor the regularity of the proceedings.

Gray v. Field, 19 Bull. 121;
Barclay v. People, 132 Ill. App. 338.

Aside from the doctrine of estoppel, the foster parents, having appeared personally before the court, made the application, and signed all necessary papers, would be held to have invoked the jurisdiction of the court and to have taken an active part in the proceeding, and would be bound by the order. *Salmond et al.* v. *Price et al.*, 13 Ohio, 368, wherein it is held:

"Where a void decree is made by a Virginia court, for the sale of Ohio lands, one of the heirs who assents to the decree and the sale, and acts as commissioner to carry it into execution, passes his own title."

The proceeding in New York recites all jurisdictional facts, and, unless it discloses on the face of the record defects which render it void, is conclusive as to this adoption. No such defect appears, and, as the foster parents can not be heard to dispute any facts alleged by them and found by the court (even if they were not bound by invoking the jurisdiction, appearing personally, and taking in the proceeding) the adoption must be regarded as having been legally consummated; and therefore fully effective in this state.

Simpson v. Simpson, 9 C. C., n. s., 137.
Jassey v. Brown, 47 S. E., 350.

In addition to the statutory adoption, the foster parents entered into an agreement, or contract, of adoption, by signing the consent and agreement provided by the New York statute. It will be noted that they

> "do hereby agree to adopt and treat the said D. H. as our own child at all times in consideration of the consents hereto the premises stated and the order of the judge of surrogate hereupon to be made, assuming and undertaking the duties and obligations which shall flow from this act of adoption upon the order being made allowing the same."

Such contracts are generally held to be valid, but it is not necessary to discuss this phase of the question for the reason that, for the present, the adoption must be regarded as regular and effective.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

829.

CIVIL SERVICE—ERRONEOUS RESIDENCE QUALIFICATIONS—STATUS OF APPOINTEE UNDER SUCH ELIGIBLE LIST—STATUS OF PERSON REMOVED BY REASON THEREOF.

Where a state department has divided the state into districts for the purpose of its administration and erroneously assumes that residence in such district is a necessary qualification for holding positions therein, and where the civil service commission coincided in such erroneous opinion and furnishes eligible lists only from such districts for the purpose of filling positions therein, the incumbent of such position so filled from such insufficient eligible list gains no standing or status under the provisions of the civil service law, and under such circumstances, when by the judgment of the court an incumbent of such position is restored to the right to hold the same from which he had been unlawfully deprived by the head of the department, in contemplation of law he has remained in the service during the interval in which he was not actually employed, and the head of the department may select which of the other incumbents holding as above described may be displaced in order to accomplish such restoration.

COLUMBUS, OHIO, December 3, 1917.

Civil Service Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—On September 21, 1917, you made the following request for an opinion from this department:

"Your opinion and advice is respectfully requested on the following case which has come before the state civil service commission.

The organization of the state agricultural commission for the year 1915 included four positions under the title of 'Drug Inspector.' On January 12, 1915, Wm. L. B. Brittain was appointed by the state agricultural commission to the position of drug inspector in the dairy and food division from an eligible list certified by the state civil service commission. Under date of October 9, 1915, Mr. Brittain received a letter from the state board of agriculture in part as follows:

'The report of the dairy and food committee to the board recommended that Mark Kidd of Dayton, Ohio, be appointed to succeed Mr. Wm. L. B. Brittain as drug inspector. Moved by Mr. Williamson, seconded by Mr. Myers, that the report of the committee be adopted and that Mark Kidd be appointed as drug inspector and Mr. Wm. L. B. Brittain be dropped.'

Upon roll call all members voted 'Yes.'

I am sending you at this hour the following message: 'at meeting, board of agriculture, October 4th, you were dropped as drug inspector in department, effective October 9th.'

Your opinion and advice is requested as follows:

Who is Mr. Brittain's successor?"

This request has attached to it a rather extensive statement of facts showing the succession of appointments from the time of Brittain's disconnection with the service down to the present time with a view to determining which particular member of the force occupies the position formerly held by Brittain. It is unnecessary to repeat this statement, but it is referred to hereinafter.

It shows, however, that at a time subsequent to Brittain's disconnection with the department, the agricultural department itself divided the state into four districts, and that thereafter that department and the civil service commission acted upon the theory that residence in each district was a requisite for appointment as drug inspector in that particular district; that your commission prepared eligible lists accordingly from each district, and that upon occasions where there was not such list or not sufficient names on the list, that to the names on the list from the particular district you added names from the eligible list from the state at large.

The controlling circumstance in answering your inquiry is the fact that by the decision of the court as it stands at present Brittain is reinstated, and it follows from the decision in like manner that he has been all the time, in legal contemplation, in the service of the state in his former position, and in as much as the whole personnel of the force has changed, it follows that unless the subsequent appointments have been according to law Brittain not only still has title and right to his position, but he is the only drug inspector whose position is legal beyond question.

It further follows, if he were at all times a member of the force, that when there were only three such inspectors actually in the service, as happened for a portion of the time, that there were, in legal contemplation, all four positions occupied, which being so, if a fourth man were appointed such appointment was illegal and conferred no rights on the appointee, so that if all appointments at all times were legal and valid, each time more than four including Brittain were on the force,the last appointment was illegal.

The above information would be sufficient for you to determine the proper answer to your question. It is exceedingly doubtful, however, whether any of the drug inspectors, save Brittain, has any proper right to hold his position, or is other than a *de facto* incumbent thereof.

In opinion 501 rendered to you on August 7, 1917, you are advised that the heads of departments have no lawful authority when creating administrative districts for

their purposes to provide that residence in such districts shall be an essential qualification for appointment to a position therein. See page 14 of said opinion.

It is intimated or advanced in said opinion that your commission may, under certain circumstances, fix such residence in a district as a necessary qualification to appointment therein by a finding on your part that such residence is essential to fitness for the position. In recognizing these districts established by the department of agriculture, however, you did not act upon that theory, but recognized the existence of the districts, and prepared an eligible list from such district only because the department of agriculture has seen fit to create the district. It is set out in the opinion that the various departments may, for the purposes of their own administration, create such districts, and they may prescribe by regulation that the incumbent of the position in such district must reside in the district while performing the duties thereof, but as above stated, they cannot fix the original selection and appointment as confined to such district.

This being so, and in view of the general provisions of the civil service act, the positions in the state service shall be bestowed as a result of competitive examinations, which shall be open and free to all, with certain limitations to be fixed by the commission, and these limitations not having been fixed by the commission, but by the board in question your eligible list confined to such district was not in compliance with the civil service law; no more than was an eligible list which was partly made up from the district but filled out by members from the state at large. Some of these positions were held as provisional appointments under section 486-14. Such provisional appointments under the terms of the section came to an end when, by reason of a certification from your department, the incumbent was regularly appointed. The following portion of said section provides for this case:

> "but such provisional appointment shall continue in force only until regular appointment can be made from the eligible list prepared by the commission, and such eligible list shall be prepared within ninety days thereafter."

From the above state of facts a situation has arisen where none of the drug inspectors but Brittain hold their positions in accordance with and under and by virtue of the civil service law. In the appointment of none of them has the law been complied with. The department, therefore, strangely finds itself in the position not only where the rejected employe is still entitled to his office but where he is the only inspector who is regularly and lawfully employed.

"The stone which the builders refused is become the head stone of the corner."

If I am right in this conclusion it would seem that the secretary of agriculture may drop whomever he pleases as none stands upon a foundation which gives him any right or title to his position, except Brittain. This opinion, of course, is based upon the present situation in reference to the case. If the decision of the court of appeals be reversed in the proceedings in error proposed by the secretary of agriculture the converse would be true and Brittain would have no title whatever.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

830.

JUVENILE COURT—JURISDICTION—BASTARDY PROCEEDINGS.

The juvenile court has no jurisdiction in a bastardy proceeding, even where the defendant and the mother of the child are under 16 *years of age.*

COLUMBUS, OHIO, December 3, 1917.

HON. J. A. WEAVER, *Probate Judge, Bryan, Ohio.*

DEAR SIR:—I have your letter of October 13, 1917, as follows:

> "I have a case of bastardy in which defendant is under eighteen years of age and girl over sixteen years of age, affidavit was made before a justice of the peace and warrant issued to sheriff and defendant arrested and brought before the justice, who arraigned him, and he plead not guilty and justice then made inquiry and found defendant under eighteen years of age, therefore transferred case with the proper transcript to the juvenile court, and sheriff delivered defendant to probation officer and defendant, gives bond for his appearance on order of court.
>
> Does the juvenile court have jurisdiction of this case and if so what section of the G. C. governs this or would be applicable if so, and defendant found guilty what disposition could be made of defendant:
>
> The word 'delinquent' does not appear in the affidavit or in any of the other papers in the case."

Sections 12110, 12115, 12122, 12123, 12124, 1639, 1642, 1644, 1654 and 1659 of the General Code of Ohio provide:

> "Section 12110. When an unmarried woman, who has been delivered of or is pregnant with a bastard child, makes a complaint in writing, under oath, before a justice of the peace, charging a person with being the father of such child, he thereupon shall issue his warrant, directed to any sheriff or constable of the state, commanding him to pursue and arrest such accused person in any county therein, and bring him forthwith before such justice to answer such complaint.
>
> Section 12115. If no compromise is effected, the justice before whom the compaint was made shall bind the accused to appear at the next term of the common pleas court, in a recognizance to the state, with sufficient surety, in not less than three hundred nor more than six hundred dollars, to answer the accusation, and abide the order of the court. On neglect or refusal to find such security, the justice shall cause the accused to be committed to the jail of the county, there to be held to answer the complaint."
>
> Section 12122. When, before the court to which he is recognized to appear, the accused pleads not guilty of the charge, or, having been recognized, fails to appear, the court shall order the issue to be tried by jury. At the trial, the examination before the justice shall be given in evidence by the complainant.
>
> Section 12123. If, in person or by counsel, the accused confesses in court that the accusation is true, if the jury find him guilty, he shall be adjudged reputed father of the bastard child, and stand charged with its maintenance in such sum as the court orders, with payment of costs of prosecution. The court shall require the reputed father to give security to perform such order.

If he neglects or refuses to give it, and pay the costs of prosecution, he shall be committed to the jail of the county, there to remain, except as provided in the next following section, until he complies with the order of the court.

Section 12124. After having been confined in prison for three months, for failing to comply with the order provided for in the next preceding section, such putative father shall be entitled to the benefits of the law relating to insolvent debtors, in like manner as persons imprisoned for debt. But before he shall be entitled thereto, he must give at least three day's notice to the complainant or her attorney of his intention to apply therefor."

Section 1639. Courts of common pleas, probate courts, and insolvency courts and superior courts, where established shall have and exercise, concurrently, the powers and jurisdiction conferred in this chapter. The judges of such courts in each county, at such times as they determine, shall designate one of their number to transact the business arising under such jurisdiction. When the term of the judge so designated expires, or his office terminates, another designation shall be made in like manner.

The words, juvenile court, when used in the statutes of Ohio shall be understood as meaning the court in which the judge so designated may be sitting while exercising such jurisdiction, and the words 'judge of the juvenile court' or 'juvenile judge' as meaning such judge while exercising such jurisdiction. * *

Section 1642. Such courts of common pleas, probate courts, insolvency courts, and superior courts within the provisions of this chapter shall have jurisdiction over and with respect to delinquent, neglected and dependent minors, under the age of eighteen years, not inmates of a state institution, or any institution incorporated under the laws of the state for the case and correction of delinquent neglected and dependent children, and their parents, guardians, or any person, persons, corporation or agent of a corporation, responsible for, or guilty of causing encouraging, aiding. abetting or contributing toward the delinquency, neglect or dependency of such minor, and such courts shall have jurisdiction to hear and determine any charge or prosecution against any person, persons, corporations, or their agents, for the commission of any misdemeanor involving the care, protection, education or comfort of any such minor under the age of eighteen years.

Section 1644. 'DELINQUENT CHILD DEFINED.' For the purpose of this chapter, the words 'Delinquent child' includes any child under eighteen years of age who violates a law of this state, or a city or village ordinance, or who is incorrigible; or who knowingly associates with thieves, vicious or immoral persons; or who is growing up in idleness or crime; or who knowingly visits or enters a house of ill repute; or who knowingly patronizes or visits a policy shop or place where any gambling device or gambling scheme is, or shall be, operated or conducted; or who patronizes or visits a saloon or dram shop where intoxicating liquors are sold; or who patronizes or visits a public pool or billiard room or bucket shop; or who wanders about the streets in the night time; or who wanders about railroad yards or tracks, or jumps or catches on to a moving train, traction or street car, or enters a car or engine without lawful authority, or who uses vile, obscene, vulgar, profane or indecent language; or who is guilty of immoral conduct; or who uses cigarettes, cigarette wrapper or substitute for either, or cigars or tobacco; or who visits or frequents any theater, gallery, penny arcade or moving picture show where lewd, vulgar or indecent pictures, exhibitions or performances are displayed, exhibited or given, or who is an habitual truant; or who uses any injurious or narcotic drug. A child committing any of

the acts herein mentioned shall be deemed a juvenile delinquent person, and be proceeded against in the manner hereinafter provided.

Section 1654. Whoever abuses a child or aids, abets, induces, causes, encourages or contributes toward the dependency, neglect or delinquency, as herein defined, of a minor under the age of eighteen years, or acts in a way tending to cause delinquency in such minor, shall be fined not less than ten dollars, nor more than one thousand dollars or imprisonment not less than ten days nor more than one year, or both. Each day of such contribution to such dependency, neglect or delinquency, shall be deemed a separate offense. If in his judgment it is for the best interest of a delinquent minor, under the age of eighteen years, the judge may impose a fine upon such delinquent not exceeding ten dollars, and he may order such person to stand committed until fine and costs are paid.

Section 1659. When a minor under the age of eighteen years is arrested such child, instead of being taken before a justice of the peace or police judge, shall be taken directly before such juvenile judge; or, if the child is taken before a justice of the peace or a judge of the police court, it shall be the duty of such justice of the peace or such judge of the police court, to transfer the case to the judge exercising the jurisdiction herein provided. The officers having such child in charge shall take it before such judge, who shall proceed to hear and dispose of the case in the same manner as if the child has been brought before the judge in the first instance."

It is evident from a reading of sections 1644 and 1654 that the juvenile court, after it assumes jurisdiction and finds a minor to be delinquent, can only commit him to a proper institution or fine him in an amount not to exceed $10.00. In other words, the specific penalty imposed for the particular offense or act of misconduct of which the minor has been found guilty is disregarded and the juvenile court imposes a fine or commits the child to a proper institution, not for the specific offense or act of misconduct, but because the child has been found to be delinquent. This power of the juvenile court is clearly not sufficient to answer the purposes of this case.

The purposes of the juvenile court act is well stated by Sater, J., in the case of In re Januszewski 10, O. L. R. 151, at page 156:

"The purpose of the statute is to save minors under the age of seventeen years from the prosecution and conviction on charges of misdemeanors and crimes, and to relieve them from the consequent stigma attaching thereto; to guard and protect them against themselves and evil-minded persons surrounding them; to protect them and train them physically, mentally and morally. It seeks to benefit not only the child, but the community also, by surrounding the child with better and more elevating influences and training it in all that counts for good citizenship and usefulness as a member of society. Under it, the state, which, through its appropriate organs, is the guardian of the children within its borders (Van Walters v. Board, 132 Ind., 569), assumes the custody of the child, imposes wholesome restraints and performs parental duties, and at a time when the child is not entitled, either by the laws of nature or of the state, to absolute freedom, but is subjected to the restraint and custody of a natural or legally constituted guardian to whom it owes obedience and subjection. It is of the same nature as statutes which authorize compulsory education of children, the binding of them out during minority, the appointment of guardians and trustees to take charge of the property of those who are incapable of managing their own affairs, the confinement of the insane and the like. The welfare of society requires and justifies such enactments. The statute is neither criminal nor penal in its

nature, but an administrative police regulation. (State v. Marmouget). A consideration of the acts enumerated which respectively constitute delinquency precludes the thought that it was the legislative intent that they or any one of them, when committed by infants within the specified age, should for correctional purposes be treated as a crime such purposes, as regards such minors, being the only ones contemplated by the statute. The intent to dissociate juvenile from criminal cases is evidenced by the provision of section 1649 that the former shall not be heard, if it can be avoided, in a room used for the trial of the latter, and by the prohibition against the detention of any delinquent child in the county jail pending the disposition of its case (section 1652). It was not, therefore, necessary that the petitioner should be presented or indicted by a grand jury before he was placed on trial."

In the case of State v. Ward, 8 O. M. P. (n. s.), page 561, it was held:

"An indictment charging a defendant with having rescued another who was in the lawful custody of a constable under a warrant issued by a justice of the peace in bastardy proceedings, is insufficient under section 6903 Revised Statutes, because the person so rescued was not charged with an 'offense.' "

In discussing the nature of a bastardy proceeding the court said:

"On page 718 of Vol. I of Words and Phrases Judicially Defined it is said:

'Bastardy proceedings are to be regarded as essentially a civil action, accompanied by the extraordinary remedy of arrest and imprisonment for the purpose of enforcing judgment rendered in the case.'

And on the same page it is said:

'Proceedings in a case of bastardy may not be considered as penal but only as a means to enforce the discharge of legal obligations.'

In the case of Devinney v. State, in Wright's Report, p. 565, Judge Wright uses this language:

'This prosecution (meaning a bastardy proceeding), is quasi criminal, but not strictly so, and if conducted in the name of the state at all it should appear to be on the relation of complaint of the real party. We think it would be more proper to carry on the suit in the name of the party complaining.'

And in the same case it is said that the state is in no way interested in it, that the prosecuting attorney is not bound to attend such suits, etc.

Now bearing in mind what Judge Wright has said, that it would be more proper to carry on the suit in the name of the party complaining and that the state is not interested in the suit and that it is at most only quasi criminal, we refer to section 20 of article IV of the constitution of Ohio, which provides that all prosecutions shall be carried on in the name and by the authority of the state of Ohio; and section 1273 of the Revised Statutes provides that the prosecuting attorney shall prosecute on behalf of the state all complaints, suits and controversies in which the state is a party, thus clearly showing that a bastardy proceeding is not a criminal proceeding.

In the case of Perkins v. Mobley, 4 O. S., 673, the supreme court say:

'In many of the states begetting a bastardy child is made an offense, and punished by indictment; but in this state it is not so. The proceeding here is not strictly civil or criminal. It neither punishes a crime nor gives redress for a civil injury. It is simply a statutory remedy to enforce a high moral duty; and the moral duty is enforced to prevent a burden which ought to rest upon the father from falling upon the public. It may be instituted upon

the complaint of the mother, or if she neglects it, or fails to prosecute to effect, by the proper public authorities. At one point in the proceedings a settlement may be made,' etc.

In the case of Carter v. Krise, 9 O. S., 405, it is said:

'It is certainly true that none of the forms and modes of proceeding under our bastardy act are analogous to proceedings in criminal cases. And yet most of the incidents to such a proceeding are such as belong to proceedings strictly civil. It is or may be prosecuted in the name of a private party only, the mother of the child, or the township trustees. On a bond of indemnity being given that the child shall not become a public charge, the proceedings may be compromised and discharged by the mother of the child. It is prosecuted neither by information or indictment. The defendant after conviction is entitled to all the benefit of the act for the relief of insolvent debtors; and I suppose it will not be claimed that at any stage of the proceedings he can be the subject of pardon by the executive. But, after all, this question can properly be determined only by looking into the essential nature, aim, and object of the proceeding. Does it aim to punish the defendant? Or is it in its nature simply a remedy to enforce the discharge of a civil and moral duty. It is clearly the latter and that only. It is the duty of every man who becomes the father of a child to contribute to its support and to save the public from the burden of its maintenance. This duty the statute aims to enforce. There is nothing punitive about it. If any crime be involved in the accusation against the defendant, it must consist in the act of illicit intercourse by which the bastard child was begotten; and of this crime the parties are equally guilty, whether paternity do or do not result; and yet by our laws there is no crime where there is no paternity, unless the parties live and cohabit in a state of adultery or fornication, and then they may be prosecuted under another statute, by information or indictment, and punished by fine and imprisonment.'"

From these decisions it is evident that the purpose of the act is to enforce a moral duty to the end that the state may not have thrust upon it the burden of supporting the child. Nothing is clearer than that the juvenile court, in exercising the jurisdiction conferred upon it, is powerless to afford the relief which the bastardy statutes were enacted to grant, and it is, therefore, my opinion that the proceedings under that act must be had in the court of common pleas even in cases where the mother of the child and the putative father are under 16 years of age.

Neither do I think that section 1659, providing that "when a minor under the age of eighteen years is arrested, such child, instead of being taken before a justice of the peace or police judge, shall be taken directly before such juvenile judge; or, if the child is taken before a justice of the peace or a judge of the police court, it shall be the duty of such justice of the peace or such judge of the police court, to transfer the case to the judge exercising the jurisdiction herein provided," applies to bastardy cases. While it is true that the defendant in bastardy cases is "arrested," yet I am of the opinion that section 1659 G. C. was meant to cover cases where the arrested minor has been arrested for the commission of an offense as is usually the case.

I might say, in passing, that the juvenile court could probably find the child delinquent upon the facts developed in the basratdy proceedings, since under section 1644 G. C. a finding that the child has been guilty of immoral conduct would justify a finding of delinquency. This was hinted at in the case of Carter v. Krise, 9 O. S. 405 supra, where the court said:

"If any crime be involved in the accusation against the defendant, it must consist in the act of illicit intercourse by which the bastard child was

begotten; and of this crime the parties are equally guilty, whether paternity do or do not result; and yet, by our law there is no crime where there is no paternity, unless the parties live and cohabit in a state of adultery or fornication, and then they may be prosecuted under another statute by information or indictment, and punished by fine and imprisonment."

While, as the court said in this case, no "crime" could be predicated upon the single act of intercourse, yet, since the enactment of the juvenile court law, a finding of delinquency could be based thereon as above indicated.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

831.

COUNTY CLERK—MAY RETAIN FEES FOR SERVICES AS LICENSING AGENT.

County clerks may retain personally the fees allowed them for services as licensing agents under appointment of the director of the bureau of mines, department of the interior, under authority of explosives law passed by congress on October 6, 1917.

COLUMBUS, OHIO, December 4, 1917.

HON. JOHN D'ALTON, *Prosecuting Attorney, Toledo, Ohio.*

DEAR SIR:—I have your letter of October 29, 1917, as follows:

"We are in receipt of a letter from William F. Renz, clerk of courts, of this date, which is as follows:

'Under date of October 22, 1917, the director of the bureau of mines sent me a communication deputizing me to accept applications for vendor's, purchaser's and foreman's licenses under an act to prohibit the manufacture, distribution, storage, use and possession in time of war of explosives, providing regulations for the safe manufacture, distribution, storage, use, and possession of the same, and for other purposes. (See enclosed copy of act.)

Section 11 of said law provides that the officer issuing such licenses shall receive a fee of twenty-five ($0.25) cents for each license issued. Will you kindly advise me whether this fee of twenty-five ($0.25) cents is to go into the clerk's fee fund or whether it belongs to him?

Kindly return enclosed letter and copy of act.

Yours truly,
Wm. F. Renz, Clerk of Courts.

As the matter inquired about by our clerk of courts is of interest to every clerk throughout the state, we respectfully request that you furnish us an opinion upon this matter.

The act of congress referred to is entitled, 'Public—No. 68—65th congress (H. R. 3932) an act to prohibit the manufacture, distribution, storage, use and possession in time of war of explosives, providing regulations for the safe manufacture, distribution, storage, use and possession of the same, and for other purposes.' "

The explosive law, passed by congress during its last session, found at page 432 of the Federal Reporter, November 15, 1917, provides in part:

"*Section* 3115⅛i. (Act. October 6, 1917, c. ....., Section 1.) Manufacture, distribution, storage, use or possession of powder, explosives, blasting supplies, etc., regulated when United States at war.

When the United States is at war it shall be unlawful to manufacture, distribute, store, use, or possess powder, explosives, blasting supplies, or ingredients thereof, in such manner as to be detrimental to the public safety, except as in this act provided.

"*Section* 3115⅛f. (Act October 6, 1917, c. ....., Section 11.) Licenses; persons entitled to; refusal; revocation; appeal to council of national defense.

The director of the bureau of mines shall issue licenses, upon application duly made, but only to citizens of the United States of America, and to the subjects or citizens of nations that are at peace with them, and to corporations, firms, and associations thereof, and he may, in his discretion, refuse to issue a license, when he has reason to believe, from facts of which he has knowledge or reliable information, that the applicant is disloyal or hostile to the United States of America, or that, if the applicant is a firm, association, society, or corporation, its controlling stockholders or members are disloyal or hostile to the United States of America. * * *.

Section 3115⅛ff. (Act October 6, 1917, c. ....., Section 12.) Applications for licenses; contents; to whom made; fees for granting licenses; records of licenses granted; blanks.

* * * * * * * * * *

Applications for vendor's, purchaser's, or foreman's licenses shall be made to such officers of the state, territory, or dependency having jurisdiction in the district within which the explosives or ingredients are to be sold or used, and having the power to administer oaths as may be designated by the director of the bureau of mines, who shall issue the same in the name of such director. Such officers shall be entitled to receive from the applicant a fee of 25 cents, for each license issued. They shall keep an accurate record of all licenses issued in manner and form to be prescribed by the director of the bureau of mines, to whom they shall make reports from time to time as may be by rule issued by the director required. The necessary blanks and blank records shall be furnished to such officers by the said director. Licensing officers shall be subject to removal for cause by the director of the bureau of mines, and all licenses issued by them shall be subject to revocation by the director as provided in section eleven."

You advise me that the clerk of courts of your county has been appointed licensing agent by the department of the interior, bureau of mines, under this act, and an examination of the papers discloses a letter from F. S. Peabody, assistant to the director in charge of explosives, bureau of mines, department of the interior, notifying Mr. Renz, your clerk of courts, of his appointment.

It will be seen from the sections of the federal act, above quoted, that it is within the authority of the bureau of mines to make this appointment.

The duties of the clerk of courts are set out in our statutes and the various provisions of these statutes do not thrust any such duty as is here referred to upon the incumbent of that office. The clerk of the courts is free to accept or refuse the appointment of the bureau of mines. If he accepts the appointment and proceeds with the work, it cannot be said that he is performing any official act as clerk of courts. He is acting in the capacity of licensing agent of the federal bureau of mines.

In an opinion rendered by this department, No. 330, under date of June 2, 1917, it was held that in cases where the sheriff is appointed receiver, he may retain the fees allowed him for acting as receiver instead of paying them into the fee fund. Reference was had in that opinion to an opinion by former Attorney-General Turner, found in page 601 of the Opinions of the Attorney-General for 1915, in which Mr. Turner held that when the sheriff is appointed by virtue of section 13195 of the General Code to make a sale of real estate thereunder, the fees received by the sheriff are personal and not payable into the fee fund. In that opinion Mr. Turner said:

> "If under this authority the court appoints as such 'suitable person or persons' the individual or individuals who are serving as sheriff or other county officers, the compensation allowed for the making of such sale will be payable to such person or persons as individuals and not in their official capacities. Therefore, such compensation is the property of the person or persons making the sale and is not subject to be paid into the fee fund provided for in said section 2977 G. C."

The same reasoning that was resorted to in these opinions applies in the case you submit and I am therefore of the opinion that the fees paid to your clerk of courts for services rendered in acting as licensing agent for the bureau of mines, department of the interior, on issuing licenses under the explosive act, may be retained by the clerk personally.

In arriving at this conclusion I have not been unmindful of the cases of State ex rel., v. Horner, 16 O. N. P., n. s., page 449, and Talbott v. State, ex rel., Houston, 5 Ohio App. Rep., p. 262. In the first named case the court held:

> "The county clerk is not entitled ,under the present Ohio salary law, to retain as an emolument of his office one-half of the fees up to $3,000.00 received for services in matters pertaining to naturalization, but he must account to the state for such fees in the same manner as for fees received for services rendered under the laws of the state."

In the second case the court considered the Ohio salary act of March 22, 1906 (98 O. L., 89), relating to county officers, as it was originally enacted and as it stood prior to the enactment of the General Code of 1910. In both these cases the clerk of courts was performing a duty thrust upon him by a law of the United States. In the question you present the clerk of courts is not acting as licensing agent of the department of the interior, bureau of mines, because of any statutory duty, but simply by virtue of appointment from that department. This being so the holding of the courts in the two cases referred to cannot affect the question.

It might be well to remark in connection with this opinion that inasmuch as the clerk of courts is performing this work, not as clerk of courts but as an individual appointed as licensing agent, he would not be entitled to the services of the deputy clerks in the performance of the work imposed upon him by the appointment. The appointment is purely personal with the clerk, and while the clerk is allowed the compensation, the county could not be asked to share any portion of the expense.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

832.

FEEBLE MINDED INSTITUTION—ADMISSION OF CHILDREN UNDER FIFTEEN YEARS OF AGE AND PUBLIC CHARGES OVER FIFTEEN YEARS OF AGE—COMMITMENT—PHYSICIANS' FEES.

Where a child not over fifteen years of age, or a person over fifteen years of age and a public charge, is admitted to the institution for the feeble minded, no commitment by the probate court is necessary and no fees to physicians for mental examination can be allowed.

However, if the child is over fifteen and not a public charge, such child shall be committed to the institution by the probate court, as provided in section 1902 General Code, and in that case the physicians making the mental examination and the required certificate shall be allowed each the sum of $5.00 and witness fees as allowed in the court of common pleas.

COLUMBUS, OHIO, December 5, 1917.

HON. B. O. BISTLINE, *Probate Judge, Bowling Green, Ohio.*

DEAR SIR:—I have your letter of November 12, 1917, as follows:

"I find the statutes silent in regard to the amount allowed to physicians called to conduct an inquest in a proceeding to commit a child to the institution for feeble minded.

Will you kindly give us an opinion as to the amount that should be allowed in such cases and by whom it should be paid?"

Section 1891 G. C. reads:

"The trustees of the institutions for feeble minded youth, may admit thereto all youth of this class not over fifteen years of age who have been residents of the state for one year, and are not capable of receiving instruction in the common schools."

Section 1892 G. C. reads:

"The trustees shall prescribe and publish instructions and forms for the admission of pupils, and may include in them such interrogatories as they think necessary or useful. Such instructions and forms shall be furnished to any person applying therefor, and also be sent in sufficient numbers to the probate judges in the several counties."

Section 1895 G. C. reads:

"The custodial department shall be entirely and especially devoted to the reception, detention, care and training of idiotic and feeble minded children and adults, regardless of sex or color, and shall be so planned as to provide separate classifications of the numerous groups embraced under the terms idiotic and imbecile or feeble minded. Cases afflicted with paralysis shall have a due proportion of space and care in the custodial department."

Section 1901 G. C. reads:

"The trustees shall receive as inmates of the custodial department, feeble minded children, residents of this state, under the age of fifteen years,

who are incapable of receiving instruction in the common schools of the state, and adults of the same class, over this age, who are public charges. The trustees shall prescribe, and cause to be printed, instructions and forms of application for their admission, include therein interrogatories and require answers thereto, under oath, showing facts needed for their information. Such instructions and forms shall be furnished to applicants for the admission of any person or patient, in whole or in part as a state beneficiary, and be endorsed by the probate judge of the county in which he resides at the time of making the application."

Section 1903 G. C. (103 O. L., 245), reads:

"Feeble minded persons of such inoffensive habits as to make them proper subjects for classification and discipline in the institution may be admitted, on pursuing the same course of legal commitment as governs admission to the state hospital for the insane."

It will be noted from these sections that a child under fifteen years of age is admitted into the institution for feeble minded by virtue of the provisions of section 1891 and 1892, above quoted, under such rules and regulations as the Ohio board of administration (which board succeeded to the powers and duties of the board of trustees of the institution for feeble minded) prescribes.

In an opinion rendered by Hon. Timothy S. Hogan, found in volume 1 of the Annual Report of the Attorney-General for 1912, p. 311, I find the following statement:

"Under authority of section 1892 General Code, the board of administration, who succeeded to all the duties of the board of trustees of the institution for feeble minded youth, may provide the terms and requirements for admission of pupils to this institution. No medical examination is required. The statute does not provide that applicants should first be examined as to their mental condition, but authorizes the board to prescribe and publish instructions and forms for the admission of pupils; and they may include therein such interrogatories as they may think necessary or useful to have answered.

This view is sustained by the case of Doran v. Fleming, 17 Circuit Decision 737.

Section 1893 General Code provides for the admission of pupils over fifteen years of age. It is as follows:

'If the capacity of the institution allows the reception of pupils besides those above described, the trustees may admit persons of greater age, and persons not resident in the state. For all who are not residents of the state for the required time, the trustees shall charge and receive for the institution a fair rate of compensation, to be fixed by them.'

I have already held in an opinion addressed to Dr. E. J. Emerick, of the date of September 25, 1911, that feeble minded persons over fifteen years of age, who are not public charges, can only be admitted to the institution by commitment by a probate judge, after witnesses are subpoenaed, hearing had, and a certificate signed by two medical witnesses; that persons who are public charges may be admitted upon simple application.

So that, answering your question specifically, two medical witnesses are not required to admit persons under fifteen years of age, eligible to be admitted to the institution for feeble minded youth; and two witnesses are not required to admit persons over fifteen and under twenty-one years of age, who are public charges, and who are admitted under authority of sec-

tion 1893 General Code, but two medical witnesses are required for persons over fifteen years of age and under twenty-one years of age *not public charges*, who are admitted to the institution.

Coming now to your second question, section 1902 provides as follows:

'Feeble minded adults of such inoffensive habits as to make them proper subjects for classification and discipline in the institution may be admitted, on pursuing the same course of legal commitment as govern admission to the state hospital for the insane.'

Proceedings for admission of the insane are found in section 1953 et seq. General Code. To admit patients to a hospital for the insane requires the certificate of two medical witnesses, who are allowed, under section 1981 General Code, five dollars each for making the examination and certificate. Section 1902, above quoted, provides: Feeble minded adults may be committed to the institution for feeble minded youth on pursuing the same course of legal commitment which governs admission to state hospitals for the insane. It therefore requires the testimony and certificate of two medical witnesses to commit feeble minded adults to the institution, and they are entitled to five dollars for making the examination and certificate, as provided in section 1981 General Code."

This followed, as will be seen from the statement quoted, an opinion rendered by Mr. Hogan to the superintendent of the institution for feeble minded, found in the Annual Report of the Attorney-General for 1911-1912, Vol. 2, page 980. In that opinion he stated:

"The trustees are empowered to accept without legal commitment persons over the age of fifteen years, incapable of receiving instructions in the common schools, who are public charges. For such admission the formalities prescribed in section 1901 are sufficient. On the other hand, the trustees must admit into the custodial department, feeble-minded adults committed by proceedings under sections 1903 et seq. General Code, if the trustees are satisfied that they are of such inoffensive habits as to make them proper subjects of classification and discipline in the institution."

This opinion was approved by my predecessor, Hon. Edward C. Turner, found in Opinions of the Attorney-General for 1916, Vol. 2, page 1460, in which he held:

"An adult person of feeble mind, who is a public charge, may be admitted to the custodial department of the institution for feeble-minded youth under the provisions of and in accordance with the formalities prescribed by section 1901 G. C., but an adult person of feeble mind who is not a public charge may only be admitted to said institution as provided by section 1902 G. C. as amended 103 O. L. 245."

From a consideration of the statutes quoted and the opinions referred to, I think it is clear that sections 1891, 1892 and 1901 General Code authorizes the admission upon rules prescribed by the board of administration of children not over fifteen years of age who have been residents of the state for one year and who are not capable of receiving instruction in the common schools, and authorizes as well the admission into the custodial department of the feeble minded institution children under the age of fifteen who are incapable of receiving instruction in the common school and who are residents of the state, and adults of the same class over fifteen years of age who are public charges. In the admission of such persons to the institution for feeble minded youth no commitment by the probate court is necessary,

nor is the testimony of any medical witnesses required. If the person to be committed is over fifteen years of age and not a public charge, then section 1902 applies. This section adopts the same method of legal commitment to the feeble minded institution as is provided by statute for admission to state hospitals for the insane. Proceedings for admission to insane hospitals are found in sections 1953 et seq. of the General Code.

It was held by Mr. Hogan in an opinion found in the Annual Report of the Attorney-General for 1912, Vol. 1, page 310, above quoted, that in these cases the testimony and certificate of two medical witnesses is required to commit feeble minded adults to the institution and they are entitled to $5.00 for making the examination and certificates, as provided in section 1891 General Code.

You do not state in your communication whether or not the person to be committed to the institution for feeble minded is under or over fifteen years of age. You do, however, inquire as to the proceeding to commit a *child* to the institution for feeble minded.

With the statutes and authorities quoted in mind, I advise you that if the child referred to is not over fifteen years of age, or is over fifteen years of age and a public charge, no commitment by the probate court is necessary and no fees to physicians for examination can be allowed. If, however, the child is over fifteen years of age and not a public charge, such child should be committed to the institution by the probate court, as provided in section 1902 General Code, and in that case the physicians examining the child and making the certificate required, shall be allowed each the sum of $5.00 "and witness fees as allowed in the court of common pleas."

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

833.

TRUANT OFFICER—WOMEN CANNOT BE APPOINTED.

The position of truant officer, as provided for under section 7769 General Code, is a public office, and women cannot be appointed to, or qualify for such position.

COLUMBUS, OHIO, December 5, 1917.

HON. EARL K. SOLETHER, *Prosecuting Attorney, Bowling Green, Ohio.*

DEAR SIR:—Under date of September 19, 1917, you submit the following to this department for answer:

> "One of the school boards of this county has put up to me the proposition of whether or not a woman can serve as truant officer as provided in section 7769 and the following sections of the General Code. I wish you would give me your advice in the matter.
>
> This question comes from the school board of Rossford, in this county, where there is a large foreign population. It seems that they have a district nurse there whom they wish to designate as a truant officer, and I believe if this could be done it would be a great help to the school board."

The question for determination is whether or not a woman can hold the position of truant officer. The first thing to be determined is whether the position of truant officer may be considered as a public office or merely as a public employment. This

question must be determined from the duties of the position rather than from the name that might be applied thereto.

Section 7769 General Code, authorizes the appointment of a truant officer and the sections following prescribe the duties of such position. Section 7769 General Code provides:

> "To aid in the enforcement hereof, truant officers shall be appointed as follows: In city districts the board of education must appoint and employ a truant officer and may employ such assistants to such truant officer as may be deemed advisable; in village and rural districts the board of education may appoint a constable or other person as truant officer. The compensation of the truant officer and assistants shall be fixed and paid by the board appointing them."

Section 7770 General Code reads:

> "The truant officer and assistants shall be vested with police powers, and the authority to serve warrants, and have further authority to enter workshops, factories, stores and all other places where children are employed, and do whatever may be necessary, in the way of investigation or otherwise, to enforce this act. He also may take into custody any youth between eight and fifteen years of age, or between fifteen and sixteen years of age when not regularly employed who is not attending school and shall conduct such youth to the school he has been attending, or which he rightfully should attend."

Section 7771 General Code reads as follows:

> "The truant officer shall institute proceedings against any officer, parent, guardian, person, partnership or corporation, violating any provisions of this chapter, and otherwise discharge the duties described therein, and perform such other service as the superintendent of schools or the board of education may deem necessary to preserve the morals and secure the good conduct of school children, and to enforce the provisions of this chapter. The truant officer shall keep on file the name, address and record of all children between the ages of fifteen and sixteen to whom age and schooling certificates have been granted who desire employment, and manufacturers, employers or other persons requiring help of legal age shall have access to such files. The truant officer shall co-operate with the industrial commission in enforcing the conditions and requirements of the child labor laws of Ohio, furnishing upon request such data as he has collected in his reports of the children from eight to sixteen years of age and also concerning employers, to the industrial commission and to the superintendent of public instruction. He must keep a record of his transactions for the inspection and information of the superintendent of schools and the board of education; and make daily reports to the superintendent during the school term in districts having them, and to the clerk of the board of education in districts not having superintendents as often as required by him. Suitable blanks for the use of the truant officer shall be provided by the clerk of the board of education."

The above section prescribes the main duties to be performed by a truant officer, and while he has other duties to perform the above provisions are sufficient to determine whether or not the holding of such position is a public office.

It will be observed that section 7770 General Code, gives to the truant officer, police power with authority to serve warrants. Under the provisions of section 7771

General Code such officer is authorized to institute proceedings against any officer, parent, guardian, person, partnership or corporation violating any provisions of the chapter pertaining to compulsory education.

The powers herein granted to the position of truant officer are clearly a part of the sovereignity of the state.

The rule by which a public officer may be distinguished from a public employment is stated in the case of state ex rel. v. Jennings, 57 Ohio State, page 415, where one of the branches of the syllabus reads:

> "To constitute a public office against the incumbent of which quo warranto will lie, it is essential that certain independent public duties, a part of the sovereignity of the state, should be appointed to it by law, to be exercised by the incumbent, in virtue of his election or appointment to the office, thus created and defined, and not as a mere employe, subject to the direction and control of some one else."

On page 429 of the above opinion, Minshall, J., says:

> "But the character of an office cannot be attached to a position by a name merely. Whether it be an office or not, will depend upon the nature and character of the duties attached to it by law."

While the name "officer" is attached to the position of truant officer, and it is designated in section 7769 General Code that the board of education "must appoint and employ a truant officer," the use of the terms "officer" and "employe" are not conclusive as to the nature of the position.

The duties which are placed upon the position of truant officer are independent and are to be exercised by the incumbent of such position and the incumbent is not subject to the direction and control of some one else. Furthermore, the powers granted to the truant officer are powers which are derived directly from the sovereign powers of the state. The powers herein granted, are similar to those exercised by a patrolman of a city. In the case of State ex rel. v. City of Painesville the first branch of the syllabus reads:

> "A duly appointed patrolman of the police department of a city is an officer within the meaning of the laws of Ohio."

This is substantially the holding in the case of Feathergill v. State ex rel. 33 Ind., App., 683, wherein it is held:

> "A truant officer under section 6033-d, Burns 1901, is a public officer, and must qualify as provided by section 7533, Burns 1901, before assuming the duties of the office."

On page 685 of the opinion Roby, J., says:

> "Following that part of section 2, above quoted, and carried into section 3, his (truant officer) duties are specified, the power conferred upon him, while it is confined within limits is a part of the power possessed by the state and inherent to sovereignity."

Upon examination of the provisions of section 6033-d, Burns 1901, referred to in the above opinion, it is found that the duties therein prescribed for the truant officer

are not as broad as those granted to the truant officer in this state. The part of the above section applicable to the duties of the truant officer reads as follows:

> "The truant officer shall see that the provisions of this act are complied with, and when from personal knowledge or by report or complaint from any resident or teacher of the townships under his supervision, he believes that any child subject to the provisions of this act is habitually tardy or absent from school, he shall immediately give written notice to the parent, guardian or custodian of such a child that the attendance of such child at school is required and if within five days such parent, guardian or custodian of said child does not comply with the provisions of this section, then such truant officer shall make complaint against such parent, guardian or custodian of such child in any court of record for violations of the provision of this act."

It is apparent from the duties placed upon the position of truant officer, and the decisions above cited, that the position of truant officer is a public office.

The sections of the General Code authorizing the appointment of a truant officer do not specifically provide that such officer must take an oath of office. It is provided, however, by section 2 of the General Code that each person chosen or appointed to an office shall take an oath of office. This section reads as follows:

> "Each person chosen or appointed to an office under the constitution or laws of the state, and each deputy or clerk of such officer, shall take an oath of office before entering upon the discharge of his duties. The failure to take such oath shall not affect his liability or the liability of his sureties."

The question now arises as to whether a woman can fill the position of truant officer. There is no specific provision of statute which authorizes the appointment of a woman for that position.

Women were granted the right to vote and to hold the position of member of the board of education by the provisions of section 4862 General Code, which section reads:

> "Every woman born in the United States or who is the wife or daughter of a citizen of the United States, who is over twenty-one years of age and possesses the necessary qualifications in regard to residence hereinafter provided for men shall be entitled to vote and to be voted for member of the board of education and upon no other question."

It is specifically provided herein that a woman shall not be permitted to vote upon any other question.

In an opinion by Honorable Timothy S. Hogan, attorney-general, under date of April 3, 1913, and reported in the Annual Report of the Attorney-General for the year 1913, Vol. 1, p. 466, the right of a woman to be elected as clerk or treasurer of the board of education was under consideration. It was held therein that a woman did not have such right except where the statutes specifically provided that she could hold such position as it did so provide in authorizing the election of a member of the board of education to elect one of its members as clerk of said board. At page 469 of the above report Mr. Hogan says:

> "By virtue of section 4747 General Code, boards of education in all districts, except in township districts, may elect one of their own members as clerk of said board of education. It follows, therefore, that if a woman is a member of such board she can be elected clerk thereof by virtue of said

section. There is no statutory provisions where a woman other than a member of such board of education can be elected clerk thereof, and inasmuch as the legislature has not yet seen fit by legislative enactment to grant the right to women to be elected clerk other than to such woman as happen to be elected as members of school boards of village, city and special school districts, it is my opinion that a woman who is not a member of such board of education cannot be elected clerk thereof. The statute is to be strictly construed in this regard and goes no further than its plain terms purport."

He applies the same principle to the position of treasurer of the board of education and the same principle of law will apply to the position of truant officer.

The above principle is based upon the provisions of the constitution of the state of Ohio, section 4, article XV, which section reads as follows:

"No person shall be elected or appointed to any office in this state unless possessed of the qualifications of an elector; provided that women who are citizens may be appointed as members of boards of, or to positions in, those departments and institutions established by the state or any political subdivisions thereof involving the interests or care of women or children or both."

This section is subject, however, to the provisions of Article VI of the constitution, which article covers the subject of education. Section 2 of said article VI reads as follows:

"The general assembly shall make such provisions, by taxation, or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the state; but no religious or other sect, or sects, shall ever have any exclusive right to, or control of, any part of the school funds of this state."

Section 3 of said article reads:

"Provision shall be made by law for the organization, administration and control of the public school system of the state supported by public funds; provided, that each school district embraced wholly or in part within any city shall have the power by referendum vote to determine for itself the number of members and the organization of the district board of education, and provision shall be made by law for the exercise of this power by such school districts."

These sections give to the general assembly authority to legislate as to the organization, administration and control of the public school system.

Section 3 was adopted September 3, 1912, and section 2 has been substantially a part of the constitution of Ohio since 1802.

In the case of State ex rel. v. City of Cincinnati, 19th Ohio, page 178, the supreme court had under consideration an act of the legislature which authorized the trustees of a township and other named officers "to create one or more school districts, for colored persons, in every such township, city, town or village."

The second section of the act authorized "the adult male colored tax payers residing in the districts to meet and choose their school directors." The court sustained the validity of this article and also held that the act impliedly authorized the selection of colored persons as members of the school board.

On page 197, Hitchcock, C. J., says:

> "So far as the elective officers of the state, county or township are concerned they must be white men. They can be elected only by white men. White men alone are legal voters at state, county, and township elections. Beyond this the court does not prescribe. Nor does it even go thus far with respect to all county and township officers.
>
> Now a school director, although in some respects a public officer, is not even a township officer. He is merely the officer of a school district—a political organization unknown to the constitution—the mere creation of legislative enactments. And it seems to the court that the person creating the political organization might well define the qualifications of its officers, if in so doing they do not violate an express provision of the charter under which they themselves act."

This case recognizes the right of the legislature to create a school district and to authorize persons who have not a constitutional right to vote to choose members of the board of directors of a school district and to be members of such board.

The next case to be considered is that of State ex rel. v. The Board of Elections, etc., 9th circuit court, page 124. In this case, what is now known as section 4862 General Code, supra, granting the right to women to vote for members of the board of education, was under consideration. The validity of that section was sustained. The syllabus of this case reads as follows:

> "The act of April 24, 1894, conferring upon women the right to vote and be voted for at any election held for the purpose of choosing any school director, member of the board of education or school council under the general or special laws of the state is valid, it being within the power to provide for the establishment and maintenance of common schools which the constitution confers upon the general assembly, and not within the limitation contained in section one of article five."

This decision follows that of State ex rel., v. City of Cincinnati, 19th Ohio, 178, supra, and was affirmed without report upon authority of the above case in Mills v. City Board of Elections, 54 O. S., 631.

This case also recognizes the right of the legislature to determine the qualifications of electors at elections for school districts and the qualifications of persons who may hold offices in a school district.

In the case of Cline v. Martin, 94 O. S., 420, the validity of the act creating county school districts was under consideration and the act was held to be constitutional. Judge Donahue, in the opinion of the court, reviews the former holdings of the supreme court above cited. On pages 427 and 428 he says:

> "If there were any doubt about the correctness of the ruling of this court in the case of Mills v. City Board of Elections et al., supra, that doubt is entirely removed by the amendment to the constitution of September 3, 1912, which amendment supplements sections 1 and 2 of article VI. There is now no other possible construction of these sections than that given them by this court in the case of Mills v. City Board of Elections et al., supra, in so far as they affected the decision in that case.
>
> That judgment of the circuit court was affirmed without report, upon the authority of State ex rel., v. City of Cincinnati, 19 Ohio, 178. In that case this court expressly recognized the distinction between a member of the

board of education of a township school district and a township officer. In the opinion of Hitchcock, C. J., at page 197, it is said: 'Now a school director, although in some respects a public officer, is not even a township officer. He is merely the officer of a school district—a political organization unknown to the constitution—a mere creature of legislative enactment.'

It would appear from these decisions that the question whether or not a member of a board of education is a township, county or municipal officer is no longer an open one in this state."

The effect of the above holdings of the supreme court is that an office in a school district is not a constitutional office and that the general assembly under the authority of sections 2 and 3, of Article VI of the constitution has full power to legislate as to the qualifications of the persons who may hold positions in a school district.

Coming now to the particular position under consideration here the general assembly has not legislated so as to permit women to hold the position of truant officer. Until the legislature passes such legislation a woman cannot hold such position.

In conclusion, the position of truant officer, as provided for under section 7769 General Code, is a public office, and a woman cannot be appointed to, or qualify for, such position.

Since the above opinion was written you have submitted a further inquiry as follows:

"Can a lady school teacher act as truant officer, and what effect would the fact that she is a nonresident of the school district in which her appointment as truant officer has been made, have upon the question?"

In view of the conclusion above reached, the above question must be answered in the negative, that is, that a lady school teacher can not hold the position of truant officer. It is not necessary therefore to consider the effect of such teacher's being a nonresident of the school district.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

834.

WORKMEN'S COMPENSATION LAW—WHO ENTITLED TO PROTECTION —INDEPENDENT CONTRACTOR.

1. *Every person who employs five or more workmen or operatives regularly in the same business, trade, profession or occupation, or in or about the same establishment under any contract of hire, express or implied, oral or written, is entitled upon compliance therewith, to the protection afforded by the workmen's compensation act.*

2. *Any person who enters into a contract with an independent contractor may, upon compliance with the workmen's compensation act, obtain the protection of said act for himself and the employes of said independent contractor.*

COLUMBUS, OHIO, December 7, 1917.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I have your communication in which you request my opinion upon the following:

> "Are the persons employed under the saleman's and dealer's contracts enclosed employes of J. J. M.?
>
> Since Mr. M. has paid his premium into the state insurance fund with the understanding that such employes were protected, may compensation be paid in case of injury if you find that they are not employes of Mr. M?"

The first contract is what is commonly known as a "dealer's contract" with a distributor. According to its terms the distributor employs the dealer to sell certain merchandise upon a commission. It is unnecessary to go into this contract, as it is clearly a contract of employment, and by its terms the dealer is required to give to the distributor a bond for the faithful performance of his duties as specified in said contract of employment.

The second contract is made between the dealer and a salesman, the dealer obtaining his right to make such contract under the contract between his and the distributor first noted. In the second contract the dealer employs the salesman to sell certain merchandise, and it is provided in this contract that the salesman must give a bond for the faithful performance of his duties, which bond runs in favor, not only of the dealer, but also of the distributor, and the main company with which the distributor has his contract. The bond provided for in the contract between the dealer and the distributor also runs in favor of both the distributor and the company with whom the distributor has his contract.

The contract between the salesman and the dealer also contains a provision that the contract is a personal one between the salesman and the dealer, and that neither the distributor nor the company are to be held responsible for payment of commissions or charges falling due under the contract; and that all claims of liability of any kind against the distributor or the company are waived.

I call your attention to the above as showing that both of these contracts are contracts of employment. Under the first the relation of employer and employe expressly exists between the distributor and the dealer; in the second contract a provision is embodied under which the distributor may, as against a claim made by the salesman, assert the claim that the salesman is the employe of the dealer and not of the distributor. This provision can undoubtedly be waived by the distributor and he may regard the salesman as his employe if he cares to do so.

Our statute defining the term "employe" and thus specifying what persons come under the protection of the compensation act, was amended by the last legislature

(section 1465-61, 107 O. L. 159) and the second and third paragraphs of said act now read:

> "2. Every person in the service of any person, firm or private corporation, including any public service corporation employing five or more workmen or operatives regularly in the same business, or in or about the same establishment under any contract of hire, express or implied, oral or written, including aliens, and also including minors who are legally permitted to work for hire under the laws of the state, but not including any person whose employment is but casual and not in the usual course of trade, business, profession or occupation of his employer."
>
> 3. Every person in the service of any independent contractor or sub-contractor who has failed to pay into the state insurance fund the amount of premium determined and fixed by the industrial commission of Ohio for his employment or occupation, or to elect to pay compensation direct to his injured and to the dependents of his killed employes, as provided in section 1465-69 General Code, shall be considered as the employe of the person who has entered into a contract, whether written or verbal, with such independent contractor unless such employes, or their legal representatives or beneficiaries elect, after injury or death, to regard such independent contractor as the employer."

You will note that the second paragraph is very broad and my opinion is if the distributor employs five or more persons under contracts of employment similar to those submitted by you, regularly in the same business, he is undoubtedly entitled to enter the state insurance fund and to be given protection; and further that if he makes application for insurance of persons employed as salesmen, under contracts between such salesmen and a dealer who has a contract with him, and lists such salesmen as his employes and pays the premiums provided, such persons must be regarded as his employes under contemplation of the workmen's compensation act, and that he is entitled to take out state insurance for his and their benefit.

Even if the dealer could be regarded as an independent contractor in his contract with the salesman, the distributor could be held at the option of the salesman under paragraph 3 of section 1465-61 above quoted.

For the reason that the workmen's compensation law should be given a liberal construction to accomplish the purposes for which it was enacted, and the fact that the last amendment to section 1465-61 G. C. shows clearly the purpose of the legislature to extend the protection of the act to all employes so far as possible; and that it has attempted so far as the employe is concerned to make it immaterial whether the employe is employed by an independent contractor or by the person who entered into the contract with the independent contractor, it is unnecessary to consider whether in the question submitted by you the dealer is to be regarded as an independent contractor; as the distributor by the statute is made liable, he certainly can insure against this liability.

My answer, therefore, to your first question is in the affirmative.

This makes it unnecessary to answer your second question.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

835.

EMPLOYE—OF INDEPENDENT CONTRACTOR—WHO HAS FAILED TO PAY INTO STATE INSURANCE FUND OR ELECTED TO PAY COMPENSATION DIRECT—HOW COMPENSATION PAID.

An employe of an independent contractor who has failed to pay into the state insurance fund the amount of premium determined and fixed by the industrial commission of Ohio, or to elect to pay compensation direct under section 1465-69 G. C. if he (such employe) makes claim for compensation, is to be considered as the employe of the person who entered into the contract with such independent contractor. If such person has paid into the state insurance fund the required premiums compensation must be made out of the fund; if such person has elected to pay compensation direct under section 1465-69 *G. C., compensation must be made under that section; if such person has failed to pay into the state insurance fund the required premiums, or to elect to pay compensation direct under section* 1465-69 *G. C., then the employe may claim and be awarded compensation in the manner provided by section* 1465-74 *(section* 27*) G. C.*

COLUMBUS, OHIO, December 7, 1917.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—You have submitted the following request for my opinion:

"Paragraph 3 of section 1465-61 of the amended workmen's compensation act, reads as follows:

'Every person in the service of any independent contractor or sub-contractor who has failed to pay into the state insurance fund the amount of premium determined and fixed by the industrial commission of Ohio for his employment or occupation, or to elect to pay compensation direct to his injured and to the dependents of his killed employes, as provided in section 1465-69, General Code, shall be considered as the employe of the person who has entered into a contract, whether written or verbal, with such independent contractor unless such employes, or their legal representatives or beneficiaries elect, after injury or death, to regard such independent contractor as the employer.'

We should like to have your advice on the following points:

1. If an employe of an independent contractor is injured and elects to consider himself an employe of the person or corporation who entered into the contract with such independent contractor, and such person or corporation not having included such employe in his payroll report, would the industrial commission recognize such claim?

2. If the industrial commission would not recognize such claim, would it then be up to the injured employe, should he still consider himself an employe of the employer entering into such contract to seek means of collecting damages which may be due him for injuries received?

3. If the industrial commission does recognize such claim and pays to such injured workman the damages growing out of his injuries, would such payments be charged up to the risk of the employer entering into such contract with the independent contractor?

4. What application has the foregoing section to the condition where an employer, such as a mercantile establishment, has contractual relations with a firm other than building or construction contractors where such firm

is amenable to, but has not complied with, the Ohio workmen's compensation act?"

Answering your questions in order:

(1) If the employer has complied with the act and paid in his premiums the payment must be made out of the fund. If the employer misrepresents the amount of his payroll, or the payroll on which his premium is based, he should be prosecuted under section 1465-97 of the General Code. The commission must recognize the claim if made; it was the intent of the legislature by passing this amendment to protect employes of independent contractors who had not complied with the act. If the person who made the contract with the independent contractor has not complied with the act, nevertheless the employe is, by this amendment, to be considered as his employe and can make claim under section 27 (section 1465-74 G. C.).

(2) The commission must recognize the claim if made—either as an ordinary claim of an employe whose employer has complied with the act; or under section 27 (Sec. 1465-74 G. C.) if the employer has not complied with the act.

(3) Yes.

(4) It applies to all cases where the relation of employer and employe exists as contemplated in paragraph 2 of section 1465-61 G. C., which reads:

> "2. Every person in the service of any person, firm or private corporation, including any public service corporation employing five or more workmen or operatives regularly in the same business, or in or about the same establishment under any contract of hire, express or implied, oral or written, including aliens, and also including minors who are legally permitted to work for hire under the laws of the state, but not including any person whose employment is but casual and not in the usual course of trade, business, profession or occupation of his employer."

The test is: does the relation of employer and employe exist between the independent contractor and the employe; if it does, and the independent contractor has not complied with the law, the employe may treat the person who entered into the contract with the independent contractor as his employer.

As stated above, it was the intent of the legislature to protect employes of independent contractors. By this amendment the person who makes a contract with an independent contractor is liable as employer to the employes of the independent contractor if the independent contractor does not pay into the state fund the premium he should pay, or does not elect to pay compensation direct under section 1465-69 G. C.

If the independent contractor does not pay such premiums or elect to pay direct, then the person who entered into the contract with him is an "employer" under the contemplation of the act and his employes are entitled to compensation from the fund, if he has paid his premiums, and under section 27 (Sec. 1465-74 G. C.) if he has not.

Very truly yours,
JOSEPH McGHEE,
Attorney-General.

836.

COLLATERAL INHERITANCE LAW—NOT APPLICABLE TO ESTATES PASSING BY VIRTUE OF WILL OF TESTATOR WHO DIED BEFORE LAW BECAME EFFECTIVE.

The collateral inheritance tax law does not apply to estates passing by virtue of the will of a testator who died before the law became effective, though such estates did not vest until after such date.

COLUMBUS, OHIO, December 7, 1917.

HON. F. G. ROBERTS, *Probate Judge, Ironton, Ohio.*

DEAR SIR:—I regret that your letter of November 8th did not receive the immediate attention of this department. The question which you ask was confused with other questions pertaining to the application of the collateral inheritance tax law which have been under consideration here for some time.

You inquire whether the present collateral inheritance tax law, which was passed in 1893, applies to a bequest passing to collateral heirs under the following circumstances:

H. died testate August 3, 1883. Her will created a trust in the Portsmouth Reading Room Association. Said association has recently been dissolved and the funds which were the subject of the trust have been turned over to the administrator with the will annexed for distribution under the residuary clause of the will to persons who are not within the exemption provisions of the inheritance tax law.

This precise question was determined under the direct inheritance tax act of 1904, in the case of Executors of Eury v. The State, 72 O. S., 448. In that case the claim of the state to the tax was predicated upon the contention that the estates created by the will there involved did not vest until after the tax law became effective. The court did not decide whether the estates therein involved were vested as of the date of the death of the testator or were contingent or executory, becoming vested only at a later date and after the law went into effect. After expressing the view that if it were necessary to determine that question "we probably should conclude that they were vested though some of them were defeasible." Summers, J., says, page 454:

> "But the occasion of the tax being the devolution of property it ought to attach to such interests only as arise by reason of a death subsequent to the act, and such clearly appears to have been the legislative intent, for not only is the act not expressly made retroactive but its words are all prospective. The right to inherit shall be taxed. The tax shall become due and payable immediately upon the death of the decedent, and shall at once become a lien upon said property, and if not paid within one year after the death of the decedent interest at six per cent. is to be collected, * * * Other provisions that would be difficult of application of the act is retroactive are contained in it, so that it would be unreasonable to conclude that the legislature, in the absence of any suitable provisions for a retroactive operation of the act, intended it so to operate."

While this reasoning is far from convincing in that there is nothing retroactive about the making an inheritance tax law apply to interests that do not vest until after it goes into effect though by virtue of a death occurring before it goes into effect, yet

the court passed squarely upon the question, and though another statute was involved, the phraseology of that act was so similar to that of the collateral inheritance tax law now in force that the case can not be distinguished.

I am therefore of the opinion that even if the residuary bequest referred to by you should be regarded as executory or contingent and as not having vested as of the death of the testator, yet the present inheritance tax, which did not go into effect until after that death occurred, does not apply to the estates arising therefrom.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

837.

APPROVAL—AMENDMENT TO THE ARTICLES OF INCORPORATION OF THE GREAT AMERICAN MUTUAL INDEMNITY COMPANY.

COLUMBUS, OHIO, December, 7, 1917.

HON. WILLIAM D. FULTON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—Under date of December 4, 1917, you submit for my approval amendment to the articles of incorporation of The Great American Mutual Indemnity Company, the original articles of which company were approved by me under date of November 24, 1917. By the amendment the company has elected to transact two of the kinds of business, other than fire insurance, authorized by the provisions of section 9607-2 G. C. (107 O. L. 647.) In the opinion above referred to I held that a mutual insurance company, organized under the provisions of the act above noted, may lawfully elect to transact more than one of the kinds of business therein specified, other than fire insurance, and inasmuch as the certificate with respect to the amendment of the articles of incorporation seems to be otherwise in conformity with the provisions of law applicable to the amendment of articles of incorporation of corporations, the same is hereby approved.

I herewith return you check for six dollars, drawn to your order, by Mr. Endly, secretary-treasurer of the company.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

838.

INDEPENDENT AGRICULTURAL SOCIETY—HOW DEPRIVED OF RIGHT TO SECURE PUBLIC FUNDS FROM COUNTY TREASURER.

Failure to comply with the provisions of section 9882 General Code, or the payment of dividends to its members, will deprive an independent agricultural society of the right to secure public funds from the county treasurer under the provisions of section 9880-1 General Code.

COLUMBUS, OHIO, December 7, 1917.

HONORABLE WALTER BECK, *Prosecuting Attorney, Lisbon, Ohio.*

DEAR SIR:—I have your communication in which you submit the following inquiry for answer:

> "We have in Columbiana county a fair association known as 'The East Palestine Fair Co.,' which was organized in 1906, under the provisions of section 9880 G. C., and subsequent sections.
>
> "Following the enactment of section 9880-1 (105-106 Ohio Laws, 273) this agricultural society filed its report with the board of agriculture of Ohio and received a certificate authorizing the treasurer of Columbiana county to pay this independent agriculture society the sum of $800.00.
>
> "This agricultural society has paid dividends to its members, and admits that they have not complied in any way with provisions of section 9882 G. C.
>
> "Under these conditions, I should like to have your opinion as to whether or not this independent society can make claim to being entitled to this allowance."

The first question presented is whether an agricultural society can secure aid from the county without complying with the provisions of section 9882 General Code. The effect of paying dividends to the members of the association will also be considered in this opinion.

The association seeking money from the county is an independent society, and such society is governed by the provisions of section 9880-1 General Code, which provides as follows:

> "When thirty or more persons, residents of a county or of contiguous counties not to exceed three, are organized into an independent agricultural society that has held annual fairs for agricultural advancement previous to January 1, 1915, in a county wherein is located a county agricultural society, and when such independent society has held an annual exhibition in accordance with the three following sections, and made proper report the state board, then, upon presentation to the county auditor of a certificate from the president of the state board attested by the secretary thereof, that the laws of Ohio and the rules of the board have been complied with, the county auditor of the county, if the fair board be residents of one county, shall draw an order on the treasurer of the county in favor of the president of the independent agricultural society for a sum equal to the amount paid to the county fair and the treasurer shall pay said order. If the fair board

of the independent agricultural society be residents of more than one county, the auditors of such counties shall draw orders on their respective treasurers for their proportionate share of an amount equal to an average amount paid to the several county fair boards to be divided according to population of the counties according to the last federal census. The treasurer or treasurers shall pay such order or orders from the county funds."

This section prescribes the conditions upon which it can secure aid from the county and one of those conditions is,

"when such independent society has held an annual exhibition in accordance with the three following sections."

Section 9881 General Code provides:

"The several county or district societies formed under the provisions of the preceding section, annually shall offer and award premiums for the improvement of soils, tillage, crops, manures, implements, stock, articles of domestic industry, and such other articles, productions, and improvements, as they deem proper, and may perform all acts they deem best calculated to promote the agricultural and household manufacturing interests of the district and of the state. They shall regulate the amount of premiums, and their different grades, so that small as well as large farmers may have an opporunity to compete therefor. In making their awards special reference shall be had to the profits which accrue, or are likely to accrue from the improved mode of raising the crop, or improving the soil, or stock, or of the fabrication of the articles thus offered, so that the premium will be given for the most economical mode of improvement."

Section 9882 General Code reads:

"Persons offering to compete for premiums on improved modes of tillage, or the production of crops or other articles, before such premium is adjudged, shall deliver to the awarding committee a full and correct statement of the process of the mode of tillage or production, and the expense and value thereof, with a view to showing accurately the profits derived or expected to be derived therefrom."

From the statement contained in your letter, it appears that the agricultural society in question has not complied with the provisions of section 9882 General Code. The statute, however, requires that the provisions of said section shall be complied with.

The failure therefore to comply with that section would not meet the conditions prescribed by statute for the payment of money from the county treasury.

The rule of construction of such condition is stated in 2 Corpus Juris, 990, at section 7, as follows:

"Under some of the statutes, agricultural societies upon compliance with certain conditions are entitled to receive appropriations from the public treasury for their support and advancement; and acts authorizing appropriations of public money in their behalf are not unconsti-

tional, although such appropriations to private corporations are forbidden. Under some statutes the number of societies in each state or county entitled to aid is not limited, while under others only the society first duly organized. The power to aid must be strictly construed, the society must have been duly organized, and must have performed all the conditions prescribed by the statute."

In an opinion by Honorable Timothy S. Hogan, attorney-general, under date of July 16, 1912, and reported in volume II, page 1412, of the report of the attorney-general for the year 1912, he had under consideration questions involving an agricultural society, and he says, on page 1414:

"In order for such an association to secure aid from the county, it must comply with the conditions of the statute."

In the case of State ex rel. v. Reed, 12 O. D. (N. S.) 415, it is held:

"A court in construing section 3697 Revised Statutes in determining an amount for which the auditor shall draw his warrant on the county treasurer to pay county agricultural societies, cannot be influenced by the construction put upon it by the agricultural societies or other county auditors, or by the wisdom of the act, the operation thereof or hardship imposed thereby."

A case in point is that of the Nemaha Fair Association v. Thummel, 47 Kan., 182, wherein it is held:

"In order to entitle a county or district agricultural society to representation in the state board of agriculture, the reports prescribed in section 2, of the act for the encouragement of agriculture must have been made; and unless these reports have been made at the time and in the manner required, such society is not entitled to demand an appropriation of the public monies of the county, such as is provided for in section 8 of the act mentioned."

In this case the agricultural society in question had complied with all requests of the secretary of the state agricultural society, and it was therefore contended that it was not necessary for it to comply with the provisions of the statute. This construction, however, was overruled by the court and the court held that the provisions of the statute must be complied with and that they could neither be ignored nor modified by the state secretary.

The legislature of Ohio has prescribed that the provisions of section 9882 General Code must be complied with before an independent agricultural society can secure aid from the county under the provisions of section 9880-1 General Code. Failure to comply with said section 9882 General Code will deprive such society of the right to secure money from the public treasuries.

The effect of paying dividends to the members of an agricultural society calls for a consideration of the provisions of sections 4 and 6 of article VIII of the constitution of Ohio.

Section 4, article VIII of the constitution provides as follows:

"The credit of the state shall not, in any manner, be given or loaned to, or in aid of, any individual association or corporation what-

ever; nor shall the state ever hereafter become a joint owner, or stockholder, in any company or association in this state, or elsewhere, formed for any purpose whatever."

Section 6, article VIII, reads:

"No laws shall be passed authorizing any county, city, town or township, by vote of its citizens, or otherwise, to become a stockholder in any joint stock company, corporation, or association whatever; or to raise money for, or to loan its credit to, or in aid of, any such company, corporation, or association; provided, that nothing in this section shall prevent the insuring of public buildings or property in mutual insurance associations or companies. Laws may be passed providing for the regulation of all rates charged or to be charged by any insurance company, corporation or association organized under the laws of this state or doing any insurance business in this state for profit."

Under the provisions of section 4, of said article VIII, supra, the credit of the state cannot be given in aid of any individual association or corporation whatever, and under the provisions of section 6, of said article VIII the general assembly is prohibited from authorizing any county or other political subdivision to raise money for any joint stock company, corporation or association whatever.

The question of the constitutionality of section 9880 General Code, authorizing payment from the county to agricultural societies, was under consideration in the case of County Commissioners v. Brown, Auditor, 1 O. N. P. (N. S.), 357. The first branch of the syllabus of said case reads as follows:

"The aid extended to agricultural societies under section 3697 is not in the nature of loans to corporations, or of assistance to private enterprises carried on for the benefit of individuals, but was intended from an early period in the history of the state to promote the agricultural resources of the state, and is therefore not violative of section 4 of article VIII of the constitution, which prohibits the state from loaning its credit to or becoming a joint owner or stockholder in any company or association in the state."

After quoting the provisions of sections 4 and 6 of article VIII of the constitution above cited, Collings, J., says at page 358:

"If the provisions made in the statute under consideration can be said to be a loan to the corporation, or if it is in aid merely of a private enterprise carried on for the benefit of the individual members of the corporation, I should say, as would anyone else, that the statute is violative of this section of the constitution. But from the history of legislation on the subject, and in view of the fact that from a very early period in the history of the state, it has been Ohio law to promote and encourage the development of the agricultural resources of the state, I doubt whether this statute was intended to or does in effect aid any private enterprise. On the contrary, I rather take the legislative intention to be, and the effect of the statute to be, the offering of a premium to the formation and carrying on of agricultural societies to the end that agriculture may be fostered and promoted. This is at

least a tenable view, and if a correct one, the statute should stand, at least so far as this section of the constitution is concerned. The statute is not so clearly violative of it as requires a court of inferior jurisdiction to hold it unconstitutional."

The principle upon which this act is held to be valid is that agricultural associations are not organized for the benefit of the individual members of the association. This would not be true in cases where such associations pay dividends to their members. In such a case, the association would be carried on for profit, and it would come within the prohibitions of sections 4 and 6 of article VIII of the constitution above cited.

What constitutes a corporation not for profit was under consideration in the case of Snyder v. The Chamber of Commerce, 53 Ohio State, 1. Shauck, J., says at page 11 as to the corporation then under consideration:

"The corporation though authorized to own or lease real estate for its general purposes, was not authorized to deal therein, nor could it transact any business out of which profits given as dividends could be realized."

He further says:

"Corporations for profit within the meaning of the statute are those which are formed for the prosecution of business enterprises with a view to realizing gains to be distributed as dividends among the share holders in proportion to their contribution to the capital stock."

Where an agricultural society pays dividends to its members, it cannot be said that such society is organized not for profit. It would under such circumstances be a corporation for the benefit of its individual members and could not therefore secure aid from the county to carry on its business. To give public aid by the contribution of money to such an association would be the giving or loaning of the credit of the county to an association in violation of the provisions of section 6 of article VIII of the constitution of Ohio.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

839.

ROADS — CONSTRUCTION WITHIN OR THROUGH MUNICIPALITY — METHOD FOR APPORTIONING COST—ASSESSMENTS.

1. *In cases where the county commissioners construct a road into, within or through a municipality, they must either select one of the four methods set out in section* 6919 *G. C.* (107 *O. L.*, 98), *for apportioning that part of the cost and expense of the improvement not borne by the city, or the township trustees and county commissioners must enter into an agreement by virtue of which each assumes a certain part of the cost and expense of said improvement, not borne by the city, unless the county cares to assume the total cost and expense.*

2. *If one of the methods set out in section* 6919 *G. C. is selected, then that part of the cost and expense of the improvement not assumed by the city, which is to be assessed against property owners, must be assessed in the manner provided in sections* 6919, 6920, 6922, 6923 *and* 6925 *G. C.*

3. *The council of the municipality may assess, against the abutting property owners, any or all of that part of the cost and expense of the improvement assumed by it.*

COLUMBUS, OHIO, December 7, 1917.

HON. J. H. MUSSER, *Prosecuting Attorney, Wapakoneta, Ohio.*

DEAR SIR:—I have your communication of November 17, 1917, requesting my opinion as follows:

> "I wish that you would please apply these sections (referring to sections 6951-1, 6919, 6920, 6922, 6923, 6924 and 6925 G. C.) and any related sections to the following facts:
>
> "The city of Wapakoneta has part of a street known as West Auglaize street, which is a continuation of a main market road and intercounty highway within said city, and which intercounty highway and main market road extends from Wapakoneta to St. Marys. It is desired that West Auglaize street be improved from a point where it is now paved to the west corporation line to connect with that part of the highway lying without the municipality. The city is willing to pay, under section 6949, sixty per cent of the costs of the improvement which they intend to assess on the abutting property as far as possible, and the city asks that the county and the township, in which the municipality lies, pay the balance of the cost, or forty per cent. It is possible that the commissioners would be willing to pay twenty-five per cent thereof and I would like to have your opinion as to whether or not there is a method by which the township can be required to pay fifteen per cent of the cost without an agreement between the township trustees and the commissioners to that effect."

I will note the general plan or scheme of road building by county commissioners. This is set forth in sections 6906 to 6953 inc. G. C. (107 O. L. 95-109), so far as your inquiry is concerned.

Sections 6949 to 6953 inc. form a part of the general scheme of road building by county commissioners and apply particularly to those proceedings connected with the improvement of roads lying within a municipality, running into the same or passing through it.

However, it must be borne in mind that sections 6906 et seq. apply just as well to improvements lying within a municipality, performed under sections 6949 to 6953 inc., in so far as the powers and duties of the county commissioners are concerned.

The following is a brief statement of the steps which would have to be taken in the matter about which you inquire:

(1) The city of Wapakoneta should adopt an ordinance giving its consent to the county commissioners to construct the improvement, in which ordinance the city could agree to assume whatever part of the cost and expense of the improvement it might desire, which you suggest is sixty per cent.

(2) The county commissioners would then adopt a resolution under section 6910 G. C., declaring the necessity for making the improvement, in which resolution they must specify which one of the methods of apportioning the cost and expense of the improvement they desire to follow, as set out in section 6919 G. C.

(3) They would then order the county surveyor to make plans, specifications, etc., in accordance with section 6911, which plans and specifications must be approved by the county commissioners.

(4) These plans, specifications, etc., would then be submitted to the council of Wapakoneta, for its approval, under section 6950.

(5) Then, if the council of Wapakoneta approves the plans, specifications, etc., submitted to it, it would proceed to give notice as provided in section 6950.

(6) The county commissioners would let the contract for the improvement under sections 6945 and 6952 G. C.

Coming now to the apportionment of the cost and expense of the improvement:

As you suggest in your letter, Wapakoneta will, in its agreement with the county commissioners, as shown by an ordinance duly adopted, assume sixty per cent of the cost and expense of the improvement. This leaves forty per cent to be otherwise assumed. As before stated, when the county commissioners pass the resolution of necessity for the improvement, they must set forth the method of paying the cost and expense of same, which must be one of the methods set out in section 6919 G. C. The county commissioners can select one of the four methods therein mentioned, but whichever one is selected must be followed to the exclusion of all other methods, even to the particular division of the cost and expense set out in the method adopted. The township trustees have nothing to do with the method to be adopted by the county commissioners. This matter is up to the sound discretion of the county commissioners.

You make particular reference to section 6951-1 G. C. (107 O. L. 108), which reads in part as follows:

> "The board of county commissioners may provide for an improvement within a municipality by levying against the property benefitted in the same manner as is herein provided for in sections 6919, 6920, 6922, 6923 and 6925 of this act and as provided in section 6924 of the General Code. * * *"

This provision has nothing to do with the cost and expense of the improvement, other than that part of the same which is to be assessed against property owners; that is, the part of the cost and expense of the improvement which is to be assessed against property owners, the amount of which

depends upon which one of the methods set out in section 6919 is selected by the commissioners, may be assessed in the manner provided by sections 6919, 6920, 6922, 6923 and 6925 G. C. Section 6924 is also mentioned, but this section was repealed at the last session of the legislature and therefore its provisions no longer apply.

A part of the cost and expense of the improvement, irrespective of which one of the four methods named in section 6919 G. C. is selected, must be assessed against property owners; that is, a part of the forty per cent not borne by the city of Wapakoneta must be borne by the property owners, without regard to which method is adopted, this amount being assessed in the same manner as is provided in the sections above mentioned.

It appears from your letter that it is the desire of those interested in the improvement that the forty per cent not borne by the city of Wapakoneta shall be assumed by the county commissioners and the township trustees, and that none of it be assessed against property owners. This cannot be done, as hereinbefore stated, if one of the methods set out in section 6919 G. C. is selected by the county commissioners, and they must select one of those methods. This is true unless the county commissioners and township trustees of the township in which Wapakoneta is located decide to follow section 6921 G. C. This section provides as follows:

> "The county commissioners, or joint board thereof, upon a unanimous vote, may without a petition therefor, order that all the compensation and damages, costs and expenses of constructing any improvement be paid out of the proceeds of any levy or levies for road purposes on the grand duplicate of the county, or out of any road improvement fund available therefor, or the county commissioners or joint board thereof, may enter into an agreement with the trustees of the township or townships in which said improvement is in whole or part situated, whereby said county and township, or one or more of them may pay such proportion or amount of the damages, costs and expenses as may be agreed upon between them."

Under this section the county commissioners may assume the whole of the cost and expense of the improvement, which in this case would be the forty per cent not assumed by the city of Wapakoneta; or the county commissioners and township trustees may enter into an agreement by virtue of which each shall pay such proportion of the damages, costs and expenses as may be agreed upon between them.

If the county commissioners and township trustees can agree as to the proportion of this forty per cent each shall assume, then before the county commissioners adopt a resolution of necessity for the improvement, the township trustees should adopt a resolution agreeing to assume a certain percentage of the said forty per cent, and the county commissioners should adopt a resolution agreeing to assume the balance of said forty per cent not borne by the city of Wapakoneta. If this is done, then in the resolution of necessity, as provided by section 6910 G. C., instead of setting out one of the methods mentioned in section 6919, there should appear the agreement as entered into between the county commissioners and the township trustees. But unless this agreement can be made or unless the county commissioners care to assume the entire cost and expense over and above that borne by the city, as provided in section 6921 G. C., then one of the said methods set out in section 6919 G. C. must be followed.

You state it is the desire of the city of Wapakoneta to assess as much of the sixty per cent of the cost of the improvement, assumed by it, on the abutting property owners, as is possible.

Section 6950 G. C. (107 O. L. 107) provides in part as follows:

> "* * * The council of said municipality may assess against abutting property owners all or any part of the proportion of the cost and expense of said improvement and the compensation and damages to be paid by it. * * *"

So this provision gives the municipality power to assess against the abutting property owners all or any part of the cost and expense of the improvement assumed by the city.

I might say in passing that inasmuch as this is an intercounty highway and main market road, and is an improvement over which the county commissioners are assuming jurisdiction, it would be well for them to submit the plans and specifications to the state highway commissioner, in accordance with section 1203 G. C. (107 O. L. 125).

Hence answering your question specifically, it is my opinion that the county commissioners, in making the improvement mentioned in your communication, would be compelled to follow one of two courses:

(a) To select one of the methods set out in section 6919 G. C., for apportioning the cost and expense of the improvement, in any one of which a part of the cost and expense would be assessed against property owners, under sections 6919, 6920, 6922, 6923 and 6925 G. C.; or

(b) The township trustees and county commissioners would have to enter into an agreement in which each would assume a certain part of the cost and expense of the improvement, not otherwise borne by the city of Wapakoneta. Of course under the provisions of section 6921 G. C. the county commissioners could assume, if they so desired to do, the total cost and expense of the improvement, over and above that borne by the city.

Very truly yours,
JOSEPH McGHEE,
Attorney-General.

840.

MUNICIPAL COAL YARD—NOT A PUBLIC UTILITY—MUNICIPALITY MAY SUPPLY COAL DURING EMERGENCY—NON-CHARTERED MUNICIPALITIES DO NOT POSSESS GENERAL POLICE POWERS.

A municipal coal yard is not a public utility within the meaning of article XVIII, sections 4, 5 and 12 of the constitution.

During periods of emergency, when private enterprise breaks down as a means of supplying the needs of the people for a commodity like coal, the police power of any subdivision to which it has been adequately delegated is sufficient to enable the subdivision temporarily to engage in the retailing of coal during the existence of the emergency.

Municipal corporations in Ohio, which have not framed and adopted a charter for their own government do not, however, possess general police power, even in local matters, under the decision of the supreme court in State ex rel. v. Lynch, 88 O. S., 71. Such municipalities may not, therefore, operate municipal coal yards.

COLUMBUS, OHIO, December 7, 1917.

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

GENTLEMEN:—I am in receipt of several communications from city solicitors of the state requesting my opinion on the right of a city to establish, maintain and operate a municipal coal yard.

Inasmuch as these requests concern a matter of state wide interest and importance, I am taking the liberty of expressing my views with respect to same in an opinion addressed to the bureau. The questions presented in said requests for my opinion amount, in substance, to the following:

> Are either charter or non-charter cities authorized and empowered under the constitution and statutes to establish, maintain and operate a municipal coal yard for the purpose of buying coal and selling it in a retail way to the citizens of said city, and to expend public funds therefor?

Neither the constitution nor the statutes of the state of Ohio contain any express provision granting to cities the power to establish, maintain and operate a municipal coal yard for the above mentioned purpose.

If such power exists at all it is contained in and must be implied from some general grant of power. The constitutional and statutory provisions to which my attention has been directed in this regard are as follows:

> Article XVIII:
>
> "Section 2. General laws shall be passed to provide for the incorporation and government of cities and villages; and additional laws may also be passed for the government of municipalities adopting the same; but no such additional law shall become operative in any municipality until it shall have been submitted to the electors thereof, and affirmed by a majority of those voting thereon, under regulations to be established by law."
>
> "Section 3. Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their

limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."

"Section 4. Any municipality may acquire, construct, own, lease and operate within or without its corporate limits, any public utility the product or service of which is or is to be supplied to the municipality or its inhabitants, and may contract with others for any such product or service. The acquisition of any such public utility may be by condemnation or otherwise, and a municipality may acquire thereby the use of, or full title to, the property and franchise of any company or person supplying to the municipality or its inhabitants the service or product of any such utility."

"Section 5. Any municipality proceeding to acquire, construct, own, lease or operate a public utility, or to contract with any person or company therefor, shall act by ordinance and no such ordinance shall take effect until after thirty days from its passage. If within said thirty days a petition signed by ten percentum of the electors of the municipality shall be filed with the executive authority thereof demanding a referendum on such ordinance it shall not take effect until submitted to the electors and approved by a majority of those voting thereon. The submission of any such question shall be governed by all the provisions of section 8 of this article as to the submission of the question of choosing a charter commission."

"Section 7. Any municipality may frame and adopt or amend a charter for its government and may, subject to the provisions of section 3 of this article, exercise thereunder all powers of local self-government."

"Section 12. Any municipality which acquires, constructs or extends any public utility and desires to raise money for such purposes may issue mortgage bonds therefor beyond the general limit of bonded indebtedness prescribed by law; provided that such mortgage bonds issued beyond the general limit of bonded indebtedness prescribed by law shall not impose any liability upon such municipality, but shall be secured only upon the property and revenues of such public utility, including a franchise stating the terms upon which, in case of foreclosure, the purchaser may operate the same, which franchise shall in no case extend for a longer period than twenty years from the date of the sale of such utility and franchise on foreclosure."

"Section 13. Laws may be passed to limit the power of municipalities to levy taxes and incur debts for local purposes, and may require reports from municipalities as to their financial condition and transactions, in such form as may be provided by law, and may provide for the examination of the vouchers, books and accounts of all municipal authorities, or of public undertakings conducted by such authorities."

Section 4206 G. C.:

"The legislative power of each city shall be vested in, and exercised by a council, composed of not less than seven members, four of whom shall be elected by wards and three of whom shall be elected by electors of the city at large. * * *"

Section 4227-1 G. C.:

"Ordinances and other measures providing for the exercise of any and all powers of government granted by the constitution or now delegated or hereafter delegated to any municipal corporation, by the general assembly, may be proposed by initiative petition. Such initiative petition must contain the signatures of not less than ten percentum of the electors of such municipal corporation. * * *"

Section 4324 G. C.:

"The director of public service shall manage and supervise all public works and undertakings of the city, except as otherwise provided by law, and shall have all powers and perform all duties conferred upon him by law. He shall keep a record of his proceedings, a copy of which, certified by him, shall be competent evidence in all courts."

Section 4326 G. C.:

"The director of public service shall manage water, lighting, heating, power, garbage and other undertakings of the city, parks, baths, playgrounds, market houses, cemeteries, crematories, sewage disposal plants and farms, and shall make and preserve surveys, maps, plans, drawings and estimates. He shall supervise the construction and have charge of the maintenance of public buildings and other property of the corporation not otherwise provided for in this title. He shall have the management of all other matters provided by the council in connection with the public service of the city."

In so far as I have been able to ascertain, the above quoted sections contain the only grants of power from which the power in question might be implied. These provisions in their application to the matter in hand refer to two things, viz: (1 powers of local self-government, and (2) public utilities. In order that the right of a municipality to establish and operate a municipal coal yard in the manner above mentioned may be considered to exist, it must be first shown that the doing of that thing amounts to the exercise of a power of local self-government or to the establishment and operation of a public utility.

In the face of the absence of express authority granted by the legislature to a non-charter city to do the thing about which inquiry is made, it is obvious that the enterprise must be classified either as a governmental one or as a public utility before the application of the general constitutional provisions which have been quoted may be made.

The two kinds of enterprises are rather sharply distinguished in the constitution itself; so that for the purposes of this opinion I feel justified in assuming that a given enterprise cannot at the same time be a governmental one and a public utility, but must be one or the other.

In the dissenting opinion by Donahue, J., in State ex rel. v. Lynch, 88 O. S. 106, this distinction is not made, but it is argued that anything which a municipal corporation may appropriately be authorized to do is necessarily governmental. Reference is made therein to such activities as owning and operating a municipal power, lighting and heating plant; provisions for water supply; the ownership and maintenance of public grounds, parks and recreation centers; the establishment of municipal lodging houses, public baths and bath houses;

the establishment of public libraries and reading rooms; and the maintenance of public band concerts.

It is submitted that all these activities do not fall within the same class for the purpose of our present discussion. Clearly enough the ownership and operation of a lighting or water plant is a public utility; but with equal clearness it seems to me that the maintenance of free band concerts and free libraries is not a public utility. One distinction which will at once assert itself between the two classes as exemplified by these instances is that in the case of a municipal water or light plant a charge is made for the service furnished by the municipality; while in the case of the libraries and band concerts the service is furnished free.

Now both classes of activities might constitute "public purposes" within the constitutional limitations upon the power of taxation resulting from provisions like article I, section 19 of the Ohio constitution, or the limitations inherent in the nature of the taxing power itself. Thus, it is conceded that the power of taxation can be constitutionally exerted only for a public purpose, yet there may be more than one kind of public purpose, and here we are forced to assume that there are two distinct kinds of such purposes.

The argument of Donahue, J., appears to me to be responsive to the general question as to what constitutes a public purpose, but on the point on which it is actually made, viz: as to whether or not the maintenance of a municipal moving picture show is a governmental activity as distinguished from a public utility—that is to say, falls within what might be termed the police activities of the municipality or within the proprietary functions thereof, the argument, as I have stated, does not appeal to me as satisfactory.

What then is the distinction between a public utility and a governmental enterprise other than a public utility? It seems that the only satisfactory approach to this distinction lies in an adequate definition of the phrase "public utility." Without quoting authorities and indeed without referring to any except Prof. Bruce Wyman's work on public service companies, section 50, let me say that I am satisfied that a single and certain test can be laid down for the determination of this question. A public utility is a calling or service which is inherently monopolistic in character. A calling or service becomes monopolistic in character when it responds to an obvious public need and there are natural limitations upon the ability of private individuals freely to supply the need. Such limitations may surround the source of the supply of the raw material required; though at this date it would probably be unsafe to say that a limitation on the supply of raw material makes the supplying of the commodity, however necessary it may be to the public in a given state of civilization, a "public calling." More frequently and certainly more obviously an inherent limitation upon the rendition of the service or the supplying of the commodity because of the nature of the medium of distribution required is sufficient to make the calling a public utility. Thus, though it must be admitted that the decisions are not all in harmony, it seems clear to me that a waterworks is a public utility, not because the people need water, but because pipes are necessary to transport it; so that the supplying of water by means of wagons, or by some such means, would not be a public calling unless indeed the person engaged in it had a natural monopoly on the source of supply of pure water. If that source were equally open to all it is difficult to see how supplying water in bottles, transported by means of wagons, or other vehicles, to the premises of the consumer, could be regarded as a public utility upon any grounds that are not common to practically all occupations engaged in furnishing commodities of

common public consumption. Clothing, milk, bread, meat—all these things are no less necessary than water and unless all the clothing is made in one place; unless some one owns all the cows there are in the immediate neighborhood; unless some such circumstance varies the ordinary condition of affairs, I do not see that furnishing any such necessary commodity can be a public utility in and of itself. Many cases apparently overlook this obvious distinction. Seemingly such a distinction was overlooked in Laughlin v. City of Portland, 111 Me. 486, 51 L. R. A. (n. s.) 1143, sustaining the constitutionality of a statute expressly authorizing a municipality to maintain a public yard for the sale of fuel to its inhabitants at cost as against the objection that it involved an unconstitutional extension of the taxing power.

The same oversight is even more palpable in Holton v. Camilla, 134 Ga., 560, 31 L. R. A. (n. s.) 116.

These decisions, from which there is a great temptation to quote at length, set forth with great ability and learning the history of the growing recognition by the courts of the broad scope of what constitutes a "public purpose," but in my opinion their reasoning does violence to the principle which I have tried to state and which I believe to be sound.

On the other hand there are many cases which I believe to be sustained by the better reasoning which hold that a purely business activity of a municipal corporation in which the municipality comes into competition with private enterprise cannot be sustained unless the activity amounts to a public calling.

State v. Toledo, 48 O. S. 112-137;
Keene v. Waycross, 101 Ga., 558; 31 L. R. A. (n. s.) 119;
Baker v. City of Grand Rapids, 142 Mich. 687;
State ex rel. Mueller v. Thompson, 149 Wis. 488, 43 L. R. A. (n. s.) 339;
Rippe v. Becker, 56 Minn. 100, 22 L. R. A. 857;
People ex rel. Detroit H. R. Co. v. Salem, 20 Mich. 452;
Union Ice & Coal Co. v. Town of Ruston, 135 La. 898; L. R. A. (1915-B) 859;
Opinion of the Justices, 155 Mass. 601, 15 L. R. A. 10.

It must be admitted that a very strong argument is made by the Maine court in the Portland case, supra, to sustain its position in that case, which is directly in point. Upon careful examination of the opinion it will be found that the court does not deny the distinction which I have laid down but merely attempts to apply the principles for which I have contended to the coal business by asserting that the existence of a monopoly in the coal business is a fact of which the court should take judicial notice. I find myself unable to follow the Maine court to the conclusion reached by that court for the reason that though it be admitted that there is a monopoly in the production of coal in the sense in which the Maine court defined the term "monopoly," yet it does not follow that there is any inherent or natural monopoly in the distribution of coal to the ultimate consumer. In other words, the reasoning of the court goes no further than to support the conclusion that the business of mining coal is a public calling. The court reaches this difficulty when it comes to deal with the argument that if selling coal to public consumers is a public calling, then the operation of a grocery store or meat market or bakery is likewise a public calling. It seems to me that the production of coal and its distribution to the markets is not characterized by monopolistic conditions in this country at the present time to a greater degree than the business of supplying meat, for example. Whatever doubt there may be on this score the decision of the supreme

court of this state in State v. Toledo seems to me to foreclose further discussion of the question. In that case the court expressed the following dictum:

> "It is inquired, why do not municipalities also purchase coal mines and issue their bonds therefor, and embark in the business of mining and selling coal to private consumers? An obvious reply is, that coal and other fuel may be carried to the consumer by the ordinary channels of transportation, and at comparatively moderate expense, while in conveying natural gas, streets must be opened, pipes laid, works erected, fixtures and machinery purchased, and other expenses incurred, beyond the enterprise and capital of an individual."

I think it is obvious that under the sections of the constitution above quoted, which purport to confer upon any municipality the power to construct and operate public utilities, there must be some limitation. The term "public utility" must be capable of definition in the nature of the case. The authorities —even the Maine case, in which the result is opposed to the conclusion which I have reached—sustain the definition which I have suggested and which makes monopoly the test. The Maine case is in my opinion erroneous, first, because the monopolistic conditions surrounding the coal business therein referred to are artificial and illegal instead of natural, and, second, because such conditions pertain to what might be termed the production end of the business instead of the supplying end of the business.

Again, the present need for public coal yards which I assume to exist is temporary in its character. More will be said on this point in dealing with the next branch of the question. At the present time it is sufficient to state that in my opinion the power granted by sections 4 et seq. of article XVIII of the constitution is to conduct such operations as through a period of years and under normal conditions constitute public utilities. An enterprise which today calls for governmental operation but tomorrow in normal times will not stand in need of governmental control cannot in my judgment be termed a public calling.

I conclude, therefore, on the first branch of the question that a service rendered by a municipality to its inhabitants, conducted as a business and, indeed, capable of being operated at a profit, is a public utility if it supplies a public necessity and there is a natural limitation upon its rendition; but where such limitations upon the rendition of a particular service as may exist at a given time are temporary or artificial and in normal times no such limitation exists, the service is not a public utility. The need which the public may have for such service at such time is one that government broadly considered is not powerless to supply, but the activity would not be a public utility under such circumstances but would rather embody an exertion of the police power which is to be sharply distinguished from the operation of a public utility. The business of supplying coal to domestic and industrial consumers in a city is not normally one with respect to which there is any natural or inherent limitation of a monopolistic character, whatever may be said respecting the business of mining coal. Therefore such business is not a public calling and a municipal coal yard would not be a public utility.

Coming now to a consideration of whether or not, though a municipal coal yard is not a public utility such an enterprise may be justified under present abnormal conditions as a governmental one. On this point we have the opinion of the Massachusetts Supreme Judicial Court in re Municipal Fuel Plants, 182 Mass. 605, 60 L. R. A. 592, the head note in which is as follows:

"Municipalities have authority to provide fuel for paupers; but they cannot be given power by the legislature to buy and sell fuel in competition with private enterprise, although it is scarce and high in price and the cost to consumers may be thereby reduced, unless there is such a scarcity as to create a general and widespread distress in the community which cannot be met by private enterprise."

I think I am able to say on the basis of the experience of this office during the past few months that private enterprise has most assuredly broken down at this time as a means of supplying the great and pressing public need for coal. The conditions suggested by the Massachusetts court seem to be satisfied and if this decision is sound it would follow that to avoid public suffering and quite apart from such service as a municipality might render in the relief of the poor, a municipal corporation, if it possesses the general police power, may temporarily and during the existence of the emergency enter the business of retailing coal.

The idea that the police power must be held adequate to meet all emergencies and therefore may be called into practical operation by a given emergency towards ends to which it would not relate did the emergency not exist is expressed in the recent case of Wilson v. New, 37 Supreme Ct. Rep. 298. In this case the supreme court of the United States held that the Adamson law, by which congress attempted a temporary regulation of the wages of the employes of interstate railroads, was within the power of congress to regulate commerce. It was admitted that the power to regulate wages was ordinarily no part of the power to regulate commerce; but it was laid down broadly that when a dispute between employers and employes respecting wages threatened to paralyze interstate commerce congress was not to be held powerless to take such action as would put an end to the dispute and keep commerce moving.

On this reasoning it would seem that if the conditions laid down by the Massachusetts case were satisfied and if the only way in which the inhabitants of a municipality could obtain an adequate supply of coal would be through the entry of the municipality into the business of selling coal, the police power of the municipality, to the extent such power were possessed by the corporation, might be invoked to sustain the enterprise during the existence of the emergency conditions. The principle is that the police power may avail itself of any method which the necessities of the case require. As has been suggested the power may be likened to the individual right of self defense. Both are alike at all times limited by the rule of necessity, but so far as present considerations are concerned by no other rule. Therefore, if a municipal coal yard is directly and immediately necessary to preserve public health, safety and economic welfare, I know of no principle on which the power to establish such an enterprise could be denied. The same would be true respecting the distribution of milk, groceries, meats and other public necessities.

This conclusion, with which I am satisfied, brings me to the consideration of the question as to whether a non-charter municipality has adequate police power. Prior to the adoption of article XVIII of the constitution it would probably have to be conceded that municipalities did not have any inherent local police power and that they possessed such powers only as were expressly or by necessary implication granted to them by the legislature. It may be argued that the adoption of article XVIII did change the law in this respect. Sections 2 and 3 of that article have been quoted. The first of them enjoins upon the general assembly the duty of passing general laws for the government of municipalities. I think it must be conceded that whatever is provided

by those general laws is binding upon municipalities which do not adopt charters or avail themselves of special laws passed for the government of municipalities adopting the same. In other words, whatever may be the inherent powers of non-charter cities they are certainly subject to the general laws.

Section 3 of the article in terms applies to all municipalities. It gives to them "all powers of local self-government" and the power to adopt and enforce such local police, sanitary and other similar regulations as are not in conflict with general laws.

Looking only to the face of the constitution it might be contended that the effect of section 3 upon non-charter cities is to reverse the presumption that formerly existed with respect to the powers of municipalities in the governmental field, so that now if section 3 is to be given any effect it means that municipalities have all governmental powers which are not taken away from them by general laws instead of being limited to such powers as were affirmatively conferred upon them by general laws, as formerly. To be sure, we should have to find in the general laws appropriate vehicles for the exercise of such powers as might be deemed to be granted to municipalities by the self-executing provisions of section 3, but when reference is had to the sections of the general code relative to the powers of council and the director of public service and to the powers of the electors to be exercised through the initiative, it would seem that no difficulty is to be encountered here. Council has all the legislative powers of the municipality. The director of public service is the officer who has to administer all of the public undertakings of the municipality; and those undertakings are not enumerated exhaustively but include such as may be established by council, in addition to those expressly provided by law. The electors have the right to initiate any measure within the power of the municipality under the constitution.

Construing the sections as they are, then, one might have no difficulty in coming to the conclusion that local police power is fully granted to all municipal corporations in this state regardless of their classification as charter or non-charter cities, and that it may be exercised by council, and in the case under consideration its administration may be conferred upon the director of public service. However, we now come face to face with the decisions of our own supreme court in State ex rel. v. Lynch, supra, and in Billings v. Railway Co., 92 O. S. 478. In these cases, especially the first of them, it was apparently held that article XVIII, section 3, is not self-executing and that the only way a municipality may avail itself of the grant of power therein would be to adopt a charter under section 7 et seq. of the same article. The remarks of the judges delivering the opinions of the court in these cases on this point were not strictly necessary to the decisions in each case; but it would seem that they embody the law as it has been decided.

In the Lynch case it was held that a non-charter municipality might not point to article XVIII, section 3, as its authority for operating a municipal moving picture show. This decision was clearly right; for a municipal moving picture show would not be an activity referable to the police power in any sense; nor could it be justified as a public utility. It would have exactly the same standing as a municipal coal yard would have in ordinary times. Indeed, three members of the court in the Lynch case agreed that the enterprise was open to condemnation for this reason in addition to the other one suggested.

In Billings v. Railroad Co. it was held that a municipality which had adopted a charter was thereby exempted from the operation of general laws prescribing the conditions upon which franchises to operate street railways might be granted by municipal corporations generally. The inference from this

decision and from the case of Carpenter v. Cincinnati, 92 O. S. 473, is that a city which has not adopted a charter remains subject to the general laws in such matters. This, as I have pointed out, is correct for the reason that a non-charter city is at all times subject to control both with respect to its frame work of government and with respect to the extent of its powers by the legislature, but it does not follow from these last two decisions that the old rule of strict construction of municipal powers still obtains in this state.

The opposing argument would be that article XVIII, section 3 is self-executing in the sense in which I have described the effect of that section. That is to say, under it the powers of a municipality are original, not derivative. They are subject, however, to control; to dimunition, not addition; to regulation, not creation. They may be diminished or regulated by the general laws of the state, if such general laws apply to them, or by the locally adopted charter, but when either the general laws or the charter are silent the power springs directly from the constitution.

Section 2 of article XVIII provides for the passage of general laws for the organization and *government* of municipal corporations. Article XIII, section 6, which formerly governed this subject matter, provided that "the general assembly shall provide for the organization of cities and incorporated villages by general laws * * *." The difference in phraseology is not without significance. Formerly there was no necessity of *governing* municipalities because municipalities had no inherent powers. When article XVIII was framed, however, it was seemingly contemplated that municipalities should have some inherent or natural rights or powers which would call for government or regulation.

Again, section 3 is not limited by any of its phraseology to non-charter cities. Indeed, as I read the opinion in State v. Lynch, supra, this concession is made. It is there argued that section 3 may apply to all cities but that it does not effectually operate as to non-charter cities because if a given power is claimed under it the claimant must trace the power not only to the municipality, but also to some proper organism within the municipality such as council or the people.

I quote the following from the opinion of Shauck, C. J., in State ex rel. v. Lynch, supra (page 92):

> "By the first and second sections municipalities are classified as cities and villages, and the legislature is peremptorily required to pass general laws for their organization and government. On the 15th of November, when the article took effect, such laws were already in force, and they continued to be in force, operating upon every municipality in the state until a change should be effected in some mode authorized by the amendment. This conclusion results necessarily from the familiar doctrine of Cass v. Dillon, 2 O. S. 607, where it was held that the new constitution of the state (that of 1851) created no new state. It only altered in some respects the fundamental law of a state already in existence; and even this was done pursuant to the prior constitution, under whose provisions the convention was called and the new constitution framed. * * *
>
> It is also to be observed that questions respecting the self-executing capacity of constitutional provisions usually relate to the necessity for legislative action to make them effective. This article provides two modes of securing the permitted immunity from the operation of the uniform laws which the legislature is required to pass. * * *

A fundamental defect in the relator's case is that it assumes that a power conferred upon a municipality is conferred upon its council, although every provision of the amendment with respect to this body merely authorizes it to make provisions for ascertaining the will of the electors. * * *

It seems, therefore, to be entirely beyond doubt that since the city of Toledo had not by a vote of its electors approved any additional law passed by the general assembly, and that its electors had not adopted a charter, the municipality and all of its departments have only such powers as were conferred by the general law; that is, such power only as it had prior to the 15th of November."

The following is quoted from the concurring opinion of Wilkins, J. (page 99):

"It cannot be argued that an agent of the municipality, chosen before the state granted to municipalities all this local governmental power, may exercise a power not within the scope of the agency when the agency was created. There is no pretense that the principal (the people of the city) has done anything since the council was elected to enlarge the authority of the agent (the council). The action of this council is based solely upon the first clause of section 3, article XVIII. And the argument of the relator is that the clause shall be interpreted to read thus: Municipal *councils* shall have authority to exercise all the powers of local self-government."

It might be contended that under the present municipal code all that is necessary effectually to confer a power upon the municipality thereunder is to grant the power to the municipality as such. It then becomes vested in the legislative sense in the council and in the administrative sense in the appropriate administrative department. If in the abstract all municipalities possess all powers of local self-government and if the power to establish a municipal coal yard in the face of an emergency, which is a police power, is a power of local self-government (which last I think needs no argument) then the principle of the Lynch case is the only reason which could be urged against the authority of the council to pass appropriate legislation looking to the exercise of this power.

As I see it, then, the central thought in the dicta in the Lynch case lies in the assumption that it is impossible to grant power to a municipality organized under the municipal code and subject thereto without also specifying that such power may be exercised by the council of the municipality or otherwise distributing its exercise through the various municipal organs of government.

In this connection I may point out that it was at all times competent for the general assembly prior to the adoption of article XVIII of the constitution effectually to confer a new power upon a municipality by the enactment of some such section as is found in title 12, division 2, chapter 1, part first of the General Code, which purports to enumerate the powers of municipal corporations. (See for example section 3647-1 G. C., adopted in 1911.)

In short, while conceding the correctness of the actual decisions in both the cases cited, one might easily disagree with the reasoning underlying the first paragraph of the syllabus in the Lynch case. But inasmuch as this language states the law of Ohio, I feel obliged to come to the conclusion that a

municipal coal yard may not be operated by a non-charter city at the present time.

Limiting my answer, therefore, to non-charter cities I am of the opinion that even in the face of the present great emergency the council or the electors of a city, if it is deemed greatly necessary for the public health, safety and welfare to enter the retail coal business, may not do so. In short, the thing inquired about cannot be undertaken even as a police measure.

I take it that all those who have inquired of me about this subject are familiar with the poor laws and that it is assumed that a municipality as the local subdivision for the relief of the poor may purchase coal and distribute it to the needy under the same conditions as have always obtained.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

841.

POLICE CHIEF—MARSHAL—FEES—TRANSPORTING PRISONERS TO OHIO REFORMATORY FOR WOMEN—WHEN SENTENCED BY MAYOR OR POLICE JUDGE.

There is no authority for the payment of any fees to marshals and chiefs of police for transporting prisoners to the Ohio reformatory for women in cases where they have been sentenced to such institution by the mayor, police or municipal judge. When prisoners have been sentenced to the reformatory for women by the justice of the peace, the constable may receive a fee of forty cents for serving the mittimus and the mileage as provided for in section 3347 G. C. He may also be reimbursed for the expense incurred in transporting and sustaining a prisoner such sum as may be allowed by the justice of the peace, from the county treasury.

COLUMBUS, OHIO, December 8, 1917.

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

GENTLEMEN:—I have your communication of September 26, 1917, as follows:

> "Sections 2148-5 and 2148-6 G. C. provide for sentence to the Ohio state reformatory for women by courts having jurisdiction. In view of the fact that there seems to be a general confusion of ideas on this point, the juvenile judge of Butler County has issued a warrant to convey in one case to a probation officer; the municipal court of Hamilton has issued one warrant to convey to the bailiff of the municipal court; the municipal court of Cincinnati has issued one warrant to convey to the humane officer; and many people are of the opinion that the warrant to convey should be issued to the sheriff of the county, for which service the sheriff is entitled to the same fees as are provided for by law for commitment to the Ohio state reformatory. See sections 2148-1, 2148-5 and 2134 G. C."
>
> *Question.* "To what officer should the commitment be issued to convey a woman to the Ohio state reformatory for women, and to what fees is such officer entitled therefor?"

"We have carefully looked over your opinion No. 427, rendered to the auditor of state under date of July 5, 1917, and we would say that while this opinion most thoroughly covers the conveyance by sheriffs, together with costs and transportation in felony cases, and in misdemeanor cases by sheriffs when committed from a common pleas or probate court, together with transportation under section 2997 G. C. and also in delinquency cases, we do not quite see that it covers sentences from police courts or municipal courts, both of which have jurisdiction under the laws of the Ohio state reformatory for women."

From your statement I take it that what you wish to know at this time is as to what officer should the commitment be issued to convey a woman to the Ohio reformatory for women, when such woman is sentenced to such institution by a mayor, justice of the peace, police court, and to what fees is such officer entitled for transporting such prisoner.

It is the duty of the constable to execute the orders of the justice of the peace, the marshal or chief of police to execute the orders of the mayor, the chief of police to execute the orders of the judge of the police court or municipal court, and it seems clear to me that in cases where these different courts sentence women to the Ohio reformatory for women, the prisoner should be transported to such institution by these officers.

No provision is made in the statutes relating to the Ohio reformatory for women for transportation of prisoners to the institution and if any fees are allowed constables, marshals or chiefs of police for this service, authority must be found elsewhere in the General Code.

Section 3347 G. C. provides in part:

"For services rendered, duly elected and qualified constables shall be entitled to receive the following fees: For services and return of copies, orders of arrests, warrant, attachment, garnishee, writ of replevin, or MITTIMUS, forty cents each, for each person named in the writ; * * * mileage, twenty cents for the first mile, and five cents per mile for each additional mile * * * transporting and sustaining prisoners, allowance made by the magistrate, and paid on his certificate; * * * ."

When a constable conveys a woman to the Ohio reformatory for women, he must have with him the mittimus or certificate of commitment and deliver the same to the superintendent of the Ohio reformatory for women. For rendering this service he may charge the fee allowed in the above section for the service of a mittimus, viz., forty cents, and may receive the mileage provided for in said section. This mileage, however, simply covers his own travel and not that of the prisoner. However, the provision of this section allowing the constable to be re-imbursed for transporting and sustaining prisoners in such sum as the magistrate allows, I think, is broad enough to cover this case and it is my opinion that the constable may receive reimbursement for transporting and sustaining a prisoner conveyed by him to the Ohio reformatory for women at Marysville such sum as may be allowed by the magistrate, and this sum when so allowed must be paid to such constable on the magistrate's certificate from the county treasury. The mileage and fee for serving the mittimus are to be paid out of the costs of the case. The fees of the marshal and chief of police for conveying the prisoner to the Ohio reformatory for women are fixed, if at all, by section 4387 with respect to marshals and section 4534

with respect to chiefs of police, respectively. Both provide that in the one case the marshal and in the other case the chief of police shall receive "the same fees as sheriffs and constables in similar cases." The fee of the sheriff for serving writs to the first named is seventy-five cents for the first name on the writ and twenty-five cents for each additional name and in addition thereto eight cents per mile going and returning (section 2845 G. C.). As will be seen, the fees allowed the sheriff for this service are quite different from the fees of the constable allowed in section 4375 G. C. Therefore, the sections which attempt to prescribe the fees of the marshal and chief of police as the same as those allowed to sheriffs and constables for similar services are meaningless.

Haserodt v. State, decided May 8, 1917, Court of Appeals, Ohio Law Bulletin Ed., Aug. 20, 1917, page 266.

It is therefore my opinion that no fees may be allowed the marshal or chief of police for conveying prisoners to the Ohio reformatory for women and I know of no statute authorizing the payment of any expenses incurred by them in such service, either on behalf of themselves or the prisoners.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

842.

BOARD OF EDUCATION—TRANSFERRING TERRITORY—CREATING NEW DISTRICTS OUT OF OLD DISTRICT—APPORTIONMENT OF INDEBTEDNESS—TUITION PAID BY ONE DISTRICT TO ANOTHER—UNDER MISTAKE OF FACT— RECOVERY.

1. *In creating new districts out of any old district or parts thereof, or in transferring territory from one district to another, the county board of education should equitably apportion the indebtedness of the original district or districts to the districts newly formed or created.*

2. *Where money is paid by one school district to another in the way of tuition, under a mistake of fact, the district so paying it may recover the same from the district to which it is paid or from the district for the use and benefit of which the money was paid.*

COLUMBUS, OHIO, December 8, 1917.

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

DEAR SIR:—I have your communication fully setting out certain matters on which you desire my opinion. The facts, briefly stated, are as follows:

In Crawford county two townships, Cranberry and Auburn, join, Auburn lying on the east. Some fifteen or sixteen years ago the two boards of education of these townships transferred certain territory from Auburn township district to Cranberry township district, and made their records so show, but the clerks of the boards failed to notify the county auditor of the transfer.

Since said time the pupils of this supposed transferred territory have been attending school in Cranberry township district, without any question being raised as to tuition. Certain high school pupils from this supposed trans-

ferred territory have been attending school at the village of New Washington, which village lies in Cranberry township district, and the Cramberry township board of education has been paying their tuition on the theory that said territory was actually transferred from Auburn township district to Cranberry township district.

Further, a short time ago the county board of education created, out of a part of Auburn township district and parts of other districts, together with Tiro, a school district known as Tiro consolidated school district, the rest of Auburn township district forming North Auburn school district. A part of the supposed transferred territory lies in the North Auburn school district and a part in Tiro consolidated school district.

To your request you attach a map which makes the state of facts very plain. Upon these facts you ask two questions:

> 1. As a matter of law can the present North Auburn district and the present Tiro consolidated school district pay to Cranberry district the amount of money which it paid to the New Washington board of education for the education of high school pupils?
>
> 2. If the same can be so paid, how should the same be divided between North Auburn district and the Tiro district?"

We will consider the statutes as they existed fifteen or sixteen years ago, at the time the supposed transfer was made.

Section 3890 R. S. at that time read as follows:

> "Each organized township, exclusive of any of its territory included in a city, village or special district, shall constitute a school district, to be styled a township district."

Section 3893 R. S., which related to transfer of territory from one district to another, read in part as follows:

> "A part or the whole of any district may be transferred to an adjoining district, by the mutual consent of the boards of education having control of such districts; but no transfer shall take effect until a statement, or map, showing the boundaries of the territory transferred, is upon the records of such boards; nor, except when the transfer is for the purpose of forming a joint subdistrict, until a copy of such statement or map, certified by the clerks of the boards making the transfer, is filed with the auditor of the county in which the territory so transferred is situated; and any person living in the territory so transferred may appeal to the county commissioners, as provided in section thirty-nine hundred and sixty-seven, and the commissioners, at their first regular meeting thereafter, shall approve or vacate such transfer; * * * ."

Under this section no transfer could take effect until, among other things, a copy of the statement or map, certified by the clerks of the boards making the transfer, was filed with the auditor of the county in which the territory so transferred was situated. The right to appeal from the action of said boards to the county commissioners was also given.

From the provisions of this section it is plainly evident that the action taken by the Cranberry district and the Auburn district was of no force or

effect whatever, in law, and the boundary line of the two township districts continued as it was prior to the attempted transfer, and, as set out in the facts, each township district received the taxes upon the property on either side of the line, as it had done prior to the supposed transfer.

We will briefly note the provisions of section 4022a R. S., relative to the attendance of pupils in a district other than that in which they reside. This section provided that if children of school age resided further than one and one-half miles from the school where they had a legal residence, they might attend the nearest subdistrict school and have their tuition paid by the board of education of the district where they had a legal residence. This section applied to pupils in grades below the high school and the provisions thereof have remained very much the same up to the present time.

Sections 7747 to 7751 G. C. provide for the tuition of pupils attending a high school. While for the purpose of this opinion I am not passing on the question as to whether all the pupils attending high school at New Washington, from the strip of territory in question, are entitled to have their tuition paid under sections 7747 to 7751 inc. G. C., yet it is quite clear, from said sections, that as to those who are so entitled to have their tuition paid the New Washington board of education would have to look to the Auburn township board for the same, because the strip of territory, as said before, was never in reality transferred from the Auburn school district to the Cranberry school district.

While the Auburn township board of education was in law compelled to pay the tuition of all pupils from this strip, entitled to attend the New Washington high school, under sections 7747 to 7751 inc. G. C., the Cranberry township board of education paid the tuition, on the theory that this strip of territory had been transferred from Auburn township district to Cranberry township district, and that Cranberry township district was receiving the taxes levied upon the property in said strip of territory. In other words, the Cranberry township board of education paid said tuition under a mistake of fact. If this money was paid to the New Washington board of education under a mistake of fact, what is the status of the three boards concerned relative thereto? In considering this we will note the following general propositions:

> "A mistake of fact is said to take place either when some fact which really exists is unknown or some fact is supposed to exist which really does not exist."
>
> "To authorize a recovery the mistake must be as to a material fact, but need not be mutual."

The facts about which you inquire come within these two statements and therefore we can draw the following conclusion:

> "A payment made by mistake of fact which the party is not by law obliged to make, under ignorance of the facts or in misapprehension in regard thereto, may be recovered back."

The above principles are set forth in 30 Cyc. 1316-1318.

Hence we are safe in drawing the conclusion that the Cranberry township board of education would be entitled in law to recover from the New Washington board of education the amount of money so paid to it under the mistake of fact.

However, a simpler way of adjusting this matter would be to consider that the Cranberry township board of education has paid money under mistake of fact, but for the use and benefit of Auburn township board of education, and for which payment said Cranberry board should be reimbursed by the Auburn township board, or rather the districts which have been formed from Auburn township.

With this conclusion, we will go one step further. As said before, a part of the territory of Auburn township, including a part of the strip which was supposedly transferred to Cranberry township, together with parts of other townships and Tiro village, were united by the county board of education to form the Tiro consolidated school district, and the northern part of Auburn township district, which includes a part of the strip supposedly transferred, was made part of the North Auburn district.

The question arises as to what proportion of the amount due Cranberry district should be paid by the two newly formed districts, namely, North Auburn school district and Tiro consolidated school district.

From the facts stated by you, I am not sure as to whether your county board, in forming these two districts, proceeded under section 4692 or section 4736 G. C. If it proceeded under section 4692, we find this provision relative to the transfer of territory:

> " * * * The county board of education is authorized to make an equitable division of the school funds of the transferred territory either in the treasury or in the course of collection. And also *an equitable division of the indebtedness of the transferred territory.*"

If your board proceeded under section 4736 G. C., we find this provision therein made:

> " * * * The county board of education is authorized to appoint a board of education for such newly created school district and direct an equitable division of the funds or *indebtedness belonging to the newly created district* * * * ."

While the language used in these two sections is not very clear, yet it is my opinion that the legislature had in mind that the county board of education, in forming a district out of parts or the whole of other districts, or in transferring territory from one district to another, would make an equitable division of the indebtedness, existing against the original districts, between the newly formed districts; that is, in the case under consideration the county board of education, in creating the North Auburn school district out of parts of the Auburn district, and joining the rest of Auburn district to the Tiro consolidated school district, would make an equitable division of the indebtedness subsisting against Auburn district as it originally stood, between North Auburn school district and Tiro consolidated school district. If the county board of education has not already done this, it is my opinion it is still warranted in law in equitably dividing the one hundred and thirty-five dollars, which was a valid and subsisting obligation against Auburn township district, between North Auburn school district and Tiro consolidated school district.

Hence answering your question specifically, it is my opinion that the county board of education should equitably divide the indebtedness of one hundred and thirty-five dollors between the North Auburn school district and the Tiro

consolidated school district, and that after this is done the two districts would be warranted, and authorized in law, in paying to the Cranberry district the amount so apportioned to each by the county board of education.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

843.

BOARD OF EDUCATION—NOT LIABLE FOR TUITION OF PUPIL IN ADJOINING DISTRICT WHEN THE PARENT OF PUPIL OWNS PROPERTY IN SAID DISTRICT.

A rural board of education which is liable for the payment of tuition under section 7747 G. C. for a pupil who attends a high school in an adjoining district can take advantage of section 7683 G. C. on the ground that the parent of the pupil or such pupil owns property in the district maintaining the high school to which the child is sent.

COLUMBUS, OHIO, December 10, 1917.

HON. CLARE CALDWELL, *Prosecuting Attorney, Warren, Ohio.*

DEAR SIR:—Your communication for my opinion reads as follows:

"Can a rural board of education which is liable for the payment of tuition under section 7747 G. C., having a pupil attending high school in an adjoining district, take advantage of section 7683 G. C. on the ground that the parent of the pupil owns property in the district maintaining the high school to which the child is sent?

"I ask this question for the reason that Hon. Timothy S. Hogan, in his opinion for the year 1912, page 1421, answered it in the negative. However, in a recent opinion of our supreme court, to wit: State ex rel Nimberger, et al, v. Bushnell et al, Board of Education et al, 95 Ohio State 177, as found in the Ohio Law Reporter for June 25, 1917 the court at page 185 says:

"'Any district which is required to pay the tuition of a pupil residing therein, but attending school in another district, is entitled to the benefits of the provisions of section 7683 General Code and should be credited with the amount of school taxes paid upon property owned by the pupil or his parent in the district wherein is located the high school attended. Such credit should be made no matter who pays the tuition.'

"This statement by the court appears to be obiter dictum. However, in the face of the same would you feel justified in agreeing with the opinion of Mr Hogan above referred to."

Section 7683 G. C., to which you refer, reads:

"When a youth between the age of six and twenty-one years or his parent owns property in a school district in which he does not reside, and he attends the schools of such district, the amount of school tax paid on such property shall be credited on his tuition."

The history of said section is noted in the opinion of former Attorney General Hogan, to which you refer, and that I may draw my deductions I shall also note such history briefly.

The substance of what is now section 7683 was enacted first in 1873, 70 O. L., 195-215. Section 71 of said act reads in part:

> "Boards of education of city, village or special districts shall also have power to admit, without charge for tuition, persons within the school age, who are members of the family of any freeholder whose residence is not within this district, if any part of such freeholder's homestead is within such district."

That is, under said provision when any member of the family of any free-holder, who resided outside of the district of the city, village or special district attended school in such district and if any part of such free-holder's homestead is within such district, then the board of education had the power to admit such members of such family within the school age "without charge for tuition," it being evidently the intention and purpose of the legislature to permit the board, in the exercise of said power, to consider the taxes paid upon said property so located within the city, village or special district, to act as an offset against any tuition which would be chargeable to the pupils, children of such free-holder. Said section was amended in 1880, 77 O. L., 196, to read in part as follows:

> "The schools of each district shall be free to all youth between six and twenty-one years of age,who are children, wards or apprentices of actual residents of the district; and such youth may also be admitted free if they are members of the family of a free-holder whose residence is without but whose homestead is partly within such district. Each board of education may admit other persons of like age upon such terms or upon payment of such tuition as it may prescribe; provided that in all counties which do not contain a city of the first grade of the first class, in such case there shall be *credited on the tuition so charged* the amount of school tax in such district for the current school year, which may be paid by such non-resident pupil or a parent thereof * * * ."

Under said amended section, where a free-holder owned a homestead located in a school district, but the residence portion thereof was located without, said district, the children of such free-holder were permitted to attend the schools of the district even though such residence was located without, and instead of limiting the classes of districts to city, village and special, the amended section provided that the condition of the credit of tuition should apply to all cases where a city of the first grade of the first class was not located within the county, and instead of the board exempting the pupil from tuition, as was provided when the section was first enacted, the last amended section provides for the crediting on the tuition so charged the amount of the school tax. Said section was next amended in 1887, 84 O. L., 69, to read as follows:

> "The schools of each district shall be free to all youths between six (6) and twenty-one (21) years of age, who are children, wards or apprentices of actual residents of the district. * * * Each board

of education may admit other persons of like age upon such terms or upon payment of such tuition as it may prescribe; provided, that in all counties which do not contain a city of the first grade of the first class, in such case there shall be credited on the tuition so charged the amount of school tax in such district for the current school year, which may be paid by such non-resident pupil or a parent thereof * * * ."

No material change is found in said amendment as far as the crediting of tuition is concerned.

The next amendment is found in 87 O. L., 317. but no change in substance was made by said amendment.

Material change, however, was made when the section was next amended in 97 O. L., 360. Said amendment read as follows.

"The schools of each district shall be free to all youth between six and twenty-one years of age, who are children, wards or apprentices of actual residents of the district, * * * . Each board of education may admit other persons upon such terms or upon the payment of such tuition as it may prescribe; provided, that when a youth between the age of six and twenty-one years or the parent of such youth owns property in a school district in which he does not reside and said youth attends the schools of said district, *the amount of school tax paid on such property shall be credited on the tuition of said pupil.*"

In each of the prior enactments the tuition, or the payment thereof, was made a personal matter of the pupil or the parent, but here for the first time general language is used so that instead of the tuition which may be paid by such pupil or parent being the language used, it is not "credited on the tuition of said pupil," and whatever tuition would be charged to said pupil must receive a credit of the school tax upon the land owned by such pupil or his parent. The language is practically the same now, for it provides that the amount of the school tax paid on such property "shall be credited on his tuition."'

Section 7747 G. C. provides in part:

"The tuition of pupils who are eligible for admission to high school and who reside in village or rural districts in which no high school is maintained, shall be paid by the board of education of the school district in which they have legal school residence * * * ."

The above is a means provided for the payment of the tuition of high school pupils, the payment to be made by the board of education of the residence of such high school pupils and the pupil being entitled to a credit when property is owned in such district either by himself or parent. Only such tuition would be chargeable to him which is over and above any taxes so paid and it seems clear, therefore, that it would make no difference who would pay the tuition the credit could not help but follow. This is the view taken by the Supreme Court in State ex rel Nimberger, et al, v. Bushnell, et al, 95 O. S. 177-185, wherein the following language is used:

"Any district which is required to pay the tuition of a pupil residing therein, but attending school in another district, is entitled

to the benefits of the provisions of section 7683 of the General Code and should be credited with the amount of school taxes paid upon property owned by the pupil or his parent in the district wherein is located the high school attended. Such credit should be made no matter who pays the tuition."

Answering your question, then, I advise you that a rural board of education which is liable for the payment of tuition under section 7747 G. C., having a pupil attending a high school in an adjoining district, can take advantage of section 7683 G. C. on the ground that the parent of the pupil owns property in the district maintaining the high school to which the child is sent.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

844.

REGISTRATION OF LAND TITLES— WITHDRAWAL —SECTIONS 8572-26 AND 8572-86 OF TORRENS LAWS AMENDED OR REPEALED BY IMPLICATION—"ALL DEEDS AND MORTGAGES" AS USED IN SECTION 8572-64a—RECORDER—DUTIES UPON APPLICATION FOR WITHDRAWAL—FEES.

Section 2 of the Act of March 8, 1915, 106 O. L., 24, relating to the registration of land titles, permits the withdrawal from registration of any registered land title, whether the same was registered in the course of proceedings to sell real estate or partition, or not; said section is inconsistent with sections 8572-26 and 8572-86 of the "TORRENS LAW" and amends or repeals them by implication.

The phrase "all deeds and mortgages" occuring in said section should be interpreted so as to include all instruments required to be recorded under the general recording acts.

It is the duty of the recorder, upon an application for withdrawal from registration, to select the documents necessary to be recorded.

No fee is chargeable by the recorder for the service of entering a withdrawal of registration; but he is entitled to usual fees for recording the instruments required to be recorded by section 2 of the act.

COLUMBUS, OHIO, December 10, 1917.

HON. SAMUEL DOERFLER, *Prosecuting Attorney, Cleveland, Ohio.*

DEAR SIR:—I acknowledge receipt of your letter of October 18, 1917, requesting my opinion upon certain questions relating to the construction of the act of March 8, 1915, amending certain provisions of the Land Title Registration Law, (106 O. L., 24). These questions, which are submitted by the recorder of Cuyahoga county, are as folows:

"1. Section 4 of this amendment specifically repeals section 8572-64 only. Sections 8572-26 and 8572-86 of the act both contain very plain provisions that land once registered can never be withdrawn. Are these sections repealed by this amendment? The recorder is in doubt

and hesitates to act on a recent request for withdrawal from registration until advised.

"2. In case it is held that the above mentioned sections are repealed and that land can be withdrawn from registration, what is the meaning of the words in section 2 of the amendment: 'and thereafter said title shall be considered the same as if it had never been registered?'

"When titles are registered the common pleas court renders two decrees—one 'settling and determining the title' (the quieting of title part of the proceeding) and the other, the decree of registration. If the recorder can withdraw lands from registration this gives him power to set aside a decree of the common pleas court, the decree of registration, at least. Does this act also set aside the decree 'settling and determining the title?' If this decree can be thus set aside, then do all clouds and title defects which were removed by the registration proceedings, automatically reattach?

"3. In the course of the registration proceedings the adjoining owners have their day in court and the title boundaries of the land are determined and fixed, sometimes after a special survey has been made by order of the court. If land can be withdrawn from registration, does this annul the establishment of the title boundaries so that after withdrawal they shall be 'the same as if the title had never been registered?'

"4. Section 2 of the amendment provides that 'all *deeds* and *mortgages* heretofore filed conveying registered lands, the registration certificate of which has been surrendered as herein provided for, shall be recorded according to law.' You will note that the above provides for record of deeds and mortages only. Various other documents affecting the title to registered lands are filed and are necessary to a proper determination of the title. Are these to be left unrecorded or shall the words 'deeds and mortgages' be construed as including all documents filed with the recorder which affect the title to the lands which are withdrawn?

"5. In the case of a complicated title, especially where only a part of the lands is to be withdrawn from registration, and where various documents are on file, some affecting all and some only various parts of the land, who is to determine just which documents are necessary to be recorded—the recorder or the applicant?

"6. If withdrawal from registration is permitted by the aforesaid amendment, what fees or fee, if any, must the recorder charge for his services in connection therewith, other than the usual fees for recording the deeds and mortgages provided for in section 2 of the amendment?"

In order to consider these questions it will be necessary to make the following quotations from the amendatory act referred to:

"AN ACT.

"To amend section 8572-64 of the General Code, to make optional the registration of title of land sold in partition or in suits brought

by an assignee or other officer appointed by a court, and to cure defects in such proceedings.

"BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF OHIO:

"Section 1. That section 8572-64 of the General Code be amended to read as follows:

Sec. 8572-64. In all suits to sell an estate in fee in the whole of unregistered land * * * and in all suits to partition unregistered land held in fee, proper allegations and parties necessary to a decree for original registration of the title to said estate *may* be made in the petition, the said allegations to be included in a separate cause of action, and said title * * * *may*, with the approval of the court * * * be registered * * * . Upon any such sale or partition and confirmation thereof the title *may* be transferred to and registered in the name of the purchaser * * * . And if such land is not so sold the person entitled thereto *may* procure a transfer and certificate therefor * * * . The court *may*, for good cause shown, in any case *provided for in this section*, enter an order dispensing with registration or permit the withdrawal of the application to register.

"Section 2. (designated as section 8572-64a) No decree or order of sale or partition heretofore or hereafter made in any suit, action or proceeding, mentioned in said section 8572-64, and no sale, conveyance or partition or decree confirming the same made in any such suit, action or proceeding shall be held void or in any wise affected by want of conformity of such suit, action or proceeding to the requirements of said section.

"*Any person owning real estate the title to which is registered may surrender his certificate to the county recorder, who shall thereupon cancel said certificate of record, and thereafter said title shall be considered the same as if it had never been registered. All deeds and mortgages heretofore filed conveying registered lands, the registration certificate of which has been surrendered as herein provided for, shall be recorded according to law, and thereafter the lands conveyed therein shall be considered the same as if they had never been registered.*

* * * * * * * * * * * *

"Section 4. That said original section 8572-64 of the General Code be, and the same is hereby repaled.

* * * * * * * * * * * *"

The title of this act, and a comparison of section 8572-64 with the original act of 1913 (103 Ohio Laws, 914-945) makes it obvious that the controlling purpose of the legislature was to dispense with the imperative necessity of procuring registration in case of proceedings to sell or partition. If there were doubt about the interpretation of any of the separate provisions of the act it would be proper to resolve such doubts by interpreting them in accordance with this controlling purpose. But such reasoning is not permissible in this case. The separate provisions are on their face of plain and unmistakable import, although they are not within the general purpose as thus ascertained. For the constitutional provision (Article II, Section 16) that:

> "No bill shall contain more than one subject, which shall be clearly expressed in its title,"

is, as has been frequently held, merely directory, so that if in the body of a

law appears subject matter that is not expressed in the title thereof, the matter is none the less the law on that account.

The second paragraph of section 2, as I have above quoted it, clearly goes beyond the scope of the title and applies to and authorizes the surrender of a certificate of registration in any case. It is not limited on its face to the surrender of a certificate of registration on the part of the owner of real estate which had been theretofore registered in proceedings to sell or to partition.

I find myself unable, therfore, to reach the conclusion that the fact that the remaining provisions of the act relate solely to registrations in the course of such judicial proceedings is enough upon which to predicate the conclusion that the paragraph of section 2 now under consideration is likewise to be so limited. However, the question is not to be resolved by the consideration of section 2 of the amendatory act alone, but as the communication of the recorder suggests the fact that section 4 may be inconsistent with certain mandatory sections of the act as first passed must be taken in to consideration on the other side. Moreover, whatever inference might arise from this fact is strengthened by the fact that the act of 1915 expressly amended one of the sections of the land title registration law, thus tending to exclude the inference that any implied repeal or amendent was contemplated.

I am thus brought to the consideration of sections 8572-26 and 8572-86 of the General Code, referred to by the recorder. The first of these provides, in part, as follows:

> "Sec. 8572-26. The obtaining of a decree of registration and receiving a certificate of title shall be deemed as an agreement running with the land and binding upon the applicant and the successors in title that the land shall be and forever remain registered land and subject to the provisions of this act (G. C. Sec. 8572-1 to 8572-118) and of all acts in amendment thereof * * * ."

The second of these sections is even more explicit and provides as follows:

> "Sec. 8572-86. No land once brought under and made subject to the provisions of this act (G. C. 8572-1 to 8572-118) shall ever be with drawn therefrom."

The only way in which the second sentence of section 2 of the amendatory act can be reconciled with these explicit provisions of the prior law is to read into it a qualification which is not expressed therein. As before suggested, such qualification would make the sentence read something as follows:

> "Any person owning any real estate the title to which is registered, *in a suit to sell real estate or in a suit to partition real estate*, may surrender his certificate to the county recorder * * * and thereafter said title shall be considered the same as if it had never been registered."

The following considerations would tend to support such an interpretation, if admitted at all:

1. Implied repeals and amendments are not favored, and where it is possible to reconcile a later act with a former act that has not been expressly

repealed such reconciliation is to be preferred to an implied repeal or amendment.

2. It must be assumed that the general assembly considered the extent of the repeal which it intended to make, in as much as it did make an express repeal in section 4 of the act; therefore, whatever repealing or amendatory effect the act has it will not reach beyond section 8572-64, which deals with registration in proceedings to sell and partition.

3. All the considerations already discussed in dealing with the question from the viewpoint first adopted come in here and may be considered again in connection with the circumstances as now revealed.

In my opinion none of these considerations is weighty enough to permit that qualification to be read into the statute. The legislature was plainly trying to change the law in some particulars. In other words, it was making a new law and not merely revising or correcting the old law. There is, to be sure, a presumption that it did not intend a more radical change in the law than the fair import of the new law may require, yet, after all allowances are made for the considerations which have been mentioned, the fact remains that the second sentence of section 2 of the act of 1915 is not ambiguous.

The first and most important rule of statutory interpretation is that where a statute is clear on its face the function of judicial interpretation or construction, or whatever it may be called, is not even invoked. The court must administer the law as it finds it.

Slingluff et al. v. Weaver, 66 O. S., 621.

Here we have the statement that:

> "Any person owning real estate, the title of which is registered, may surrender his certificate * * * and thereafter said title shall be considered the same as if it had never been registered."

Section 86 of the original act is exactly the opposite. I cannot escape the conclusion that it is impossible to reconcile these provisions without doing violence to the fair meaning of the one last enacted.

I must conclude therefore that in spite of the failure of the legislature specifically to repeal section 86 of the original act or to amend section 26 thereof, and in spite of the fact that the legislature did actually amend and repeal by expression when it was passing the act of 1915, an implied repeal has taken place and section 86 and the first sentence of section 26 of the original act are no longer the law.

In this connection, however, let me observe that too much significance should not be given to the fact that the legislature did expressly repeal section 8572-64 General Code. This repeal was made because section 8572-64 was being expressly amended, and in deference to the requirement of section 26 of Article II of the constitution to the effect that whenever a statute is amended the original shall be repealed and the amending act shall set forth the whole section as amended. In other words, the repealing section of the act of 1915 goes, as it were, with section 1 and completes the legislative act started in section 1, viz: the express amendment of section 8572-64. It has nothing to do therefore with sections 2 and 3 of the act, which relate to matters other than the amendment of the section in question.

The first question, therefore, is answered by saying that the recorder has authority to entertain an application for the withdrawal of a title from registration, though the title was originally registered otherwise than in a partition proceeding or in a proceeding to sell real estate.

The second question as raised by the recorder does not, it seems to me, raise an issue in which the state has an interest within the meaning of the statute authorizing the attorney-general to formulate and express an official opinion (section 343 General Code). Of course, it has been the policy of this department to advise as to all matters in which the duties of public officers may be involved, because of the desirability of uniform practice to be observed under the guidance of the bureau of inspection and supervision of public offices. The recorder's second question, however, raises an issue exclusively of private right. The statute, as I have interpreted it, authorizes a withdrawal of the registration, but the effect of such withdrawal on land titles previously registered, and more particularly upon decrees of courts ordering registration is a matter about which I do not feel authorized to advise.

The same remark applies to the third question submitted by the recorder.

It is otherwise with respect to the recorder's fourth question. Having regard to the manifest intent and purpose of the second paragraph of section 2 of the amendatory act, I would be inclined to hold that the phrase "deeds and mortgages" as therein used should be broadly interpreted to mean all documents requiring record in the office of the county recorder. In fact nothing else could result from the mandate of the law that in case of registration "said title shall be considered the same as if it had never been registered," for if such is the case then the general laws requiring the recordation of instruments like leases, etc., would come into play and operate, possibly even without the last sentence of section 2. However that may be, I am of the opinion that the effect of a withdrawal of registration is to bring into play the general recording acts and to make them applicable to all instruments which otherwise would have been subject thereto, and which have been filed during the life of the registration. Whether or not recordation, when it takes place, shall be, as it were, a *nunc pro tunc* is a question which is not submited, and which has not been considered.

In answer to the recorder's fifth question, I am of the opinion that the recorder is to decide which documents are necessary to be recorded. The language of the second sentence is mandatory upon him. That is to say, the law commands him to record the necessary conveyances which are in his possession and are a part of the files of his office. Therefore, without any express order from the applicant for withdrawal, and as a result of the application itself, it is his duty to select the instruments requiring record and record them. I do not believe, however, that he would have the authority to refuse to record a particular document because he might not think that its recordation was necessary. On the other hand, if the general recording acts do not authorize him to record a particular instrument he would, of course, be at liberty to refuse to record it.

In answer to the recorder's sixth question, I beg to advise that the recorder is not permitted to charge any fee for cancelling a certificate of registration, but, in my opinion, he is entitled to the usual fee for recording the various instruments which are required to be recorded by the last sentence of section 2.

Very truly yours,

JOSEPH MCGHEE,
Attorney-General.

845.

BOARD OF EDUCATION—WHICH MAINTAINS HIGH SCHOOL CONTRACT WITH ANOTHER BOARD FOR SCHOOLING PUPILS—WHEN NOT COMPELLED TO PAY TUITION OF PUPILS OF DISTRICT.

A board of education which maintains no high school, but which has entered into an agreement with a board of education in the same or an adjoining township which does maintain a high school for the schooling of the high school pupils of the first named board, is not compelled to pay the tuition of pupils of such school district who live more than four miles from the school maintained by the board and who attend high schools other than the one with which the board has the contract, unless the school such pupils attend is a nearer high school.

December 10, 1917.

HON. GEORGE C. VON BESELER, *Prosecuting Attorney, Painesville, Ohio.*

DEAR SIR:—Your request for my opinion reads in part:

"About the most difficult question I have tried to answer is whether a board of education of a rural school district, which does not maintain a high school of its own, must pay the tuition to some other high school elected by a student who lives more than four miles from the high school with which the board of education has entered into an agreement for the schooling of its pupils.

"The facts in the case here further are, that the board of education of the village of Willoughby, a first grade high school, charges the board of education of the township of Willoughby $47.50 tuition per year, while the board of education of the city of Cleveland, to which some students are going, charges the board of education of Willoughby rural school district the sum of $180.00. The question is, can pupils who live more than four miles from the high school in the village of Willoughby elect to go to the high school in Cleveland and obligate the board of education of Willoughby rural school district to pay what seems to them an exorbitant tuition. Willoughby rural board has a contract with Willoughby village board."

Pertinent to your inquiry are sections 7747, 7748 and 7750 of the General Code.

Section 7747 G. C., as amended in 107 O. L. 625, reads as follows:

"The tuition of pupils who are eligible for admission to high school and who reside in village or rural districts, in which no high school is maintained, shall be paid by the board of education of the school district in which they have legal school residence, such tuition to be computed by the month. An attendance any part of the month shall create a liability for the entire month. No more shall be charged per capita than the amount ascertained by dividing the total expenses of conducting the high school of the district attended, which may include charges not exceeding five per cent. per annum and depreciation charges not exceeding five per cent. per annum, based upon the actual value of all property used in conducting said high school by the

average monthly enrollment in the high school of the district. The district superintendent shall certify to the county superintendent each year the names of all pupils in his supervision district who have completed the elementary school work, and are eligible for admission to high school. The county superintendent shall thereupon issue to each pupil so certified a certificate of promotion which shall entitle the holder to admission to any high school. Such certificates shall be furnished by the superintendent of public instruction."

Section 7748 G. C. reads as follows:

"The board of education providing a third grade high school as defined by law shall be required to pay the tuition of graduates from such school residing in the district at any first grade high school for two years, or at a second grade high school for one year. Should pupils residing in the district prefer not to attend such third grade high school the board of education of such district shall be required to pay the tuition of such pupils at any first grade high school for four years, or at any second grade high school for three years and a first grade high school for one year. Such a board providing a second grade high school as defined by law shall pay the tuition of graduates residing in the district at any first grade high school for one year: except that a board maintaining a second or third grade high school is not required to pay such tuition when the maximum levy permitted by law for such district has been reached and all the funds so raised are necessary for the support of the schools of such district. No board of education is required to pay the tuition of any pupil for more than four school years; except that it must pay the tuition of all successful applicants, who have complied with the further provisions thereof, residing more than four miles by the most direct route of public travel, from the high school provided by the board, when such applicants attend a nearer high school or in lieu of paying such tuition the board of education maintaining a high school may pay for the transportation of the pupils living more than four miles from the said high school, maintained by the said board of education to said high school. Where more than one high school is maintained, by agreement of the board and parent or guardian, pupils may attend either and their transportation shall be so paid. A pupil living in a village or city district who has completed the elementary school course and whose legal residence has been transferred to a rural district in this state before he begins or completes a high school course, shall be entitled to all the rights and privileges of a resident pupil of such district."

Section 7750 G. C. provides:

"A board of education not having a high school may enter into an agreement with one or more boards of education maintaining such school for the schooling of all its high school pupils. When such agreement is made the board making it shall be exempt from the payment of tuition at other high schools of pupils living within three miles of the school designated in the agreement, if the school or schools selected by the board are located in the same civil township as that of the board making it, or some adjoining township. In case no such

agreement is entered into, the school to be attended can be selected by the pupil holding a diploma, if due notice in writing is given to the clerk of the board of education of the name of the school to be attended and the date the attendance is to begin, such notice to be filed not less than five days previous to the beginning of attendance."

Applying the above to your case, we have the following situation: There is no high school located in Willoughby rural school district, but the board of education of said rural district has entered into an agreement with the board of education of the Willoughby village district, wherein a high school is located, for the schooling of all the high school pupils of the Willoughby rural district at the Willoughby village high school. Some of the pupils of the Willoughby rural district reside more than four miles from the Willoughby village high school and the question is, can such pupils elect to attend a high school other than the one at Willoughby village, which has been provided by the board, and compel the board of education of the Willoughby rural school district to pay their tuition?

A school can be selected by pupil holding a diploma and the board of education charged with the tuition only in one of two ways:

First. If no high school is maintained by a board of education and no agreement is entered into between such board of education and a board of education maintaining a high school for the schooling of its high school pupils, then a pupil who resides in a district which maintains no such high school and which has entered into no such agreement may select a high school and give notice in writing to the clerk of the board of education of the name of the school so selected and the date the attendance is to begin, and the board of education will thereby be bound to pay the tuition of such pupil at such school so selected, or,

Second. If a board of education provides a high school and a pupil resides more than four miles therefrom by the most direct route of public travel, and such pupil attends a nearer high school, then the board of education must pay the tuition of such pupil at such nearer high school.

But where a board of education which has no high school enters into an agreement with a board of education which maintains a high school for the schooling of its high school pupils, then such board of education cannot be charged with the tuition of pupils who attend other high schools, because the entering into of the contract between the board of education which maintains no high school and the board of education which maintains a high school for the schooling of the high school pupils of the first named board, is a "providing" of a high school by the board of education as far as the schooling of high school pupils is concerned. It is urged, though, on account of the language contained in section 7750,—"when such agreement is made the board making it shall be exempt from the payment of tuition at other high schools of the pupils living within three miles of the school designated in the agreement, if the school or schools selected by the board are located in the same civil township as that of the board making it, or some adjoining township,"—that where pupils live more than three miles the exemption mentioned in the above quoted language would not apply. That reasoning, however, does not follow, for before tuition of a pupil can be paid by a board of education there must be a statute specifically authorizing that same may be paid. It was held in Board of Education v. Board of Education, 10 O. D., 459, that:

"The constitutional guaranty of 'an efficient system of common schools throughout the state' does not impose an obligation upon township boards to pay the tuition of a few pupils who elect to enjoy the advantages of a high school outside the township of their residence, either in the same or an adjoining county."

That is, before a board of education can be charged with the tuition of high school pupils, there must be a specific statute granting the right therefor. In other words, tuition is not had as a matter of right, but only as a matter of statute. So that, what the provision of section 7750 G. C., in relation to the three mile limit, does mean is that where a board of education, which has no high school, enters into an agreement with a board of education which maintains a high school for the schooling of the high school pupils, then any pupil who lives within three miles of the high school so designated shall not attend another high school at the expense of the board, provided, of course, that the agreement is entered into with a board of education of the same or an adjoining civil township.

In School District v. Harrison Twp., 14 O. D., 62-63, it is held:

"The clause which gives the pupil the right to select the school of his attendance and to charge the tuition upon the township by giving notice in writing, *applies only where no high school is maintained by the township and where no agreement has been made with the board of education in the same or adjoining township, but does not apply to a case of a pupil residing more than three miles from the township high school attending a nearer high school,* for in such case there is no right of selection by the pupil."

This department held in Opinion No. 260, rendered to Hon. Charles H. Jones, under date of May 12, 1917, that the high school pupil who resides more than four miles from the high school of his district must attend a nearer high school before the board of education of the district in which he resides is required to pay his tuition, and what applies to the attendance in a district where a school is maintained would, as noted above, apply to a district where a contract is entered into. If, then, the pupils who live more than four miles from the Willoughby high school attend a nearer high school, that is, if the Cleveland high school is nearer to their residence, then the Willoughby rural district board of education must pay their tuition, but if the Cleveland high school is not nearer to the residence of such pupils who live more than four miles from their own high school, then the Willoughby rural district board of education is not compelled to pay the tuition thereof.

So that, answering your question, I advise you that a board of education which maintains no high school, but which has entered into an agreement with a board of education in the same or an adjoining township, which does maintain a high school for the schooling of the high school pupils of the first named board, is not compelled to pay the tuition of pupils of such school district who live more than four miles from the school maintained by the board, other than the one with which the board has the contract, unless such pupils attend a nearer high school.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

846.

APPROVAL—TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE—CITY OF FOSTORIA,OHIO.

COLUMBUS, OHIO, December, 12, 1917.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—IN RE Bonds of the city of Fostoria, Ohio, in the sum of $1,300.00, to pay the city's share of the cost and expense of improving Union street in said city from Sycamore street to the south rail of the main track of the New York, Chicago & St. Louis Ry. Co.

I have examined the transcript of the proceedings of the council and other officers of the city of Fostoria, Ohio, relating to the above bond issue, and find said proceedings to be in accord with the provisions of the General Code relative to bond issues of this kind.

I am, therefore, of the opinion that properly prepared bonds covering said bond issue will, when properly signed and delivered, constitute valid and binding obligations of said city.

No bond form was submitted with the transcript and I am therefore writing to the authorities of said city asking them to forward to me a copy of bond form for my approval. The transcript relating to this bond issue will be retained until a copy of such bond form is received. Very truly yours,

JOSEPH MCGHEE,
Attorney-General.

847.

APPROVAL—BONDS—FAIRFIELD COUNTY.

COLUMBUS, OHIO, December, 12, 1917.

Industrial Commission of Ohio, Columbus, Ohio.

"GENTLEMEN:—IN RE: Bonds of Fairfield county, Ohio, in the sum of $38,000.00, in anticipation of assessments apportioned to said county for the improvement of Rush creek, petitioned *for by J. E. Purvis and others.*

I have carefully examined the transcript of the proceedings relating to the above bond issue. These bonds are issued by the board of county commissioners of Fairfield county, Ohio, in anticipation of the collection of that part of the total assessments for the improvement above mentioned, conducted by the board of county commissioners of said county and the board of county commissioners of Perry county under the provisions of law relating to the improvement of joint county ditches. The proceedings relating to this improvement have been extensive and somewhat involved, and the examination of the transcript has entailed a great deal of work and careful attention on the part of this department.

The only question, however, that has given me any concern with respect to the validity of this bond issue is one touching the authority of the boards of county commissioners of said counties to entertain the petition for the improvement and conduct the proceedings therefor. As to this the transcript

shows that when the petition for the improvement of Rush creek, which is a stream of living water, located in both counties, was presented to the board of county commissioners of Fairfield county and to the board of county commissioners of Perry county said boards, in joint session, refused to entertain the petition on the ground that they had no authority to entertain said petition, inasmuch as it calls for the improvement of a living stream of water, which they claimed they had no authority to improve under the provisions of sections 6536 et seq. of the General Code relating to the improvement of joint county ditches. Thereupon, Purvis and others, petitioners for said improvement, brought an action in mandamus in the court of appeals of Perry county, Ohio, praying for a peremptory writ of mandamus directing said boards of county commissioners to entertain said petition and to determine whether or not said improvement should be granted. The court sustained the petition of the relators and issued a peremptory writ of mandamus to the board of county commissioners of Fairfield county and to the board of county commissioners of Perry county, directing them to entertain said petition and to determine whether said improvement should be granted as prayed for in the petition. It does not appear that this case was taken to the supreme court. On the contrary, upon receipt of the writ of mandamus the boards of county commissioners of said counties met and considered said petition and, having found the facts alleged in said petition with respect to the necessity of said improvement to be true, directed the same to proceed; and this and subsequent proceedings of the boards of county commissioners of said counties seem to be in all respects regular and in conformity to the provisions of the statute relating to improvements of this kind.

Inasmuch as the bonds in question are issued in anticipation of the collection of assessments, the question naturally arises whether or not the judgment of the court finding that said boards of county commissioners had authority to entertain jurisdiction of the petition for said improvement is conclusive on the persons assessed for the cost and expense of the improvement. As there is some question with respect to the correctness of the court's decision relative to the authority of the said boards of county commissioners to entertain jurisdiction of the petition for said improvement, the question just suggested is one of some concern.

There is very little in the way of authority in this state on this question.

In the case of *State ex rel.* v. *Mitchell*, 31 O. S. 592, it appears that the city of Columbus instituted an action in mandamus against Mitchell and others, commissioners for the improvement of north High street in said city under a special law applying to said city. The relief prayed for was a writ requiring those commissioners to levy an assessment for the cost and expense of said improvement. By way of defense to the petition the commissioners for said improvement set up the unconstitutionality of the law authorizing the improvement. The court held that the law was unconstitutional as a special grant of corporate power to the city of Columbus, but further held that all persons to be assessed for the cost and expense of the improvement participating in said improvement, either in the petition therefor or by taking part in the election for the commissioners, were estopped to contest the constitutionality of the law. In its decision in this case, however, the court in sustaining the petition of the relator for a writ of mandamus stated that the action of the commissioners in levying the assessment would not conclude the lot owners from contesting their liability, and that if there were any who were not estopped by their conduct they might make their defense when the assessment was sought to be enforced against them. This case was decided in 1877.

In the case of *City of Columbus* v. *Sarah Schneider et al.*, decided by the circuit court of Franklin county in 1895, 14 C. C. R. S., 312, the same being a case relating to the same improvement in question in the Mitchell case, the court held as follows:

> "Actions brought by the proper parties against a municipality to enjoin the collection of a street improvement assessment, where submitted on the issues and decided against the plaintiffs by the upholding of the assessment, amount to a conclusive adjudication of the validity of the assessment, in an action brought by the city against other parties to enforce the collection of assessments against other property for said improvement."

This case was affirmed by the supreme court without opinion in 54 O. S. 617.

In the case of *Ashton et al.* v. *City of Rochester*, 133 N. Y., 187, the plaintiffs were the owners of property assessed for a local street improvement, and the action was one in their own behalf and in behalf of all other persons having property fronting on the street and assessed for the improvement for the purpose of obtaining a judgment declaring the assessment null and void. The court in its opinion in this case affirming a judgment of the lower court dismissing the petition says (p. 192):

> "The record shows that upon the application of certain of the property owners on the street other than the plaintiffs, liable to be assessed for the improvement, the supreme court at special term awarded a mandamus against the executive board, commanding it to proceed upon the resolution and to award a contract for the performance of the work. That, acting in obedience to this command, the board did award the contract in accordance with the provisions of the character prescribing the powers and duties of the board. The decision upon the application for the mandamus was a judgment of a court of competent jurisdiction. It adjudged that the resolution of the common council was in full force, notwithstanding the motion to reconsider, and that it was the clear legal duty of the executive board to proceed and let the contract. This judgment could not thereafter be questioned collaterally by any of the parties, nor anyone else who was represented in the proceeding. They might attack it directly by appeal or motion to set aside, or for a rehearing, but so long as it remained unreversed and not set aside, it bound everyone who was a party, or represented in any subsequent collateral action or proceeding. It is quite clear that it bound the property owners who applied for the writ, the executive board and the city. The only question is whether it bound these plaintiffs who were not parties by name. But the judgment of a court of competent jurisdiction will sometimes operate as an estoppel and a former adjudication against persons who were not named in the proceeding and who were not parties to the record by name. It is enough if they were represented in the action or proceeding which resulted in the judgment, or were entitled to be heard. When a judgment is rendered against a county, city or town in its corporate name, or against a board or officer who represents the municipality, in the absence of fraud or collusion, it will bind the citizens and taxpayers. This is upon the principle that they are represented in the litigation by agencies, authorized to speak for them, and to protect

their interests. (Herman on Estoppel, vol. 1, p. 166, Clark v. Wolf, 29 Iowa, 197; Lyman v. Faris, 53 id. 498; Tredway v. Soux City & P. R. Co., 39 id. 663; Freeman on Judgments, Sec. 178; Robbins v. Chicago, 4 Wall. 657; S. C., 2 Black, 418; Preble v. Supervisors, 8 Biss. 358.)"

The court in its opinion in this case further says:

"When a judgment is rendered by a competent court awarding a writ of mandamus against a board of supervisors or other body or officers having power to audit claims against a county or other municipality, commanding them or him to audit a claim or demand against the county or municipality, and it is audited in obedience to such command, the validity of the claim cannot be questioned subsequently by the tax-payers in any collateral action or proceeding. Their remedy is to appeal from the judgment awarding the writ or move for a rehearing. So also a receiver of a corporation, appointed in an action by the people for dissolution, represents the creditors, and a judgment that would estop him estops them also. (Herring v. N. Y. L. E. & W. R. R. Co., 105 N. Y., 340).

We are not aware of any reason for holding that the plinciple does not apply to the plaintiffs in this case. True this is not a general tax but a special and local assessment. But it is nevertheless an exercise of the taxing power and its validity as well as the right of the plaintiffs to question or assail it in the courts rests on the same principles as are applicable to an assessment or tax for general purposes. If the expense of the improvement was to be paid out of the city treasury there would then be little doubt that an adjudication upon an application for a mandamus, involving as this did the validity of the proceedings up to that time, would have bound all the taxpayers. Is the rule any different when a small part or even the whole of the expense is to be paid by the property owners within a certain district? Is the principle changed because the area over which the tax was distributed is contracted? The executive board laid the matter on the table and, in effect, refused to act, treating the resolution as rescinded by the common council. They were brought into court and the very question involved was whether the board had authority to contract for the execution of the work, and the court held, upon full argument and against the contention of the board, that they had. The question was whether they had power under the proceedings to make a contract and incur an expense which was to be paid by the property owners, and it adjudged that they had, and that it was their duty to do so. When the executive board was before the court on that application they represented and spoke, not only for themselves and the city, but also the property owners who were to be bound by the contract, and whose property was to be assessed for the expenditure which the work embraced in the contract involved. When the court directed the board to make the contract the effect of its judgment was to direct the imposition of a tax upon the plaintiffs' property. On that question the plaintiffs could have been heard, and on their application were entitled to a hearing and to be made parties to the proceeding and to appeal from the decision. This was a right that no court would have denied to them had they demanded it."

The case last cited is quite persuasive to my mind to the point that the

judgment of the court of appeals of Perry county in the mandamus case is conclusive on the persons assessed for this improvement with respect to the question of the authority of the boards of county commissioners of Fairfield and Perry counties to entertain jurisdiction of the proceedings relating to the improvement, including the matter of the assessment. When the court directed the boards of county commissioners of said counties to entertain jurisdiction of the petition presented for the improvement, the effect of its judgment was to direct the imposition of an assessment upon benefited property in case said boards of county commissioners determined in favor of said improvement. In this state the action of mandamus is a civil action, having all the essential attributes of such action, and I doubt not that the owners of property liable to be assessed for this improvement could, on their application, have been made parties defendant with a right to be heard upon the question whether said peremptory writ or mandamus should issue.

I am of the opinion, therefore, that the judgment of the courts of appeals Perry county in the mandamus case against the boards of county commissioners of Fairfield and Perry counties is conclusive upon the owners of property assessed with respect to the question there adjudicated.

The bonds in question, though issued in anticipation of the collection of assessments on property specially benefited by the improvement, are nevertheless bonds issued by the county of Fairfield, as such; and the more immediate question is perhaps whether the judgment of the court of appeals of Perry county in the mandamus case is conclusive upon the counties with respect to the question involved in that case. If in proceedings of this kind boards of county commissioners could be said to represent the county and the citizens and taxpayers thereof, no difficulty would be encountered in holding in this matter that said counties of Fairfield and Perry were bound by said adjudication, even if our conclusion were otherwise with respect to the owners of property specially assessed for the improvement.

As said by the court in the case of *Ashton* v. *City of Rochester*, supra,

> "When a judgment is rendered against a county, city or town in its corporate name, or against a board or officer who represents the municipality, in the absence of fraud or collusion, it will bind the the citizens and taxpayers. This is upon the principle that they are represented in the litigation by agencies, authorized to speak for them, and to protect their interests."

Further on this point the court in the case of *Bear* v. *Commissioners*, 122 N. C., 434, says (p. 436-437):

> "A judgment against a county or its legal representatives, in a matter of general interest to all its citizens, is binding upon the latter, though they are not parties to suit. Every taxpayer is a real though not a nominal party to such judgment, and cannot relitigate any of the questions which were litigated in the original action against the county or its legal representatives, and, if the county board fail, to avail itself of legal defences, the people are concluded by the judgment. If such failure comes from negligence or corruption, the taxpayer has a remedy on both the criminal and civil dockets of the courts, and, if from incompetency, the taxpayer's remedy is the ballot box. Such judgments must be conclusive unless impeached for fraud or mistake. They must be conclusive or not admissible at all. This doctrine is supported by able authorities. Freeman on Judgments, Section 178; Black on Judgments, Section 583; State v. Rainey, 74 Mo.,

229; Clark v. Wolf, 29 Iowa, 197; Harmon v. Auditor, 123 Ill., 122; City of Cairo v. Campbell, 116 Ill., 305. A judgment against a city, county or school district, in matter of general interest, is binding upon all its citizens, though not made parties by name. 1 Herman on *Res Judicata*, Section 155, 128; * * * ."

In the case of *Atlas National Bank* v. *Columbia Tp.*, 13 O. Dec., 472, it was held that when an act of the general assembly directing township trustees to issue bonds to pay for winding and extending a street, has been judically declared, in an action by taxpayers in mandamus against the trustees to compel the trustees to proceed under the provisions of the act, to confer power upon the trustees to issue the bonds, and the bonds are issued in the manner provided by the act and are held by innocent purchasers for value and the proceeds spent on the improvement, the trustees are estopped in an action against them on the bonds to deny their power to issue them, although the bondholders were not directly parties to the suit in which the validity of the bonds was established.

The court in this case, referring to the decision in the mandamus case directing township trustees to proceed under the provisions of the act above noted, says (p. 486):

"The decision of the circuit court was not valuable to the taxpayers and the trustees unless there was some one who would take the bonds which the court said the trustees could legally issue. Those parties were not seeking the settlement of a mooted question merely. The decision of the court compelled the trustees to issue the bonds and sell them to whomsoever would buy. The act of the legislature and the decree of the court necessarily contemplated the fact that there would be purchasers of the bonds. By the decision the declaration came to every one who took the bonds issued by virtue of it that the trustees and power to issue them. The only title the trustees had, as it now appears, existed by virtue of the decision. They transferred all they had no more, no less, to the purchaser. If they had a right to sell the bonds, the same decree, which necessarily contemplated a purchaser, gave the purchaser the right to take the bonds. If this is not so the decree was a vain thing, available to the trustees only for the purpose of working a fraud upon the innocent persons who might be victimized by it The title which the trustees could convey, the power they had to sell, could not it is conceded, be relitigated by them nor by any taxpayer in the township. That title necessary passed to the purchasers. If they are not strictly parties to the suit, they are indirectly so by reason of their relation to their vendors. Justice, good faith, the protection of the business community, and the dignity of the courts and of judicial decree require that this court hold that the bondholders were, at least, privies to that decree, and that the trustees are estopped to deny their power to issue the bonds sued upon."

Some embarrassment in the application to the question at hand of the principles noted in the foregoing cases is presented by the consideration that in applications for ditch improvements boards of county commissioners represent the petitioners for the improvement rather than the county in those cases where the improvement is of more or less local interest only and the cost and expense is assessed wholly against the lands benefited; and it is only where the finding is that the improvement is of sufficient importance to the public to justify the payment of damages and compensation, in whole or in

part out of the county treasury, that the board of county commissioners represents the county and not exclusively the petitioners.

Board of County Commissioners v. Gates, 83 O. S. 19.

However, it is likewise true that proceedings with respect to county ditch improvements are proceedings *in rem*, and in the present case when the boards of county commissioners of Fairfield and Perry counties, acting under directions of a peremptory writ of mandamus issued by the court of appeals of Perry county, entertained jurisdiction of the petition for this improvement, I am inclined to the view that the status of the proceedings and the relation of the said boards of county commissioners thereto were fixed as to all the world, and that for this reason the bonds issued as a part of said proceedings are to be deemed valid.

Moreover, section 5630-1 General Code provides that bonds issued by county commissioners in the manner provided by law in anticipation of the collection of special assessments levied against the property abutting upon a proposed improvement or to be benefited thereby, shall be full, general obligations of the county, for the payment of the principal and interest of which when due the full faith ,credit and revenues of the county shall be pledged.

Having arrived at the conclusion that the judgment of the court of appeals of Perry county in the mandamus case above noted is conclusive upon the owners of property specially assessed for the improvement with respect to the question there adjudicated, and having found that the proceedings of the boards of county commissioners with respect to this improvement were substantially regular, I am of the opinion that under the provisions of section 5630-1 General Code these bonds, when properly signed and delivered, will constitute valid and binding obligations of Fairfield county.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

848.

APPROVAL—BOND ISSUES—CITY OF FOSTORIA—OHIO.

COLUMBUS, OHIO, December, 12, 1917.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—IN RE: Bonds of the city of Fostoria, Ohio, in the sum of $12,000.00, in anticipation of the collection of special assessments for the *improvement of Crocker street, in said city.*

I have examined the transcript of the proceedings of the council and other officers of the city of Fostoria, Ohio, relating to the above bond issue, and find said proceedings to be in accord with the provisions of the General Code relative to bond issues of this kind.

I am, therefore, of the opinion that properly prepared bonds covering said bond issue will, when properly signed and delivered, constitute valid and binding obligations of said city.

No bond form was submitted with the transcript and I am therefore writing to the authorities of said city asking them to forward to me a copy of bond form for my approval. The transcript relating to this bond issue will be retained until a copy of such bond form is received.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

849.

APPROVAL—FINAL RESOLUTIONS FOR ROAD IMPROVEMENT—IN FRANKLIN, HARRISON, LAKE, LOGAN, SENECA AND WASHINGTON COUNTIES.

COLUMBUS, OHIO, December, 12, 1917.

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

DEAR SIR:—I have your communication of December 7, 1917, in which you enclose, for my approval, final resolutions on the following improvements:

Franklin county—Sec. "Q," Columbus-Sandusky road, I. C. H. No. 4. (in duplicate).

Harrison county—Sec. "P," Dennison-Cadiz road, I. C. H. No. 370.

Lake county—Sec. "Q," Cleveland-Buffalo road, I. C. H. No. 2. (in duplicate).

Lake county— Sec. "J," Cleveland-Buffalo road, I. C. H. No. 2. (in duplicate).

Logan county—Sec. "F-1," Bellefontaine-Richwood road, I. C. H. No. 236.

Logan county—Sec. "A-1," Bellefontaine-Lima road, I. C. H. No. 130.

Seneca county—Sec. "Q," Upper Sandusky-Bellevue road, I. C. H. No. 267.

Washington county—Sec. "L," Athens-Marietta road, I. C. H. No. 157 (in duplicate).

I have carefully examined said final resolutions, find the same correct in form and legal and am therefore endorsing my approval thereon, in acordance with the provisions of section 1218 G. C. Very truly yours,

JOSEPH MCGHEE,
Attorney-General.

850.

APPROVAL—CONTRACT BETWEEN BOARD OF PUBLIC WORKS AND FRANK MUNGER.

COLUMBUS, OHIO, December, 12, 1917.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your communication of November 23, 1917, enclosing a contract, in triplicate, between Frank Munger and your department, for the construction of culvert at Holes creek, Montgomery county, Ohio, and you ask that I approve this contract.

I have carefully examined the contract and find the same correct in form and legal in every respect. There is attached to the contract a certificate of the auditor of state, to the effect that there is money appropriated which is available for said purpose; also a certificate of the Industrial Commission reciting that Mr. Munger has complied with the workmen's compensation law. Hence I find everything in connection with the contract regular and in conformity to law and have therefore endorsed my approval thereon.

I have this day filed the original contract and bond with the auditor of state and am herewith returning to you the duplicate copies thereof.

Very truly yours, JOSEPH MCGHEE,
Attorney-General.

851.

SCHOOL SAVINGS BANKS—NOT SUBJECT TO SUPERVISION OF BANKING DEPARTMENT—BOND FORM FOR TEACHERS.

So-called "School Savings Banks" under the act of March 20, 1917, are not subject to the supervision of the banking department.

The state may be the obligee in the bond provided in said act to be given by the person designated to make the collections of deposits under G. C. section 6.

COLUMBUS, OHIO, December 12, 1917.

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

GENTLEMEN:—Under date of November 5th, the following request for opinion was made of this department by the assistant city solicitor of Cincinnati, Ohio:

> "I have been requested by the superintendent of the Cincinnati public schools for an opinion as to the proper form of bonds for teachers in charge of the school savings banks.
>
> School savings banks have been authorized by the general assembly of Ohio at its last session under sections 7722-1 and 7722-2 of the General Code of Ohio (Laws of Ohio, Vol. 107, pages 597-598).
>
> Since these school savings banks are not incorporated the question has been raised as to the liability under the bond provided for by section 7722-2 and in whose favor the bond should be executed.
>
> Now that the state has authorized the organization of such school savings banks I take it that their operation may be subject to the department of banks and banking.
>
> Your opinion on the matters referred to above will be greatly appreciated in order that school savings banks organized in this city may be conducted in accordance with rulings that are uniform throughout the state."

The statute referred to above authorizing the so-called "School Savings Banks" is as follows (107 O. L. 597):

"AN ACT

To provide for a system of school savings banks.

Be it enacted by the General Assembly of the State of Ohio:

Sec. 7722-1.

Section 1. That it shall be lawful for the principal or superintendent of any public schools or schools in the state of Ohio, or for any person designated for that purpose by the board of education or other school authority under which such school shall be, to collect once a week, or from time to time, small amounts of savings from the pupils of said school, the same to be deposited by said principal or superintendent or designated person on the day of collection in some savings bank, or building and loan associations, trust company, state or national bank, located in the district and having an interest department. These moneys shall be placed to the credit of the respective pupils from whom the money shall be collected, or, if the amount collected at any one time shall be deemed insufficient for the

opening of individual accounts, in the names of said principal or superintendent or designated person, in trust, and to be by him eventually transferred to the credit of the respective pupils to whom the same belongs. In the meantime, said principal or superintendent, or designated person shall furnish to the bank or institution a list giving the names, signatures, addresses, ages, places of birth, parents' names, and such other data concerning the respective pupils as the savings bank or institution may require, and it shall be lawful to use the words 'system of school savings banks' or 'school savings banks,' 'system of school savings' in circulars, reports and other printed or written matter used in connection with the purposes of this section.

Sec. 7722-2.

Section 2. The board of education shall provide by resolution for the giving of bond by the principal or superintendent of any public school or schools in the state of Ohio, or any person designated for the purpose of making the collections, as provided for in section 1, and also may require the depositary to give bond. If a bonding company or other corporate surety is offered on said bonds, the premium therefor may be paid by the board of education."

The two questions asked above may be discussed in a more brief and orderly manner by reversing the order, as the question last asked concerns the very nature of the institution created by the statute, if, indeed, it be entitled to be called one. It is rather a means of utilizing some institution already in existence with more facility to a class not now understood to be generally availing themselves of its benefits. The very first words of the above act are permissive. It is doubtful whether any one may be required or compelled by law to do anything whatever under this act. The legislature simply contented itself by declaring that a certain course shall be lawful. It is extremely doubtful whether any school board could be compelled to designate any person to make the collections provided for in the act. It is equally doubtful whether, if they did so, they could compel a given person to enter upon the performance of the duty, and absolutely certain that nobody would be required to deposit any money. In no sense is a bank created, or anything in the nature of a bank. The mere permission is extended to use certain words in circulars, reports and printed and written matter in connection with the affair. The bank that is involved is one already in existence and already under the control of some department of the federal or state government. This bank, when selected as this depository, acquires no new character and assumes no new duty. It simply receives deposits in the manner in which it already is engaged in doing. In other words, simply secures some more customers. It is true that the person acting as a "go-between" from the depositor to the bank may be required to furnish the bank certain information if the bank wants it. This the bank could impose as a condition without statutory provision therefor, for, like everybody else, the bank is not required or compelled to do anything whatever in connection with it; could refuse or accept these deposits at its pleasure.

It is perfectly plain, therefore, that this scheme imposes no new duty upon the state banking department and only possibly may create a slight amount of additional attention or supervision of the banks, all of which existed independently of this proposed institution. The superintendent of banks certainly would not have anything to do with it if the deposit were made in a national bank or in a building association, and this is sufficient to illustrate and prove that it is not such institution as may come under his supervision.

The superintendent, principal or person designated, becomes little more than a messenger, nothing more in fact, except that he keeps some accounts of the money he carries. A similar question was answered to the superintendent of banks by this department on April 16, 1917, in Opinion No. 194, in which the same conclusion was reached with reference to an institution known as "The Young Men's Business Club of Springfield, Ohio." This club was a voluntary organization, and proceeding under a plan of its own, having the same general characteristics of that provided in this statute, but being much more elaborate as to details.

You are, therefore, advised that the banking department has nothing to do directly with the so-called "School Savings Banks."

As to the obligee in the bond required, the question seems to be disposed of by section 6 of the General Code, which is as follows:

> "A bond payable to the state of Ohio, or other payee as may be directed by law, reciting the election or appointment of a person to an office or public trust under or in pursuance of the constitution or laws, and conditioned for the faithful performance, by such person, of the duties of the office or trust, shall be sufficient, notwithstanding any special provision made by law for the condition of such bond."

The position in question is not an office. It may, however, be properly classed as a public trust under and in pursuance of a law, that is, the statute above quoted. Section 6 uses the word "appointment;" the other statute uses the word "designated." It is not conceived, however, that this could make any material difference, and the bond in this case might properly be in accordance with the provisions of section 6 General Code. The enactment is that such bond should be sufficient. Of course, in drawing such bond it would be good practice to go further than the mere requirements of this section and recite the facts and the law under which the same is given, thus showing expressly that it is for the benefit of those who are or may become depositors.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

852.

GAME WARDENS—NOT ENTITLED TO FEES—COSTS.

There is no authority for the payment of any fees to deputy game wardens and none can be charged or collected. This being the case no fees can be taxed for the deputy warden in the costs in any of these cases.

COLUMBUS, OHIO, December 12, 1917.

HON. A. C. BAXTER, *Acting Chief Warden, Bureau of Fish and Game, The Department of Agriculture, Columbus, Ohio.*

DEAR SIR:—I have your letter of November 14, 1917, as follows:

> "This department is having several inquiries from game wardens in regard to section 1394 which was amended at the last session of the legislature.

Under the former statute this reads 'In addition to the salaries and compensation herein provided, each warden shall be entitled to receive the same fees as sheriffs are allowed for like services in criminal cases.'

Under the present section this clause has been entirely dropped and the compensation of deputy wardens shall be fixed and paid in the same manner as in section 1087 of the General Code.

Can deputy wardens in addition to their salaries and compensation, collect costs in a case? If not, what disposition should be made of the costs?"

Section 1394 General Code, prior to the enactment in 107 O. L., and as amended in 106 O. L., page 170, read:

"The board of agriculture may allow the chief warden, each special warden and each deputy state warden such compensation as it deems proper and his necessary expenses. In addition to the salaries and compensation herein provided, each warden shall be entitled to receive the same fees as sheriffs are allowed for like services in criminal cases. The salaries and expenses of the chief warden and each special warden and the compensation allowed each deputy state warden shall be paid by the state upon the order of the board."

In an opinion rendered by former Attorney-General Turner, found in Opinions of the Attorney-General for 1915, Vol. 2, p. 1901, I find the following statement:

"Deputy game wardens are now appointed by the state board of agriculture under the provisions of section 1391 G. C., as amended in 106 O. L. 170. They hold their office for the term of two years, are required to give bond for the faithful discharge of their duties and are charged generally with the enforcement of all laws for the protection, preservation and propagation of birds, fish, and game within this state. They are paid such compensation as the appointing power may allow and deem proper and in addition thereto are entitled to the same fees sheriffs are allowed for like services in criminal cases."

Section 1394 G. C. was amended in 107 O. L., page 467, to read:

"The compensation of the chief warden, deputy state wardens and special wardens shall be fixed and paid in the same manner provided for in section 1087 of the General Code for the compensation of other agents of the secretary of agriculture. They may also be allowed and paid in the manner provided in section 1087 all necessary expenses incurred by them in the performance of their duties."

Section 1087 G. C., as amended in the same act, reads in part:

"The board of agriculture is authorized to elect a secretary with the approval of the governor, who shall be known as the secretary of agriculture. * * * He shall appoint all heads of bureaus, experts, inspectors, *wardens*, clerks, stenographers and all other assistants and employes and shall fix their compensation within the limits prescribed by law. All of such appointees shall be entitled to receive from the state their actual and necessary expenses incurred while traveling on the business of the department. * * *"

It will be seen that the compensation of the deputy game wardens is now fixed by the secretary of the board of agriculture.

In section 1394, as amended, the provision of the section as it formerly stood, to the effect that "in addition to the salaries and compensation herein provided, each warden shall be entitled to receive the same fees as sheriffs are allowed for like services in criminal cases," does not appear.

There is, therefore, no longer any authority for the payment of any fees to the deputy wardens and none can be charged or collected. This being the case no fees can be taxed for the deputy warden in the costs in any of these cases.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

853.

CIVIL SERVICE—RESIDENCE IN COUNTY NOT QUALIFICATION FOR POSITION IN COUNTY SERVICE—PERSONS MAY NOT BE TRANSFERRED FROM STATE SERVICE TO COUNTY SERVICE—NOR APPOINTED TO COUNTY SERVICE FROM STATE ELIGIBLE LIST.

Residence in a county is ordinarily not a qualification for a position in the civil service of such county aside from the elective offices, but in providing eligible lists for the service of such county, the state civil service commission has power to hold the examinations in such county and advertise the same therein.

The state civil service commission has not power to permit transfers from the county service to the state service or from the state service to the county service.

Neither is it permissible to make appointments to a county position from the state eligible list, even though the applicant be a resident of the county in which the appointment is to be made.

COLUMBUS, OHIO, December 12, 1917.

Civil Service Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Under date of October 19, 1917, you submit the following for an opinion from this department:

"Article XV, sec. 10 of the constitution of Ohio provides that:

'Appointments and promotions in the civil service of the state, the several counties, and cities, shall be made according to merit and fitness, to be ascertained, as far as practicable, by competitive examination.'

Sec. 486-8 of the civil service law provides in part as follows:

'The civil service of the state of Ohio and the several counties, cities, and school districts thereof shall be divided into the unclassified service and the classified service.'

'The unclassified service shall comprise the following positions which shall not be included in the classified service, and which shall be exempt from all examinations required in this act.'

Thereafter certain specific exemptions from examination are provided for the state, the county and the municipal service.

Sec. 486-10, in providing for publicity for examinations, says:

'In case of examinations limited by the commission to a district, county, or city, the commission shall provide in its rules for adequate publicity of such examinations in the district, county or city, within which competition is permitted.'

Throughout the civil service law we find constantly recurring the phrase, 'the classified service of the state, counties, cities and city school districts.'

From this wording of the constitution and law we assume that it was the intent of both the framers of the constitution and the legislature to clearly differentiate between the civil service of the state, counties, cities and city school districts, and that the civil service of the counties is to be treated as separate and apart from the civil service of the state.

Sec. 486-13 of the civil service law provides in part as follows:

'In the event that an eligible list becomes exhausted, through inadvertence or otherwise, and until a new list can be created, or when no eligible list for such position exists, names may be certified from eligible lists most appropriate for the group or class in which the position to be filled is classified.'

Your advice and opinion is respectfully requested as follows:

1. In conducting examinations to create eligible lists for certification to positions in the classified service of the various counties, must the commission limit competition for positions in any county to legal residents thereof?

2. Within the provisions of Sec. 486-16 of the civil service law, may the commission permit transfers from the county service to the state service, or vice versa?

3. In the absence of an eligible list created for certification to a county position in the classified service which may be vacant, can the commission make certification under the provisions of Sec. 486-13, above quoted, from a state list as appropriate, using the names of the three persons standing highest on such state list who are residents of such county?

It frequently happens, especially in the case of clerical positions, that the commission has a large number of eligibles who have passed examination for clerical positions in the various state departments and who are residents of a county in which a vacancy occurs in a clerical position of the same grade as that of the state positions for which the eligible list was created."

In addition to the statements in the above inquiry you have personally, upon request, communicated to this department the present situation and practice with reference to the matters above referred to, which personal communication is taken into consideration along with your written inquiry.

Nothing will be added here to what is expressed in former opinions upon the subject of qualification for office and the power of your commission with reference thereto.

The questions you ask are not definitely and expressly settled in the civil service law itself, so that some construction thereof is necessary, and the present and former opinion and practice of the people of the state in reference to the subject of residence in connection with qualification for office may be properly taken into account in disposing of the questions presented.

Except as to elective offices there is, generally speaking, no requirement that deputies and employes in the county offices should be residents of the county, but it has been the general, but not the universal, practice that they be so. The great mass of county employes are now and have at all times been residents of the county in which they are respectively engaged. In occasional instances where special qualification is required, or for some other reason, county officers have appointed and employed persons residing outside the county to fill various positions. This, however, has been the exception, and a rather rare exception. It is, however, sufficient to show that residence in the county has not been regarded by the public as an absolute and positive qualification for position in the public employment of the county.

There is no express language in the civil service act requiring a change of this general practice either the one way or the other. The great purpose of the act is to promote efficiency in the public service by eliminating partisan and personal considerations from the selection of those who are to carry it on. The purpose of the act is rather an imposition of an additional system and scheme of legislation upon the law and practice already in existence than a radical or essential change in that practice itself, so that in reference to the subject of these inquiries it is proper to interpret the civil service law and give it operation and effect accordingly, recognizing existing institutions and existing conditions and practices, and superadding thereto the restraints, requirements and regulations of the statutes.

You have quoted in your inquiry the different provisions of these statutes necessary to the disposition of the questions you ask, and interpreting those provisions of the act in connection with the principles above stated.

Your first question should be answered as follows: Residence in a county is not a necessary qualification for the holding of positions in the public service of such county. Section 10 of the law, however, without expressly so enacting, assumes power on your part to limit examinations to a county. You are correct in your assumption that the act regards the county service as in a sense distinct from the state service, or, to speak with more certainty, the act recognizes the existing condition that such county service is distinct from the state service. This distinction is not intended to be eliminated by dividing the public service into state and municipal service. The provision merely places county service under the jurisdiction of the state commission instead of creating an independent county commission or one for each separate political unit.

Combining the two doctrines above mentioned it is therefore undoubtedly within your power to limit the examinations of a county without fixing an absolute qualification of residence in the county for the proposed office or position. This you may do, and it is not going too far to say that you should do, as already indicated by the expression of your own opinion by holding an examination in a county in which you are required to furnish an eligible list and by advertising the same in that county only but without expressly excluding those who are non-residents of the county from taking such examination. There is reason to believe that this course would have the oractical effect of preserving the present practice and that it would be in conformity with the present public ideas upon the subject. Non-residents of the county should not generally desire to take such examinations or attempt to intrude themselves into such positions except in such cases as they were desired in such positions in the same manner as they heretofore been. This practice would not be outside the limit of the law and would certainly be within its spirit and undoubtedly have the effect of conferring all the benefits of the civil service law upon the county service without disturbing the existing opinions and practice with reference thereto.

As to your second question, the answer should be in the negative, for the following reason:

A transfer from the county service to the state service would intrude one into the latter service who had not competed with all those entitled to seek the same position, but who had only competed against those in the same one of the eighty-eight counties in which he took the examination.

This would be a direct infraction of the extension of the civil service embodied in the provisions of section 10 of the act, that the examination shall be free for all, for by this method far the greater number would be excluded. The converse of this is not quite so apparent, yet it seems to present a proper case for the application of the old-fashioned maxim that, "It is a poor rule that does not work both ways;" besides which it would introduce irregular practice and unsatisfactory conditions if the county service were partly made up of those who had competed in a county examination and partly of those who had done so in a state examination, and would therefore afford an opportunity for unfair discrimination or cause groundless suspicion of such examinations.

It is necessary to answer your third question in the same way, having found a line of cleavage between the state and county service the same should be observed, and if one on the state eligible list wishes to enter the service in his own county, he should compete in a county examination in order that there may be uniformity and equality, and that all may enter the county service upon the same basis of equal opportunity. Where there is no county eligible list resort should be had to temporary or provisional appointment just as in other cases.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

854.

ROADS AND HIGHWAYS—IMPROVEMENT UNDER SECTION 6919 G. C.—WHAT LANDS MAY BE ASSESSED—STATE AID.

1. *Under the provisions of subdivision* 4 *of section* 6919 *G. C.* (107 *O. L.* 99) *the lands which may be assessed to provide for a part or all of the cost and expense of the improvement are confined to those lying on either side of the improvement, within one-half mile, one mile or two miles thereof, and within lines drawn at right angles with the termini of the improvement.*

2. *There is no provision of law whereby the state may furnish a part of the cost and expense of an improvement over which the county commissioners have assumed jurisdiction under sections* 6906 *et seq. G. C.* (107 *O. L.* 95.) *To secure aid from the state, relative to the improvement of intercounty highways, application must be made for state aid under sections* 1178 *et seq. G. C.*

COLUMBUS, OHIO, December 12, 1917.

HON. HUGH F. NEUHART, *Prosecuting Attorney, Caldwell, Ohio.*

DEAR SIR:—I have your communication of November 22, 1917, in which you ask me to place a construction upon section 6919 G. C., with a view to answering the following questions:

"May real estate within two miles of the termini of the improvement be assessed on the theory that it comes within the provisions of this section by being within two miles of either side thereof, providing, of course, that said real estate is benefited by the improvement?

May the state join with the county in an improvement of an intercounty highway under the above provision (referring to subdivision 4 of section 6919 (G. C.) for two mile assessment plan, or must any portion of an improvement made on an intercounty road, as above, be controlled exclusively by the county commissioners, and any portion thereof which the state may desire to improve in conjunction with a portion of any improvement as made above by the county be made separately by the state?"

Your first question relates to assessing a part of the cost and expense of an improvement against the benefited property owners, as set forth in subdivision 4 of section 6919 G. C. (107 O. L. 99), said subdivision reading as follows:

"4. All or any part thereof shall be assessed against the real estate abutting upon said improvement, or against the real estate situated within one-half mile of either side thereof, or against the real estate situated within one mile of either side thereof, or against the real estate situated within two miles of either side thereof, according to the benefits accruing to such real estate and the balance thereof, if any, shall be paid out of the proceeds of any levy or levies for road purposes upon the grand duplicate of all the taxable property in the county or from any funds in the county treasury available therefor."

The first alternative provision in this subdivision is that all or any part of the cost and expense of the improvement shall be assessed against the real estate *abutting upon said improvement.* In reference to this provision it could hardly be considered that lands abut upon the terminus of an improvement, but under this part of the alternative provision only the lands which touch either side of the improvement could be assessed.

The other alternatives are:

"or against the real estate situated within one-half mile of either side thereof, or against the real estate situated within one mile of either side thereof, or against the real estate situated within two miles of either side thereof."

I believe this language should be construed in connection with the language used in the first alternative, to the effect that it embodies lands lying immediately back of the lands abutting on either side of the improvement, to the depth of one-half mile, one mile or two miles.

This construction would also be in harmony with the general understanding in reference to the word "distance." When we speak of any object being a certain distance from a line, we mean that distance is to be measured by a line drawn perpendicularly to the line in reference to which the object is located.

The statute reads:

"the real estate situated within two miles *of either side thereof.*"

The sides of course would not include the terminus. Hence the lands that may be assessed to pay the cost and expense of the improvement would be those lands included in a rectangle on either side of the improvement, on which the side thereof would form one dimension, and a line two miles, one mile or one-half mile, as the case may be, the other dimension.

Further, this construction seems to be in harmony with the evident intention of the legislature. Section 6919, as found in the Cass highway law, provided eight methods of taking care of the cost and expense of an improvement, and the eighth method more nearly corresponds with the fourth method named in section 6919 of the White-Mulcahy law, than does any other method contained in said Cass highway law.

The eighth method in the Cass law read as follows:

> "The county commissioners may assess the total cost and expenses of the improvement against the owners of real estate located within one mile or two miles, as the petitioners may request, from either side or terminus of said improvement, according to the benefit resulting to such real estate; or they may assess not to exceed one-half of the cost and expenses of such improvement upon the owners of real estate situated within one-half mile of either side or terminus of said improvement, in proportion to the benefits accruing to such real estate as determined by said commissioners, while the remainder of the cost and expenses shall be paid out of the proceeds of any levy or levies for road purposes upon the grand duplicate of the county."

The legislature in this subdivision 8 provided that the measurement might be "from either side *or terminus* of said improvement."

However, when we come to consider the language in subdivision 4 of section 6919, in the White-Mulcahy law, we find legislature omitted the words "or terminus." This would indicate that the legislature did not intend that measurements made relative to assessment districts should be made from the terminus of the improvement, but only from either side thereof. This is in harmony with the holdings of our courts in reference to statutes embodying much the same language as that found in the section upon which you ask me to place a construction.

In Lear v. Halstead, 41 O. S. 566, the court say, in the first branch of the syllabus:

> "Under amended section 8 of the act authorizing county commissioners to lay out and establish free turnpike roads (73 Ohio Laws, 98), the provision that, 'extra taxes when levied shall be on all real and personal property within one mile on each side of said free turnpike road,' does not include land within one mile as measured from the end of the road, but only as measured from either side of the road and between the termini of the same."

On page 569 in the opinion the court uses the following language:

> "The provision in this section which requires that extra taxes shall be levied on real and personal property within one mile on each side of the turnpike road, does not, we think, embrace lands within one mile as

measured from the end of the road, but only as measured from either side of the road and between the termini of the same. The lands therefore, situated beyond the terminus of the turnpike, and lying outside of the line drawn from the terminus at right angles with the last course of the road, were not subject to taxation. The legislative intent seems plain. If it had been designed to extend the tax limits, so as to include territory and personal property beyond the end of the turnpike, the legislature, it is presumed, would have made it manifest by appropriate language. It did not fail to do so in the act commonly known as the two mile road improvement law, which provided in amended section 4 (71 Ohio Laws, 94), that no lands should be assessed which did not lie within two miles of the proposed improvement, and that such distance of two miles might 'be computed in any direction from either side, end or terminus of said road.'"

In Kasson v. County Commissioners, 15 C. C. (N. S.) 460, the court in the syllabus lays down the following proposition:

"Under the one mile road assessment act, the taxing district is confined to one mile of the improvement within a line drawn at right angles with the termini thereof."

The particular language upon which the court in this case was placing a construction was found in section 4670-14 R. S., as follows:

"That when a majority of the resident owners of any real estate lying and being within one mile of any public road, shall present a petition," etc.

From all the above it is my opinion that the conclusion hereinbefore reached by me is correct.

Your second question is as to whether the state highway commissioner could join with the county commissioners in an improvement, the cost and expense of which is based upon one of the methods found in section 6919 G. C., and more particularly the fourth method therein set out. It must be remembered that sections 6906 et seq. G. C. relate particularly to those improvements over which the county commissioners assume jurisdiction. There is no provision whatever made in these sections, which permits the state highway commissioner to join in the making of the improvement.

I desire to call your attention to section 1214 G. C. (107 O. L. 129). Sections 1178 to 1231-11 inc. G. C., deal particularly with the improvements over which the state highway commissioner exercises jurisdiction. Section 1214, which is one of this group of sections, provides as follows:

"Sec. 1214. * * * Provided, however, that the county commissioners by a resolution adopted by unanimous vote may increase the per cent of the cost and expense of the improvement to be specially assessed and may order that all or any part of the cost and expense of the improvement contributed by the county and the interested township or townships be assessed against the property abutting on the improvement; and provided further, that the county commissioners by a resolution passed by unanimous vote may make the assessment of ten per cent or

more, as the case may be, of the cost and expense of improvement against the real estate within one-half mile of either side of the improvement or against the real estate within one mile of either side of the improvement. * * *"

So that while the state could not join in an improvement, a part or all of the cost and expense of which is to be assessed upon property owners to a distance of two miles on either side of the improvement, yet under section 1214, supra, provision could be made whereby the property owners on either side of the improvement, to a distance of one mile, might be assessed for all or a part of the cost and expense of same, which is to be contributed by the county and the interested township or townships under the agreement of the county with the state. In order to do this, it would be necessary for the county commissioners to make application to the state highway department for state aid, relative to the construction of intercounty highways, provisions for which are made in sections 1178 to 1231-11 inc. G. C.

Hence answering your second question specifically, there is no provision of law by virtue of which the state could assume a part of the cost and expense of an improvement over which the county commissioners are assuming jurisdiction under sections 6906 et seq. G. C. However, application for state aid might be made to the state highway commissioner under sections 1178 et seq. G. C., under the provisions of which sections the state could furnish aid as might be agreed upon between the state highway commissioner and the county commissioners.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

855.

COUNTY SURVEYOR—MAY NOT EMPLOY LABORERS, TEAMS, ETC., WITHOUT AUTHORITY OF COMMISSIONERS—WHEN CERTIFICATE OF AUDITOR REQUIRED IN SUCH CASES—WHEN COMMISSIONERS ENTER INTO CONTRACT WITHOUT CERTIFICATE OF AUDITOR—CONTRACT NOT VALIDATED BY CERTIFICATE ISSUED LATER—OBLIGATION NOT BINDING ON COUNTY—NO AUTHORITY TO ISSUE NOTES OF COUNTY TO PAY SAME—LIABILITY OF COMMISSIONERS.

1. *Under the provisions of section* 7198 *G. C.* (107 *O. L.* 115), *the county surveyor cannot act in reference to the matters therein set out until he is authorized so to do by the county commissioners.*

2. *If acts are performed under section* 7198 *G. C. by the county surveyor without the authority of the county commissioners, they would be void and the county commissioners could not validate the same after they were performed by the county surveyor; neither could they pay the obligations arising under said acts.*

3. *The provisions of section* 5660 *G. C. in reference to the certificate of the county auditor do not apply to contracts entered into by the county surveyor under section* 7198 *G. C., but they do apply to the county commissioners in ordering the payment of claims which arise out of contracts so entered into.*

4. *In cases where contracts are entered into by the county commissioners contrary to the provisions of section* 5660 *G. C., the fact that the county auditor issues his certificate after the contract is entered into and the work thereunder performed would not validate the contract.*

5. *Contracts entered into contrary to the provisions of section* 5660 *G. C. are not legal obligations against the county. County commissioners have no authority to recognize moral obligations.*

6. *The provisions of section* 5656 *G. C. cannot be resorted to in order to take care of claims arising under void contracts, for the reason that the obligations must be valid and binding obligations of the county as set forth in section* 5658 *G. C.*

7. *Neither can the provisions of section* 5656 *G. C. be resorted to in order to replenish some fund which is depleted, but the same are limited to those cases in which the county cannot meet obligations when they mature.*

8. *The county commissioners would have no authority to issue the notes of the county in payment of claims arising under contracts entered into by them contrary to the provisions of section* 5660 *G. C.*

9. *The county commissioners are not personally responsible for the payment of claims arising under contracts entered into in violation of the provisions of section* 5660 *G. C.*

COLUMBUS, OHIO, December 12, 1917.

HON. MELL G. UNDERWOOD, *Prosecuting Attorney, New Lexington, Ohio.*

DEAR SIR:—I have your communication of October 24, 1917, in which you set forth nine separate and distinct questions upon which you desire me to express an opinion. Instead of setting forth the communication in full I shall take these questions up in the order in which they are given in your communication and answer them in the same order.

Your first question is as follows:

"Under the provisions of section 7198 G. C., as amended in 107 Ohio Laws, can the county surveyor do the acts mentioned therein without first

being authorized by the county commissioners to do so, and thereby create contractual obligations that bind the county for their payment?"

On April 19, 1917, I rendered an opinion to the bureau of inspection and supervision of public offices, in which I placed a construction upon this said section in reference to the same matters about which you inquire. The section which was in force at that time read somewhat differently than the section does at present, and this will make it necessary for me to note the provisions of the section as it stood under the Cass act, and as it stands under the White-Mulcahy act.

Section 7198 under the Cass act, and upon which I placed a construction in said opinion, read as follows:

"The county highway superintendent may, with the approval of the county commissioners or township trustees, employ such laborers, teams, implements and tools, and purchase such material as may be necessary in the performance of his duties."

This section under the act as it now stands is found in 107 Ohio Laws, page 115, and reads as follows:

"The county surveyor may when authorized by the county commissioners employ such laborers and teams, lease such implements and tools and purchase such material as may be necessary in the construction, reconstruction, improvement, maintenance or repair of roads, bridges and culverts by force account."

In placing a construction upon the section as it formerly read I arrived at the following conclusion:

"Hence, answering your inquiry specifically, it is my opinion that the approval mentioned in section 7198 G. C. precedes the purchase of material and the employment of labor by the county highway superintendent."

The section as it now reads, instead of providing that the county highway superintendent may act with the approval of the county commissioners or township trustees, provides that the county surveyor may when authorized by the county commissioners act, as provided in said section.

The word "authorized" is much stronger than the word "approval" when we come to consider the proposition as to whether the authority must be given before the act is done or whether it may be given after the act is done. Authority cannot be given after an act is done. The authority to do an act must be given before the act itself is done. Hence, from reason and from the authority of the opinion from which I have quoted, it is my opinion that the authority of the county commissioners must be given to the county surveyor before he acts in the matter of employing laborers and teams as set out in section 7198 G. C.

Your second question reads as follows:

"In case the county surveyor does the acts mentioned under the provisions of the foregoing section, and you should hold that it is necessary for the authorization to precede the making of said contracts, can the county commissioners validate his acts by their subsequent approval after the same are performed?"

In the same opinion above noted, namely, No. 202, rendered April 19, 1917, I touched upon this question also. To be sure, it was construed at that time with reference to the word "approval" rather than with reference to the word "authorized."

In placing a construction upon said section as it formerly stood, I arrived at the following conclusion:

> "I might say in passing that if the county highway superintendent employed labor, etc., and purchased material, without the aproval of the county commissioners, and the county commissioners afterwards should see fit to place their O. K. upon the acts of the county highway superintendent and allow the bills so made by him, the acts of the county highway superintendent could be considered as having the approval of the county commissioners from the beginning. * * * But the statute contemplates in my opinion that the approval should be given before the employment of labor and the purchase of material, and the county commissioners should not adopt the course of giving their approval and consent after the county highway superintendent has acted."

But as said before, in answer to your first question, the word "authorized" is much stronger than the word "approval," when it is considered with a view as to when the approval and authority are to be given, that is, whether before the act is performed or afterwards. It is possible for one to approve a course of conduct, but it is difficult to see how one could authorize a course of conduct after it has once been taken. In fact it is my opinion that the same cannot be done.

Hence answering your second question specifically, it is my opinion that if the county surveyor proceeds under section 7198 G. C., without authority from the county commissioners, his acts are void and cannot be validated by the county commissioners after they are performed, and therefore the county commissioners would have no authority to pay claims arising upon contracts so entered into by the county surveyor.

Your third question reads as follows:

> "Where the provisions of section 7198 G. C. are carried out by the county surveyor upon the authorization of the county commissioners, is the certificate of the county auditor under section 5660 necessary?"

This question was also answered in said opinion No. 202, above noted, and as I went into the matter very fully in said opinion, I am going to enclose a copy of the same with this opinion. You will note that I arrived at the conclusion in said opinion that while the county highway superintendent might enter into contracts provided for in section 7198 without the certificate of the county auditor, yet the county commissioners could not make the order for the payment of the bills so made by the county highway superintendent until the county auditor had certified that the money is in the treasury to the credit of the proper fund. This conclusion would also apply to the section as it now stands. Upon this question the following cases throw some light:

> State ex rel. v. Ballot Box Co., 3 C. C. 626.
> State ex rel. v. McConnell, Auditor, 28 O. S. 589.

Your fourth question reads as follows:

"The former board of commissioners of this county wilfully and knowingly ignored the provisions of sections 5660 and 5661 G. C., making numerous contracts in violation thereof, especially bridge contracts, knowing at the time that said contracts were made, that the funds out of which they were to be paid were in a depleted condition, and that there would not be any money available in said funds out of which to pay said contracts, several of those mentioned as being made without the certificate of the auditor that there were available funds to pay the same are honest obligations, with the exception that the law in this respect was not complied with by the commissioners, while others entered into under the same condition are of a questionable character, being made for extravagant sums far above what the work mentioned in the contract was reasonably and actually worth. Can the auditor after the work has been fully performed and the bill presented for payment, certify to the same, in case money should become available for the payment of the obligations that are not questionable, that the money is in the particular fund out of which it is to be paid, and thereby enable the present board of commissioners to pay the parties who hold honest claims against the county?"

This question, briefly stated, is as to whether the county auditor could after the contract is fully completed—which contract was entered into without complying with the provisions of section 5660 G. C.—make his certificate to the effect that the money is in the treasury, and by so doing make the contract effective as it would have been if the certificate had been made before the contract was entered into. In order to answer this question it will be necessary for us to note the language used in section 5660. In so far as it applies to your question, said section reads as follows:

"The commissioners of a county, * * * shall not enter into any contract, agreement or obligation involving the expenditure of money, * * * unless the auditor * * * *first certifies* that the money required for the payment of such obligation or appropriation is in the treasury to the credit of the fund from which it is to be drawn. * * *"

It will be noted that the provision of this section is that the auditor must first certify that the money is in the treasury. Section 5661 G. C. provides that

"All contracts, agreements or obligations * * * entered into * * * contrary to the provisions of the next preceding section, shall be void. * * *"

From this section we note that if a contract is entered into contrary to the provisions of section 5660 G. C. it is void. It naturally follows that if the contract is void the issuance of the certificate by the county auditor after the work is done or performed could not make the same valid.

Hence, answering your fourth question specifically it is my opinion that in a case where a contract is entered into by the county commissioners without the county auditor first certifying that the money is in the treasury, the county auditor could not make the same valid by issuing his certificate after the contract is let and the work performed.

Your fifth question reads as follows:

"Are contracts made under the foregoing conditions in wilful violation of the provisions of section 5660, and in view of section 5661, either legal or moral obligations of the county?

"If they are not legal obligations, is there any duty resting on the present board of commissioners to settle the same as moral obligations of the county?"

As said in answer to your fourth question, section 5661 G. C. provides that all contracts entered into contrary to the provisions of section 5660 G. C. shall be void. But in order to understand fully the principles which should be applied to this question it might be well for us to note two decisions of our supreme court.

In State v. Fronizer, 77 O. S. 7, the court found in the syllabus as follows:

"Section 1277, Revised Statutes, which authorizes a prosecuting attorney to bring action to recover back money of the county which has been misapplied, or illegally drawn from the county treasury, does not authorize the recovery back of money paid on a county commissioners' bridge contract fully executed but rendered void by force of section 2834b, because of the lack, through inadvertence, of a certificate by the county auditor that the money is in the treasury to the credit of the fund, or has been levied and is in process of collection, there being no claim of unfairness or fraud in the making, or fraud or extortion in the execution of such contract for such work, nor any claim of effort to put the contractor in *statu quo* by a return of the bridge or otherwise, the same having been accepted by the board of commissioners and incorporated as part of the public highway."

And in the opinion, on page 16, the court reasons as follows:

"This court is of opinion that such recovery is not authorized. The principle applicable to the situation is the equitable one that where one has acquired possession of the property of another through an unauthorized and void contract, and has paid for the same, there can be no recovery back of the money paid without putting, or showing readiness to put, the other party in *statu quo,* and that rule controls this case unless such recovery is plainly authorized by the statute. The rule rests upon that principle of common honesty that imposes an obligation to do justice upon all persons, natural as well as artificial, and is recognized in many cases."

Let us keep in mind now that this was a case in which the county commissioners had entered into a contract without the county auditor first having made the certificate provided for in section 5660 G. C. (then section 2834b R. S.), and the work had been fully completed and the county had paid the consideration set forth in the contract. Under these facts, the court held that the county could not recover the money so paid from the contractor.

With this principle in mind let us turn to Buchanan Bridge Co. v. Campbell et al., 60 O. S. 406. The court in the syllabus lays down the following proposition of law:

"A contract made by county commissioners for the purchase and erection of a bridge in violation or disregard of the statutes on that subject.

is void, and no recovery can be had against the county for the value of such bridge. Courts will leave the parties to such unlawful transaction where they have placed themselves, and will refuse to grant relief to either party."

In the opinion, on page 419, the court lays down the following proposition:

"Whatever the rule may be elsewhere, in this state the public policy, as indicated by our constitution, statutes and decided cases, is, that to bind the state, a county or city for supplies of any kind the purchase must be substantially in conformity to the statute on that subject, and that contracts made in violation or disregard of such statutes are void, not merely voidable, and that courts will not lend their aid to enforce such a contract directly or indirectly, but will leave the parties where they have placed themselves. If the contract is executory, no action can be maintained to enforce it, and if executed on one side, no recovery can be had against the party of the other side."

And in the opinion, on page 425, the court reasons as follows:

"The statutes are notice to the world as to the extent of the powers of the commissioners, and the bridge company is bound by that notice. It knew, and was bound to know, that the commissioners had no power to thus enter into a contract, and that a contract thus attempted to be entered into would be null and void and would not bind either party.

It is necessary to so construe the statutes, in order to prevent the evils which induced the enactment of them. If such statutes could be evaded, there would always be found some public servants who would be ready and willing to join in transactions detrimental to the public, but favorable to themselves or some favored friend; and if public officers should be ever so honest, some persistent agent or salesman would impose upon them, and obtain more out of the public treasury than is justly due. When the provisions of the statute are followed, and all is done openly and publicly, the public interests are best conserved, and even then there is often complaint to the effect that some one has been favored."

This case embodies the same facts as are embodied in the matters about which you write.

Upon the authority of this case and many others which might be cited to the same effect, it is my opinion that there is no legal obligation resting on the present board of county commissioners to settle for the work done under contracts entered into in violation of section 5660 G. C.

You further ask, in your fifth question, as to whether there is any duty resting on the present board of commissioners to settle the said claims against the county, under the theory that they are moral obligations of the county. I will say, in answering this question, that while there are certain conditions under which the question of moral obligation may be considered, yet those conditions are not such as would warrant your county commissioners in paying said claims, on the theory that they are moral obligations.

In order that this principle may be understood, it might be well for us to consider the matter briefly. This principle is sometimes applied to legislative enactment. It is well established that the legislature has the power to make

binding and legal an obligation against a municipality or a county, which otherwise could not have been enforced against the municipality or the county.

In O'Neil, Extrx. v. Mayor et al., 72 N. J. L. 67, the court say:

> "When under a contract for compensation entered into with some public agency a private party has rendered service or expended money in an enterprise which is beneficial to a particular municipality, and for which the legislature might in the first instance have made that municipality chargeable, it is competent for the legislature to discharge the original agency and fix the obligation to pay the compensation on the municipality itself."

In Sinton et al. v. Ashbury, 41 Calif. 525, the court say:

> "The legislature has the constitutional power to direct and control the affairs and property of a municipal corporation for municipal purposes, and may for such purposes so control its affairs by appropriate legislation as ultimately to compel it out of the funds in its treasury or by taxation to pay a demand which in good conscience it ought to pay, though there be no legal liability to pay it."

In Lycoming v. Union, 15 Pa. St. 166, the court used the following language in the opinion on page 169:

> "That the legislature might have made provision by the original act for the payment of costs by each of the counties interested, will not admit of cavil. Ingenuity, the most astute, though sharpened by interest, fails to suggest any plausible foundation for such a cavil. We are then reduced to the simple inquiry whether after the work is done, the services rendered, and the benefit enjoyed, the legislature may provide for its compensation and furnish a means for enforcing it."

The court in this case drew the following conclusion:

> "Where a moral obligation exists the legislature may give it legal effect."

In New Orleans v. Clark, 95 U. S. 644, the court laid down the following proposition:

> "It is competent for the legislature to impose upon a city the payment of claims just in themselves, for which an equivalent has been received, but which from some irregularity or omission in the proceedings creating them cannot be enforced in law."

For Ohio cases of similar import, see:

> Board of Education v. McLandsborough, 36 O. S. 227.
> Insurance Co. v. Commissioners, 106 Fed. 123.

From all the above it will be seen that the power to recognize a moral obligation is essentially legislative. It might be going too far to say that it cannot

be delegated, but I am certain that it has not been delegated to county commissioners. Their power to allow claims against the county is limited to legal claims (Jones v. Commissioners, 57 O. S. 189). I am aware that there are some lower court decisions in this state, declaring that the power to recognize a moral obligation exists in respect of certain agencies such as boards of education. While frankly acknowledging that I doubt the correctness of such holdings, I point out that they cannot be applied to county commissioners, in the face of the Jones case, supra.

There is another principle into which the question of a moral consideration or obligation enters, viz., that a moral consideration or obligation may sustain a promise to do that which without the promise could not be enforced. This principle is stated in Elliott on Contracts, section 211:

> "It is well settled that a moral consideration alone is not sufficient to give an original cause of action if the obligation on which it is founded was never enforceable at law."

However, it is quite evident that this principle could not be made to apply to the question about which you inquire, because in your case there never was a legal and valid obligation against the county and hence there is nothing upon which a promise of the county commissioners could be based, under the theory that there is a moral obligation against the county.

Your sixth question reads as follows:

> "In case your opinion should be that contracts made in violation of section 5660 are moral obligations of the county, can the county commissioners borrow money under authority of section 5656 et seq. G. C. for the purpose of paying the same?"

This possibly does not require an answer in view of the answers that I have given to the former questions, but in passing let me say that section 5656 G. C. does not cover transactions such as those mentioned in your communication. Note the reading of this section:

> "* * * the commissioners of a county, for the purpose of extending the time of payment of any indebtedness, which from its limits of taxation such * * * county is unable to pay *at maturity,* may borrow money or issue the bonds thereof," etc.

Even though the provisions of section 5656 G. C. could be made to apply to obligations as set out in your communication, we would further be compelled to consider the provisions of another section, namely, 5658 G. C., which reads in part as follows:

> "No indebtedness of a * * * county shall be funded, refunded or extended unless such indebtedness is first determined to be an existing, valid and binding obligation of such * * * county by a formal resolution of the * * * commissioners thereof. * * *"

As said before, the claims about which you inquire are not valid obligations. Hence, the provisions of section 5656 G. C. could not be resorted to in order to postpone the time of settling the same.

Your seventh question reads as follows:

> "If the county commissioners cannot borrow money under the provisions of the section above mentioned to pay said obligations, is there any way in which they could legally transfer money from one fund to another and thereby create a deficit in the fund from which they make the transfer and fund said deficit under the provisions of the aforesaid mentioned section 5656 G. C.., thereby enabling them to pay obligations made in violation of section 5660 of the General Code?"

This question has to do with the transfer of money from one fund to another. An answer to this question is really rendered unnecessary by virtue of the answers that have been given to your previous questions, but in passing let me say that the answer to your sixth question answers this question.

The provisions of section 5656 G. C. were not intended to make provision for a deficit in a certain fund, but were meant simply to take care of those obligations which could not be met at maturity, due to the fact that the county is unable to pay the same.

Your eighth question reads as follows:

> "Where the commissioners have knowingly violated section 5660, in the making of contracts, can they bind the county for the same, by giving the party who holds the contract the county's note for the payment of the amount due under the contract?"

In view of all that has been said heretofore, this question will require no extended discussion. If the contract which is entered into contrary to the provisions of section 5660 G. C. is void, as is provided in section 5661 G. C., then this contract could not be used as a consideration for the entering into by the county commissioners of another contract which would be legal. In other words, if there is nothing due the contractors under the first contract, there would be no consideration by virtue of which the county commissioners could enter into another contract agreeing to pay an obligation some time in the future.

Your ninth question reads as follows:

> "Can the county commissioners be held personally responsible on their official bonds for the payment of bills contracted in violation of the plain provisions of the law, when they have knowingly violated the statutes regulating the making of said contracts?"

The principle of law which controls in this case might be stated as follows:

> "Action on the part of an officer in excess of his legal authority will not have the necessary effect of imposing upon him a personal liability on the contract which he has signed, since those with whom he is dealing cannot be deceived by him. For the extent of his authority may be ascertained by an examination of the law."

This principle is taken from Cyc. and is substantiated by the cases cited therein as authority.

In Newman et al. vs. Sylvester, 42 Ind. 106, the court lays down the following proposition:

> "If the party contracts as a public officer, and in that capacity acts honestly, he will not ordinarily be personally liable. If his authority to act is defined by public statute, all who contract with him will be presumed to know the extent of his authority, and cannot allege their ignorance as a ground for charging him with acting in excess of such authority, unless he knowingly misled the other party."

In Sanborn vs. Neal et al., 4 Minn. 126, the following is laid down as a correct principle of law:

> "Where a person contracts for another without authority, or exceeds the scope of his authority, he is held personally liable; but when *public agents* in good faith contract with parties having full knowledge of the extent of their authority, or who have equal means of knowledge with themselves, they do not become individually liable, unless the intent to incur a personal responsibility is clearly expressed; although it should be found that, through ignorance of the law, they may have exceeded their authority."

In McCurdy v. Rogers, 21 Wis. 197, we have the following:

> "In the case of a public agent, where his authority, or that of his principal, to contract, is derived from a public statute, the party contracted with is presumed to know the limitations of such authority; and the doctrine that an agent, by contracting for his principal, affirms his authority, does not apply."

In all the above I had in mind your statement to the effect that the board of county commissioners wilfully ignored the law in entering into many of the contracts; but if they wilfully entered into these contracts undoubtedly those who contracted with them entered into the same just as wilfully.

Hence, in view of all the above, it is my opinion in answer to your ninth question that the county commissioners could not be held personally liable for the claims arising under contracts entered into contrary to the provisions of section 5660 G. C.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

856.

LIQUOR LICENSE—IS A PROPERTY RIGHT AND SURVIVES DEATH OF HOLDER—ADMINISTRATOR STANDS IN PLACE OF DECEDENT IN CASE APPLICANT DIES PENDING PROCEEDINGS FOR RENEWAL—RIGHT OF ADMINISTRATOR TO APPEAL FROM FINDING OF BOARD.

1. *A liquor license under the Ohio law is more than a mere personal privilege. It is a right in, over and in respect to property and survives the death of the holder thereof.*

2. *Where the holder of a liquor license dies, pending proceedings on his application for renewal thereof, his administrator, proceeding properly under section* 1261-32*G. C., stands in the place of said decedent, representing his estate, and such license so represented is entitled to be considered, on an application for renewal thereof, the same as if the original applicant had not died.*

3. *Where J. W., a liquor licensee, duly filed an application for renewal, and died on the last day of the application period, and where the administrator of J. W. properly qualified under section* 1261-52 *G. C., and continued the business of the licensee, said administrator, standing in the place of his decedent and representing his estate, possesses all the rights of the original licensee applicant; and where on the last day of the application period J. S. files an original application for a license, and the board, coming on to consider the two applications, granted said original application to J. S. and rejected the application theretofore filed by said J. W., alleging as a ground thereof that the quota for the wet unit was filled, the administrator of said J. W. is the proper party to prosecute the appeal from such order, and said administrator should be accorded the right given under section* 1261-47 *G. C.* (107 *O. L.* 25), *that no applicant for renewal of said license shall be refused a license unless said applicant has not met the qualifications required by law.*

COLUMBUS, OHIO, December 13, 1917.

State Liquor Licensing Board, Columbus, Ohio.

GENTLEMEN:—Under date of November 23, 1917, you ask an opinion upon the following state of facts:

On September 5, 1917, John Wagner, the holder of a liquor license, properly filed application with his local county board for a renewal. On September 15, 1917, which was the last day of the application period, said John Wagner died and on the same day another party, John Schenz, filed an original application for a saloon license.

One of the members of Wagner's family qualified as administrator and as provided by the license law took over the management of the Wagner saloon, and was in control thereof as such administrator on the date provided for the announcement of the names of persons to whom licenses would be granted or whose applications for renewals would be granted.

Upon consideration of the two applications, the local board announced that it would grant the application of Schenz for original license, and that it would reject the application theretofore filed by Wagner, now deceased, stating as its grounds for such rejection that the quota for that wet unit had been filled.

The administrator of Wagner has appealed to the state licensing board, from the decision of the local board rejecting the application of his decedent for a renewal of his said license. You further state that the sole question raised by the record is whether or not the right of renewal for saloon license survives the

death of the licensee and inures to the benefit of his estate or successors, or whether such right of renewal is a personal one granted to the licensee and which ceases with his death.

The question presented is a new one under our license law, and as far as I have been able to learn this is the first time the exact matter has been raised. Its determination is important for I can well see that property interests might be involved, dependent upon the answer to the conclusion arrived at.

It may be well to consider what a license to traffic in intoxicating liquors is, and then more particularly consider what is a license to so traffic under the liquor licensing act of this state. A license, generally speaking and probably in its proper sense, is a permit to do business that cannot be done without it.

As defined by our supreme court in State v. Frame, 39 O. S. 399, a license is essentially a grant to those to whom it is given or extended.

Again, the court in State v. Hipp, 38 O. S. 199, defined license as "permission granted by some competent authority to do an act which without such permission would be illegal."

Licenses to traffic in intoxicating liquors may be divided into two general classes: One where the granting authority is given plenary power and is authorized to issue liquor licenses in such number and to such persons as in his discretion is determined. The laws pertaining to this kind of liquor license usually provide for both petitions on the part of the applicant and remonstrators who desire to protest against the granting of such license. The other general class of liquor licenses are those where the granting power does not possess the authority to grant the licenses at will but where licenses are obtainable by such applicants as properly qualify under the law. In this class any person possessing the qualifications prescribed is entitled to the liquor license.

As I have said, while there are two general classes, still all liquor licenses do not fall within one of the two general classes, for there are liquor licenses which partake in varying degrees of the character of a license in both of the general classes. This is the case of the liquor license under the Ohio law. The constitution and the law provides that licenses shall not be granted to a person who is not a citizen of the United States or who is not of good moral character.

The law further provides that no saloon license can be issued to any person who has not been a resident of Ohio for more than one year preceding the date of his application. Further provision is made by virtue of the constitutional requirement that not more than one saloon shall be licensed in any township or municipality of less than five hundred population.

The constitution provides that license to traffic in intoxicating liquors should be granted, and then proceeds to inhibit the issuance of licenses to certain persons and to limit the number in particular districts.

So the license granting authority is possessed of some wide discretion in determining the proper qualifications of the applicants. Yet the liquor licensing boards have not the plenary power that is given the license issuing authorities under some of the liquor laws of other states.

Woollen & Thornton on Intoxicating Liquors, section 319, says:

> "A license to sell intoxicating liquor is granted to the recipient of it because of his personal fitness to receive it and act thereunder. It is a personal trust not transferable, and not, because of its non-transferability, an asset of his estate on his decease or assignment in bankruptcy."

Citing in re Buck's Estate, 185 Pa. St. 57, and other cases.

The above quotation found in the text of Woollen & Thornton, supra, is true as a general proposition, but we must look to the specific statutes providing for the license systems of the various states, to determine whether it has full application. It is well settled that in the absence of statute the grant of the license, being a personal trust, is not transferable; but some of the states have seen fit to specifically provide for the assignment and transfer of liquor licenses.

A liquor license law is a regulatory law affecting the traffic. Ever since the first general statute passed by the British parliament in 1552, being the act of the fifth and sixth parliament of Edward VI, Chap. 5, p. 391, Eng. Stat. at Large, 1540 to 1552, various schemes of regulating this traffic have been prescribed by law by the legislative bodies of the different commonwealths. This legislation has been upheld as an exercise of the police power of the state, a governmental power under which permits are obtained by virtue of the laws enacted thereunder. These permits or licenses are not contracts and the licensee does not acquire any contractual interest. The license is taken with the tacit condition of the power of the sovereign at any time to impose different or additional restrictions. In some jurisdictions it has been held that liquor licenses are not property—at least they are not property in any legal constitutional sense.

If the Ohio law merely provided for the grant of a liquor license and made no provision whatsoever for a transfer or assignment of such license, nor any provision for survivors in interest of such license, I would have no difficulty in determining that it was a right inuring solely to the person to whom the license was granted, and that all the privileges pertaining thereto ceased upon the death of the holder of such license. However, our legislature has seen fit, as have the legislatures of some other states, to make provision for the transfer and assignment of liquor licenses.

In considering this question, it will be necessary to refer to the following sections of the General Code.

Section 1261-52 G. C. provides in part:

> "Upon the death of a licensee * * * the interest of the decedent shall be disposed of by the administrator * * * under the direction of the probate court without delay. The surviving member or partner * * * (or if there be no survivors in interest then the relict of the deceased, or if there be no relict then the child or children), paying to the said administrator * * * such an amount * * * shall have the right to assume the interest of said decedent providing said notice is given of such intention to the probate court within thirty days after the death of the decedent. If a license or an interest therein shall pass by descent or otherwise to one who cannot qualify under the law as licensee, or if the survivor or relict or child or children, as the case may be, shall not in the time prescribed elect to assume said decedent's interest in the license, or if said survivor or relict or child or children, as the case may be, does not comply with the terms fixed by the court, the probate court shall order the license as a whole sold, without delay but after proper notice given by publication, and shall order the proceeds distributed to the survivors in the ownership of the license, if there be such, and the executor or administrator of the decedent, according as their interest may appear, providing, however, that the purchaser of the license shall be duly qualified under the law, and provided further that the said purchaser shall have filed the application required by law of an original applicant for a license.
>
> If all the conditions have been complied with, and if the applicant is qualified by law, the county licensing board shall, upon proper certificate

from the probate court and without fee, transfer the license to the purchaser thereof for the remainder of the license year. The said purchaser shall have all the rights and obligations of the original licensee under said license.

Pending the settlement in the probate court, the executor or administrator may continue the business upon notice to the county licensing board that such is his intention, but within three days said executor or administrator must file an application in all respects as is required of an original applicant, except that no fees shall be required. And if said executor or administrator does not possess the qualifications required by law, the probate court may appoint some person who has such qualifications to serve as trustee of the license pending said settlement. If there are survivors in interest in the license, said survivors shall have the privilege of continuing said business until the settlement in the probate court has been effected.

* * * * * * *

So far as applicable, and so far as is not inconsistent herewith, the laws of Ohio concerning the disposition of the personal estate of a deceased person shall be applied."

Section 1261-35 G. C. (107 O. L. 23), providing where and how applications shall be filed and when same shall be considered under the new license year as in the amended act provided, reads in part as follows:

"* * * except that in the case of applications for the intermediary license period hereinbefore provided for no application for a saloon license filed with the said county board before the first day of September, 1917, and after the fifteenth day of September, 1917, may be considered by the board until after the fourth Monday in November, 1917."

Section 1261-43 G. C. (107 O. L. 23) reads in part as follows:

"* * * Where the number of applications is greater than the number of licenses allowed by law, the applicants who were engaged in the sale of intoxicating liquors prior to the fourth Monday of May, 1912 (or their bona fide successors in title), as evidenced by the payment of the assessment for the preceding period under section 6071 of the General Code shall be preferred, provided they are otherwise qualified by law. * * *."

Section 1261-47 G. C. (107 O. L. 25), provides, among other things, that on the expiration of each of said licenses, the said license shall be renewed upon the application of the licensee, subject to the same conditions, qualifications and limitations applying to a new applicant for license, and that no applicant *for a renewal of license shall be refused a license unless the said applicant has not met the qualifications required by law.*

Under section 1261-52, supra, upon the death of the licensee Wagner, his interest should be disposed of by the administrator under the direction of the probate court, and it is therein provided that decedent's wife, if he has one, and if not, then his child or children, is entitled to assume the interest of the decedent in said license, paying to the administrator the sum determined and complying with the provisions of the statute in reference to qualifications. This section contains an inference that the existing license may pass by descent to one who could not qualify as a licensee, and makes provision for such a case. Likewise, if there is

no election to assume the interest of the decedent in the license, provision is made for the sale of the license, the proceeds of such sale to be paid to the administrator or "to the survivors in the ownership of the license," according as their interests may appear. It will be noted of course that the continual provision is made that the person to whom the license finally goes shall possess the qualifications of a licensee as provided by the constitution and the law.

This section in terms makes it the duty of the county licensing board, upon certification from the probate court, to transfer such license to the purchaser thereof for the remainder of the license year, and grants to the purchaser all the rights and obligations of the original licensee under said license.

As I understand the facts in the present case, the administrator has under the law continued the business, having been found to possess the qualifications necessary therefor. But attention is directed to the fact that even if the administrator could not have so qualified, the probate court was authorized to appoint a qualified person to serve as trustee of the license, pending settlement in the probate court.

Your attention is further called to the concluding provision of the section which makes, so far as applicable and so far as is not inconsistent with the section, the laws of Ohio applicable concerning the disposition of the personal estate of a deceased person.

I think it is plain and beyond any possible controversy that at least pending the settlement in the probate court and during the existent license year, the administrator held the license with all the rights and liabilities exactly as the original licensee. I take it that it was his duty to conserve the value of this license the same as he would the assets of the estate coming into his hands, and that the proceeds arising from the sale or transfer of such license would be treated as assets of the estate.

Now, could it be that the legislature, in imposing this specific duty upon the administrator, intended that all duties devolving upon the administrator should cease by reason of the expiration of the then current license year? If such were the intention, would not the law-makers have confined the provisions of section 1261-52 G. C. to the license year of decedent's death?

In 14 N. S. Wales Law Rep. 430, in the case of Dunlop v. Uhr, the supreme court of New South Wales was considering the authority of an assignee in bankruptcy on the question of renewal of a liquor license. The court held that the assignee might carry on the business of such licensee until the expiration of the license, but that he could not renew the license. Innes, J., at page 433, as well as the concurring justice, Stephen, bases his conclusions upon the express language of the licensing act (section 15 of 45 Vic. No. 14), which states:

> "If any licensee shall die or become insolvent before the expiration of his license, his executors or administrators or his official assignee, as the case may be, may by an agent specially authorized in writing by the licensing magistrate, carry on the business of such licensee, *until the expiration of his license.*"

The court further says that in its opinion it required the express authorization of the legislature to allow an assignee to sell liquor as the publican could.

I am of the opinion that in the absence of a limitation to the current license year, the authority given by our licensing act to the administrator is a general authority, limited only by the provisions of the section and the orders of the probate court.

At the time our state constitution was amended so as to provide for the granting of liquor licenses, it was further provided that the granting of saloon

licenses should be limited according to population. At that time it was well known that in many of the license units a greater number of saloons were doing business than such unit would be entitled to under its quota. Then too, recognition was given to the fact that many persons were engaged in the traffic of intoxicating liquors, a recognized business under the Ohio laws and the liquor taxation system then existing, and the legislature, in the enactment of statutes carrying into effect the constitutional amendment, sought to give a priority of right to license to applicants who had been engaged in the sale of intoxicating liquors.

In section 28 of the act, section 1261-43 G. C., express provision was made that when the number of applications is greater than the number of licenses allowed by law, those applicants who were engaged in the sale of intoxicating liquors prior to the fourth Monday of May, 1912, or their bona fide successors in title, as evidenced by the payment of the assessment for the preceding period under section 6071 G. C., should be preferred, provided they are otherwise qualified by law. This probably would have been regarded as an executed law and only applicable at the time of the first granting of the licenses under the new licensing act but for the fact that the last legislature has seen fit to re-enact it and section 1261-43 G. C., supra, contains the same language. This section so enacted continues the preferential right given to applicants, tracing their title as therein provided.

I have heretofore stated that authorities have held that a liquor license does not constitute property in the constitutional sense. The Ohio courts have not decided either that such a license is property or otherwise.

In Horrigan v. Mendelson, 18 N. P. (N. S.) 596, it was held:

> "A saloon license is not personal property in this state, in the sense that it is subject to levy and execution."

Laeghley, J., calls attention to the authorities supporting the claim that this license is property and also to the adjudications holding the license not to be property subject to levy on execution. While the question before the court, and which was finally decided, was whether or not a saloon license was personal property in the sense that it is subject to levy and execution, the reasoning of the court, as well as its opinion that such a license was a mere privilege and that a holding that the license was property would present many anomalous situations, indicates the trend of mind of the court upon what it conceded to be a difficult question.

I would follow the decision that a saloon license is not personal property in the sense that it is subject to levy and execution, but with all due respect I am constrained to hold that it is more than "a mere privilege."

In 2 N. B. N. Rep. 245; 98 Fed. 407, in the case of In re Becker, the court says:

> "The statutes of the state permit a license to be transferred, subject to the approval of the court of quarter sessions; and I regard it, therefore, as so far property, 'which, prior to the filing of the petition, a bankrupt could by any means have transferred,' that the right to sell it (I do not say the right to exercise it) will pass to the trustee. No doubt there is a clearly visible distinction between a right to property and a mere personal privilege; but I see no abstract reason why some personal privileges may not also come to have qualities belonging usually to property rights alone—such, for example, as capacity to be transferred, and

sufficient attractiveness to make other persons willing to pay money for the opportunity to acquire them. Where, as in the case of a license to sell liquor, these qualities are found to exist in fact, it seems to me the privilege has ceased to be a privilege merely, and has become, in some sense, and in some degree, property also. It can hardly be sound to hold that a bankrupt's creditors may not avail themselves of the fact that money can be had for the chance of stepping into the licensee's place, but that the bankrupt himself may make the same bargain, and put the money safely into his pocket. The license court may or may not accept the buyer as the bankrupt's successor. That is the buyer's affair, and is not decisive upon the point now being considered. He buys a contingency, and buys it with his eyes open; but, in my opinion, the trustee has the contingency to sell, and the bankrupt is bound to execute the instrument necessary to carry out the sale."

See also Re Brodbine, 93 Fed. 643.

And the same conclusion is reached by the circuit court of appeals in Fisher v. Cushman, 51 L. R. A. 292, C. C. A. 381, 103 Fed. 860.

In Deggender, Receiver, v. Seattle Brewing & Malting Co., 83 Pac. 898, the Washington supreme court held as shown by the first paragraph of the syllabus, which reads as follows:

"A license to sell intoxicating liquors, which, under the terms of the statute, is transferable, and therefore has a money value, is an asset of the estate of the licensee to which a receiver for the benefit of his creditors is entitled."

Mount, C. J., uses the following language:

"Under statutes which do not permit transfers of the license from one person to another, and where the right is a personal privilege only, we think the rule stated is undoubtedly correct. But where the statute recognizes the right of transfer from one to another, and where the right is a valuable right, capable of being surrendered and reduced to money, a different rule prevails. In such cases the license or right to do business becomes a valuable property right, subject to barter and sale. It is property with value and quality. The United States courts have held that liquor licenses issued under statutes authorizing a transfer are assets of an estate, under the bankruptcy act. Fisher v. Cushman, 51 L. R. A. 292, 43 C. C. A. 381, 103 Fed. 860; Re Becker, 98 Fed. 407; Re Fisher, 98 Fed. 89; Re Brodbine, 93 Fed. 643; Re Gallagher, 16 Blatchf. 410, Fed. Cas. No. 5,192. Mr. Black, in discussing these cases and the question involved in this action, in this note appended to the case of Fisher v. Cushman, 43 C. C. A. 392, says: 'If these questions (referring especially to franchises to collect tolls and the like) should again arise, it is probable that they would be decided in accordance with the rule laid down in regard to liquor licenses; the true test being found in the question whether the franchise or right is actually transferable, with the consent of the authorities and without any practical difficulty, and whether it has a market value and can be disposed of by sale.' This, it seems in reason, must be the correct rule. If a license to sell liquors is transferable, valuable, and is subject to sale, it is certainly not merely a personal privilege, but it has all the attributes of property, except tangibility, and must be treated as property."

In 19 Vict. Law Rep. 66, the supreme court of Victoria, construing their licensing act, which is somewhat similar to ours, where a widow of a licensee carried on the business for a time until the administrator was appointed, who nominated the widow as his agent to carry on the business and subsequently sold the business, making application to the licensing court to transfer the license to his transferee under a section empowering the licensing court to transfer licenses "to any person of whom the court may approve upon the application of the holder of the license and the proposed transferee jointly;" *held:* That were it not for the provision of section 115 of the licensing act, the license would be a personal privilege, coming to an end on the death of the licensee. But since said section provided that in case of the decease of the licensee before the expiration of his license, his administrator by agent might be specially authorized to carry on the business, it was apparent that the legislature had made this provision to protect the license and that said license is kept in existence as a part of the estate and becomes the legal property of the administrator, passing to him, he becoming the owner thereof for the benefit of the persons beneficially interested in the estate.

In In re Peck v. Cargill, 167 N. Y. 391, on an appeal from an order revoking and cancelling a liquor tax certificate, O'Brien, J., in delivering the opinion of the court, said:

> "These certificates are recognized by the statute under which they are issued as a species of property transferable from one to another. They are the evidence of a right or privilege to carry on a certain kind of business issued by the state to the individual and hence a thing of pecuniary value."

Martin, J., in concurring in this opinion says:

> "While it has been said that a tax certificate possesses some of the elements of property and to an extent may be so regarded, still it is at most a qualified property subject to all the provisions of the statute, and may be cancelled or destroyed in the manner specified."

That a liquor license can be considered as some species of property appears from a statute of the state of Connecticut which has a provision giving the right to attach liquor licenses. It provides a way for the attachment and levy of execution upon liquor licenses.

In Quinnipiec Brewing Co. v. Hackbarth, 50 Atl. Rep. 1023, the supreme court of errors of Connecticut was called upon to construe that portion of their liquor licensing act which provides that "the license and all right and interest therein" may be attached, etc., and that such attached license "should be holden to respond to execution in the same manner and for the same length of time as personal property attached." The attaching officer took the certificate into his custody.

The court says at p. 1024:

> "* * * He attached and levied upon something more than a worthless piece of paper which his hands rested upon. He attached and levied upon a 'license'—speaking after the manner of common speech and the statutory meaning given to the word—upon the valuable intangible right conferred upon the licensee, of which the paper was the recognized token and representative. Holding the paper, he held the embodiment of the liquor selling franchise—a valuable thing—to respond to a judgment * * *."

In that case also it appears that the license was the subject of replevin proceedings.

I cite this case merely to show that this intangible right or interest in a license has been treated in some cases as if it possessed some attributes of property.

In Bonnie & Co. v. Perry, Trustee, 78 S. W. 208, the court of appeals of Kentucky held:

> "Under Ky. St. 1903, section 4203 et seq., relative to liquor licenses which contemplate that a license be given to a definite person to sell at a definite place, although section 4198 allows (but does not compel) the authorities to renew a license in case of the death or transfer of the business by the licensee to his personal representative or the purchaser, a license is a mere personal privilege and is not transferable, and any attempt by an insolvent licensee to transfer his license to a creditor does not render the creditor who accepts it liable to pay anything for the license to the licensee's trustee in bankruptcy."

The court in this case held that the Kentucky statute did not compel the authorities, although it permitted them to renew the license to the personal representative, etc., and stated that such a license was—

> "an intangible privilege without vendible value or quality. It might be abandoned by its owner or be revoked at any time for certain causes by the public authority granting it. It is not transferable. The fact that the city council and county court are allowed to transfer it without additional charges, upon the application of the owner, does not give him the right to transfer it."

The court further found that as a matter of fact in that case the license did not appear to have been really transferred by either the city or county authorities. Such transfer had only been effected or attempted to have been done by the licensee himself.

I do not think this Kentucky decision is authority in the instant case. Under our statute the license is transferable. Further, the provisions of section 1261-52, supra, unlike the Kentucky statutes, appear to make it mandatory upon the county licensing board to transfer the license to a purchaser thereof for the remainder of the license year upon compliance with all the conditions and a finding that the transferee is qualified by law.

From all the foregoing, I am inclined to the view that the legislature in its enactment of the liquor licensing law, particularly section 1261-52 G. C., intended to confer more than a mere personal privilege upon the holder of such a license. True, it may not be subject to sale or execution, because I can well see that the execution officer would not be in a position to transfer the full title to the purchaser, but it might be possible for a diligent creditor to realize upon its value by way of some proceeding in aid of execution.

Under the facts in the case we are called upon to consider, the administrator has followed the express terms of the statute. There, of course, is and could be no question but that he held the liquor license for the estate during the period of the existing license year. Had he been able to close up that portion of the estate prior to the date when announcements would be made by the licensing board of those to whom it intended to grant licenses, and a transfer had been made of such license to the purchaser thereof, it is my view that such purchaser

would have succeeded to all the rights of the original licensee, would have been the successor in title as contemplated in section 1261-43 (107 O. L. 23), and should have been preferred, provided he was otherwise qualified by law.

I do not believe the situation is changed by the fact that the administrator has not as yet closed up that portion of the estate in the probate court in the manner prescribed by the liquor licensing act. While of course it must be conceded that a renewal license could not have been granted to the deceased, it is my opinion that such renewal license could be granted to the administrator who stands, on behalf of his decedent's estate, in the place of the decedent, succeeding to all his rights as well as his liability.

Under the authority of section 1261-31 G. C., county liquor licensing boards among other things are authorized to renew as provided by law, all licenses to traffic in intoxicating liquors in the county wherein the board is situated.

Under section 1261-43 as amended (107 O. L. 23), where the number of applications is greater than the number of licenses allowed by law, the applicants who are engaged in the sale of intoxicating liquors prior to the fourth Monday of May, 1912 (or their bona fide successors in title), as evidenced by the payment of the assessment for the preceding period under section 6071 G. C., shall be preferred, provided they are otherwise qualified by law.

Section 1261-47 as amended (107 O. L. 25), which re-enacts, with some amendments, section 32 of the original license act, expressly authorizes the renewal of licenses and specifically provides that:

> "* * * no applicant for a renewal of license shall be refused a license unless the said applicant has not met the qualifications required by law. * * *"

The word "renew" etymologically contemplates something more than passivity and suffering the estate to continue as it was. The renewel of a note, for instance, consists of a distinct contract for the period of time covered by the renewal or under the same terms and conditions. The renewal of a policy of insurance likewise constitutes a separate and distinct contract for the period covered by the renewal under the same terms and conditions. The renewal of a lease is an extending of the term under the same conditions, importing the giving of a new lease like the old one, with the same terms, stipulations and covenants. A lease might be made for a year, *renewable* annually for ten years, at the option of the lessee. If the lessee had a right to assign the lease, the right of renewal would follow and adhere to the lease.

The right to renew a liquor license is conferred by the statute. This right inures to the applicant by reason of the fact that he is a licensee, and it is my view that this right of renewal follows the license, and that the person who at the expiration of the annual period holds the license, with it possesses the right of renewal. True, throughout the entire license statute runs the provision that no one can be a licensee unless he possesses the qualifications required by law.

In State ex rel. v. Steimer, 151 N. W. 256, the supreme court of Wisconsin was construing certain provisions of their liquor licensing law, which in some respects is similar to ours. The first paragraph of the syllabus reads as follows:

> "In St. 1913, Sec. 1565d, forbidding the issuance of retail liquor dealers' licenses beyond the proportion of one for every 250 inhabitants, except in certain cases, where there was such a license issued and in force on or prior to June 30, 1907, the conjunction 'or' is not to be read 'and,' but the exceptional applies where a license for the year 1907 had been

issued to one who died during the year, and whose business was conducted by his administratrix till the end of the year, when it was taken over by another, who procured a renewal of the license."

In this case one, McGarty, held a retail liquor license for the year ending June 30, 1907. He died on October 5, 1906, and his widow and administratrix conducted, for his estate, this retail liquor business from the time of his death up to and including June 30, 1907. After that time, other persons, to whom retail liquor licenses were issued, continued the business as tenants of the premises in question, and this continued every year thereafter until the year 1914, when such a license for this place was issued to the respondent Steiner.

On June 30, 1907, and every year since, the city in which the business was conducted, counting the licensed premises in question, had more than one license for each two hundred and fifty inhabitants or fraction thereof.

The circuit court held that the license of Steiner expiring June 30, 1915, was valid, and gave judgment accordingly, dismissing the complaint.

At page 257 the court says:

"The appellant contends that on the death of McGarty on October 5, 1906, his license expired, and did not pass to his administratrix or authorize her to continue the retail sale of liquors to be drunk on the premises, consequently there was no license in force for the premises in question on June 30, 1907, and that a proper reading of the statute * * * forbade the issue of retail liquor licenses beyond the proportion of one for every 250 inhabitants or fraction thereof, except in certain cases where there was such a license issued and in force on and prior to June 30, 1907."

The supreme court affirmed the judgment of the circuit court and held that within the meaning of the statute there was a license in force on or before June 30, 1907. This case in effect held that since the license of the deceased passed to the administratrix and authorized her to continue the business, there was a license in force for the year ending June 30, 1907, and that the successive renewals protected the license of Steiner, and that his license expiring June 30, 1915, under such renewals was valid.

I am inclined to the view that the right of renewal given by the statute follows the license, and that since the legislature has seen fit to make the license a right in or to property as hereinbefore set out, there has also been superadded another right; that is, upon the filling of the qualifications by the applicant, the further right to have a renewal of the license.

From the facts contained in your communication, I gather that after the death of the licensee, Wagner, his administrator following the law, was authorized to and did continue the business of his decedent. If this were so, the county liquor licensing board at that time recognized the administrator as standing in the place of the deceased licensee. His complying with the statute in order to continue the business, constituted him an applicant, at least under section 1261-32 G. C., which provides that the administrator must file an application in all respects as is required of an original applicant, except that no fees shall be required. If the foregoing be true, then the board has already recognized the standing of the administrator as the successor of the deceased licensee.

The administrator standing in the place of the deceased licensee and by his qualifications being an applicant, even though in a representative capacity holding the license of one who was himself or by succession entitled to preference, it is

my opinion that said administrator possessed all the rights of the original licensee, including the right to renewal, and the county liquor licensing board in question was in error in concluding that the right of renewal ceased with the death of the licensee.

Under the Pennsylvania statute, while the law itself is silent upon the subject, the decided weight of authority, as stated by the court in McOmber's License, 3 Pa. Dist. Rep. 431, is that:

> "In the event of the death of an applicant for a retail liquor license pending the proceedings for the granting of the same, the license may be issued to the successor of or the substitute for the original applicant."

The above case shows that liquor licenses are granted by the common pleas judges and that when it is made to appear to the license court that the applicant has died, it merely makes an order directing that the name of the applicant be stricken out and that of the new party substituted therefor. Of course, under the Pennsylvania law, the court decides upon the qualifications of the persons seeking license.

You are no doubt familiar with the provision of our civil code which permits on suggestion that the party has died, the substitution of the name of his personal representative in lieu of his own.

It strikes me that analogous to such provisions, that upon the suggestion of the death of the applicant the administrator ought to be permitted to be substituted in the place of the decedent.

I am fully mindful of the dicta or expressions of our highest courts, both state and federal, that the right to engage in the retail traffic of intoxicating liquors is not an inherent or inalienable right, but, as found in the text of Woollen & Thornton on Intoxicating Liquors, section 323, and also in Sopher v. State, 169 Ind. 177, these expressions invariably occur in connection with the unregulated traffic in such liquors and not as an argument to defeat laws regularly adopted for the purpose of licensing and regulating the sale of such liquors. No matter what one's individual ideas are upon the ever present liquor question, the matter presented to us must be determined solely in view of our constitutional and statutory enactments.

Coming then to answering your specific question, it is my opinion that under our liquor licensing law a license is more than a mere personal privilege, and that it does not cease with the death of the holder thereof; that under the facts in this case and by virtue of section 1561-52, supra, the administrator representing the estate, as the successor in interest of the deceased licensee, succeeds to all the rights and privileges of said licensee; that when a licensee dies after having made application for a renewal and before such application is finally passed upon, the administrator stands in the place of his decedent, and upon complying with all provisions of law and being duly qualified therefor, can hold said liquor license; that such administrator possesses the same right of renewal that would have belonged to his decedent had he still lived, and is entitled to like preference under the law, and that under the facts of this case, when an application for renewal is rejected upon the ground that the quota for the wet unit has been filled, the administrator of the decedent licensee is the proper party to prosecute the appeal from such order.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

857.

BRIDGES—HOW SAME MAY BE REPAIRED BY COUNTY COMMISSIONERS—STATE OFFICERS—MAY EMPLOY MEN, ETC.—IN FURTHERING CONSTRUCTION OF STATE BUILDINGS—FORCE ACCOUNT DEFINED.

1. *The commissioners of a county are not authorized to construct bridges by what is known as force account. However, in the repair of bridges the county commissioners may thus proceed.*

2. *The commissioners are authorized to secure the necessary equipment to enable them to repair the bridges of the county; but the word "equipment," as used in section 7200 G. C. (107 O. L. 115), is not broad enough to include the item of boots, whether the same be the ordinary knee or hip boots.*

3. *Under the provisions of the act found in 107 O. L. 453, state officers, boards or other authorities may employ men and purchase material in furthering the construction, etc., of state buildings and public works, which is in the nature of force account.*

4. *The term "force account" implies that the department officer or board having work to do, instead of entering into a contract for the performance of the work, assumes a direct oversight of the same, employing men with teams, purchasing material and paying for the same without reference to any contract whatever.*

5. *The authority to perform work under what is termed force account would not include authority to a department, board or officer to enter into a contract with another, giving him as consideration a certain percentage of the entire cost of the work.*

COLUMBUS, OHIO, December 13, 1917.

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

DEAR SIR:—I have your communication of October 26, 1917, in which you ask my opinion in reference to five questions. I will consider them in the order in which they are set out in said communication.

Your first question is as follows:

> "(1) Are the commissioners of a county legally empowered to construct bridges, or repair the same, by force account?"

This question embodies two distinct matters, the one being the construction of bridges, and the other the repairing of the same, and I will consider them separately.

I will note a number of sections as found in the White-Mulcahy act, in order to reach a conclusion as to whether the county commissioners are legally empowered to construct bridges by force account.

Section 6948-1 G. C. (107 O. L. 107) reads as follows:

> "If the county commissioners deem it for the best interest of the public they may, in lieu of constructing such improvement by contractor, proceed to construct the same by force account."

The particular part of this section to which our attention must be given is:

"may, in lieu of constructing such improvement by contractor, proceed to construct the same by force account."

The main question is as to what the words "such improvement" refer. To answer same we will note the Cass highway act and the manner in which it was divided and subdivided. Chapter 6 of said act was headed "Road construction and improvement by county commissioners" and embodied the sections of the General Code from 6906 to 6956. From this it is quite evident that the words "such improvement," used in section 6948-1 G. C., above quoted, refer to road construction provided for in sections 6906 to 6947 inc. G. C. (107 O. L. 69).

In noting sections 6906 and 6907 G. C., in this chapter, we find that the same relate to the construction, improvement or repair of any public road, or part thereof. The question then arises as to whether the word "public road" would include a bridge which is located on the same, for if the words "public road" include bridges, then section 6948-1 supra would apply to bridges, and the county commissioners might construct the same by force account, if they should deem it for the best interest of the public.

In an opinion rendered by me on September 28, 1917 (No. 668), to Hon. Joseph T. Micklethwait, prosecuting attorney, Portsmouth, Ohio, I discussed at considerable length the question of the construction and improvement of bridges in general. In this opinion I proceeded on the theory that the word "road" would not in and of itself include the word "bridge." I am still of the opinion that this conclusion is correct.

Section 1226 G. C. seems to lend considerable force to this view and reads in part as follows:

"The word 'highway' as used in this chapter (G. C. Secs. 1178 to 1231-3), includes an existing causeway or bridge, or a new causeway or bridge, or a drain or watercourse which forms a part of a road authorized by law. * * *"

It will be noted that in this chapter, which relates to the powers and duties of the state highway department in the matter of road construction, the word "highway" is made to include bridges or causeways, but nowhere else in the Cass highway act, nor in the White-Mulcahy act, do we find this provision or anything like it. The very fact that this provision is made in the chapter relating to the duties of the state highway department and is not made in the chapter in reference to the construction and improvement of roads by county commissioners, goes strongly to the point that the legislature did not intend that the word "road," as it applies to the powers and duties of township trustees and county commissioners, should include bridge or bridges. If this be correct, then section 6948-1, hereinbefore quoted, would not apply to bridges.

With this in mind we will turn to the provisions of another section which requires construction. Section 7198 G. C. (107 O. L. 115) reads as follows:

"Sec. 7198. The county surveyor may when authorized by the county commissioners employ such laborers and teams, lease such implements and tools and purchase such material as may be necessary in the construction, reconstruction, improvement, maintenance or repair of roads, bridges and culverts by force account."

This section at first sight would seem to confer the power upon some one, at least, to construct bridges and culverts by force account, either upon the county

surveyor himself or upon the county commissioners. In examining this section carefully it will be seen that it is to the effect that the county surveyor may, when he is authorized so to do by the county commissioners, employ such laborers and teams, etc., "as may be necessary in the construction, reconstruction, improvement, maintenance or repair of roads, bridges and culverts by force account." This section does not confer power upon either the county surveyor or the county commissioners to do anything by force account. However, it does confer authority upon the county surveyor, when authorized by the county commissioners, to employ laborers, lease implements and purchase material for the construction, etc., of roads, bridges and culverts by force account. This makes it necessary for us to look elsewhere for the power and authority to construct by force account, and when we do this we find no other provision, permitting of the construction by force account, than section 6948-1 supra, and this goes no further than to permit the construction of roads by force account.

My views, as hereinbefore set out, are considerably strengthened by the fact that the legislature, in enacting the White-Mulcahy law, did not in any respect seek to repeal the provisions of section 2352, 2353 and 2354 G. C.

Sections 2333 to 2361 inc. G. C. relate to the construction of county buildings and bridges.

Section 2352 G. C. provides:

> "* * * the county commissioners shall give public notice in two of the principal papers in the county having the largest circulation therein, of the time when and the place where sealed proposals will be received for performing the labor and furnishing the materials necessary to the erection of such building, bridge or bridge structure. * * *"

Section 2353 G. C. provides that when the estimated cost of a bridge or bridge substructure does not exceed one thousand dollars, then the advertisement, as provided in section 2352 G. C., may be dispensed with, but notice of the letting must be given for fifteen days by posting on a bulletin board or writing on a blackboard in a conspicuous place in the county commissioners' office, showing the nature of the letting, etc.

Section 2354 G. C. provides that if the estimated cost of the bridge or bridge substructure does not exceed two hundred dollars, it may be let at private contract without publication or notice.

These three sections include all bridges, irrespective of the cost of constructing the same, and these sections are clearly against the idea that the county commissioners may proceed by force account to construct bridges, regardless of the cost of the same. Hence it is my opinion that there is no authority given in law which would warrant the county commissioners in constructing bridges by force account.

In reference to the other part of question one, that is, whether the county commissioners might repair bridges by force account, I will call attention to an opinion rendered to your bureau by my predecessor, Hon. Edward C. Turner, and found in Vol. I, Opinion of the Attorney-General for 1916, p. 882. In this opinion Mr. Turner held that under and by virtue of sections 7214 and 7198 G. C., the county commissioners might proceed with the maintenance and repair of highways under force account, and that they would not be compelled to advertise for bids in the purchase of material or the hiring of laborers and teams. Inasmuch as section 7214 G. C. includes bridges as well as roads, the same principle would apply to the repairing of bridges as applies to the repairing of roads, and I am of the opinion that Mr. Turner's reasoning is correct, and that the county commissioners might

repair bridges by what is known as force account. This would apply to all cases of repair, regardless of the cost of the same. It must be kept in mind that sections 2352, 2353 and 2354 G. C. relate merely to the construction of bridges.

Your second question reads as follows:

> "(2) May the commissioners also provide equipment for doing such work, and can rubber boots, whether ordinary or hip, be considered as equipment to be paid for from the public treasuries of any taxing district?"

In the same opinion above referred to, Mr. Turner held that the county commissioners themselves would have authority, or they could authorize the county highway superintendent, now the county surveyor, to purchase or lease the necessary machinery, teams, etc., for the repair of the roads of the state. I am of the opinion this would apply to the repair of bridges and, therefore, that the county commissioners themselves could, under section 7200 G. C., purchase the necessary equipment to enable them to repair the bridges which come under their jurisdiction, or they could under section 7198, supra, authorize the county surveyor to purchase the same.

Section 7200 G. C. (107 O. L. 115) reads in part as follows:

> "The county commissioners may purchase such machinery, tools or other equipment for the construction, improvement, maintenance or repair of the highway, bridges and culverts under their jurisdiction as they may deem necessary, which shall be paid for out of the road funds of the county. * * *"

You also ask in your second question as to whether this equipment could include rubber boots coming either to the knees or to the hips. In answering this question it will be well for us to note the provisions of section 7200 above quoted. The language therein used is as follows:

> "The county commissioners may purchase such *machinery, tools* or *other equipment* for the construction, improvement, maintenance or repair of the highway, bridges and culverts. * * *"

The question arises as to whether rubber boots could be brought within the term "other equipment." It is my opinion that they cannot be so brought within this term. While I will not go into this to any extent for the purposes of this opinion, yet the rule is well established in law that where a general term follows specific and definite terms, the meaning of the general one must be fixed with a view to the meaning of the specific and definite terms.

In the provision just quoted the specific terms are "machinery" and "tools," and the general term which follows these specific ones is "other equipment." Hence, in view of the above rule of law, "other equipment" would be held to include only those things which would be similar in nature to "machinery" and "tools;" that is, such things as would be used by a workman in the building of roads, bridges and the like, which could hardly be said to include articles of wearing apparel, irrespective of whether they be hip or ordinary boots. Therefore, it is my opinion that the county commissioners would have no authority to purchase boots, as suggested, and pay for the same from the proper fund of the county.

Your third question reads as follows:

> "(3) Are any state departments other than the state highway department authorized by law to do work by force account?"

This question is somewhat indefinite, but I will say that there is no other department of the state given the same extensive powers, in the way of doing work under force account, as are given to the state highway department.

In 107 O. L. 453 is an act which radically amends the sections of the General Code relating to the construction, alteration and improvement of state buildings and public works and the installation of equipment therefor. The provisions of this act apply to all officers, boards or other authorities of the state upon whom devolve the duty of constructing, erecting or altering state buildings and public works and the installation of equipment therefor. Hence, this act is broad enough to include all state departments, but there is no provision therein made, whereby work may be done strictly under force account. However, under sections 2328 and 2329 G. C., in said act, the department is authorized to give notice to the contractor to push the work along more speedily than he has been doing up to any particular time, and if the contractor fails to heed the notice within fifteen days, the department may employ upon the work additional force or supply the special materials or such part of either as it deems proper. This is in a sense completing the work or assisting in the completion of the same by force account.

Of course it must be remembered that the act above noted relates to those contracts which involve an expenditure of more than three thousand dollars, as is set out in section 2314 G. C., in said act. So that there is nothing in the act which provides for the manner of erecting or constructing buildings or structures, or the purchase of material for the same when the cost is less than three thousand dollars. Undoubtedly in such cases the board or other authority in charge of said matters might do the work under force account, if they felt it to be for the best interests of the public, unless it is otherwise provided by law.

Your fourth question reads as follows:

> "(4) Please define the legal meaning of the term 'force account.'"

There is no definition of the term "force account" set out in the General Code. When we come to examine the dictionaries we also find that there is no definition given to this phrase, and the decisions of our courts rarely contain any definition or discussion as to this term. So that one has but little precedent or guide in the matter of legally defining this term.

In Hottel v. Poudre, etc., Co., 41 Colo. 370, the court on p. 378, in the opinion, used the following language, in referring to said term:

> "It was done under what the parties called force account. That is, compensation therefor was not in accordance with the prices specified in the contract, but Temple & Company hired men and teams to do the work by the day and paid therefor on the basis of time they were employed."

This possibly gives the correct idea of the term "force account." In doing the work under force account, the department having authority to perform the work, instead of entering into a contract with some certain party to do said work, itself takes charge of the work, employs men with teams, purchases material and oversees the men performing the work, and pays for the same on the basis of the

length of time they are engaged in said work. It is my opinion that no contract involving the work as a whole enters into the performance of the same under force account.

Your fifth question reads as follows:

> "(5) Is there legal authority for letting a contract on the basis of the entire cost thereof plus a certain percentage of such cost as a consideration, and if so would such contract legally be termed as a force account?"

The answer to this question depends altogether upon the wording of the statute which relates to improvements or constructions of any kind. There are some sections in the General Code which give such broad authority that the department having charge of the matter would have authority to enter into such a contract. For example, section 1209 G. C. (107 O. L. 126) provides in part as follows:

> "* * * the state highway commissioner shall have full power and authority to enter upon and complete said improvement either by contract, force account *or in such manner as he may deem for the best interest of the public.* * * *"

The latter part of this quoted matter is possibly broad enough to enable the state highway commissioner to enter into a contract such as you suggest. What you have in mind, as I view it, is this, would the department, officer or board have power to enter into such a contract as you suggest, in those cases in which the department, officer or board is given authority to do the work under force account? From the definition I have given you of the term force account, it is my opinion that the authority given to perform work under force account would not include the authority to enter into such a contract as that which you suggest in your fifth question. As stated,, in answer to your fourth question, the term force account does not involve the idea of a contract, but on the other hand the particular work is done under the direct supervision and oversight of the department, officer or board. This probably covers your fifth question, if I understand what you have in mind.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

858.

COLLATERAL INHERITANCE TAX—HOW ASSESSED AND COLLECTED IN FOLLOWING CASE—TESTATOR DEVISED HIS FARM TO COLLATERAL RELATIVE FOR LIFE, DIRECTING HIS EXECUTOR TO SELL FARM AFTER SAID RELATIVE'S DEATH AND FROM PROCEEDS TO PAY $10,000 TO A FOREIGN EDUCATIONAL INSTITUTION AND DIVIDE REMAINDER SHARE AND SHARE ALIKE "WITH MY LAWFUL HEIRS."

A testator devised his farm to a collateral relative for life directing his executor to sell the farm after said relative's death and from the proceeds to pay $10,000 to a foreign educational institution and divide the remainder share and share alike "with my lawful heirs."

As to the assessment and collection of inheritance taxes on the estates created by the above items, HELD:

1. *The value of the life estate should be determined by analogy according to the rule prescribed by section 5333 of the General Code.*

2. *The interest of the foreign educational institution is to be treated as a specific legacy charged on the remainder. Hence, it is to be valued as of the date of the death of the testator at its present worth determined by the expectancy of life of the life tenant, unless such present worth should exceed the value of the remainder after the life estate, determined according to the analogy of section 5333 G. C., in which event the value of said interest is the value of said remainder.*

If upon interpretation of the will the interests of the "lawful heirs" be regarded as vested, they are to be valued at the difference, if any, between the present worth of $10,000 and the value of the remainder after the life estate, divided into such parts as the number of vested interests dictates; if, however, such interests are contingent, then the probate judge before whom the matter is pending should not fix any value for them as of the death of the testator, but the value of the remainder after the life estate is to be used only for the purpose of showing whether or not the legacy to the educational institution is to be valued at the full amount of its present worth. In such event the valuation of the interests of said "lawful heirs" should be postponed until those interests vest.

The lien of the state for the tax attaches on account of interests whether vested or contingent. The tax on the interest of the college is due at the death of the testator and if not paid within one year interest at the rate of eight per cent is chargeable thereon; whether or not the taxes on the interests of the "lawful heirs" are due at the death of the testator depends upon whether or not they are vested; if they are contingent the tax is not due until they vest. If the taxes are not sooner paid the executor or administrator with the will annexed must pay them before paying the specific legacy to the college or paying any part of the net proceeds to the "lawful heirs" out of the funds in his possession remaining after the sale of the real estate.

COLUMBUS, OHIO, December 13, 1917.

HON. LEWIS F. HALE, *Prosecuting Attorney, Bellefontaine, Ohio.*

DEAR SIR:—Your letter of December 4th received here December 6th. I should have been glad to have answered so that you would have had my reply on the 7th, but this would of course have been impossible. Some of the questions submitted by you have required careful consideration and I hasten to give you my reply at the earliest possible moment.

In your letter you enclose copy of the will of B. G. and request my opinion upon several questions relating to the collateral inheritance taxes due upon legacies therein, as follows:

> "1. After finding tax due from the life tenant, there is a remainder, on which tax is due. When should tax on remainder be paid and how is it to be determined?
>
> "2. Ten thousand dollars goes to a foreign institution after the death of life tenant. When is tax due on this and if due now is penalty attached?
>
> "3. The remainder of proceeds arising from sale of this farm will go to legal heirs all of whom are collateral, and no person can now tell how many there will be nor what amounts each will receive. When is tax due on legacies to these legal heirs? Is it a lien on the farm? Will penalty attach?
>
> "4. In case life tenant pays the tax on life estate, and dies within next few months, then after paying the ten thousand dollars to the foreign institution in place of remainder being $5,000 for legal heirs, it would be $10,000.
>
> "How shall we arrive at the amount of tax due? How shall we proceed to collect it? From whom and from what fund shall it be paid?"

These questions all have relation, I take it, to the tenth and eleventh items of the will, which are as follows:

> "Item 10. All my real estate consisting of about 200 acres in survey No. 9988 in Richland township, Logan county, Ohio, I give and devise to my brother A. F. G. for and during his natural life time, and at his death said land shall be sold by my executor in a body or in pieces, at such price and on such terms as he may think will be disposing of it to the best advantage; and the proceeds of said sale, after deducting all expenses and $1,000 compensation to be paid to my executor in full for all of his claims for his services as such executor, and $10,000 to the trustees of Cooper college located at Sterling, Rice county, Kansas, to be made a part of the endowment fund of said Cooper college.
>
> "Item 11. Any residue to be divided with my lawful heirs share and share alike."

The questions themselves are inter-related and it will be more convenient, I think, to consider and discuss them as a whole than to take them up one at a time.

Evidently you have construed these somewhat ambiguous paragraphs as meaning that after the death of the brother, who has a life estate in the farm, the real estate should be sold and ten thousand dollars of the proceeds paid into the endowment fund of Cooper college, and the remainder of said proceeds, less one thousand dollars and expenses, be "divided with my lawful heirs share and share alike," i. e., among the lawful heirs of the testator, share and share alike.

I think this interpretation is proper.

Though the land is to be sold at the expiration of the life estate therein and the proceeds divided, generally speaking, between the college and the heirs, the fact that it is to be converted into cash does not change the character of the ultimate estates which will be treated for the purposes of the inheritance tax law just as if they were remainders in specified interests in the land itself. The general rule is stated in Blakemore & Bancroft on Inheritance Taxes as follows:

"It is the general rule in this country that the doctrine of equitable conversion cannot be invoked to affect the imposition of the inheritance tax so * * * an absolute direction to sell real estate will not transform it to personal property for the purposes of the tax."

Citing:

Connell v. Crosby, 210 Ill. 380;
McCurdy v. McCurdy, 197 Mass. 248;
In re Curtis, 142 N. Y. 219;
In re Dows, 167 N. Y. 227;
Orr v. Gillman, 183 U. S. 278.

In other words, the interest of the "lawful heirs" is to be treated, for the purpose of the tax, as if it were a remainder in the land, on which, however, the executor's compensation, the expenses and the bequest to the college are charged.

The interest of the college may be described as a legacy payable out of the remainder after the life estate and therefore not to take effect in possession and enjoyment until that time. Nevertheless, this interest is clearly vested. It depends upon no contingency whatsoever, except a contingency that may effect its value. An extreme view of the case might be taken which would make the estate contingent in that it would never exist if the proceeds of the sale should be less that one thousand dollars plus expenses. However, you state that the farm is appraised at $21,350.00. The better view seems to me to be that the interest is regarded as vested and taxable at the present time. The problem is, however, as to how to arrive at its value. It has been previously held by this department that remainders, after taxable life interests, are to be valued according to the analogy of the rule suggested by section 5333 of the General Code for the appraisement of taxable remainders following exempt life estates. This rule is that "the value of the prior estate shall be appraised, * * * and deducted, together with the sum of five hundred dollars, from the appraised value of such property."

In other words, where the estate is vested the rule is not to take the present worth of its value computed on the expectancy of life of the taker of the life estate, but rather to tax it on its entire value after subtracting that of the life estate.

Of course, in the case of a long expectancy of life it might well happen that the value of the life estate, computed according to the so-called actuaries' combined experience tables and five per cent compound interest, would consume by far the greater part of the value of the whole and leave the remainder subject to a comparatively small tax by virtue of section 5333 of the General Code.

In the case submitted by you the strict application of the rule of section 5333 would produce another peculiar result, for if the estate of the college is to be treated as vested, in accordance with the suggestion above outlined, and if it will at all events be ten thousand dollars; and if in addition the expectancy of life of the brother should prove to be large, then the application of the rule of section 5333 to the case might well result in placing such a value upon the life estate so created as to leave a theoretical value for the entire remainder of less than ten thousand dollars, in the event that the value of the interest of the college be placed at ten thousand dollars, that is fixed without any dimunition, there will be nothing at all left to represent the interest of the "lawful heirs" whether their estate be regarded as vested or contingent. Obviously, therefore, the method above outlined should not be applied.

The only alternative which occurs to me is to apply the rule of section 5333 to obtain the value of the entire farm as it will be at the death of the brother. This would be obtained by subtracting from the appraised value of the farm as now

found the value of the life estate, then from the remainder so ascertained I would suggest a subtraction, not of the entire sum of ten thousand dollars, but of the present worth of that sum payable at the end of the brother's expectancy of life computed at five per cent. compound interest. The remainder would represent the aggregate value of the estates of the "lawful heirs." This method would give effect to the conclusion that the legacy to the college is to be treated as a money legacy at a theoretical future date and a charge upon future interests, but the interest in which is now vested.

In the short time during which I have had your question under consideration I have found no precedents for a case of exactly this kind. On the whole, however, I am satisfied that no better method could be devised for the assessment of the taxes than that which I have outlined.

Repeating, that method is as follows:

From the entire value of the farm as now appraised deduct the appraised value of the life estate, which is not in question. The remainder represents the value of the entire remainder in the farm. To get the value of the interest of the college, take the present worth of the sum of ten thousand dollars payable at the end of the expectancy of life of the taker of the life estate, using five per cent interest. If this sum is greater than the entire remainder, then the amount of the entire remainder is to be regarded as the value of the interest of the college and the interest of the "lawful heirs" is reduced to nothing. If, however, the present worth of ten thousand dollars, payable at the end of the expectancy of life of the brother is less than the value of the entire remainder as ascertained in accordance with the rule analogous to that of section 5333 of the General Code, then the difference over and above the sum of five hundred dollars for each taker represents the aggregate value of the legacies of the "lawful heirs."

This leaves but one question in the case so far as computing the tax is concerned, and that is the question suggested by your third inquiry. The answer to this question depends upon whether or not the estates of the "lawful heirs" are vested or contingent. If these remainders are vested as of the death of the testator, then the five hundred dollars exemption is to be deducted from each vested remainder; but if they are contingent then there is no possible way to assess the tax as to this portion of the estate until the contingency happens.

Whether the interests are vested or contingent depends upon the interpretation of the will. If the will be construed as meaning that those who are the lawful heirs of the testator, that is, those who sustain that relation to him as of the date of his death, are to enjoy the benefits of the division of the residuary estate after the death of his brother, so that if they themselves are not then in life, their heirs are to receive, *per stirpes,* then the several estates are vested and can be now appraised. If, however, the meaning of the testator was that the residuary estate should be divided share and share alike, i. e., per capita among those persons, in life at the death of his brother, who then sustained to him (the testator) the relation of heirs, it is manifest that the amount which will pass to each will depend upon a contingency, viz., the number of such persons who happen to be in being at the death of the brother. If such is the interpretation of the will, then it is my opinion, following numerous holdings of this department, that the tax upon that part of the estate, if any, representing the aggregate interests of the "lawful heirs" cannot now be determined and of course is not now payable.

The tax on the estate to be taken by the college is payable now, however, as this estate depends upon no contingency whatsoever; was due as of the death of the testator, and if the period of time referred to in section 5335 has elapsed, in-

terest at the rate of eight per cent should be charged and collected thereon. The statutes authorize no further "penalty" therefor. If, however, the period of one year referred to in said section has not elapsed, then under favor of the same section a discount of one per cent per month may be allowed on the amount of taxes payable by the college.

In my opinion the state has a lien though the amount thereof is undetermined and though the tax itself is subject to be defeated, upon the farm, not only for the payment of the tax due from the life tenant on account of his interest and that due from the college on account of its interest, but also that to become due from the "lawful heirs" on their separate interests, even if they are to be regarded as contingent.

As to the collection of the deferred taxes (if the interests of the "lawful heirs" be regarded as contingent) the following machinery provided by the statute seems to be available:

> "Sec. 5336. An administrator, executor, or trustee, having in charge, or trust, property subject to such law, shall deduct the tax therefrom, or collect the tax thereon from the legatee or person entitled to the property. He shall not deliver any specific legacy or property subject to such tax to any person until he has collected the tax thereon.
>
> Sec. 5337. When a legacy subject to such tax is charged upon or payable out of real estate, the heir or devisee, before paying it, shall deduct the tax therefrom and pay it to the executor, administrator, or trustee, and the tax shall remain a charge upon the real estate until it is paid. Payment thereof shall be enforced by the executor, administrator, or trustee, in like manner as the payment of the legacy itself could be enforced."

It would be the duty of the executor, under section 5336, not to pay over to the "lawful heirs" their several legacies after the death of the brother until he had collected the tax thereon, and under section 5337 it would become his duty, in paying the legacy payable out of the land to be sold at the death of the brother, to deduct the tax therefrom. The amount of the tax as then to be ascertained would in my opinion not be foreclosed by the appraisement already had. The probate court in the present proceeding should decline to fix a value upon that part of the estate. This in my judgment will prevent his present determination from having the effect of settling and determining the value of the remainder. There is no precedent in Ohio which would justify me in holding positively that there will be power to order an additional appraisement upon the complaint of the prosecuting attorney or the executor when the time comes to settle the estate. This question involves an interpretation of section 5343 of the General Code, which provides for an appraisement. Whether more than one appraisement can be held under this section for one universal estate where different singular successions in the nature of the case would have to be appraised at different times is not clear. I do not feel like expressing any very positive opinion upon the question, but will suggest that it would be advisable for the prosecuting attorney, then in office, to raise the question, if the executor does not do so, by petition for a supplementary appraisement at that time.

Where the statutes expressly provide for a supplementary appraisement in case of postponed interests, it has been held that the value of the interests then vesting as of the date on which they actually do vest is the criterion.

In my opinion the eight per cent interest referred to in section 5335 of the General Code is not chargeable in the event that the assessment and collection of the tax is necessarily postponed.

Answering your questions, then, in the order in which they are submitted, beg to state that:

(1) Your first question is a general question which is not susceptible of direct answer.

(2) The tax is due on the interest of the college at the death of the testator. The value of this interest is to be appraised at its present worth, unless that present worth exceeds the remainder arrived at by deducting from the appraised value of the whole estate the value of the life estate plus the present worth of one thousand dollars and expenses. No penalty in the strict sense is chargeable on account of delinquencies in the payment of collateral inheritance taxes. If such taxes due at the death of the testator are not paid for one year thereafter they will bear interest at the rate of eight per cent from and after the expiration of said year. If they are paid before the end of such year, a discount of one per cent a month is allowable.

(3) The answer to your third question depends upon whether the will is construed as creating in the "lawful heirs" vested or contingent interests, i. e., whether the persons who take under the will are now ascertainable so that at the death of the brother they, or their representatives claiming through them, will receive the fund. If so, the tax is now due and their interests are subject to valuation in the manner above described. If not, the tax is not due, the eight per cent will not begin to run at the end of one year from and after the death of the testator and the whole process of assessment will have to be postponed. In either event, however, in my opinion the lien of the tax attaches to the farm on account of these interests, though the amount thereof is undetermined.

(4) In the event that the will is interpreted as creating contingent or unascertainable interests in the "lawful heirs," i. e., in the event that the identify of such "lawful heirs" cannot be ascertained until the death of the brother, then the value of their several estates or interests for the purpose of the collateral inheritance tax cannot be now ascertained but must be postponed until the contingency which determines their number and identity has occurred. At the present time, then, the probate judge should not assume to fix the value of these interests if he regards them as contingent.

Leaving the question of the power of the probate judge in office at the time of the death of the brother to determine the value and complete the assessment open, and assuming the collectibility of these taxes upon the hypothesis that the interests taxable are contingent, the taxes themselves would have to be paid by the executor, or the administrator with the will annexed, as the case might be, from the fund produced by the sale of the real estate in accordance with the terms of the will before paying any part of said fund to any of the "lawful heirs."

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

859.

LEASE—FOR FIVE YEARS MADE TO THE STATE—VALIDITY.

A lease of lands made to the state of Ohio for a period of five years, rentals payable annually, is not a valid and binding lease unless the obligation upon the part of the state to pay rentals is made subject to the general assembly's making appropriation every two years to take care of the rentals.

COLUMBUS, OHIO, December 14 ,1917.

Board of Agriculture of Ohio, Columbus, Ohio.

Attention Mr. N. E. Shaw, Secretary.

GENTLEMEN:—I have your communication of recent date in which you enclose a lease, in duplicate, of certain lands located in Pike county, Ohio, to the state, in which William B. Lee and Mary W. Lee are grantors, and you ask my approval of the same.

Generally speaking, I might say that the form of the lease is correct and the matters therein contained are fully and legally set out. However, there is one provision of the lease to which I desire to call your attention, viz., that the lease is made to cover a period of five years from the date of the same. I will not go into the matter fully, but will call your attention to the case of The State v. Medbery et al., 7 O. S. 522. The matter before the court in that case involved contracts which were to run for a period of five years. The court on p. 540 say:

> "These contracts run for five years. The general assembly existing when these contracts were made, provided no revenue and made no appropriations to meet the gross amount."

That statement applies to the leases presented to me for approval. The court on p. 531 used the following language:

> "The question before us is, whether a contract binding the state to pay specific sums of money at a future period, without revenue provided or appropriations made to meet it, is such a contingent liability as may be entered into under this financial system, and the provisions of the constitution relating to debts?"

Without going into the case any further, the court held that the contracts were not binding upon the state for the reason that no appropriation had been made to meet the gross liability of the state set out in the contracts, and that the contracts could not bind the general assemblies which would meet from time to time and thus compel them to make appropriations to meet the specific amounts becoming due under the contracts from year to year.

I am not unmindful of the fact that the last general assembly appropriated moneys which might be used for this purpose. The specific provision is found in section 1423 G. C. (107 O. L. 488) and reads as follows:

> "* * * which (license fees) shall be paid into the state treasury to the credit of a fund which is hereby appropriated for the use of the secretary in the preservation and protection of birds, game birds, game animals and fish. * * *"

This appropriation is made for the preservation and protection of fish, among other things. The question is whether these two terms are broad enough to include propagation of fish. Even admitting they are broad enough to include the proposition which you have in mind in the leasing of the lands, yet the appropriation therein made could not be for a longer period than two years from the taking effect of the act of which section 1423 G. C. is a part, for the reason that the constitution limits appropriations of any general assembly to a period of two years. However, it is my opinion that the words "preservation and protection of * * * fish," as used in said section, are not broad enough to include the propagation of fish.

From all the above it is quite evident that the contract of lease which you have entered into does not comply with the principles of law set forth in State v. Medbery, et al., supra.

However, I am of the opinion that under later decisions of our supreme court the lease submitted, in so far as it is defective, could be cured by the insertion of a clause somewhat as follows:

> "It is agreed and understood by and between the parties to this lease that the lessee is not bound under and by virtue of the terms of the same, relative to the payment of the rentals thereunder, excepting in so far as and to the extent that the legislature from time to time shall make specific appropriations for the payment of said rentals herein set out."

If the lessors see fit to permit such a provision to be inserted in the lease, it is my opinion the same would conform to the constitution and the decisions of our courts. To be sure, I am not at all passing on the question of the two hundred and seventy-five dollars which is now due under and by virtue of a verbal lease, but simply upon the validity of the written lease which dates from December 1, 1917.

In passing I might also suggest that the legislature appropriated for fish propagation and distribution the sum of twenty-five thousand dollars. While, as said before, I do not believe that the matter you have in mind would be along the line of propagation and distribution of fish, yet under section 4 of the appropriation act (107 O. L. 350). the controlling board might make provision for your taking care of the rental under the contract, either for a period of one year, or five years if the gross amount is paid in advance, under the following provision:

> "* * * Said board may authorize the expenditure of monies appropriated in sections 2 and 3 of this act within the purpose for which the appropriation is made, whether included in the detailed purposes for which such appropriations are distributed by 'items' in said section, or not. * * *"

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

860.

SUPERVISOR OF PUBLIC PRINTING—WITHIN PROVISIONS OF STATE PURCHASING AGENT ACT.

The supervisor of public printing comes within provisions of state purchasing agent act (107 *O. L.* 422).

COLUMBUS, OHIO, December 14, 1917.

HON. W. A. EYLAR, *Supervisor of Public Printing, Columbus, Ohio.*

DEAR SIR:—You have submitted to this department the following request for opinion:

> "After reading the law creating the purchasing department, 107 O. L. 422, we are not certain whether the department of public printing comes under its provisions or not.
>
> We would be pleased to have an opinion from your department covering this point at your earliest convenience."

The law creating the state purchasing department is found in 107 O. L. 422. Section 196-4 G. C., being section 4 of the act, provides, in the last sentence thereof, as follows:

> "Nor shall this act apply to or affect the educational institutions of the state or the commissioners of public printing."

Unless, therefore, your department can be considered as within the purview of the term "commissioners of public printing" such department would be within the purview of the state purchasing department.

The department of public printing specified by you is undoubtedly the department over which you have control as supervisor of public printing. The commissioners of public printing are the secretary of state, auditor of state and attorney-general. An examination of sections 745 to 787 G. C. inclusive, and sections 163 to 170 G. C. inclusive, shows that your department is in no sense under the jurisdiction of the commissioners of public printing. It is true that in the purchase of paper for state uses, under section 163 et seq. you, together with the commissioners of public printing, ascertain and fix the amount and grade of paper necessary, and that under the provisions of section 751 G. C. the supervisor of public printing is required to cause duplicate bills to be made of property purchased and file one with the secretary of state for the use of the commissioners of public printing. However, there is nothing in the language of the sections of the General Code to which my attention has been directed that in any way connects the supervisor of public printing with the commissioners of public printing in such manner as to bring your department within the exception contained in section 196-4, hereinbefore referred to.

I am therefore of the opinion that your department does come within the law creating the state purchasing department.

Of course, the paper that is furnished by the state to state contractors, who hold contracts for state printing, under the provisions of section 755 et seq., does not come within the provisions of the state purchasing act for the reason that such paper when purchased is delivered to the secretary of state, who in turn, under the provisions of section 752, delivers the same to you, to be in turn delivered to the various contractors as provided in section 764 G. C.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

861.

DOG LAWS — CONSTITUTIONALITY — DEPUTY SHERIFF — APPOINTMENT—COMMISSIONERS MUST PROVIDE FUNDS TO PAY SAID OFFICER—HUMANE OFFICER—JURISDICTION.

1. *The provisions of the act of March 27, 1917, requiring the county commissioners to provide for the appointment of a deputy sheriff to enforce the dog laws is a requirement upon the commissioners to provide means for the sheriff to pay for the services of such deputy as may be necessary to enforce the law, and does not change the manner of the selection of the deputy sheriffs.*

2. *The said act is not unconstitutional.*

3. *It is mandatory upon the county commissioners to provide the funds to comply with the requirements of the act.*

4. *A humane officer employed by a society for the prevention of cruelty to animals may not as such perform the duties of such deputy, the statutes only permitting such society to provide the necessary dog pound and dispose of the dogs not properly registered. The statute makes no change in the manner of apportioning funds of the county, but the necessary money for carrying the provisions of the law into effect are to be paid out in the same manner as has been heretofore done in like cases.*

COLUMBUS, OHIO, December 15, 1917.

HON. PERRY SMITH, *Prosecuting Attorney, Zanesville, Ohio.*

DEAR SIR:—November 23, 1917, you sent the following communication to this department:—

> "I would like to have you interpret house bill No. 4 to amend section 5652 of the General Code, and especially I would like you to interpret section 5652-8 and answer what this means.
>
> 'County commissioners shall provide for the employment of deputy sheriffs necessary to enforce the provision of this act.'
>
> 1. Is the law as amended constitutional?
>
> 2. Is it mandatory upon the county commissioners to provide money to comply with this amendment?
>
> 3. If there is a society for the prevention of cruelty to children and animals organization, etc., can the county commissioners appoint a humane officer to perform the duties of dog catcher under this law?
>
> If there is any money in the treasury how can the county commissioners appropriate sufficient money under this section?"

The statute which is the subject of your inquiry is the act of March 21, 1917 (107 O. L. 534), and is an amendment of section 5652 General Code and is supplemental thereto, consisting of fifteen sections, followed by amendment of a number of other sections upon the subject of animals.

Section 5652 provides for a registration of dogs and a fee therefor, taking the place of the dog tax; and sub-section 1 provides a like registration and fee for the owner of a kennel of dogs in addition to the fee upon each individual unless the same be confined in the kennel; subsection 3 provides for a certificate of registration and a record thereof; section 4 provides for a tag to be worn by the dog; section 6 requires each dog to wear a tag and provides for his impounding, sale or destruction if he does not. Section 7, among other things, enacts that in a proceeding therein provided the sheriff of the county shall seize and

impound dogs with respect to which the statute is not complied with. Section 8, from which you partly quote, after the language quoted by you, requires the commissioners to

> "provide a suitable place for impounding dogs, and make proper provision for feeding and caring for the same, and shall also provide humane devices and methods for destroying dogs. Provided, however, that in any county in which there is a society for the prevention of cruelty to children and animals, incorporated and organized as provided by law, and having one or more agents appointed in pursuance of law, and maintaining an animal shelter suitable for a dog pound and devices for humanely destroying dogs, county commissioners shall not be required to furnish a dog pound, but the sheriff shall deliver all dogs seized by him to such society for the prevention of cruelty to animals and children at its animal shelter, there to be dealt with in accordance to law, and the county commissioners shall provide for the payment of reasonable compensation to such society for its services so performed out of the county general fund."

This seems as far as it is necessary to quote the act in reference to the questions asked by you. The beginning of your inquiry is as to the meaning of the phrase quoted by you, which is the first part of sub-section 8 of the act. You do not state in what respect the meaning appears uncertain to you nor direct attention to any particular ambiguity, or difficulty of application of the language. The question arising in your mind is probably the meaning of the word "provide," and it is sufficient in this connection to say that "provide" does not mean "appoint."

The whole provision with reference to the sheriff and his duties means the sheriff himself, and requires him to seize and impound dogs, to give notice and to do all acts necessary to effect the purpose of the law. Therefore, the requirement that the commissioners shall provide him with deputies would necessarily mean that they should provide him with the means of employing such additional deputies as might be rendered necessary by the provisions of these new duties. The sheriff himself selects his deputies.

Section 2830 provides that he may appoint one or more such deputies, in writing, requires the approval of the written appointment by a judge of the court of common pleas to be endorsed thereon, and that it should be filed with the clerk and entered on the journal of the court. There is nothing to indicate that the requirement upon the commissioners to provide deputies necessary to carry out the provisions of this act means anything other than deputies in their ordinary character that the sheriff has for the performance of his general duties.

Some question might arise under section 2980-1 as to whether the limitation of 30 per cent, etc., of the amount of fees collected by the office would still apply or whether the amount rendered necessary by complying with this act would be in addition thereto. It will be time enough to meet that question when it is presented, and the foregoing seems to be sufficient to answer your inquiry as to the meaning of the sentence quoted in the inquiry, at least until some further practical question as to such meaning presents it.

In addition to the above you make three other inquiries:

"1. Is the law as amended constitutional?"

This department held in opinion No. 612, rendered to the tax commission of Ohio, September 14, 1917, that the act is not unconstitutional as being in violation of article XII, section 2, being the so-called "uniform rule" provision, and that the imposition of this registration fee is rather an exercise of the police power

of the state. You do not indicate in what respect you are doubtful of its constitutionality and the question is not apparent in any other respect.

2. The duty imposed by this act upon the county commissioners to provide the means to carry it into effect is undoubtedly mandatory.

3. Under the provisions above quoted with reference to a society for the prevention of cruelty to children and animals no power is given to appoint any officer of such humane society to carry out the provisions of this act, although it is not meant by this that the sheriff could not appoint him a deputy. The incorporation of such society is only provided for when the society has a dog pound and devices for humanely killing dogs, in which case the sheriff may farm out this duty to the society instead of the commissioners' supplying such pound and devices.

You ask a further question as to the meaning of "appropriating money." There is nothing in the act indicating that the appropriation is to be made otherwise than in the usual manner.

Sub-section 10 of the act provides for the collection of costs in prosecutions by the county treasurer, and section 12 makes them a part of the general fund. Section 13 makes the registration fee a special fee known as the "dog and kennel fund;" and section 5653 General Code as amended, and other sections amended in the act provide for the payment of claims for stock injured by dogs and authorize the county commissioners to appropriate funds to the society for the prevention of cruelty to animals, provided that any surplus left after the above purposes are accomplished shall be transferred to the county board of education at the direction of the county commissioners.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

862.

PLEA OF GUILTY——MAY NOT BE ENTERED ON BEHALF OF ONE CHARGED WITH AN OFFENSE, WHO FAILS TO APPEAR ACCORDING TO THE CONDITIONS OF HIS BOND.

Where one, who is accused of an offense, has given bond for his appearance and absconds and fails to appear according to the conditions of his bond, no one may appear and enter a plea of guilty on his behalf in order to permit the judge, by giving him a nominal fine, to relieve his surety from the obligation of the bond.

COLUMBUS, OHIO, December 15, 1917.

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

GENTLEMEN:—Your request for an opinion from this department, dated November 14, 1917, is as follows:

> "We respectfully request your written opinion upon the following matter. We are referring you to section 13508 et seq. G. C.:
>
> QUESTION:
>
> A recognizance is given for the appearance of the accused in court upon a certain day. The accused failed to appear. Is there any authority of law which will permit the judge of a police or municipal court to allow the bondsmen of the accused or attorney for the accused, or any other person other than the accused to come into court, plead guilty and then such judge give a nominal fine and cost, thereby doing away with the recognizance?"

The answer to the above question is "NO."

It is too plain to require any discussion that the course above suggested cannot be taken. It would simply be a bald evasion of the law and an unwarranted release of the surety on the bond. A defendant in such case by absconding and concealing himself may create a strong inference that he is guilty, but in no sense can it be construed as a plea of guilty on his part or authority to anyone to enter a plea of guilty for him, if, indeed, he could under any circumstances extend such authority or plead guilty otherwise than by doing so personally in open court.

It is enacted in section 13676 General Code that a person indicted for a misdemeanor may, upon request in writing, subscribed by him, be tried in his absence, and that no other person shall be tried unless personally present. This seems to leave no question whatever, as it is a perfectly plain enactment forbidding, except as therein set out, that any person be tried in his absence. If it be claimed that the plea of guilty is not a trial and therefore not within the meaning of this section the inherent impossibility of such plea by one who is not there disposes of the question.

In addition to this, the supreme court has decided the exact question. See Truman v. Walton, 59 O. S. 517. The decision in this case is that the mayor

cannot proceed to trial, convict and sentence. It is equally apparent that he could not impose such sentence on a pretended plea of "not guilty" entered by someone other than the accused.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

863.

APPROVAL—FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN SENECA AND VAN WERT COUNTIES.

COLUMBUS, OHIO, December 15, 1917.

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

DEAR SIR:—I am in receipt of your letter of December 12, 1917, in which you enclose for my approval final resolutions on the following improvements:

Seneca County—Sec. "A-1," Upper Sandusky-Tiffin road, I. C. H. No. 266, Types "A," "B" and "C."

Van Wert County—Sec. "C," Van Wert-Ft. Wayne road, I. C. H. No. 419.

I have carefully examined said final resolutions, find the same correct in form and legal, and am therefore endorsing my approval thereon, in accordance with section 1218 G. C.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

864.

SOCIETY FOR PREVENTION OF CRUELTY TO ANIMALS—MUST HAVE APPROVAL OF BOARD OF STATE CHARITIES TO ARTICLES OF INCORPORATION—TO BE LEGALLY INCORPORATED—SEE OPINIONS No. 773 AND 865.

Under the decision of the circuit court of Cuyahoga county it is necessary for a society for the prevention of cruelty to animals in that county to have the approval of the board of state charities to its articles of incorporation in order to be legally authorized as a corporation.

COLUMBUS, OHIO, December 15, 1917.

The Ohio Board of State Charities, Columbus, Ohio.

GENTLEMEN:—Your communication of September 17, 1917, is as follows:

"Our attention has been called to The Cleveland Animal Protective League, which we have reasons to believe is the successor to The Society for the Prevention of Cruelty to Animals, of Cleveland, which was ousted by the state of Ohio on relation of Timothy S. Hogan, attorney-general, by proceedings in the circuit court of Cuyahoga county, known as No. 5197.

The Cleveland Animal Protective League was first incorporated on June 9, 1917, by filing with the secretary of state a copy of the proceedings of the meeting of such league, as provided by section 10068 of the General Code.

On June 29, 1917, an amended statement of purposes for such league was filed at the office of the secretary of state. Neither the original articles nor the amendments thereto were submitted to the board of state charities as seems to be required by section 1352-2 of the General Code.

We believe that because of section 10063 and other connected sections of the chapter specifically provide that any society or organization incorporated in the manner set forth in section 10068 has the right by virtue of the laws covering such corporations to receive and care for children. We, therefore, call this matter to your attention, and if it is deemed in order, we suggest that you take such steps for ouster proceedings as is customary in such matters.

I am attaching hereto copies of records in the office of the secretary of state and also of the journal entry in case No. 5197 of the circuit court of Cuyahoga county."

The answer to your inquiry seems of necessity to involve nothing further than an examination of the records of the case referred to by you, and of the final entry of which you enclose a copy. The petition in that case sought the ouster upon the exact ground now made by you—that the proposed articles of incorporation, or rather the amendment thereto, was not submitted to your department and had not the proper certificate from you authorizing the secretary of state to record such amendment or issue the certificate therefor.

The statute in question is now numbered 1352-2, but it is substantially and almost verbally the same as former section 1670, which was originally section 35 of the act of April 20, 1908, 99 O. L. 201, which reads as follows:

"No association whose objects embrace the care of dependent, neglected or delinquent children shall hereafter be incorporated unless the proposed articles of incorporation shall first have been submitted to the board of state charities, and the secretary of state shall not issue a certificate of incorporation unless there shall first be filed in his office the certificate of the secretary of the board of state charities that he has examined the said articles of incorporation, and, in his judgment, the incorporators are reputable and respectable persons, that the proposed work is needed and the incorporation of such association is desirable and for the public good. Amendments proposed to the articles of incorporation of any such association shall be submitted in like manner to the board of state charities, and the secretary of state shall not record such amendment or issue his certificate therefor unless there shall first be filed in his office the certificate of the secretary of the board of state charities that he has examined the said amendment, that the association in question is, in his judgment, performing in good faith the work undertaken by it, and that the said amendment is, in his judgment, a proper one, and for the public good."

No suggestion is made here as to the correct interpretation of this statute as to whether or not it contemplates such society as the one in question, nor is the

soundness of the decision cited questioned. It is enough to say that it is a binding authority in this instance, and so, without discussion, you are answered that The Cleveland Animal Protective League, by reason of the facts stated by you and under the above decision, is not a lawfully organized corporation for the objects and purposes for which it purports to be organized.

In regard to your suggestion as to ouster proceedings, it would seem that at present such course is not necessary for the reason that if, as appears to be likely, this association is simply engaged in caring for unfortunate animals and conducting a home for them, there is no necessity for invoking the power of the law against it, as there are ample means whereby this department or the prosecuting attorney of the county may prevent any unlawful expenditure of public money by them or for them.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

865.

SOCIETY FOR PREVENTION OF CRUELTY TO ANIMALS—MUST HAVE APPROVAL OF BOARD OF STATE CHARITIES TO ARTICLES OF INCORPORATION—TO BE LEGALLY INCORPRATED—SEE OPINIONS NOS. 773 AND 864.

Under the decision of the circuit court of Cuyahoga county it is necessary for a society for the prevention of cruelty to animals in that county to have the approval of the board of state charities to its articles of incorporation in order to be legally authorized as a corporation.

COLUMBUS, OHIO, December 15, 1917.

HON. SAMUEL DOERFLER, *Prosecuting Attorney, Cleveland, Ohio.*

DEAR SIR:—Your inquiry of September 14, 1917, is as follows:

"I have your valued communication of September 6, containing your opinion concerning the right of the county commissioners to contribute funds to The Cleveland Animal Protective League. Since the receipt of your opinion, I have been in conference with members of The Cleveland Humane Society, and I am told by them that The Cleveland Animal Protective League at the time that it amended its charter did not receive the approval of the state board of charities.

It seems that under section 1352-2 of the General Code, as recently amended, that an association whose object may embrace the care of dependent, neglected or delinquent children or the placing of such children in private homes, must receive the approval of the state board of charities before it can receive a charter from the secretary of state.

I am enclosing a letter from The Cleveland Humane Society, giving its views on this question, together with a journal entry in a case decided by the circuit court, in a matter that appears to be quite similar.

It is the contention of The Cleveland Animal Protective League that it does not come within the provisions of this statute for the reason that

its function as respects children is only to protect them from cruelty and abuse, and not to take care of them or provide homes for them.

At the time I submitted to you my request for an opinion as to the right of The Cleveland Animal Protective League to receive a part of the sheep fund, I was not aware of this phase of the matter, and consequently did not include it in my letter to you.

Kindly give me the views of your department on this question."

In the first place attention is called to the former opinion rendered to you on November 10, 1917, No. 773, to correct an error not in the conclusion of the opinion but as to some of the reasoning leading up to it.

It is there stated or assumed that it is necessary for this society to file articles of incorporation complying with the same statutory requirements as other general corporations do in compliance with section 8625. An examination of section 10068 General Code seems to establish that this is not necessary. That section is as follows:

"The secretary or clerk of the meeting must make a true record of the proceedings thereat, and certify and forward it to the secretary of state, who shall record it. This record shall contain the name by which such association is to be known, and from and after its filing, the directors and associates, and their successors will be invested with the powers, privileges, and immunities incident to incorporated companies. A copy of such record, duly certified by the secretary of state, shall be taken in all courts and places in this state, as evidence that such society is a duly organized and incorporated body."

This section gives an independent means for the incorporation of these societies somewhat different from the general provisions above referred to.

The question as to the necessity of the approval of the Ohio board of state charities seems to be foreclosed by the decision in the case of State ex rel. Hogan, Attorney-General, v. The Society for the Prevention of Cruelty to Animals. An opinion upon this same subject is this day sent to the board of state charities, and in order to avoid repetition a copy thereof is herewith enclosed to you, in which it is found that by reason of the binding effect of this decision the corporation is not properly organized and has no right to exercise its franchise. If, notwithstanding this, it assumes privileges to which it is not entitled, and secures or seeks to receive public money, proper measures can be taken either to prevent its unlawful acts or to forfeit its alleged franchise.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

866.

SCHOOL BUILDINGS—WHEN BUILDING CONDEMNED BY THE DEPARTMENT OF INSPECTION, DIVISION OF WORKSHOPS, FACTORIES AND PUBLIC BUILDINGS—EMERGENCY—HOW LEVY MADE.

Where two school buildings have been condemned by the chief deputy, department of inspection, division of workshops, factories and public buildings, and the board of education determines to build a new school building instead of the one condemned, and enlarges the other one, and money cannot be raised under sections 7625, 7626, 7627, 7628 and 7629 G. C. because of the limitations of taxation, such an emergency exists as will permit the levy to be made under section 5649-4 G. C.

COLUMBUS, OHIO, December 15, 1917.

HON. MILTON HAINES, *Prosecuting Attorney, Marysville, Ohio.*

DEAR SIR:—You request my opinion on the following facts:

> "I enclose you printed circular issued by the board of education of Union township, Union county, Ohio, containing copies of letters received from Hon. Frank W. Miller, superintendent of public schools, also one from Hon. T. P. Kearns, chief deputy, department of inspection of the industrial commission of Ohio. Upon receipt of these letters the board proceeded to arrange for an election to determine whether an issue of $65,000 worth of bonds should be issued for the purpose of building a new school building at Milford Center and enlarging the one located at Irwin in said township.
>
> The bond issue carried and new buildings were built or enlarged. While Milford Center is an incorporated village, the schools of the village are under the control of the township board, and because of the great amount of indebtedness and the limitations of the tax rate, the school board is unable to secure sufficient funds to run their schools and are continually in debt, having to borrow money to pay the teaching force and their haulers.
>
> The question I would like for you to answer is as follows: Can this election, issuing of bonds be considered as an emergency, as provided under an act passed by the state legislature and found on page 527 of Vol. 103 O. L.?"

In the circular which you enclosed with your letter is copied a letter from Hon. T. P. Kearns, chief deputy, department of inspection, division of workshops, factories and public buildings, industrial commission of Ohio, in which letter said inspector ordered the use of said school houses for their intended purposes prohibited. You also advised me orally that the board of education then ascertained that it was without sufficient funds which were applicable to the purpose of repairing or rebuilding such school houses or to construct a new school house for the proper accommodation of the schools of the district, and that it was not practicable to secure the funds for such purposes under sections 7625, 7626, 7627, 7628 and 7629 because of the limits of taxation applicable to such school district, and that the board did, subject to the provisions of sections 7625, 7626

and 7627 submit the question of issuing $65,000 worth of bonds to the electors of the district, and that said election carried in favor of the issue of said bonds, and your question is, can this state of facts be considered an emergency?

Section 7630-1 G. C. reads as follows:

> "If a school house is wholly or partly destroyed by fire or other casualty, or if the use of any school house, for its intended purpose is prohibited by any order of the chief inspector of workshops and factories, and the board of education of the school district is without sufficient funds applicable to the purpose, with which to rebuild or repair such school house or to construct a new school house for the proper accommodation of the schools of the district, and it is not practicable to secure such funds under any of the six preceding sections because of the limits of taxation applicable to such school district, such board of education may, subject to the provisions of sections seventy-six hundred and twenty-six and seventy-six hundred and twenty-seven, and upon the approval of the electors in the manner provided by sections seventy-six hundred and twenty-five and seventy-six hundred and twenty-six issue bonds for the amount required for such purpose. For the payment of the principal and interest on such bonds and on bonds heretofore issued for the purposes herein mentioned and to provide a sinking fund for their final redemption at maturity, such board of education shall annually levy a tax as provided by law."

Your statement of facts seems to bring your case directly within the terms of the above quoted section, that is, you say that the chief deputy in the department of inspection, division of workshops, factories and public buildings, prohibited by an order the use of the school buildings at Milford Center and at Irwin, and that the board of education then determined that it was without sufficient funds which were applicable to the purpose of re-building or repairing such school houses or to construct a new school house which would properly accommodate the schools of the district, and that on account of the limits of taxation it was not practicable to secure sufficient funds under the six sections preceding section 7630-1, and that the board called an election as provided by sections 7625, 7626 and 7627, at which election was submitted to the electors of the district the question of issuing $65,000 worth of bonds, which would be the amount required for the purpose of repairing, re-building or building a new school house for the proper accommodation of the schools of the district. Nothing it seems to me could come more squarely within the terms or provisions of said section, and we must therefore advise you that the same can be considered an emergency.

It was held in Opinion No. 602, Annual Report of the Attorney-General for 1913, volume 2, page 1715, that:

> "Where the industrial commission and its deputies in charge of the department of workshops, factories and public buildings condemn the use of a public school building for school purposes, the order must be complied with and an emergency is created.
>
> If bonds are issued by the board of education, with the approval of a majority of the electors at a special election, the tax levies necessary to carry these bonds may be made outside of the limitations of the Smith one per cent law. Such is the effect of the amendment of section 5649-4 G. C."

It was also held in Opinion No. 888, Annual Report of the Attorney-General, volume 1, page 548, under date of April 24, 1914, that:

> "Where the inspector of workshops and factories prohibits the use of a school house until certain repairs are made, but the board of education decides to erect a new school building instead, and the electors vote for a $25,000 bond issue for the construction thereof, but cannot levy sufficient taxes to pay bonds and maintain school, there would be an emergency within the meaning of section 5649-4, General Code, and the necessary taxes for the retirement of bonds required for the purpose might be levied outside of all limitations of law."

Following the above opinions, then, I advise you that where the chief deputy of the department of inspection, division of workshops, factories and public buildings, prohibits the use of school houses for their intended purpose, and the board of education is without funds to re-build or repair same, or to build a new school house for the proper accommodation of the school youth, and that the funds for said purposes cannot be raised under the provisions of sections 7625, 7626, 7627, 7628 and 7629 G. C., because of the limits of taxation applicable to such school district, then if under the provisions of sections 7625, 7626 and 7627 G. C. bonds are sold, such an emergency exists as will permit the levy of taxes to pay the bonds and the interest thereon outside of any limitations of the Smith one per cent law.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

867.

PORTABLE STEAM BOILERS—INDUSTRIAL COMMISSION—HAS NO AUTHORITY TO COMPEL INSPECTION WHEN USED IN CONSTRUCTION, ETC., OF STREETS—PUBLIC ROADS DEFINED.

1. *Under the provisions of section* 1058-7 *G. C., the Industrial Commission has no authority to compel the inspection of portable steam boilers used in the construction of and repair to the public streets of a municipality and railroads and bridges lying within a municipality.*

2. *The words "public roads" as used in said section would include public streets lying within a municipality.*

COLUMBUS, OHIO, December 15, 1917.

The Industrial Commission of Ohio, Columbus, Ohio.

Attention Mr. Robert S. Hayes, Sec'y.

GENTLEMEN:—I have your communication of November 27, 1917, which reads as follows:

> "The enclosed copy of minutes from the record of the Industrial Commission of Ohio is explanatory.
>
> Will you please advise this department whether it has the right by general order to insist upon inspection of the portable steam boilers referred to, and further to construe the phrase 'public road?'"

To this communication you attached copy of minutes containing the resolution referred to by you. Your inquiry relates to section 1058(7 G. C., which reads as follows:

> "Sec. 1058-7. All steam boilers and their appurtenances, except boilers of railroad locomotives subject to inspection under federal laws, portable boilers used in pumping, heating, steaming and drilling, in the open field, for water, gas and oil, and portable boilers used for agricultural purposes, and in construction of and repairs to public roads, railroads and bridges, boilers on automobiles, boilers of steam fire engines brought into the state for temporary use in times of emergency for the purpose of checking conflagations, boilers carrying pressure of less than fifteen pounds per square inch, which are equipped with safety devices approved by the board of boiler rules, and boilers under the jurisdiction of the United States, shall be thoroughly inspected, internally and externally, and under operating conditions at intervals of not more than one year, and shall not be operated at pressures in excess of the safe working pressure stated in the certificate of inspection hereinafter mentioned. And shall be equipped with such appliances to insure safety of operation as shall be prescribed by the board of boiler rules."

In the resolution referred to, your commission has adopted a certain general order relative to the inspection of portable steam boilers, which order reads as follows:

"All portable steam boilers and their appurtenances within the limits of municipalities within the State of Ohio, except boilers of railroad locomotives subject to inspection under federal laws, boilers of automobiles, boilers of steam fire engines brought into the state for temporary use in times of emergency for the purpose of checking conflagations, boilers carrying pressure of less than fifteen pounds per square inch, which are equipped with safety devices approved by the Board of Boiler Rules, and boilers under the jurisdiction of the United States, shall be thoroughly inspected, internally and externally, and under operating conditions at intervals of not more than one year, and shall not be operated at pressures in excess of the safe working pressures stated in the certificate of inspection issued by the Industrial Commission of Ohio; and shall be equipped with such appliances to insure safety of operation as have been prescribed by the Board of Boiler Rules; all such boilers installed after January 1, 1915, must be Ohio Standard."

We will first note the provisions in section 1058-7 G. C. in reference to the inspection of steam boilers. They state that all steam boilers shall be inspected except:

1. "Boilers of railroad locomotives subject to inspection under federal laws;
2. Portable boilers used in pumping, heating, steaming, and drilling, in the open field, for water, gas and oil;
3. Portable boilers used for agricultural purposes;
4. And in construction of and repairs to public roads, railroads and bridges;
5. Boilers on automobiles;
6. Boilers of steam fire engines brought into the state for temporary use;
7. Boilers carrying pressure of less than fifteen pounds per square inch, which are equipped with safety devices;
8. Boilers under the jurisdiction of the United States."

We will now note the provisions of the resolution, relative to the inspection of boilers. This resolution provides that:

"All portable steam boilers and their appurtenances within the limits of municipalities within the State of Ohio, except * * * (here the resolution, in almost the exact language of the statute, excepts boilers enumerated in the statute which are above set out in classes 1, 5, 6, 7 and 8, in the analysis of section 1058-7 G. C.), shall be thoroughly inspected, internally and externally."

But the boilers excepted in the statute and enumerated in classes 2, 3 and 4 in the above analysis of said section, are not excepted in said resolution. Classes 2 and 3 enumerated in the statute above analyzed relate to portable boilers used in drilling for water, gas and oil, and also for agricultural purposes. These seem to be involved in the particular question which you submit to me for consideration. Possibly it would not frequently occur that boilers would be used for drilling for water, gas and oil in the open field and for agricultural purposes, and yet be within a municipality, although this con-

dition is possible, inasmuch as cultivated land is included within the limits of municipalities.

This leaves for consideration class 4, above enumerated, wherein it is stated that portable boilers used in construction of and repairs to public roads, railroads and bridges are excepted from inspection, but nothing is stated as to the location of the public roads, railroads and bridges, whether in municipalities or not.

The resolution of the Industrial Commission provides that all portable steam boilers in municipalities must be examined, with certain exceptions, which exceptions do not include portable steam boilers used in construction of and repairs to public roads, railroads and bridges. In other words, said resolution virtually provides for the examination of portable steam boilers used within the limits of municipalities in the construction of and repairs to public roads, railroads and bridges; while the statute specifically exempts portable boilers used in the construction of and repairs to public roads, railroads and bridges, making no distinction whatever as to whether the same are used within or without municipalities.

This raises the question as to whether the orders of the Industrial Commission are broader and more inclusive than the statute itself, on which the orders must be based.

Do the streets of a municipality come within the term "public roads"? There is nothing in the original act, nor in the act as amended, to indicate what the legislature had in mind when using said words. Section 23 of the act (103 O. L. 652) provides:

> "Whoever being the owner, or operator of any steam boiler, *herein required to be inspected,* * * * shall be fined * * * ."

Section 23 afterwards become section 1058-28 G. C.

From this section it is evident that no owner or operator is required to have boilers inspected unless the requirement is found in the act itself.

Section 3 of the act (102 O. L. 494) gives the board of boiler rules, now the industrial commission, authority to make rules and regulations relative to certain matters connected with its duties, but there is no indication whatever that the legislature intended the rules should in any way extend the effect of the statute further than the statute itself provides.

In order to ascertain the meaning of the words "public roads" as used in section 1058-7 G. C., we might refer to other acts of the legislature, wherein these words are used, but this is a dangerous course to pursue, in placing a construction upon a statute, and would afford but little evidence as to the intention of the legislature in the use of said words in the section now under consideration. We are therefore driven to assuming they were used in their common and accepted meaning, as defined by our standard lexicographers.

Webster defines "road" as follows:

> "The word is generally applied to highways, and as a generic term it includes highway, street and lane."

Webster defines "street" as follows:

> "A paved way or road; a city road."

In the Century Dictionary we find "street" defined as follows:

> "A public way or road, whether paved or unpaved, in a village, town or city * * * and having houses or town lots on one or both sides."

The same work defines "road" as follows:

> "A public way for passage or travel."

Bouvier gives the following definition of "street:"

> "A public thoroughfare or highway in a city or village."

From all the above it seems clearly evident the word "road" would include highways, whether located outside of or within a municipality. There is one provision of section 1058-7 G. C. which throws some light upon the question and seems to tend in the same direction, as to the meaning of the words "public roads". The language in the exception is:

> " * * * and portable boilers used for * * * and in construction of and repairs to *public roads, railroads and bridges* * * ."

It could hardly even be claimed that portable steam boilers, used in building bridges or railroads, or in repairing the same, must, in order to be excepted under the statute, be used on bridges and railroads outside of municipalities merely, and not on bridges and railroads inside of municipalities. There is nothing whatever in the section to warrant such a conclusion. This being the case, we can not consistently hold that the term "public roads" should be limited in its meaning to include only roads outside of municipalities, and not roads within same.

Another part of section 1058-7 G. C. which seems to throw a little light upon this question is found in this language:

> "except * * * portable boilers used in pumping, heating, steaming and drilling, *in the open field*, for water, gas and oil."

In this exception the legislature made it clear that in order to be excepted, the boiler must be used "*in the open field;*" that is, outside of and beyond a thickly settled community, such as a municipality. However, there is no such language found in the exception to which we are directing our attention.

Another thing to be kept clearly in mind, in placing a construction upon this phrase, is that the provisions of section 1058-7 G. C. partake very much of a criminal nature. Section 1058-28 G. C., above referred to, provides that any owner or operator of a steam boiler required to be inspected, who operates the same in violation of the provisions of the act, shall be fined not less than twenty dollars nor more than five hundred dollars.

It is a familiar rule that in placing a construction upon a criminal statute, it shall not be made to include anything other than that which the plain language of the act itself includes.

In view of all the above, it is my opinion that the term "public roads," as found in section 1058-7 G. C., includes the streets of a municipality used by

the public, as well as the highways lying outside the limits of the municipality and used by the public for travel. Of course if this construction be correct, the resolution adopted by the commission is broader than the terms of the statute upon which it is based, and hence could not be enforced in reference to the particular matter about which you inquire.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

868.

FISH AND GAME CASES— COSTS—COUNTY NOT LIABLE WHEN AFFIDAVIT NOT APPROVED BY PROSECUTING ATTORNEY OR ATTORNEY GENERAL WHERE OFFENSE NOT COMMITTED IN PRESENCE OF WARDEN.

The costs in a fish and game case must be paid by the county auditor when certified to him under oath by the justice, if the defendant has been acquitted or discharged from custody, or if he has been convicted or committed in default of payment of fines and costs, subject to the following rule:

But where the offense was not committed in the presence of the game warden, the affidavit must have been approved by the prosecuting attorney or the attorney-general, otherwise the costs should not be paid by the county auditor for the reason that in such cases the game warden is not "a person authorized by law to prosecute the case" as referred to in section 1404 *G. C.*

COLUMBUS, OHIO, December 15, 1917.

HON. TOM A. JENKINS, *Prosecuting Attorney, Ironton, Ohio.*

DEAR SIR:—I am in receipt of the following communication under date of November 27, 1917, from W. H. Crawford, County Auditor of Lawrence County:

> "In the last few months the deputy game warden of our county has instituted proceedings against people charged with violating the fish and game laws and the defendants have been acquitted or discharged because the state could not make a case against them.
>
> The costs in these cases have been certified to us for payment and the justices and game warden claim that the auditor must pay these costs without waiting to be authorized to do so by the county commissioners.
>
> We have referred this matter to the prosecuting attorney for advice as to our duty in the matter, but he does not wish to take the responsibility of directing us in the matter and advised us to write you for instruction. He also wished us to write for the reason that it does not look right to him for the county to bear the expense of all cases which are lost by the state when the fines collected for such offenses are sent to the state authorities and not turned into the county."

Section 1404 of the General Code reads:

> "A person authorized by law to prosecute a case under the provisions of this chapter shall not be required to advance or secure

costs therein. If the defendant be acquitted or discharged from custody, or if he be convicted and committed in default of payment of fine and costs, such costs shall be certified under oath by the justice to the county auditor who shall correct all errors therein and issue his warrant on the county treasurer payable to the person or persons entitled thereto."

It will be noted that this section provides that when the defendant is acquitted or discharged from custody, or when he is convicted and committed in default of payment of fines and costs, such costs shall be certified under oath by the justice to the county auditor, who shall correct any errors found and issue his warrant on the county treasurer, payable to the person or persons entitled thereto. In these fish and game prosecutions, therefore, a county auditor must issue his warrant on the county treasurer covering the costs incurred. It is not necessary that any authorization be had by him from the county commissioners. It might be well, however, to call your attention to section 1397 of the General Code, which reads:

"Sheriffs, deputy sheriffs, constables and other police officers shall enforce the laws for the protection, preservation and propagation of birds, fish and game and for this purpose they shall have the power conferred upon the wardens and receive like fees for similar services. Prosecutions by a warden or other police officer for offenses not committed in his presence shall be instituted only upon the approval of the prosecuting attorney of the county in which the offense is committed or upon the approval of the attorney general."

In an opinion rendered under date of January 3, 1912, found in Annual Report of the Attorney-General for that year, page 1075, former Attorney-General Hogan held as follows:

"If the approval of the prosecuting attorney or the attorney-general is not obtained by a warden or other police officer before instituting a suit, when the offense is not committed within his presence, the county auditor is in no event compelled to issue warrants on the county treasury for costs.

A blanket authority from the attorney-general or the prosecuting attorney is not sufficient."

In that opinion it was said:

"You will note that said section 1397 provides in substance that prosecutions, by wardens or other police officer, for offenses not committed in his presence, shall be instituted only upon the approval of the prosecuting attorney of the county wherein the offense was committed, or upon the approval of the attorney-general.

Section 1404 provides in substance that any person authorized by law to prosecute a case under the provisions of this chapter shall not be required to advance or secure costs, and further provides that if the defendant be acquitted or discharged then such costs shall be certified under oath by the justice to the county auditor.

I am of the opinion that a warden or other police officer is not authorized by law to prosecute a party for a violation of the fish and

game laws not committed in their presence without the approval of the prosecuting attorney of the respective county wherein the offense is committed, or the attorney general. Therefore it follows that if the approval of the prosecuting attorney or the attorney-general is not obtained before instituting a suit by a warden or other police officer when the offense is not committed in his presence, and the defendant is discharged either on motion or upon the merits, then the county auditor is not compelled to issue warrants on the county treasury in payment of the costs.

For similar reasons I am of the further opinion, in answer to your second question, that when the approval of the prosecuting attorney or attorney-general is not obtained in such cases, as provided in section 1397 of the General Code, the auditor is not required to issue a warrant for said costs as provided in section 1303 of the General Code, as above quoted.

In answer to your third question, it is my opinion that the following provision 'prosecutions by warden or other police officers for offenses not committed in his presence shall be instituted only upon the approval of the prosecuting attorney of the county in which the offense is committed, or upon the approval of the attorney-general' as contained in section 1397, means that in such cases authority must be obtained in each individual case, so that either the prosecuting attorney of the county wherein the offense is committed, or the attorney-general may pass upon the sufficiency or insufficiency of the evidence in each individual case of violation of the fish and game statutes not committed in the actual presence of a game warden or other police officer. Said section would utterly fail to accomplish this purpose if a blanket authority were given indiscriminately to the game warden to prosecute all such violations."

A similar opinion was rendered by Mr. Turner, as found in opinions of the Attorney-General for 1916, Vol. 2, page 1601. I would therefore advise you that the costs in a fish and game case must be paid by the county auditor when certified to him under oath by the justice, if the defendant has been acquitted or discharged from custody, or if he has been convicted and committed in default of payment of fines and costs, subject to the following rule.

But where the offense was not committed in the presence of the game warden, the affidavit must have been approved by the prosecuting attorney or the attorney-general, otherwise the costs should not be paid by the county auditor for the reason that in such cases the game warden is not "a person authorized by law to prosecute the case" as referred to in section 1404 G. C.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

869.

COLLATERAL INHERITANCE TAX—INTEREST WHEN CHARGEABLE ON SAME.

Testatrix directed her executors to dispose of her entire estate, appraised at $30,000, including both real and personal property, to pay debts and funeral expenses out of the proceeds, to pay three specific bequests and to divide the net balance into ten equal shares, giving them three years within which to make such disposition with authority to manage the real estate;

HELD: Under these facts the interests in the ten shares vested as of the death of the testatrix and should be appraised as of that date and not as of the date on which final distribution is made. Interest at the rate of eight per cent per annum from and after one year after the death of the testatrix is chargeable on the inheritance taxes payable under these circumstances. The costs of administration might have been estimated for the purpose of settling the tax and avoiding interest.

COLUMBUS, OHIO, December 17, 1917.

HON E. A. BROWN, *Probate Judge, Circleville, Ohio.*

DEAR SIR:—I acknowledge receipt of your letter of December 1st in which you submit for my opinion a question relative to the assessment of the collateral inheritance tax, upon the following facts:

"Mrs. S. died testate November 4, 1915 (more than two years ago), leaving real and personal property which amounted to the sum of about $30,000.00. Under her will the executors were given the period of three years within which to dispose of her real property and convert it into money, and until it is sold, the executors are authorized to lease same and collect the rents. Real estate consisted of two farms of about one hundred and sixty and eighty acres, respectively, and small tract of land, twelve acres adjoining corporation of Circleville and two houses and lots in city.

After the payment of debts, funeral expenses and costs of administration, and three bequests of $500.00 each, the net balance under will of testatrix was divided into *ten* shares, which she bequeathed to eight brothers and sisters, or their legal representatives, and two friends, in *ten* equal parts.

The executors have disposed of all the real estate and also the personal property, except the present year's crops, which will also be converted into money by the first of March, 1918. Executors have made a partial distribution on the basis of $1,800.00 to each of the ten distributees. The balance, coming to these distributees, cannot be ascertained until they have settled their final account, which will be about March 1st, 1918. The attorney and I agree that the entire estate is subject to tax (none of the legatees or distributees being exempt), after deducting the exemption of $500.00 each.

General Code, section 5335, provides as follows:

'If such taxes are not paid within one year after the death of the decedent, interest at the rate of eight per cent shall be thereafter charged and collected thereon * * *.'

> The question is, under the foregoing facts, will they be liable for the payment of the eight per cent interest on their several distributive shares in view of the fact that at the expiration of the year, the property had not been converted into money, and the real estate not sold, until the present summer, so that the amount could not have been ascertained even approximately, until it will have been ascertained what the net balance will be in the hands of the executors for distribution."

If the facts as you state them would justify the conclusion which you express to the effect that the value of the ten separate interests could not be ascertained until the sale of the real estate, payment of debts and funeral expenses and costs of administration and the bequests charged on the farm, I would be of the opinion that the eight per cent interest should not be charged, but I find myself, with deference, unable to accept the view that this is a case where the amount of the tax could not be ascertained until distribution.

From your statement I take it that the ten bequests were in every sense vested as of the death of the testatrix. That being the case they represented interests in all the property of the deceased passing at her death. To be sure the real estate was to be converted into money and in equity the whole would be regarded as personal property. The principle, however, as stated by Blakemore & Bancroft on Inheritance Taxes is that

> "the doctrine of equitable conversion can not be invoked to affect the imposition of the inheritance tax so * * * an absolute direction to sell real estate will not transform it to personal property for the purposes of the tax."

Citing:

Connell v. Crosby, 210 Ill., 380;
McCurdy v. McCurdy, 197 Mass., 248;
In re Curtis, 142 N. Y., 219;
In re Dows, 167 N. Y., 227;
Orr v. Gillman, 183 U. S., 278.

Thus, if the real estate had been situated in another state it could not, under the above authorities, have been regarded as personal property and therefore subject to the Ohio collateral inheritance tax law simply because in equity the interest of the beneficiaries would have been treated as personal property. Another way of putting the same thing is to say that the testamentary disposition of the real estate amounts to a devise of it to the executors with power of sale and direction to pay the proceeds to the ultimate beneficiaries. The executors take, not in their capacity of executors, strictly speaking, but in reality as testamentary trustees. But whatever technical view be taken of this question, it is at least clear that by the will beneficial interests in the entire estate, both real and personal, were created in the ten legatees as of the death of the testatrix. The value of those interests should be appraised then as of that date and it is not necessary, nor is it proper to wait until the sale is actually made to ascertain what that value is. Thus, if the aggregate value of the estate be, as you state, thirty thousand dollars, then despite the three year period the interest of each of the ten legatees would be one-tenth of the sum to be ascertained by deducting from thirty thousand dollars, fifteen hundred dollars for the three specific bequests and the amount of the debts,

funeral expenses and costs of administration. The income received after the death of the testatrix from the management of the farm is not property included in the appraisment.

Hopper v. Bradford, 178 Mass., 95;
In re Vassar, 127 N. Y., 1;
In re Miller, 5 Pa. Co. Ct., 522.

If the sale should actually produce either more or less than the amount of the appraisement, this fact would be immaterial as it would be conclusively assumed that the estate had either appreciated or depreciated in value after the death of the testatrix so far as the inheritance tax is concerned.

There is but one reason therefore justifying the postponement of the assessment in the case you have mentioned and that is the fact that the debts of the decedent, the funeral expenses and the costs of administration are properly to be deducted from the appraised value of the estate. It might be argued that so long as an estate remains in process of administration or settlement the tax should not be regarded as payable and the eight per cent interest should not be charged because the amount of the tax cannot be ascertained until the amount of the costs has been ascertained and that cannot be done until settlement is effected.

The statute providing for the charging of the eight per cent interest will not, however, permit this view. Its language is as follows:

> "Sec. 5331. * * * All administrators, executors and trustees, * * * shall be liable for all such taxes, with lawful interest as hereinafter provided, until they have been paid, as hereinafter directed. Such taxes shall become due and payable immediately upon the death of the decedent * * * ."
>
> "Sec. 5335. Taxes imposed by this subdivision of this chapter shall be paid into the treasury of the county in which the court having jurisdiction of the estate or accounts is situated, by the executors, administrators, trustees, or other persons charged with the payment thereof. If such taxes are not paid within one year after the death of the decedent, interest at the rate of eight per cent shall be thereafter charged and collected thereon and if not paid at the expiration of eighteen months after such death, the prosecuting attorney of the county wherein said taxes remain unpaid, shall institute the necessary proceedings to collect the taxes in the court of common pleas of the county, after first being notified in writing by the probate judge of the county of the non-payment thereof. The probate judge shall give such notice in writing. If the taxes are paid before the expiration of one year after the death of the decedent, a discount of one per cent per month for each full month that payment has been made prior to the expiration of the year, shall be allowed on the amount of such taxes."

Now the legislature must have been deemed to have taken cognizance of the fact that all estates, especially those passing by will, would require sometime for settlement. Nevertheless, no express exception was made in these statutes which would have the effect of postponing the due date of the tax until settlement could be made. Therefore, I think it is clear that if the delay in the settlement of this estate had occurred otherwise than because of the ex-

press directions of the will we should be driven to the conclusion that despite the practical impossibility of settling the tax before the expiration of one year the interest would have to be charged. Is the case altered by the fact that under the terms of the will the executors had power to manage the estate for a period of three years? I think that the answer to this question is in the negative for the following reasons:

(1) In the first place the postponement in the settlement of the estate is for the benefit of the legatees. As we have seen it amounts to a testamentary trust. No doubt the testatrix's intention was that the debts and costs of administration would be covered by the profits of the management of the estate during the three-year period.

(2) The practice of estimating expenses of administration, where it is necessary to pay the tax at an earlier date in order to avoid the accumulation of interest or penalties, has been approved and in my opinion the provisions of the Ohio law are broad enough to justify such a practice. (See section 361, Blakemore & Bancroft Inheritance Taxes and cases cited; sections 5334 and 5347 G. C.).

(3) As has been seen, the postponement of the settlement is for the benefit of the legatees and amounts strictly to a testamentary trust. That being the case all expenses connected with it, i. e., all those growing out of the postponement itself and incidental to it, are not strictly speaking costs of administration at all but rather expenses of the trust. (See Blakemore & Bancroft, Sec. 369; State v. Probate Court, 101 Minn. 485; In re Gihon, 169 N. J., 443).

While it would perhaps be very technical to separate the expenses of administration in the case at hand, yet the fact that a part of them at any rate are voluntarily incurred for the benefit of the ultimate takers tends to destroy the supposed injustice of charging eight per cent from and after the expiration of a year after the death of the testatrix on the sole ground that the incurring of these expenses made it impossible to determine the amount of tax the sooner.

I answer your question therefore by saying that in my opinion the eight per cent interest is chargeable on the several distributive shares of the ten legatees, but that the value of such shares should be appraised as of the death of the testatrix instead of being determined by the amount in the hands of the executors after all had been converted into money.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

870.

PRIVATE ACADEMY—WHICH HAS ENTERED INTO A CONTRACT WITH A BOARD OF EDUCATION FOR HIGH SCHOOL FACILITIES—RIGHTS OF RECOVERY FOR TUITION FOR NON-RESIDENT PUPILS.

Neither a contract entered into under section 7991 of the General Code between a board of education and the trustees of a private academy nor the making of a levy for the support of a private academy by the board of education of a school district under sections 7673 and 7674 of the General Code, as amended 107 O. L., 548, is effectual to constitute the private school with which such agreement or arrangement is made the high school of the district within the purview of the section authorizing the recovery of tuition for the attendance of non-resident pupils.

Even if this were not so, any right of recovery on account of such tuition would be limited to the board of education of the district making such agreement or arrangement and would not exist as against the board of education of any other district in favor of the management of the academy.

The rights, if any, of the academy against the board of education making the arrangement or agreement referred to would not be in the nature of a claim for tuition, but would be predicated upon the agreement in the one instance and the making of the tax levy in the other.

COLUMBUS, OHIO, December 17, 1917.

HON. F. J. BISHOP, *Prosecuting Attorney, Jefferson, Ohio.*

DEAR SIR:—I acknowledge receipt of your letter of recent date enclosing letter received by you from Mr. E. W. Hamblin, principal of Grand River institute, which appears to be a private educational institution located at Austinburg, Ohio. You request my opinion upon the inquiries submitted by Mr. Hamblin, which are as follows:

> "Will you kindly secure for me an opinion from the attorney-general as to how I may be able to collect Boxwell-Patterson tuition from townships which claim to be unable to pay it because of small tax duplicate? Is there not a provision whereby state aid may be invoked in such cases so that neither the school will lose the tuition nor the parent be obliged to pay it?
>
> I am referring specifically to the townships of Colebrook and Windsor which claim to be unable to pay such tuition."

So far as the inadequacy of tax levies as a defense to the payment of what is designated in the letter as "Boxwell-Patterson tuition" is concerned, I may advise that such facts when established do constitute a defense to a claim for such tuition under certain circumstances pointed out in section 7748 of the General Code as amended 104 O. L., 125. Said section provides that:

> "A board maintaining a second or third grade high school is not required to pay such tuition when the maximum levy permitted by law for such district has been reached and all the funds so raised are necessary for the support of the schools of such district."

In other words, if the townships named by Mr. Hamblin are townships which maintain second or third grade high schools, then under the circumstances mentioned they are not required by the earlier provisions of section 7748 to pay the tuition for the full course (if the school is a third grade high school) or for the one year (if the district maintains a second grade high school) in order to afford four full years of high school education. If, however, the board maintains no high school at all, then upon compliance with the conditions of section 7747 the board of education of the district may be charged with the payment of tuition for the full period of four school years (section 7748). If the board of education provides a high school by contract with another district, entered into under section 7750 of the General Code, exemption from the payment of such tuition is thereby obtained as to pupils residing within three miles of the school designated in the agreement; but if such school, or where a high school is maintained, the school so maintained is located more than four miles from the residence of a given pupil, the obligation to pay tuition exists, but only in case the pupil attends a nearer high school; and such obligation may be discharged by paying for the transportation of such pupil to the high school which is maintained by the board, if such high school is maintained.

These are the general conditions upon which the board of education of one district may be liable for the payment of tuition of those who are eligible to admission to high school. I am, of course, unable to advise whether Colebrook and Windsor township rural boards of education are actually liable to pay the tuition of their eligible pupils at other high schools and as to whether or not their alleged inability to pay such tuition on account of their tax duplicates is sufficient to discharge their liability. I point out that if the tuition claimed is that payable under the first three sentences of section 7748, such inability is sufficient to discharge all obligations which would otherwise exist provided the maximum levy permitted by law for the district has been reached; but that if tuition is due under section 7747, or otherwise under the provisions of section 7748, then such inability would not be a defense and the board of education of the district would remain liable for the tuition.

I have, however, not discussed these questions in great detail because I am at a loss to understand upon what theory a private institution claims tuition from a public school district.

The "Boxwell-Patterson" law, so-called, has been repealed in so far as the requirement for an examination and the issuance of a certificate to successful applicants is concerned. See 104 O. L., 100-125. The whole subject is now regulated by section 7747, which was put into its present general form in 1914, though it has been since amended. Without quoting that section, suffice it to say that there is no provision that a pupil eligible for admission to high school may attend a private school and have anything paid to that school under said section by way of tuition. The phrase "high school," as used throughout the related sections, in my opinion means a public high school conducted by the board of education of a school district existing under the laws of the state. Grand River institute appears to be "a home school for boys and girls." There is nothing on the face of the correspondence to indicate that it is a public high school.

I have made inquiry at the office of the superintendent of public instruction and find the following to be the interesting history of this "institute:"

It was organized as a private institution, but some years ago the board of education of the district in which it was located assumed to enter into an agreement with the management of the institution for its maintenance as a high school, paying a certain sum annually to the management of the school. The only authority for such an arrangement existing prior to 1917 was that found in section 7991 of the General Code, which formerly provided as follows:

> "The trustees of any school heretofore established under the provisions hereof, and in no way connected with any religious or other sect, and the board of education of the district in which such school is situated, may make contracts whereby such trustees receive into the school pupils from such district, who shall receive such instruction as is, or may be, provided by law for public schools in this state. In consideration of such service by such trustees, such board, under the general restrictions of the law relating to common schools, in so far as they are applicable and not inconsistent herewith, may contribute to the maintenance of such school, and pay such part of the costs of the erection of additional buildings, and upon such conditions, not inconsistent with the deed, devise or gift under which the school is established, as is agreed upon by such board and such trustees."

This section was amended in 107 O. L., 548, in an immaterial particular.

It is clear to me that an agreement entered into under the above quoted section did not have the effect of constituting the private school the high school of the district in the sense contemplated by the tuition law. As to the pupils of the district in which the school was located, they of course would be entitled, after the making of such an arrangement, to attend the academy free of charge; and the academy would be entitled to the consideration agreed upon by the board of education making the arrangement; but this would not be tuition in any sense of the word and I am firmly of the opinion that pupils from other districts would have no right to charge the boards of education of their districts with tuition of any kind for attendance at such a private school.

In 1917 the legislation of this character was supplemented by the amendment of sections 7673 and 7674 of the General Code, which now read as follows:

> "Sec. 7673. The school board of any village or rural school district or the joint boards of any union of districts for high school purposes, in which is located a university, college, or academy organized or existing under the laws of this state, as an institution of learning not for profit, and under the management of a board of trustees, or the board of any district adjoining that in which such institution is located, may levy a tax not exceeding two mills annually, upon all taxable property within such district for the support of such university, college or academy.
>
> Sec. 7674. In the event such levy is made; all holders of a high school diploma obtained from such district high school shall have the right to attend such university or college for the period of two years, free of tuition, and all holders of a certificate from the eighth grade elementary schools of each district in which such tax is levied shall

have the right to attend such academy for the period of four years, free of tuition."

Here again we have special provision for the pupils of a district, the consideration for whose free attendance at the academy is the receipt of the proceeds of the levy by the academy, but the institution remains a private one and does not become the high school of the district for the purpose of charging tuition to pupils of other districts who happen to attend the school. So that even if action has been taken under the act of 1917, which does not appear, such action could not be the basis of the recovery of tuition by the academy from the boards of education of any other districts than the one in which it is situated; nor would the right of the academy against the district in which it is situated be for the recovery of tuition as such.

But even if I am in error in my opinion that the making of an agreement under former section 7991, or an arrangement under sections 7673 and 7674 made since said sections as amended went into effect, would not have the effect of making the academy with which the agreement or arrangement was made the high school of the district or districts making the arrangement; and even if a contrary answer be returned to this question, this would not give the academy the right to recover tuition from the boards of education of other districts. As the statute quoted and referred to in dealing with the subject of tuition show, the attendance of a pupil at high school in a district other than that in which he resides may give rise to a right on the part of the board of education maintaining or providing the high school to recover tuition from the board of education of the district in which the pupil resides; but this right is limited to the board of education. So even if the academy be regarded as the high school of the district for the purpose of the statutes under discussion, Mr. Hamblin, or the institution which he represents, is without any right to recover for tuition for pupils of other districts attending the academy; whether the board of education of the district or districts making the arrangement with the academy are entitled to recover such tuition or not.

If Mr. Hamblin means by his inquiry to ask how he can recover from the districts with which the academy has made an arrangement, I can only say that he is in error in supposing that the academy is entitled to recover anything by way of "tuition" from such townships. If the arrangement was under sections 7673 and 7674, then the academy was not obliged to admit the pupils of the district free of tuition unless the levy had been made; and if they were admitted before the levy was made, any right of recovery for tuition which the academy may have exists against the pupils or their parents or guardians and not against the district. If the arrangement was made under section 7991, then if the boards of education entering into the agreement have not complied with their agreement and the academy has done so, the latter may recover from the former as upon a breach of contract; or, waiving the breach, may possibly sue for the reasonable value of the service performed, which last might be with some appropriateness called tuition. In the vindication of any such rights, however, the academy would be acting in a private capacity and I do not feel called upon to advise its officers in the premises.

I have tried to cover every possible angle which may be involved in Mr. Hamblin's brief inquiry, excepting the supposition that an arrangement may have been entered into between the academy and the board of education of the

district which was wholly unauthorized by law. Of course, if such was the case, the results suggested would even more palpably follow.

I conclude therefore that upon no imaginable hypothesis could Mr. Hamblin, or the institution which he represents, have a right to recover anything from the boards of education of any districts with which the academy had not entered into contracts or agreements under the sections noted; and if the districts which he names are those with which the academy has valid agreements under section 7991, or has entered into arrangements under sections 7673 and 7674 of the General Code, then the academy may have a private right of recovery for breach of contract in the one event, or may be entitled to recover from the pupils, their parents or guardians in the other event; but in no case can "tuition" as such be recovered from the boards entering into such agreements or arrangements by virtue thereof.

I do not mean to pass upon any of the questions which I have suggested respecting the rights of the academy against the district or districts with which a lawful agreement has been made under section 7991. As to section 7674, I am satisfied that no formal contract is contemplated by this and the preceding section as amended in 1917 and that boards of education are without authority to agree to make a levy as provided in section 7673. They may make the levy or not as they choose. If they make it their pupils are entitled to attend the academy free of tuition. If they do not make it, the officers of the academy are not bound to receive the pupils free of tuition. If the levy is made it belongs, of course, to the academy, if it has complied with the conditions of the law and a plain remedy is available for its collection. If it has not been made and pupils from the districts have nevertheless been admitted on the faith of a supposed understanding that it would be made, the academy is the loser because its management has assumed the risk of the performance of an official function which the officers involved were not obliged by contract or otherwise to perform. I have suggested a recovery from the pupil, the parents or guardians, but do not mean to pass an opinion upon this point.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

871.

CONJURING—INDUSTRIAL COMMISSION HAS NO AUTHORITY TO PAY FOR SUCH SERVICES UNDER SECTION 1465-89 G. C.

One who claims to have cured by "conjuring" not entitled to compensation under section 1465-89 *General Code.*

COLUMBUS, OHIO, December 17, 1917.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Through Mr. Hamm, director of claims, you have submitted the following request for my opinion:

"We attach hereto copy of a communication addressed to the commission by our chief medical examiner. The same is self-explanatory.

I have been instructed by the commission to request from you an opinion as to whether the fee bill covering the services described in the communication next attached can legally be paid for by the commission from the state insurance fund. The alleged treatment for claimant's injury was given by J. C. C., * * *"

The statement of facts contained in the communication of your chief medical examiner (referred to in your request) is as follows:

"Attached you will find attending physician's report and fee bill in the case of G. N., employed by the G. G. Co., and injured on July 26, 1917.

The injured is 67 years of age. He was first attended by J. C. C., who signs himself as the attending physician on July 29, 1917. He has made a diagnosis of bone erysipelas. Treatment—'conjuring, no medicine given.' The conjurer further says he was working on a track; in taking out track jack it slipped and struck him on the left leg.

The first notice of injury in this case was received on September 18th, properly signed by the employer and the claimant. The attending physician's report blank was received September 24th. The fee bill also was received September 24th. In this fee bill he has charged for conjuring services on July 29th, 'also service about two times per week from July 29th to September 22d, inclusive,' charging a fee of $20.00. He reports the claimant ready for work September 24th."

The "attending physician's report and fee bill," referred to, were not submitted to me; but it is not necessary to consider them.

It appears from the above statement that we still have with us, in person, the conjurer. I had thought they had all vanished with the Indians.

A conjurer, as defined by Webster, is

"One who practices magic arts; one who pretends to act by aid of supernatural power."

Among several definitions given by the same authority for the verb "conjure" the following is selected as most appropriate for the operation referred to in your request:

"To affect or effect by conjuration; to call forth or send away by magic arts; to excite, bring about, get or convey as if by magic or by aid of supernatural powers."

It appears from the statement that the work of this particular conjurer was very effective; to cure a case of "bone erysipelas" caused by being struck on the left leg by a track jack would seem to require expert treatment; and when the patient was a man sixty-seven years of age and the cure was effected

in less than sixty days, by conjuring, it must be admitted that the services were valuable and one would expect a large fee to be charged. However, it appears that for this remarkable cure the only remuneration asked is twenty dollars, being for "service about two times per week from July 29th to September 22, inclusive;" a calculation shows that this is at the rate of $1.25 per visit —certainly not an exorbitant charge. Considering the results obtained the charge is most reasonable, and the conjurer is entitled to his money. But, unfortunately for him, there is no way in which your commission can pay him.

Section 1465-89 G. C. authorizes your board to pay certain amounts for "medical, nurse and hospital services;" it allows no payment to be made for "conjuring services;" in fact, makes no mention whatever of conjurers. As the conjurer in this case does not claim to be a physician, makes no charge for "medical services," and disclaims giving any medicine, there is nothing upon which to base an allowance to him.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

872.

MUNICIPAL COURT (ALLIANCE)—JUDGE HAS POWER TO APPOINT BUT ONE BAILIFF—DUTIES OF SAID BAILIFF.

Under the provisions of the act creating a municipal court for the city of Alliance (107 *O. L.* 660-670), *the judge of said court has the power and authority to appoint but one bailiff, whose duties are those usually performed by the sheriff of the court of common pleas and the constable of courts of justices of the peace. Any further duties necessary to be performed in said court must be performed by deputy bailiffs provided in section* 29 *of said act.*

COLUMBUS, OHIO, December 17, 1917.

HON. MILTON C. MOORE, *Judge of the Municipal Court, Alliance, Ohio.*

DEAR SIR:—I have your communication of December 4, 1917, in which you call my attention to an act found in 107 O. L. 660-670, which creates a municipal court for the city of Alliance. You ask me to place a construction upon sections 29 and 30 of said act, relative to bailiff, especially with a view to deciding whether the judge of said court may appoint more than one bailiff.

The first part of section 29 of said act reads as follows:

> "The bailiff shall be appointed by the judge of such court and hold office during the pleasure of the court, and may be removed at any time by the judge of the municipal court. * * *"

It is evident from this language that the legislature had in mind that the judge of the court should appoint but one bailiff; that the term "bailiff" has some fixed, definite and specific meaning, and that the person occupying said

position has some definite and fixed duties to perform. In so far as this section is concerned, there are no duties given to the bailiff to perform, no salary fixed and no qualifications for office prescribed.

However, section 30 of said act reads as follows:

> "One bailiff shall be designated as hereinafter provided for in this act. He shall perform for the municipal court, services similar to those usually performed by the sheriff for courts of common pleas and by the constable of courts of justices of the peace. Such bailiff shall receive such compensation not less than six hundred dollars per annum payable out of the treasury of the city of Alliance in monthly installments as the council may prescribe. Before entering upon his duties, said bailiff shall make and file in the office of the clerk of the city of Alliance, a bond in the amount of not less than two thousand dollars. The terms and sufficiency of said bond shall be subject to the approval of the judge of the court. The said bond shall be given for the benefit of the city of Alliance and of any person who shall suffer loss by reason of the default of any of the conditions of said bond."

This language might be held to indicate that the legislature intended that there should be more than one bailiff, inasmuch as provision is made that "one bailiff shall be designated as hereinafter provided for in this act." But inasmuch as section 29 prescribes no duties for the bailiff and section 30 does prescribe his duties, fix his salary and prescribe his qualifications, I do not think this construction can be given to said language.

In connection with section 30 of said act, it will be well for us to note the latter part of section 29, which reads as follows:

> "Every police officer of the city of Alliance shall be ex-officio a deputy bailiff of the municipal court and the chief of police shall assign one or more such police officers from time to time to perform such duties in respect to cases within the jurisdiction within said court as may be required of them by said court or the clerk thereof."

Under this provision deputy bailiffs are provided for, in that every police officer of the city of Alliance is ex-officio a deputy bailiff, and these police officers are to perform such duties as may be assigned to them as deputy bailiff.

It is clear that the word "bailiff," appearing in section 30 of the act, has no reference to a deputy bailiff, else the title deputy bailiff would have been used. Inasmuch as section 29 provides for a bailiff, but assigns him no duties, fixes no salary and prescribes no qualifications, and section 30 makes provision for a bailiff, assigns his duties, fixes his bond and prescribes his qualifications, it is my opinion that the legislature intended there should be but one bailiff and that his duties should be such as those set out in section 30, and his salary and qualifications be as therein described, and that any other necessary services in connection with said court should be performed by the deputy bailiffs, who shall perform such duties as may be required of them by the court or by the clerk thereof.

The term "bailiff" has no definite, distinct and specific meaning. A bailiff may be merely a court attendant, which is ordinarily the case at the present

time. But this term is used in connection with the duties of the sheriff and the deputies in his office are frequently denominated deputy bailiffs or bailiffs. It is my view that it was this latter meaning the legislature had in mind when enacting sections 29 and 30 in the act above referred to. Section 30 clearly indicates this.

There is but one other provision in this act which throws any light upon what the legislature had in mind when using the term "bailiff," and it is found in section 9, wherein it is provided that when the appraised value of property sought to be recovered or sold exceeds one thousand dollars, the case shall be certified to the court of common pleas of Stark county by the municipal court, and "the bailiff (of the municipal court) shall turn over the property in his possession to the sheriff of Stark county, to be by him held as in like cases originating in the court of common pleas."

It is clear that the duties of the bailiff were to be more than those of a mere court attendant. The legislature intended them to be such duties as are ordinarily performed by a sheriff.

Hence answering your question specifically, it is my opinion that the judge of the municipal court of Alliance has the power and authority to appoint but one bailiff, and that the duties of the bailiff so appointed are those set out in section 30 of the act, and his salary and qualifications such as those therein specified, and that whatever additional help the court may need will have to be furnished by the deputy bailiffs provided in section 29.

I am aware that these two sections are so drawn that it is difficult to arrive at an understanding as to what the legislature had in mind, but it is my view that the above is the correct construction to be placed thereon.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

873.

CHIEF INSPECTOR OF MINES—NO RIGHT TO FURNISH COPIES OF MAPS AND PLANS OF MINES, EXCEPT UPON REQUEST OF OWNER, ETC.

Under the terms of section 904 General Code, the chief inspector of mines has no right to furnish copies or to permit any other person to make copies of the maps and plans of mines in his possession, except by request of the owner, lessee or agent of the mine to which such maps, plans, records and papers pertain.

COLUMBUS, OHIO, December 17, 1917.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Under recent date you asked an opinion of this department as to the interpretation of section 904 of the General Code of Ohio.

The question submitted is as to the authority of the chief inspector of mines to furnish copies of maps and plans of mines in his possession, or to permit persons to make tracing or copies thereof as authorized by said section 904 General Code. This section reads as follows:

> "The chief inspector of mines shall have an office at the seat of government, in which he shall keep the maps and plans of all mines in the state, and all records, correspondence, papers, apparatus, and other property belonging to the state, pertaining to his office, in accessible and convenient form for reference by persons entitled to examine them, all of which he shall deliver to his successor in office. The persons entitled to examine maps, plans, records and papers of a mine, shall be the owner, lessee or agent of such mine; the persons financially interested in such mine; the owner or owners of land adjoining such mine; the owner, or owners, of land adjacent to such mine; the owner, lessee or agent of a mine adjacent to such mine; and the authorized representatives of the employes of such mine. The chief inspector of mines shall not permit such maps, plans, records and papers to be removed from his office, and shall not furnish copies thereof to any persons, except by request of the owner, lessee or agent of the mine to which such maps, plans, records and papers pertain. Each district inspector shall keep his office in such place in his district as is central and convenient."

Section 935 General Code specified what the maps and plans in question are to contain, and section 969 General Code authorizes certain persons therein named to make surveys of certain mines. In neither of these sections is there any provision for making or securing copies of such maps, plans or surveys from the chief inspector of mines, or from or through his office. It is not necessary, therefore, to quote from these sections.

Section 904 General Code contains a specific provision that the chief inspector of mines "shall not furnish copies thereof, to any persons, except by request of the owner, lessee or agent of the mine to which such maps, plans, records and papers pertain." There is a specific prohibition against the furnishing of copies of such maps and plans by the chief inspector of mines, and he can only furnish copies thereof upon the conditions therein provided, that is, upon request of the owner, lessee or agent of the mine.

In the case now in question it appears that a request was made to permit the making of tracings or copies of the maps desired. While the statutes do not specifically prohibit the right of any one to make tracings or copies of the maps, yet to permit the making or tracing of copies of the maps would be doing indirectly what the statute says cannot be done directly. It is a well established principle of law that what is prohibited directly cannot be done indirectly.

It is my opinion, therefore, that under the terms of Section 904 General Code the chief inspector of mines has no right to furnish copies or to permit any other person to make copies of the maps and plans of mines in his possession, except by request of the owner, lessee or agent of the mine to which such maps, plans, records and papers pertain.

Section 11552 of the General Code provides as follows:

"Either party, or his attorney, in writing, may demand of the adverse party an inspection and copy, or permission to take a copy, of a book, paper, or document in his possession, or under his control, containing evidence relating to the merits of the action or defense, specifying the book, paper, or document with sufficient particularity to enable the other party to distinguish it. If compliance with the demand within four days be refused, on motion and notice to the adverse party, the court or judge may order the adverse party to give the other, within the time specified, an inspection and copy, or permission to take a copy, of such book, paper or document. On failure to comply with such order, the court may exclude the paper or document if offered in evidence, or, if wanted as evidence by the party applying, may direct the jury to presume it to be such as such party, by affidavit, alleges it to be. This section shall not prevent a party from compelling another to produce any book, paper, or document when he is examined as a witness."

Whether or not the request of the owner of the mine can be enforced through the provisions of the above section is not passed upon.

Very truly yours,

JOSEPH MCGHEE,
Attorney-General.

874.

ASSESSMENTS—FOR MUNICIPAL STREET IMPROVEMENTS—WHEN BONDS, ETC., ARE ISSUED IN ANTICIPATION OF COLLECTION—NOT PAID WHEN DUE—INTEREST—PENALTY—HOW COLLECTED—ASSESSMENTS AGAINST DELINQUENT LANDS—PENALTY—INTEREST—HOW COLLECTED—RIGHT OF COUNTY TREASURER TO ACCEPT GENERAL TAXES WITHOUT ASSESSMENTS.

1. *When special assessments are made for municipal street improvements, etc., and bonds, notes or certificates of indebtedness are issued in anticipation of the collection thereof, the several installments of such assessments, if not paid when due, bear interest until the payment thereof at the same rate as the bonds, and when such assessments are certified to the county auditor for collection by the county treasurer on the tax duplicate, such installments, if not paid when due, are subject to a penalty of ten per cent thereof.*

2. *The interest and penalty referred to cannot be charged or collected unless the installment is not paid when due. The date at which any given installment falls due is to be fixed by the council in the assessment ordinance. It is competent for council to fix the date of the next ensuing semi-annual collection of taxes as the date when the first installment of the assessment shall be payable; and if the clerk of council has not certified the assessment to the county auditor for collection by the county treasurer prior to that date, said installment is payable to the city treasurer. If not paid to him, the installment bears interest at the rate carried by the bonds; but there is no authority to charge a penalty of ten per cent until the assessment is certified to the county auditor. If such installment with the remainder of the assessment is subsequently certified to the county auditor before it is paid, it reaches that officer in a state of delinquency and it is his duty to charge the interest and penalty at the same time he places the installment on the duplicate (provided that thirty days intervene between the date of the publication of the assessment ordinance and the time of certifying it to the county auditor for collection).*

3. *Under section 9 of the act of March 21, 1917 (107 O. L. 735) delinquent assessments charged against delinquent lands are to be included in the amount of the delinquent land tax certificate. If the penalty has accrued and been charged on the delinquent assessment, such penalty also enters into the amount of the certificate. Interest at the rate of eight per cent is chargeable on the entire amount of the certificate, including such delinquent assessment and penalty therefor, and takes the place of interest at the rate carried by the bonds in case the assessment is one made by a municipal corporation and anticipated by the issuance of bonds, notes, etc.; under section 10 of said act, assessments subsequently accruing against delinquent lands and the penalties thereon bear interest from the date of delinquency at the rate of eight per cent in lieu of interest at the rate of five per cent on the principal sum of the assessment.*

4. *Land does not become delinquent under said act of 1917 for non-payment of assessments only, but the general taxes must be unpaid and the land returned as delinquent, as provided by law, before it can be placed upon the delinquent list.*

5. *The act of 1917 in no wise changes the law respecting the authority of the county treasurer to accept payment of general taxes without payment of assessments charged against the land; nor does it affect the necessity on the part of the owner of the land charged with an assessment of enjoining the treasurer from collecting such assessment.*

6. *If land becomes delinquent, then all duplicate charges against the land in the nature of assessments, whether for past years or not, must be included in the delinquent land tax certificate.*

7. *Delinquent taxes and assessments charged against forfeited lands may be collected by action under section 2667 et seq. of the General Code to foreclose the lien.*

COLUMBUS, OHIO, December 17, 1917.

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

GENTLEMEN:—I am in receipt of a letter from you with which you enclose communications directed to you by the city auditor of Lima and the city solicitor of Steubenville, respectively, making certain inquiries respecting the matter of interest and penalty on special assessments, and requesting my opinion on certain questions respecting same. The communication of the city auditor of Lima and the questions asked by you thereon are as follows:

> "The city auditor certifies special assessments to the county auditor for collection in April and September, each year.
>
> If the assessing ordinance was not passed by council in time to certify the first assessment to the county auditor, in April, so that the county treasurer could collect in June, it being necessary to hold before certifying until September, should interest be added to the first assessment for the period elapsing between April and September?
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> It is my further understanding that under section 3817 of the General Code, if such assessment or any installment thereof is not paid when due, it shall bear interest until the payment thereof at the same rate as bonds issued in anticipation of the collection thereof, and the county auditor shall place upon the tax duplicate the penalty and interest. Please advise.
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> *Question* 1. Can interest in this case be added to the first assessment for the period elapsing between April and September?
>
> *Question* 2. Can the county auditor place upon the tax duplicate penalty and interest? If so, what penalty and what interest?"

From the form of the auditor's inquiry I assume that the special assessments referred to in his letter and in the questions asked by you are assessments for municipal street and sewer improvements for which bonds or certificates of indebtedness have been issued. In this connection section 3892 G. C. provides as follows:

> "When any special assessment is made, has been confirmed by council, and bonds, notes or certificates of indebtedness of the corporation are issued in anticipation of the collection thereof, the clerk of the council, on or before the second Monday in September, each year, shall certify such assessment to the county auditor, stating the amounts and the time of payment. The county auditor shall place the assessment upon the tax list in accordance therewith and the county treasurer shall collect it in the same manner as other taxes are collected, and when collected pay such assessment to the treasurer of the corporation, to be by him applied to the payment of such bonds, notes or certificates of indebtedness and interest thereon, and for no other purpose. For the purpose of enforcing such collection, the county treasurer shall have the same power and authority as allowed by law for the collection of state and county taxes."

Section 3896 G. C. provides, among other things, that when bonds have been issued in anticipation of the collection of assessments, interest on such bonds shall be included in the cost of the improvement for which the assessment is made, and similar provision is made by section 3817 G. C., which provides further as follows:

"* * * If such assessment or any installment thereof is not paid when due, it shall bear interest until the payment thereof at the same rate as the bonds issued in anticipation of the collection thereof, and the county auditor shall annually place upon the tax duplicate the penalty and interest as therein provided."

Under the provisions of this section it is clear that no interest can be charged on any assessment or installment certified to the county auditor under section 3892 G. C. until after such installment becomes due; but that after such time interest is to be charged thereon at the rate carried by the bonds.

With reference to the matter of penalty on special assessments, I note that my predecessor, Hon. Edward C. Turner, in an opinion addressed to you under date of July 21, 1915, held that no penalty can be added or collected for default in the payment of assessments certified under section 3892, but that where bonds, notes or certificates of indebtedness have not been issued in anticipation of the collection of such assessments, the municipal officers have the option, in the event such assessments are unpaid and delinquent, of collecting the same by suit, together with interest and a penalty of five per cent added, as provided in section 3898 G. C., or of certifying the same to the county auditor for collection, as taxes under section 3905, in which event the assessment certified becomes subject to a ten per cent penalty to cover interest and the cost of collection.

In the case of State ex rel. v. Sanzenbacher, 13 C. C. (n. s.) 356, the circuit court of Lucas county, apparently going beyond the conclusion reached by Mr. Turner, held that there is no statutory provision for imposing a penalty on unpaid assessments against real property for public improvements and that mandamus will lie to compel a county treasurer to accept such assessments without the penalty added.

The opinion by Kinkade, J., reads in full as follows:

"This is an action in mandamus brought in this court to require the county treasurer to accept the assessments that are due without collecting the penalty on the assessment. There is no occasion to review all the statutes that were mentioned by counsel here in argument. We have gone over the situation very thoroughly and we are satisfied there is no authority in the statutes of Ohio for affixing the fifteen per cent on the assessments the same as it is fixed upon taxes. The statute, General Code 2608 (Revised Statutes 1053), provides that such penalty must be placed upon delinquent taxes; must be audited, I should say, on delinquent taxes. We find no statute so directing as to assessments, and for that reason we think the placing of it there is not warranted, and the relief prayed for here must be granted. We do not find any authority, I should have said, for the placing of any penalties on assessments such as are placed for taxes."

I find difficulty in bringing myself to the view expressed by either Mr. Turner or by the circuit court in the case above cited. Clearly the decision in the case of State ex rel. v. Sanzenbacher is stated too broadly if the same had reference to special assessments for municipal street or sewer improvements, for certainly as to *some* of such special assessments, as pointed out by Mr. Turner, a penalty of five per cent is imposed in actions by the municipality to recover such special assessments under section 3898 General Code, and a penalty of ten per cent is imposed where such unpaid assessments are certified to the county auditor by the clerk or other proper officer on order of the council under section 3905 G. C.

In point of fact an examination of the case of State ex rel. v. Sanzenbacher, supra, would show that the only question before the court was as to the right to charge on assessments the fifteen per cent penalty provided for in the case of delinquent taxes. The treasurer in that case had charged no other penalty and the question was as to whether or not he could refuse to accept payment of the assessments without the penalty which he had charged. The actual decision of the court was, of course, correct on this question.

Mr. Turner, in the opinion above referred to, held in effect that neither the penalty authorized by section 3898 nor that authorized by section 3905, applied to special assessments certified to the county auditor under section 3892 General Code. It is clear that the penalty provided for in section 3898 General Code has no application to assessments certified under section 3892, for no power is conferred upon a municipality to bring suit to recover such assessment. I am not persuaded, however, that the penalty provided for in section 3905 General Code does not apply to such assessments.

Said section 3905 G. C. provides as follows:

> "The council may order the clerk or other proper officer of the corporation to certify any unpaid assessment or tax to the auditor of the county in which the corporation is situated, and the amount of such assessment or tax so certified, shall be placed upon the tax-list by the county auditor, and shall, with ten per cent penalty to cover interest and cost of collection, be collected with and in the same manner as state and county taxes, and credited to the corporation. Such ten per cent penalty shall in no case be added unless at least thirty days intervene between the date of the publication of the ordinance making the levy and the time of certifying it to the county auditor for collection."

The provisions of section 3905 G. C., prior to the enactment of the municipal code of 1902, and thereafter until the adoption of the General Code of 1910, comprised section 2295 of the Revised Statutes. Section 3892 General Code was originally enacted as section 94 of the Municipal Code of 1902, and this section, among other things, provided that all assessments provided for in the act of which said section 94 is a part should be subject to the provisions of section 2295 R. S. (3905 G. C.), as far as the same might be applicable, and that such section should remain in full force and effect.

The statutes in their present form are, to be sure, far from clear. Section 3905 was a part of a scheme of things to which present section 3892 was entirely foreign. Moreover, it speaks of the ten per cent penalty as being "to cover interest and cost of collection," whereas, as we have seen, interest is specifically provided for by section 3817 of the General Code. However, section 3817 itself directs that a penalty be charged, and as there is no authority for charging any penalty other than the ten per cent penalty referred to in section 3905, and as section 3905 was expressly continued in force by the provisions of section 94 of the municipal code of 1902, I incline to the view that as a general proposition the ten per cent penalty provided in section 3905, together with interest at the rate carried by the bonds, is properly chargeable upon due and unpaid installments of assessments certified to the county auditor under section 3892 of the General Code.

But while these propositions are generally true, it does not directly follow that they furnish answers to your questions. In truth, the facts stated by the city auditor are far from complete. The auditor does not show, for example, when the first installment of the assessment was due. This, as I have pointed out, is a very material consideration. If the first installment was not due until the December or June following the certification to the county auditor, then manifestly neither interest nor penalty could be charged or collected on account of said first installment. If, however, council

by accident or design made the first installment payable in June, as seems fairly inferable from the auditor's letter, then an entirely different question is presented. Assuming the authority of the council to make the first installment payable before it would be possible to certify it to the county auditor for collection, it would follow, of course, that so much of said first installment as would remain unpaid at date of certification would be certified in a state of delinquency so that the auditor should place the interest and penalty on the duplicate along with the original charge. The ultimate question, therefore, is as to whether or not council may lawfully provide for the collection of an assessment in installments and fix the period of the first payment at a date too early for collection through the county treasurer's office. This question involves a consideration of section 3892, already quoted, in connection with sections 3893 and 3897 of the General Code.

Section 3893 provides as follows:

> "In all other cases, such assessment shall be paid to and collected by the treasurer of the municipality, and in any event the clerk of the council, when the receipt is presented to him by the owner, showing the payment of an assessment on his property, shall enter such receipt on the margin of the record of the assessment."

Section 3897 provides in part as follows:

> "Special assessments shall be payable by the owners of the property assessed personally, by the time stipulated in the ordinance providing therefor, and shall be a lien from the date of the assessment upon the respective lots or parcels of land assessed. * * * ."

I am able to apprehend no sufficient reason for holding that these sections can not be applied to assessments when bonds, notes or certificates of indebtedness have been issued in anticipation of the collection thereof, but the date of certification has not yet arrived. The phrase "in all other cases" in section 3893 should not in my opinion receive such an interpretation as to mean cases other than those in which bonds, notes or certificates of indebtedness have been issued in anticipation of assessments; rather it means in my opinion cases other than those in which, under the preceding section, the unpaid assessments have been certified for collection to the county auditor. An assessment is, under section 3897, a lien from the date thereof. It would be most unjust to create such a lien and prevent its discharge by the owner of the property at any time after it is created. The statutes should not receive such an interpretation but in my judgment should be so construed as to permit the payment of the assessment at any time after it is levied. This payment is to be made to the treasurer of the muncipality under section 3893, and if it is possible for the owner of the property to discharge his personal obligation and the lien against his property by paying the assessment before certification, I know of no reason why the council may not fix the date of the payment of the first installment at such time that collection must take place through the office of the treasurer of the municipality. Therefore, without the necessity of holding that section 3897 applies to assessments when bonds, notes or certificates of indebtedness have been issued, I arrive at the conclusion that council has the power to fix the date for the payment of the first installment of an assessment so early as to preclude its collection through the county treasurer's office. In my opinion, however, section 3897 is of general application and applies to all assessments. Like section 3905, previously referred to, this section as section 2285 R. S. was specifically retained in full force and effect by section 94 of the Municipal Code and was a part of the very same context in which present section 3892 first made its appearance.

In other words, section 3892 is not a new and distinct method of collecting assessments when bonds, notes or certificates of indebtedness have been issued in anticipation thereof, to the exclusion of all other provisions of law; rather it affords new machinery, exclusive when it begins to operate but not before, and to be fitted into the existing statutes where it is not inconsistent with them.

I therefore conclude that it is lawful for a municipal corporation to fix the due date of the first installment of an assessment too early for its collection through the county treasurer's office; that when the date is so fixed the installment becomes payable at the city treasurer's office on that date and if not then paid becomes delinquent. True, after the date of delinquency and before certification there is no authority to collect any penalty, for under section 3905 and section 3817 as well a penalty is only collectible when it is charged on the duplicate. The interest, however, provided by section 3817 would be collectible at the city treasurer's office until the certification to the county auditor. At certification, however, the installment would be delinquent and it would be the duty of the county auditor immediately to charge a ten per cent. penalty and interest at the rate carried by the bonds on the duplicate along with the principal sum of the installment then delinquent.

In passing permit me to remark that the word "therein" as used in section 3817, and which as it there appears might support the view that the penalty referred to in that section is to be provided for in the assessment ordinance, is evidently a clerical error. In original section 51 of the Municipal Code the phrase was "the penalty and interest herein provided for." The mistake took place when the section was amended in 97 O. L., 121. The mistake is, however, in my judgment a palpable one and reading the word as "herein" instead of "therein" makes clearer the correctness of the conclusions which I have reached.

In your first question you inquire whether interest can be added for the period elapsing between April and September. This question may be answered broadly in the negative. Interest can not be added for the period from April to September under any circumstances because there is nothing to indicate that the assessment would draw interest commencing at any time in April. If, however, the first installment was payable in June at the city treasurer's office and was not then paid, interest from the date of payment to September and thereafter until paid should be added to such installment when it is placed on the duplicate by the county auditor. If, however, the installment was not due and unpaid when certified to the county auditor, then he would have no authority to add interest to it until it should become due and remain unpaid.

Answering your second question, I beg to advise that the county auditor would be without authority to place any penalty on the duplicate unless the instalment when certified to him were past due and unpaid. As previously pointed out, if such were the case however, he should add a penalty of ten per cent together with interest at the rate carried by the bonds.

The letter of the solicitor of Steubenville is quoted by you as follows:

> "I am taking the privilege of writing you, asking that you secure for me an opinion of the attorney-general upon two questions: First, in this city we have done considerable improving in the way of paving, sewering and putting down sidewalks; the assessments for the paving of said improvements by the property owners are all certified to the county auditor for collection. It has been and it is the custom with property owners to pay their regular taxes and to permit the assessments to go over, and pay them whenever they are ready, the result is that there is always from $25,000.00 to $35,000.00 of due and unpaid assessments which are delinquent. The certificates of indebted-

ness, or bonds, and interest naturally must be paid when due, by the city, and the result is that the city is losing 5 or 6 per cent interest on the amount of their delinquent assessments.

I have insisted that the county auditor place the penalty and interest against these delinquent assessments, which he has refused to do, claiming that the law and decisions of the court do not permit him to do this.

The loss to the city of Steubenville each year in interest charge amounts to $1,500.00 to $1,800.00."

In connection with this letter you submit the following questions:

"*Question* 3. In the above case, can the county auditor place the penalty and interest against these delinquent assessments, and if so, what interest and what penalty?

Question 4. Under section 10 of the act of March 21, 1917 (107 O. L. 735), in making up certification of delinquents, may the county auditor place the same penalty and interest on the assessments as he does on the unpaid general taxes?

Question 5. In the event that the general taxes are paid, and an assessment only is delinquent, does the county auditor under this act make certification of the property against which the assessment is delinquent in the same manner as he would where both taxes and assessments were delinquent?

Question 6. Under the provisions of this law, is it not now incumbent upon an individual who wishes to refuse to pay a special assessment, to enjoin the treasurer from collecting same?

Question 7. In every county of the state of Ohio the tax duplicates carry delinquent special assessments of former years. True, some of these are involved in injunction proceedings and other litigation concerning their payment, but where such assessments of former years are not in litigation, will it be the duty of the county auditor to merge them into the certified delinquencies under this act?

Question 8. This act does not amend any of the sections in the chapter of the General Code regarding forfeited lands, although under the operation of this act there will be no forfeitures to the state in the future. Almost every county of the state has forfeited lands on their duplicates in the name of the state, which, under the provisions of law, must be advertised for sale every two years, and experience has proven that very few sales are made from these offerings. This department has been asked how to dispose of the forfeitures now on the tax duplicates. It is, undoubtedly, a waste of public moneys to pay for the publication of the forfeited lists, and we are of the opinion that the best procedure to attempt to clear up these old lists is for the county treasurer to proceed under the provisions of section 2667, et seq., General Code, and subject them to foreclosure proceedings. Are we right in this view?"

Your third question is fully answered by the answers which I have given to your first and second questions.

Coming now to your fourth question: I note the following provisions of the act referred to by you, being parts of sections 9 and 10 thereof, therein designated as sections 5712 and 5713 of the General Code respectively:

"*Section* 5712. Section 9. The county treasurer * * * and the county auditor * * * shall * * * make * * * a certificate to be known as a delinquent land tax certificate, for each tract of land, * * * on which the taxes, assessments and penalty have not been paid, describing each tract of land * * * and the amount of taxes, assessments and penalty thereon due and unpaid, and stating therein that the same has been certified to the auditor of state as delinquent, * * * Interest at the rate of eight percent. per annum shall be charged on the duplicate against the delinquent lands, * * * certified by the county auditor on such certificate.

Section 5713. Section 10. The state shall have a first and best lien on the premises described in said certification, for the amount of taxes, assessments and penalty, together with interest thereon at the rate of eight per cent. per annum, from the date of delinquency to the date or (of) redemption thereof, and the additional charge of twenty-five cents for the making of said certification, and sixty cents for advertising. * * *"

I do not know that I correctly understand your fourth question. If you mean to inquire thereby whether, for example, the same penalty of fifteen per cent. chargeable under sections 5678 and 5679 of the General Code can now be computed upon and added to delinquent assessments by reason of anything found in the above quoted sections, or elsewhere in the act referred to, my answer is in the negative. The only charges authorized by the act are the charges of eight per cent. interest and certain fees. Authority to charge the penalties referred to in the act must be found elsewhere in the statutes as in the sections cited. Said sections 5678 and 5679, which I need not quote, authorize the imposition of a penalty of fifteen per cent. upon delinquent taxes, but not upon delinquent assessments. (State ex rel. v. Sanzenbacher, supra.) It is true that section 2 of the act found in 107 O. L. 735, therein designated as section 5705 of the General Code, provides that

"Delinquent lands as defined in this act shall mean all lands upon which the taxes, assessments and penalties have not been paid for two consecutive semi-annual tax paying periods."

The exact effect of this section will be considered in answering some of your other questions. At the present time, however, it is sufficient to state that while it defines "delinquent lands" it does not purport to define "delinquent taxes" and therefore does not have the effect of making "delinquent assessments" "delinquent taxes" either for its own purpose or for the purpose of any other section of the General Code and thus amending such other sections by implication. The meaning of the phrase "delinquent taxes" is just the same now as it always has been.

So far as the penalty is concerned, then, I beg to advise that authority elsewhere in the General Code than in the act of 1917 must be found for the imposition thereof on delinquent assessments. Such authority exists as to assessments which have been anticipated by the issuance of bonds, notes or certificates of indebtedness, as I have pointed out in dealing with the questions raised by the auditor of Lima. Whether or not like authority exists in the case of other assessments is a point not necessary to be considered in answering your fourth question.

Your question, however, relates also to interest. As pointed out the act of 1917 authorizes the charging of eight per cent. interest while the sections considered in answering the questions of the auditor of Lima authorize and require that due and unpaid installments of assessments which have been anticipated by the issuance of bonds, notes or certificates of indebtedness shall bear interest at the same rate carried by the bonds, in addition to the penalty of ten per cent. An inspection of the whole

act of 1917 shows that there are some circumstances in which delinquent assessments are to be treated as a part of the delinquencies for the collection of which its procedure is available. The second section of the act has already been quoted and the ninth and tenth sections, which have also been quoted, repeat the frequently reiterated phrase "taxes, assessments and penalties" which is found in almost every section of the act. A complete answer to your present question would require me first to determine under what circumstances the delinquency of assessments may be made the predicate of the delinquency of the lands. Inasmuch, however, as this is the identical question which you next submit, I shall postpone discussion of it until dealing with that inquiry. It is at least clear that when the status of delinquency has been acquired by the land itself and it has been certified as such under section 9 of the act of 1917, section 5712 G. C., the amount of delinquent assessments, if any, enters into the amount of the delinquency of the land. Thus the question is raised as to whether when the land against which the assessment has been levied has become delinquent and has been certified as such, the amount on which the eight per cent. interest referred to in section 5712 and that referred to in section 5713 of the General Code, being sections 9 and 10 of the act of 1917 respectively, is to be computed is to include the amount of any delinquent assessment that may be charged against the land.

Of course in the case of a great many assessments an affirmative answer to this question would be very easily reached. Assessments for state and county road improvements, for example, are not required by any law other than the act of 1917 to bear interest after delinquency; therefore no conflict arises. But in the case of municipal assessments in anticipation of which bonds, notes or certificates of indebtedness have been issued, we have the distinct requirement of the statutes considered in answering the question of the auditor of Lima to the effect that such assessments when delinquent shall bear interest at the rate carried by the bonds, which would in every case be less than eight per cent; while the act of 1917, if interpreted so as to impose the interest of which it speaks upon delinquent assessments as well as upon delinquent taxes, would seem to conflict with such other requirement in the instance in which it would have operation.

In reality there are four possible solutions of the question now under consideration. They are:

> "(1) That when delinquent assessments form a part of the amount for which lands are certified as delinquent, or when assessments become delinquent against land which has been certified as delinquent, the eight per cent interest referred to in sections 9 and 10 of the act of 1917 respectively is chargeable upon the whole amount of the delinquencies to the exclusion of any other interest, but not to the exclusion of any penalties which might thereafter accrue.
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> (2) When such circumstances exist the eight per cent interest is chargeable in lieu of any other interest that delinquent assessments might carry and also in lieu of penalties which might otherwise be charged against delinquent assessments.
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> (3) Under such circumstances the eight per cent interest is chargeable on the total amount of delinquent charges including assessments in addition to such penalty and interest as is authorized to be charged under other sections.
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> (4) The eight per cent provided for in sections 9 and 10 of the act of 1917 is not to be computed at all on so much of the delinquency as represents unpaid assessments for which other penalties and interest are provided by law, as municipal assessments which have been anticipated by the issuance of bonds, notes or certificates of indebtedness."

I must admit that this question, together with some of the others which you ask, has greatly puzzled me. So far as the present question is concerned the leading characteristics of the act seems to be expressed by the statement that its draftsman has taken the word "assessments" and inserted it in each of the sections along with the words "taxes and penalties" in utter disregard of the other statutes of the state respecting the collection of assessments. But much as we may criticise such legislation as this, we must give it a meaning if possible. The difficulty, however, is to ascertain what that meaning is as we are without any very definite clues in the act itself.

I think it is possible to eliminate some of the alternative meanings which I have suggested. For example, the third of them, which is to the effect that delinquent assessments as a part of the total amount of delinquent charges against delinquent land would bear both the eight per cent. and the five per cent. interest at the same time, may be rejected. While such a solution would not be exactly impossible, yet it is very improbable that the legislature intended that two kinds of interest should run concurrently against the same charge or that interest at eight per cent should be charged upon interest at five per cent for example. I therefore put this interpretation out of view.

Nor on careful consideration do I think that the fourth interpretation can stand. At first blush it would seem necessary to avoid conflict between the statute requiring interest at the rate carried by the bonds and the statute requiring eight per cent interest. As a matter of fact, however, the eight per cent statute provides for a special case, that is, interest chargeable when the lands themselves have become delinquent, while the other sections considered in answering the questions of the auditor of Lima provide for the charging of interest when the assessments are delinquent. As pointed out there is a wide distinction between delinquent assessments or taxes and delinquent lands. This distinction will be further elaborated upon in this opinion. I think therefore that when the lands have become delinquent and assessments have accrued, or thereafter accrue, against such lands, the interest chargeable against such assessments as a part of the principal sum of the delinquency is, by virtue of sections 9 and 10 of the act of 1917, eight per cent. instead of the rate carried by the bonds.

These eliminations narrow the choice down to the first two of the suggested solutions.

Though the question is not free from doubt as I have hinted, I incline to accept the first suggested interpretation. That is, to say, the eight per cent interest is in my opinion chargeable upon the whole amount of the delinquencies to the exclusion of any other interest such as that provided for by the section of the municipal code which has been under consideration; but it is not in lieu of the ten per cent. penalty provided for by said statute. There is nothing in the act of 1917 to indicate that the eight per cent interest is to be regarded as a substitute for the ten per cent penalty. In fact, if it were so regarded then the assessments accruing against land that has acquired the status of delinquency and remaining unpaid after their accrual, would involve a lighter exaction from the redeeming taxpayer than would have been required if the land had not been delinquent at all. This fact, together with the lack of any express provision in the statute, leads me to the conclusion which I have reached.

Fully answering your fourth question, then, I am of the opinion that in making up certification of delinquencies under section 9, the county auditor should charge no new or different penalties on account of the delinquent assessments than he is authorized to charge by other statutes such as those which have been discussed; and in no event may he charge the fifteen per cent penalty which applies to general taxes which are delinquent. The assessments, as well as the taxes and penalties, however, bear interest at the rate of eight per cent on the amount certified and assessments accruing subsequently and while the land is in a state of delinquency are, if unpaid

when due, to bear interest at the rate of eight per cent. instead of the rate borne by the bonds and to have charged against them the ten per cent. penalty hereinbefore discussed or any other penalty that may be chargeable against delinquent assessments, as such, which said penalty also bears eight per cent. interest; but no penalty of fifteen per cent is to be charged.

Your fifth question presents the most difficult problem of all. As I have intimated its solution is really involved in your fourth question, but I have purposely eliminated any discussion of this point except in connection with the query now under consideration.

In my opinion there is not enough in the way of express provision in the act of 1917 to enable me to hold that land can acquire the status of delinquency through non-payment of assessments only. I answer your question therefore, generally, in the negative.

In arriving at this result I have not been unmindful of the provisions of section 2 of the law of 1917, which has been quoted. For convenience I repeat the quotation of that section here:

> "Section 2 (Sec. 5705 G. C.) Delinquent lands as defined in this act shall mean all lands upon which the taxes, assessments and penalties have not been paid for two consecutive semi-annual tax paying periods."

One of the possible meanings of this section is that land shall become delinquent unless the "taxes, assessments and penalties" have been paid; that is to say, it will take the payment of all three kinds of charges in order to keep it from assuming or becoming susceptible of assuming the status of delinquency. However, the whole act must be fitted into the statutory scheme for the collection of taxes as it exists in the sections which have not been amended or repealed. The act cannot stand alone but rests upon a foundation composed of the other sections referred to. This is apparent from several of the sections of the act itself. In the first place section 3 sets forth the substance of the delinquent tax certificate which is to be published in a newspaper, as provided in section 1 of the act. Said notice in part is as follows:

> "The lands, lots and parts of lots *returned delinquent by the treasurer of ---------- county, with the taxes and penalties* charged thereon agreeable to law, are contained and described in the following list, viz.: * * * ."

Section 5, designated as section 5708, provides as follows:

> "Before advertising such list of delinquent lands and lots, the county auditor shall compare it with the duplicate in the office of the county treasurer, and strike therefrom all lands or town lots upon which the taxes, assessments and penalty of the preceeding year, with the taxes and assessments of the current year, have been paid, and advertise the remainder as provided in this chapter."

Section 6, designated as section 5709, provides as follows:

> "The county auditor, on or before the day of certification to the auditor of state, mentioned in such notice, shall insert, at the foot of the record, on the delinquent list, a copy of the notice, and certify on the record immediately following such notice, the name of the paper, and the length of time such list and notice were published therein."

Section 7, designated as section 5710, provides as follows:

"If a county auditor, by inadvertence or mistake, omits to publish the delinquent list of the county, as required by law, he shall charge the lands and town lots with the taxes, assessments and penalty, if such taxes, assessments and penalty with which the lands and town lots therein stand charged have not been paid before the tenth day of August of the next succeeding year. He shall also charge them with the taxes and assessments of the current year, and record, certify and publish them as part of the delinquent list."

Section 23, designated as section 5726, provides as follows:

"When any tract of land, city or town lot is *returned delinquent for non-payment of taxes or assessments*, and placed on the duplicate of the succeeding year, the owner or person liable to pay taxes therefor produces the receipt of the treasurer for such taxes and assessments of the preceding year, the county auditor or treasurer shall not make the deduction from the duplicate, of such taxes, assessments, penalty and interest but it shall be chargeable to the treasurer as if such receipt had not been produced. The treasurer shall receive such receipt in discharge of the tax or assessment for the year it is returned delinquent, with the penalty and interest and the auditor of the county shall credit such treasurer with the amount and shall forthwith collect such taxes."

With the exception of one perhaps unintentional slip in the form of delinquent tax notices the draftsman of the above section evidently thought that land could be "returned delinquent for non-payment of taxes or assessments," as he has expressed it in section 23. The whole action of the auditor under the first seven sections of the law is predicated upon an actual list of delinquent lands and lots which has been returned by the treasurer. This, moreover, is not altered by the fact that in the first line of section 1 the word "the" has been changed to "a" so that instead of reading "Each county auditor shall cause the list of lands to be published" it now reads "Each county auditor shall cause a list of delinquent lands in his county to be published." That no change is effected is apparent when reference is had to the frequent mention of the list returned by the treasurer. Indeed, section 6 refers expressly to "the delinquent list."

Again, the sections quoted show that it was the supposition of the legislature in passing this act that when an assessment, as well as a tax, was not paid before the twentieth of December following the last delinquency, the assessment of the following year is immediately payable. This is true of general taxes by virtue of sections 5678 and 5679 of the General Code.

But while these assumptions are made in the statute of 1917, there is not a syllable outside of remote inferences to be drawn from section 2 which authorized the return of land as delinquent on account of non-payment of *assessments*; and certainly nothing which authorizes delinquent assessments to become payable prior to the time fixed in the ordinance levying them, as is the case with general taxes.

The mere fact that the legislature enacts one law upon the palpable supposition that another law with which it must articulate contains a given provision, is not enough to read into that other law a provision which is not there.

When we turn to the sections of the General Code dealing with the return of delinquent lands and the charging of delinquent taxes, we find that these apparent suppositions are both erroneous. The delinquent list is provided for by sections 2601 and 2608 of the General Code. These sections are as follows:

"Section 2601. During the month of August of each year, the auditor shall make and record, in a book provided for that purpose, a list of all lands and town lots returned by the treasurer delinquent at the preceding settlement, describing them as described on the tax duplicate, charging thereon the unpaid taxes for the year next preceding, together with the penalty thereon, and also the taxes of the current year. He shall certify the correctness of such list and the date at which it was recorded, and sign it officially."

"Section 2608. The delinquent list shall not be returned to the office of the auditor of state but shall be recorded by the county auditor immediately after his semi-annual settlement with the county treasurer, an abstract of which, in such forms as the auditor of state prescribes, shall be sent to his office in August, with the settlement sheet of the county treasurer. No taxes returned delinquent shall be paid into the state treasury, except by the county treasurers, and in making out the duplicate of each year, all tracts of land and lots returned delinquent or forfeited to the state, shall be again entered on the duplicate, and the taxes on such tract or lot, including the taxes of the current year, shall be charged thereon, with fifteen per cent penalty on the amount charged on the duplicate of the preceding year."

These sections must be construed together with sections 5678 and 5679 of the General Code. (White v. Woodward, 44 O. S. 347.) Those sections provide as follows:

"Section 5678. If one-half the taxes charged against an entry of real estate is not paid on or before the twentieth day of December, in that year, or collected by distress or otherwise prior to the February settlement, a penalty of fifteen per cent thereon shall be added to such half of said taxes on the duplicate. If such taxes and penalty, including the remaining half thereof, are not paid on or before the twentieth of June next thereafter, or collected by distress or otherwise prior to the next August settlement, a like penalty shall be charged on the last half of such taxes. The total of such amounts shall constitute the delinquent taxes on such real estate to be collected in the manner prescribed by law.

Section 5679. If the total amount of delinquent taxes and penalty as provided in the next preceding section, together with one-half of the taxes charged against such real estate for the current year, is not paid on or before the twentieth day of December, of the same year, the delinquent taxes and penalty, and the whole of the taxes of the current year, shall be due, and be collected by the sale of the real estate, in the manner authorized by law. If the first half of the taxes charged upon any real estate is paid on or before the twentieth day of December, as provided by law, but the remaining half thereof is not paid on or before the twentieth day of June next thereafter, or collected by distress or otherwise, prior to the next August settlement, as provided by law, a like penalty shall be added to such unpaid taxes, and they shall be treated as delinquent taxes, and, with the taxes of the current year, collected by the sale of such real estate, as aforesaid."

The joint effect of all four of these sections is limited to taxes. Lands against which unpaid assessments alone are charged may not be included in the list of delinquent lands, nor is there any authority for imposing the fifteen per cent penalty. (State ex rel., v. Sanzenbacher, supra.)

In spite, therefore, of the language of section 2 of the Act of 1917, and having regard to the provisions of the other sections of that act, I am led to the conclusion

that the act of 1917 does not in reality define delinquent lands at all, but that the definition of that term remains the same as it was before the amendments embodied in that act. That definition is briefly land which has been returned delinquent by the county treasurer and has found a place upon the delinquent land list.

What then is the meaning of section 2 of the act? Some meaning must be given to it and I am not disposed to ignore it entirely. In my opinion the effect of this section in addition to the frequent repetition of the phrase "taxes, assessments and penalties" and that of "taxes and assessments" as it is found throughout the other provisions of the act, is to make the machinery of the act available for the collection of unpaid assessments as well as for the collection of unpaid taxes. That is to say, while land can acquire the status of delinquency only through failure to pay the general taxes as formerly, yet when once it has acquired that status the amount of the delinquency will include unpaid assessments as well as unpaid taxes, and the whole machinery of the act may be employed to collect the assessments as well as the taxes. A similar provision, for example, is found in sections 2667 et seq., referred to in one of your questions. Here is a provision for the collection of delinquent charges by the county treasurer by action to foreclose the lien. By express provision the action which the county treasurer may bring under this section is for the collection of assessments as well as taxes. The only difference between section 2667 and the delinquent land act of 1917 in this respect is that the treasurer has the option of collecting assessments along with the general taxes under section 2667, whereas the inclusion of delinquent assessments in the amount to be collected under the act of 1917 is automatic.

In answer to your sixth question I may say that I know of no reason why it is any more incumbent upon an individual who wishes to refuse to pay a special assessment to enjoin the treasurer from collecting same under the provisions of the act of 1917 than it ever has been in the past. Assuming, but not deciding, that it is lawful for the treasurer to accept the general taxes without accepting an assessment charged against the same land, in the absence of an injunction against the latter. The law in this respect is not in any wise changed by the delinquent land act of 1917, for as I have pointed out lands can become delinquent under that act as formerly only through nonpayment of taxes and penalties.

Answering your seventh question I am of the opinion that where assessments of former years are unpaid and not in litigation it will be the duty of the county auditor to merge them into the certified delinquencies under the act of 1917. This is but an application of what I have said in dealing with your fifth question. Though the nonpayment of assessments alone does not make lands delinquent, yet if lands are properly returned delinquent for nonpayment of taxes and there are charged against such lands unpaid assessments, though constituting an accumulation of several years prior to the enactment of the act of 1917, it will be the duty of the county auditor in making up his list under section 9 of the act to include the amount of said unpaid assessments, together with all other duplicate charges against the land, in his certification thereof.

Your eighth question is answered by provision of section 2670 of the General Code, which expressly provides that:

> "When the lands or lots stand charged on the tax duplicate as forfeited to the state, it shall not be necessary to make the state a party, but it shall be deemed a party through and represented by the county treasurer."

This shows that the machinery of section 2667 et seq. is available for the collection of taxes and assessments due on forfeited lands. This is the only question of law involved in your eighth inquiry. I would not express any opinion as to the exped-

iency of the procedure you suggest, although it seems clear to me that the remedy is section 2667 et seq. is the best one for the collection of the taxes upon forfeited lands. In this connection permit me to point out that by virtue of section 2673 of the General Code the action referred to in section 2667 of the General Code may be brought upon the direction of the auditor of state, even though the county treasurer refuses or neglects to bring it.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

875.

SUPERINTENDENT OF PUBLIC INSTRUCTION—NOT AUTHORIZED TO FIX STANDARD OF SCHOOL ESTABLISHED BY OHIO UNIVERSITY —TEACHERS IN SUCH SCHOOL NOT REQUIRED TO HOLD TEACHERS' CERTIFICATES.

1. *The Ohio University is not authorized in law to establish a school, although it may be designated a high school, and have its standard fixed by the superintendent of public instruction as a high school and receive a certificate from him as to the standard of such school.*

2. *This school so established by the Ohio University not being a part of the public school system of the state, the teachers therein would not be required to hold teachers' certificates before being qualified to teach.*

COLUMBUS, OHIO, December 19, 1917.

HON. F. B. PEARSON, *Superintendent of Public Instruction, Columbus, Ohio.*

DEAR SIR:—I have your letter to which you attached communication received by you from the Ohio University. Said communication of the university reads as follows:

> "A new secondary school having recently been founded at Ohio University, the question arises as to whether it may be classified and chartered by your office under the powers conferred by law to examine and classify the high schools of the state. To enable you to determine the legal status of this new school with a view to your passing upon an application for inspection of it, the following facts are set forth:
>
> The school is known as the John Hancock High School, and it is supported out of funds appropriated by the state legislature in the name of the Ohio University. The principal and teachers are appointed by the president of the university with the approval of the board of trustees. Students in the university who are preparing to teach make use of the classes of this high school, under proper regulations, as means of satisfying university requirements in observation of teaching and practice teaching. The school is open to pupils resident outside of the Athens city school district; and for the present a nominal tuition fee is charged.
>
> In view of these facts—
>
> 1. May the school be chartered by your office as a high school of first grade, if it is found on inspection to meet the standards upon which the classification of schools of this grade is determined?

2. Will the teachers of this school be required to be holders of teachers' high school certificates?"

In your letter you request that I answer the two questions propounded by the university. In passing upon same I will not have in mind the oft debated question as to whether or not the Ohio University is one of the educational wards of the state and therefore entitled to the financial support of the state. This question does not enter into the matter under consideration. So far as this opinion is concerned, it may be assumed that the Ohio University is a ward of the state and entitled to financial aid and support from the state.

What we have to decide is as to whether this university has such characteristics as would entitle it to establish a high school and then have said high school brought within the provisions of the law relating to high schools, in connection with the matters about which inquiry is made.

In order to reach a correct conclusion we will note the provisions of a number of sections of the General Code. We may thus be able to learn the spirit and general idea which seems to prevail in the provisions relative to high schools.

Section 7662 G. C. reads as follows:

"Section 7662. No school shall be considered a high school that has not furnished the information and received a certificate as provided above, nor be entitled to the privileges and exceptions provided by law for high schools."

Under this section no school shall be considered a high school unless it furnishes certain information and receives a certificate as provided for in the law.

In order to ascertain what information is referred to in section 7662 G. C., we will turn to section 7660 G. C., which reads as follows:

"Section 7660. The clerk of the board of education of each district in which a high school is established and maintained shall furnish to the superintendent of public instruction definite and accurate information concerning the length of time necessary for the completion of the high school curriculum or curriculums, the courses of instruction offered therein, and such other information as the superintendent of public instruction requires in relation to the high school work of the district, and in the form and manner he prescribes. Such information shall be filed when high schools are established or any changes made in curriculums."

It will be noted that the desired information is to be furnished by the clerk of the board of education of each district. In order to decide what certificate is referred to in section 7662 G. C., we will refer to section 7661 G. C., which reads in part as follows:

"Section 7661. Upon examination of the information thus filed, or after personal inspection of work done if he deems this advisable, or both, the superintendent of public instruction shall determine the grade of each such high school and, under the seal of his office, certify to the clerk of the board of education his finding as to the grade of the high school maintained by such board. * * *."

Under this section the certificate is given by the superintendent of public instruction to the clerk of the board of education.

We find in section 7663 G. C. the authority given for the establishment of high schools, which reads as follows:

> "Section 7663. A board of education may establish one or more high schools, whenever it deems the establishment of such school or schools proper or necessary for the convenience or progress of the pupils attending them, or for the conduct and welfare of the educational interests of the district."

Under said section the authority to establish high schools is given to the board of education.

All of these sections seem to indicate that the high school for which provision is made are a part of the *public* school system of the state, are located in the school districts of the state and established by the boards of education thereof.

The necessary requisites which will entitle a school to be called a high school are set forth in section 7752 G. C., which reads as follows:

> "Section 7752. No board of education shall be entitled to collect tuition under this chapter unless it is maintaining a regularly organized high school with a course of study extending over not less than two years and consisting mainly of branches higher than those in which the pupil is examined. The standing or grade of all public high schools in the state shall be determined by the superintendent of public instruction and his finding in reference thereto shall be final."

In this section boards of education are mentioned and high schools are designated as *public* high schools—that is, high schools connected with the public school system of the state.

When we turn to the provisions of the statutes relative to the inspection of high schools by the superintendent of public instruction, we find this general idea and theory running through them, viz., that the high schools provided for in the statutes are schools connected with the public school system. The sections covering inspection are sections 7753 to 7754 inc. G. C.

From all the above it is my opinion that high schools provided for by the laws of this state must be connected with the public school system of the state and be managed by the boards of education of the public schools, and that therefore the Ohio University would not be authorized in law to establish a high school and have it recognized by the officers of the state as such.

The communication from the Ohio University states that the school established by said university and called the John Hancock [High School is managed entirely by the trustees of the university. Then too, this high school is supported out of funds appropriated by the legislature of the state for the use and purpose of the Ohio University, which is contrary to the general idea under which the public schools of the state are maintained, viz., by taxation.

Again, this school seems to be established and maintained on the principle that those attending the school shall pay tuition, whether large or small in amount. This is not in harmony with the idea of the public school system of the state.

There is a provision relative to the Ohio State University which may throw some light upon this matter. In section 7950-1 G. C. provision is made that a high school may be established on the campus of said university. This section states that the Ohio State University and the board of education of the city school district in the city of Columbus, Ohio, may by agreement establish such a high school, and that the high school established shall be used as an observation and practice school by the college of education of the Ohio State University, upon the terms and conditions agreed upon by the board of trustees of said universiy and said board of education. This seems

to a certain extent at least to indicate that the legislature felt it to be necessary to grant the power and authority to establish a high school to be used in connection with the Ohio State University. The legislature not only gives authority to establish it, but outlines the manner in which it may be established and the purposes which it may serve.

While this is not at all conclusive upon the proposition before us, yet it assists us in determining the legislative intent relative to high schools.

From all the above it is my opinion that the school established by the Ohio University, although denominated a high school, would not be such a school as could be chartered by the superintendent of public instruction as a high school of the first grade and be certified as such.

If this conclusion be correct, we can readily arrive at an answer to the second question submitted, which would be to the effect that the teachers of this school would not be required to be holders of teachers' high school certificates. The examinations provided for by statute and the certificates granted upon said examinations relate to to the public school system of the state, and if this high school is not a part of said system, the teachers thereof would not be required to hold high school certificates, but would be under the control, management and direction of the trustees of the university.

I might call attention to section 7829 G. C., relating to teachers' certificates which reads as follows:

> "Section 7829. Three kinds of teachers' certificates only shall be issued by county boards of school examiners, which shall be styled respectively 'teacher's elementary school certificate,' valid for all branches of study in schools below high school rank, 'teacher's high school certificate,' valid for all branches of study in recognized high schools and for superintendents and 'teacher's special certificate,' valid in schools of all grades, but only for the branch or branches of study named therein."

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

876.

COUNTY COMMISSIONERS—NOT AUTHORIZED TO HIRE SHERIFF'S MACHINE FOR USE OF SHERIFF ON OFFICIAL BUSINESS.

County commissioners have no authority to hire the sheriff's machine for the use of the sheriff in the performance of his official duties.

COLUMBUS, OHIO, December 19, 1917.

HON. CHESTER PENDLETON, *Prosecuting Attorney, Findlay, Ohio.*

DEAR SIR:—I am in receipt of your communication of November 16, 1917, wherein you request my opinion as follows:

> "Calling your attention to your opinion numbered 631 and dated September 19, 1917, to the effect that the county commissioners may enter into a contract for the hire of a machine owned by the county surveyor for the use of said surveyor and his assistants in the performance of their official duties, I wish to ask whether the same reasoning does not apply to the sheriff

and whether the county commissioners may not enter into a contract for the hire of a machine owned by the sheriff for the use of the sheriff and his deputies in the performance of their official duties."

There is quite a distinction between the case presented by you and the one presented by Harry S. Core, to whom opinion No. 631 was rendered, arising from the fact that section 7200 G. C. gives the county commissioners authority to hire an automobile for the use of the county surveyor, whereas in the case presented by you there is no authority given the county commissioners under the statutes to hire an automobile for the use of the county sheriff and his deputies. In the former case the real question to be determined was whether or not the principle of public policy prohibited the commissioners from hiring the surveyor's machine for the use of said surveyor and his assistants in the performance of their official duties, whereas in this case it is unnecessary to decide that question, as the commissioners have no authority to hire a machine from any one for the use of the sheriff.

I might in this connection call your attention to section 2997 of the General Code, which reads in part as follows:

"In addition to the compensation and salary herein provided, the county commissioners shall make allowances quarterly to each sheriff * * * and all expenses of maintaining horses and vehicles necessary to the proper administration of the duties of his office."

The question of whether or not this section of the General Code would include automobile hire was passed upon in the case of State ex rel. Sartain, as sheriff of Franklin county, Ohio, v. Sayre, as auditor, etc., 12 O. N. P. 61. The syllabus in said case reads as follows:

"It is within the discretion of county commissioners to make an allowance to the sheriff for automobile hire, incurred in and necessary to a proper administration of the duties of his office in the service of writs and processes or in pursuing or transporting persons who are wards of the state or are charged with crime."

This question was passed upon by my predecessor, in an opinion rendered July 20, 1915, found in the Reports of the Attorney-General for the year 1915, Vol. 2, page 1276, wherein he held as follows:

"While section 2997 contains the word 'maintaining' and does not contain the word 'operating,' it would undoubtedly follow that said section authorizes the allowance of all expenses incident to the use of the automobile in public business, and would include oil and gasoline, as well as necessary repairs to tires and parts.

"The county commissioners may, therefore, make an allowance to the sheriff for the expenses of maintaining and operating his automobile when used in the proper administration of the duties of his office. * * * Just what proportion of the expenses may be charged against public funds will depend upon the facts in each particular case and is more a matter of policy than of law."

I agree with the opinion above quoted and am of the opinion that section 2997 authorizes the commissioners to make an allowance to the sheriff of expenses incurred by said official for the use of his own machine in the discharge of his official duties.

If, however, said machine is not used exclusively by the sheriff for public business, it will be necessary for the commissioners to make some arrangement for the division of the expense of maintaining and operating said machine, but in no case can such arrangement include any item of compensation for the use of said machine.

Answering your question specifically, therefore, I advise you that the reasoning used in opinion 631 cannot be extended to apply to any county official except the county surveyor, and that the county commissioners have no authority to hire the sheriff's machine for the use of the sheriff in the performance of his official business, but that the commissioners, under authority of section 2997 may make allowances to the sheriff to reimburse him for the expense of using his own machine for public business.

I might in passing call your attention to section 2412-1 G. C., as amended in 107 O. L., p. 585, which reads:

> "That, whenever the county commissioners are of the opinion that it is expedient to purchase one or more automobiles or other vehicles for the use of the county commissioners and county sheriff, in order to facilitate the transaction of public county business, they shall adopt a resolution to that effect, and shall file an application in the court of common pleas, setting forth the necessity for such purchase, together with a statement of the kind and number of vehicles required and the estimated cost of each such vehicle. Ten days' notice of the time of hearing such application shall be published in a newspaper of general circulation in the county. If upon such hearing of said application the court shall find that it is necessary and expedient to purchase one or more of such vehicles, it shall so order, and shall fix the number and kind of such vehicles, and the amount to be expended for each."

Very truly yours,
JOSEPH McGHEE,
Attorney-General.

877.

BOARD OF EDUCATION—BY WHOM SUCCESSOR TO MEMBER WHOSE TERM EXPIRES THE DAY PRECEDING THE THIRD SATURDAY IN JANUARY IS APPOINTED.

The member of the county board who is elected to succeed the member whose term expires the day preceding the third Saturday in January in each year, must be elected by the presidents of the boards of education, which presidents are themselves elected on the first Monday in January each year.

The appointing power cannot forestall the rights and prerogatives of their own successors by appointing successors to office expiring after their power to appoint has itself expired.

COLUMBUS, OHIO, December 19, 1917.

HON. C. M. CALDWELL, *Prosecuting Attorney, Waverly, Ohio.*

DEAR SIR:—Your request for my opinion reads as follows:

> "Under section 4729 of the General Code, as amended in Vol. 104 O. L. 136, should the member of the county board of education whose term begins the third Saturday in January, 1918, be elected by the present presidents of the rural boards, or should he be elected by the presidents of the boards as they will be constituted after the first Monday in January, 1918?

"Was the election of a member of the county board, term to begin in January, 1918, at a meeting of the presidents held in August, 1917, upon call of the county superintendent, legal? Or, should not the meeting for this purpose be called after the first Monday in January, and before the third Saturday in January, 1917?"

Section 4728 G. C. provides that each county school district shall be under the supervision and control of a county board of education which is composed of five members, each of whom shall be elected by the presidents of the various village and rural boards of education in such county school district.

Section 4728-1 G. C. provides that all school districts other than village and city school districts within a civil township shall be jointly entitled to one vote in the election of members of the county board of education; that is, that the presidents of the boards of education of all such districts in a civil township shall meet for the purpose of choosing one of their number to cast the vote for members of the county board of education and if no such meeting is held wherein the person is chosen to cast such vote, then the president of the board having the largest tax valuation shall represent all such districts of the civil township at the election of the county board member.

Section 4729 G. C. provides that the term of office of the members of the county board of education shall begin "on the third Saturday of January" and shall extend for a period of five years. Section 4730 G. C. provides that the call of the various presidents of the boards of education for the election of the county board member shall be issued by the county superintendent, that the meeting shall organize by electing a chairman and a clerk, and that the result of the election of such county board member shall be certified to the county auditor by the chairman and clerk of the meeting.

Section 4732 G. C. provides that:

"Each county board of education shall meet * * * on the third Saturday of March of each year * * * and shall organize by electing one of its members president and another vice-president, both of whom shall serve for one year,"

and that the county superintendent shall act as secretary of the board.

Section 4745 G. C. provides:

"The term of office of members of each board of education shall begin on the first Monday in January after their election and each such officer shall hold his office for four years * * * and until his successor is elected and qualified."

The above refers to the members of boards of education of the various school districts and does not refer to the members of the county board of education.

Section 4747 G. C. provides:

"The board of education of each city, village or rural school district shall organize *on the first Monday in January after the election of members of such board.* One member of the board shall be elected president, one as vice-president and a person who may or may not be a member of the board shall be elected clerk. The president and vice-president shall serve for a term of one year and the clerk for a term not to exceed two years. * * *"

This last quoted section provides for the organization of the various boards of education of school districts, except the board of education of the county school district.

Section 4838 G. C. provides:

> "All elections for members of boards of education shall be held on the first Tuesday after the first Monday in November in odd numbered years."

This section refers to members of boards of education of city, village and rural school districts, but does not include the members of the county board of education.

From the above, then, you will note that the term of office of the members of the boards of education, except the county board of education, shall begin on the first Monday in January after such members have been elected and that the election of such members is to be in odd numbered years and at the time of the holding of the general election, viz., the first Tuesday after the first Monday in November thereof. Such boards of education, except the county board of education, shall meet and organize on the day the terms of the newly elected members begin, that is, the first Monday in January every other year. In other words, the organization of the board of education occurs every year and a period of one year from and after the first Monday of January in each year. As also above noted, the presidents of the boards of education of the various districts of the county school district, that is, the boards which have a vote in the selection of a county board member, shall compose the electing body for the selection of the members of the county board. The term of office of the county board member shall begin on the third Saturday in January and shall extend for a period of five years. So that the end of the term of a member of the county board of education would be at the end of the day preceding the third Saturday in January, five years after the time at which such member began the term, and no vacancy would exist and no term would terminate until that date.

Your question resolves itself, then, into the following:

> Does the election of such new members fall to the presidents who are elected on the first Monday in January next preceding such third Saturday in January at which the county board members term begins, or can such county board members be elected by the presidents of the various boards prior to such first Monday in January?

It is a well established principle of law that:

> "The appointing power cannot forestall the rights and prerogatives of their own successors by appointing successors to office expiring after their power to appoint has itself expired."

In opinion No. 495 this department held that a county board of education had no authority to elect a county superintendent to succeed one whose term did not begin during the term of all the members of the board seeking to so elect such county superintendent. In that opinion was cited the case of State v. Sullivan, 81 O. S. 79-92, wherein the following language is used:

> "It admittedly is the well established general rule of law that an officer clothed with authority to appoint to a public office, cannot, in the absence of express statutory authority, make a valid appointment thereto for a term which is not to begin until after the expiration of the term of such appointing officer.

Mechem in his work on Public Offices and Officers, at section 133, cites the general rule as follows:

'The appointing power cannot forestall the rights and prerogatives of their own successors by appointing successors to office expiring after their power to appoint has itself expired.' The author then quotes with approval the language of Buchanan, J., in Ivy v. Lusk, 11 La. An., 486, where he says:

'That an appointment thus made by anticipation has no other basis than expediency and convenience, and can only derive its binding force and effect from the supposition that there will be no change of person, and consequently of will, on the part of the appointing power, between the date of the exercise of that power by anticipation, and that of the necessity for the exercise of such power by the vacancy of the office.'

Throop on his treatise on Public Officers, section 92, says:

'But it has been held that where an office is to be filled by appointment by the governor, with the advice and consent of the senate, the governor and senate cannot forestall their successors, by appointing a person to an office, which is then filled by another, whose term will not expire until after the expiration of the terms of the governor and senators. And that an outgoing board of free-holders of a county cannot lawfully appoint a person to an office which will not become vacant during their official terms.' *The correctness and soundness of the rule and doctrine as above enumerated, so far as investigation has disclosed to us, is not opposed by any of the authorities,* but is supported by many, among which are State ex rel. Bownes v. Mechan, 45 N. J. L. 189; The People, ex rel. Sweet, v. Ward, 107 Cal. 236; Ivy v. Lusk, 11 La. An., 486."

In that case it was urged that the board was a continuing body and that only one member was being changed and that therefore the personnel of the board would only be changed in part, and for that reason it could not be considered a new board. But the court held in State ex rel. Attorney General v. Thompson, 6 O. C. D. 106-110, that:

"At the time of the attempted appointment of the defendant by the commissioners it was known that when the office should become actually vacant, the personnel of the board would be changed by the expiration of the term of Mr. Cassidy. For that reason, in addition to the others I have stated, *the board had no power to make his appointment.*"

In this case it cannot be determined until after the organization of the various boards of the county just how many changes there will be in the electing body, but it is only fair to assume that on account of the election of new members to the various boards there will be some changes and that the electing body will have a different personnel after the first Monday in January than what it has had this time.

Following the above authorities, then, I must advise you that a member of the county board of education who is elected to succed the member whose term expires on the day preceding the third Saturday in January, 1918, must be elected by the presidents of the various boards of education of the county school districts who are elected on the first Monday in January, 1918, or who are serving until their successors are duly elected and qualified. That is to say, it will be for the new electing body and not the old to select such successor.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

878.

WITNESS FEES—BEFORE GRAND JURY—LIMITED TO $1.00 PER DAY—REGARDLESS OF THE NUMBER OF CAUSES HE APPEARS IN—UNLESS OTHERWISE SPECIALLY ORDERED BY THE COURT—RECOVERY MAY BE HAD AGAINST WITNESS FOR EXCESS FEES.

A witness subpoenaed to appear before a grand jury is limited to the one witness fee of $1.00 per day regardless of how many causes he appears in before the grand jury during the day, unless the court otherwise directs by special order.

The court may, by reason of section 3014 G. C., if it sees fit, allow a witness a witness fee for his appearance before the grand jury on any one day, which allowance shall be made by special order, as provided by statute.

Where a witness has been paid more than one witness fee for appearing on any one day, without special order from the court, recovery can be had against the witness receiving the excess fees.

COLUMBUS, OHIO, December 19, 1917.

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

GENTLEMEN:—I have your letter of November 12, 1917, as follows:

"We respectfully request your written opinion upon the following questions:

(1) May a witness, who has been subpoenaed to appear before a grand jury, say at 9 a. m., at 2 p. m. and at 3:30 p. m., of the same day, be legally paid a witness fee for each appearance, or is he limited under the provisions of section 3014 G. C. to only one dollar?

(2) May a court under the circumstances set forth make a sepcial order granting a witness a fee for each appearance before a grand jury?

(3) If you should hold that witnesses can only be paid one witness fee, can findings for recovery be made against witnesses who have received more than one fee for any one day's appearance for attendance before a grand jury, or when testifying in more than one cause?"

Section 3014 of the General Code reads:

"Each witness attending under recognizance or subpoena, issued by order of the prosecuting attorney or defendant, before the court of common pleas, or grand jury, or other court of record, in criminal causes, shall be allowed the following fees: For each day's attendance one dollar, and five cents for each mile, the same as in civil causes, to be taxed in only one cause, when attending in more causes than one on the same days, unless otherwise directed by special order of the court. When certified to the county auditor by the clerk of the court, fees under this section shall be paid from the county treasury."

It will be noted that this section provides that the witnesses may receive "for each day's attendance, $1.00, and five cents for each mile, the same as in civil causes, to be taxed as in only one cause when attending in more causes than one on the same days, unless otherwise directed by special order of the court." This provision makes it clear that the witness is limited to the one witness fee of $1.00, regardless of how many causes he appears in before the grand jury in one day, unless the court otherwise directs by special order. This answers your first question.

Answering your second question I would advise that the court may, if it sees fit, allow a witness a witness fee for each appearance before the grand jury on any day since the statute vests that discretion in the court, provided such appearances are on separate matters.

Answering your third question, I would advise you that where witnesses have been paid more than one witness fee for appearing on any one day, without any special order from the court, recovery might be made against witnesses receiving the excess fees, since the payment of these excess fees to them is payment not warranted by law.

Vindicator Printing Company v. State, 68 O. S., 362.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

879.

TRANSPORTATION—OF PERSONS TO HOSPITAL FOR THE INSANE—ALLOWANCE OF SHERIFF FOR SAME GOVERNED BY SECTION 2997 G. C.—SECTION 1982 REPEALED BY IMPLICATION.

The act of March 22, 1906, found in 98 O. L. 89, section 19 of which contained originally the provisions of section 2997 General Code, repealed by implication section 1982 G. C., in so far as that section related to the method of transportation of persons to the hospital for the insane.

The allowance to be made the sheriff, therefore, for his expenses incurred in transporting and conveying persons to such hospitals is now to be governed entirely by section 2997 G. C.

COLUMBUS, OHIO, December 20, 1917.

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

GENTLEMEN:—I have your letter of November 22, 1917, as follows:

"We respectfully request your written opinion upon the following questions:

(1) Can a sheriff convey an insane patient to a state hospital in a county other than his own county by automobile and be reimbursed for the expense of such commitment under the provisions of section 2997 G. C., or does the provision of section 1982 G. C. govern as to the method of commitment so far as the use and expense of a conveyance is concerned?

(2) Should you hold that the conveyance must be by railroad and not by automobile, may the examiners of this department make a finding for recovery against a sheriff, who has made such commitment in an automobile, for the difference in cost, the cost by the automobile being three times as much as it would have been by rail?"

Section 1982 G. C. reads:

"When it appears at the time of conveying such person to the hospital that the condition of the patient so requires, a conveyance may be provided from the nearest railroad station, or in counties where state hospitals are located, from the county seat to the hospital,and the expense thereof and the costs and expenses specified in the preceding section shall be paid from the county treasury upon the certificate of the probate judge."

Section 2997 General Code reads:

"In addition to the compenastion and salary herein provided, the county commissioners shall make allowances quarterly to each sherlff for keeping and feeding prisoners, as provided by law, for his actual and necessary expenses incurred and expended in pursuing or transporting persons accused or convicted of crimes and offenses, in conveying and transferring persons to and from any state hosiptal for the insane, the institution for feeble-minded youth, Ohio hospital for epileptics, boys' industrial school, girls' industrial home, county homes for the friendless, houses of refuge, children's homes, sanitariums, convents, orphan asylums or homes, county infirmaries, and all institutions for the care, cure, correction, reformation and protection of unfortunates, and all expenses of maintaining horses and vehicles necessary to the proper administration of the duties of his office. The county commissioners shall allow the sheriff his actual railroad fare and street car fare expended in serving civil processes and subpoenaing witnesses in civil and criminal cases, and may allow his necessary livery hire for the proper administration of the duties of his office. Each sheriff shall file under oath with the quarterly report herein provided a full, accurate and itemized account of all his actual and necessary expenses, including railroad fare, street car and livery hire mentioned in this section before they shall be allowed by the commissioners."

Section 1959 G. C. reads:

"When advised that the patient will be received, the probate judge shall forthwith issue his warrant to the sheriff, commanding him forthwith to take charge of and convey such insane person to the hospital. If the probate judge is satisfied, from proof, that an assistant is necessary, he may appoint one person as such. If the insane person is a female, he shall appoint a suitable female assistant to accompany the sheriff and such insane person to the hospital."

Section 1982 G. C. originally appeared in an act passed April 29, 1891, entitled "an act to amend section 719 of the Revised Statutes." Up to the passage of this act the sheriff was only entitled to certain mileage for transporting persons to the asylum, but no provision was made concerning the hiring of any conveyance. In the act above referred to the following provision was read into section 719 R. S.:

"Provided that in counties containing a city of the first class, second grade, when it shall be made to appear to the probate judge that the condition of the patient makes the same necessary, he shall make an order authorizing the sheriff to provide a conveyance for said patient, and the same shall be taxed in the bill of costs and paid as other costs in the case."

In 93 O. L., page 198, section 719 of the Revised Statutes was again amended and the provision above referred to was made to read:

"The costs specified shall be paid out of the county treasury upon the certificate of the probate judge, provided that when it appears necessary to the sheriff at the time of conveying said person to the hospital, the condition of the patient requires the same, he shall be authorized to provide a conveyance for said patient from the next railroad station, except that in counties where state hospitals are located the sheriff may provide a conveyance from the

county seat and the costs of the same shall be taxed in the bill of costs and paid as other costs in the case."

This section was again amended in 95 O. L., 286, but the provision referred to remained practically the same and was carried in that form into the General Code as section 1982.

Section 2997 G. C. was originally section 19 of an act passed March 22, 1906, 98 O. L., page 89-96, and read substantially as we now find it in the General Code.

From the above it will be seen that section 2997 of the General Code is a later enactment than section 1982 of the General Code. It also appears that section 2997 G. C., in providing that the county commissioners may allow the sheriff his actual and necessary expenses incurred "in conveying and transferring persons to and from any state hospital for the insane" covers the same subject matter as section 1982 of the General Code. It is evident, too, from a reading of both sections that section 2997 G. C. is inconsistent with section 1982 G. C. in that the expenses of the sheriff in conveying and transporting persons to the state hospital are to be allowed by the county commissioners under section 2997 and under section 1982 G. C., are to be paid from the county treasury upon the certificate of the probate judge.

In Goff et al. v. Gates, et al., 87 O. S., 142, it was held:

> "An act of the legislature that fails to repeal in terms an existing statute on the same subject matter, must be held to repeal the former statute by implication if the latter act is in direct conflict with the former, or if the subsequent act revises the whole subject-matter of the former act and is evidently intended as a substitute for it."

In view of the above I am of the opinion that the act of March 22, 1906, found in 98 O. L., page 89, section 19 of which contained originally the provisions of section 2997 G. C., repealed by implication section 1982 G. C. in so far as that section related to the transportation of insane persons to the state hospital.

The allowance to be made the sheriff, therefore, for his expenses incurred for transporting and conveying persons to the state hospital is now to be governed entirely by section 2997 G. C. There may be many cases where it might be unwise to attempt to transport insane persons by rail and if the sheriff conveys them by automobile and the county commissioners are of the opinion that his action, in so doing, is proper, I am of the opinion that they may allow him the automobile expense thus incur ed. Of course there may be cases when the authority to empower the sheriff to so transport persons may be abused, but whether or not such abuse is in evidence in any certain case is a matter for the county commissioners to determine.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

880.

STATE BOARD OF EMBALMING EXAMINERS—WITHOUT AUTHORITY TO RETURN FEES TO APPLICANT FOR REGISTRATION, EXAMINATION OR LICENSE—APPLICANT MUST PAY SAME FEE FOR SECOND EXAMINATION—NO POWER TO REFUSE LICENSE BY AFFIDAVIT TO QUALIFIED PERSON—AFFIDAVIT IN CRIMINAL PROSECUTION—HOW SAME SIGNED—LIABILITY OF PERSON WHO SIGNS SAME.

1. *The state board of embalming examiners is without authority to return fees which have been properly received for registration, examination, license by affidavit or for reciprocal license.*

2. *An applicant who fails at an examination and takes a second or re-examination, must pay the same fee as is charged at the first or original examination.*

3. *The state board of embalming examiners has no power to refuse a license by affidavit to a person who qualifies under the provisions of section* 1343 *G. C.*

4. *The secretary-treasurer cannot sign an affidavit in a criminal prosecution in an official capacity. The same must be signed by him personally and in his own private capacity.*

5. *The person who signs the affidavit is not liable in damages unless the action is brought without probable cause or unless he acts maliciously.*

COLUMBUS, OHIO, December 20, 1917.

The State Board of Embalming Examiners, B. G. JONES, *Secretary-Treasurer, Columbus, Ohio.*

GENTLEMEN:—My opinion is requested upon the following questions:

"1. I respectfully ask for your opinion as to whether this board has the authority to return for any cause fees received for registration, examination, licenses by affidavit or reciprocal licenses.

2. Also if an applicant registers and takes an examination and fails to receive the necessary passing grade and applies to the board again for an examination, what is the fee that the law requires of him. In other words, does this applicant have to again pay the registration and the examination fee or will the payment of the examination fee be sufficient?

3. Has this board the power to refuse a license by affidavit, even if the provisions of the General Code have been complied with, if the board has knowledge that the applicant is not a proper person to have a license?

4. Can the secretary-treasurer sign a warrant for the arrest of an offender in his official capacity or must he sign it personally?

5. If he signs it personally, is he (secretary-treasurer) not liable for damages providing the case is decided against him?"

Registration fees for persons who desire to take examinations for a license as embalmer in this state are provided for by section 1342 G. C., which reads as follows:

"Every person desiring to engage in the practice of embalming or the preparation of the dead for burial, cremation or transportation, in the state of Ohio, shall make a written application to the state board of embalming examiners for *registration,* giving such information as the said board may, by regulation, require for such registration. *Each application must be accompanied by a fee of one dollar* * * * If the said board shall find the facts set

forth in the application to be true, the said board shall issue to said applicant a certificate of registration. * * * ."

Examination fees for applicants who desire to become licensed embalmers in the state of Ohio are provided for in section 1342 G. C., as follows:

" * * * All applications for a license to practice embalming and the preparation of the dead for burial, cremation or transportation in this state, must be made to the state board of embalming examiners in writing and contain the name, age, residence and the person or persons with whom employed, the name of the school attended, together with a certificate from two reputable citizens that the applicant is of legal age and of good moral character, also a certificate under oath when required by the said board from the president or dean of the embalming school or college he or she has attended, that the applicant has complied with the requirements of said school or college or a certificate under oath when required by said board, from the licensed embalmer under whom he or she has worked as an apprentice, that he or she has complied with the requirements of apprenticeship as set forth in this section. *Each application must be accompanied by a fee of ten dollars and the certificate of registration.* * * *."

License by affidavit fees are provided for in section 1343 G.. C. as follows:

" * * * This section and the two preceding sections shall not apply to any person * * * engaged in the practice of embalming or the preparation of the dead for burial, cremation or transportation prior to January 1, 1903, provided that he or she has had at least three years practical experience, if such person, prior to January 1, 1918, makes application to the state embalming examiners *for a license accompanied by a fee of* $25.00, and an affidavit certifying that he or she was in such practice before January 1, 1903, and thereupon the state board of embalming examiners shall issue a license to such applicant. * * * ."

Reciprocal license fees are provided for in section 1343-1 G. C. as follows:

"The state board of embalming examiners may grant without examination an embalmer's license to a duly licensed embalmer of another state, who shall have been examined by a regular board of embalming examiners on substantially the same subjects and requirements demanded by the board of this state, and shall have obtained an average grade of not less than seventy-five per cent in such examination. Such license shall be known as a reciprocal license. * * * Each applicant for a reciprocal license *shall pay a license fee of twenty-five dollars.* * * * "

Section 24 of the General Code reads in part as follows:

"On or before Monday of each week every state officer, state institution, department, *board,* commission, * * * shall pay to the treasurer of state all moneys, checks and drafts received for the state, or for the use of any such state officer, state institution, department, board, commission, * * * during the preceding week, from taxes, assessments, licenses, premiums, fees, penalties, fines, costs, sales, rentals or otherwise, and file with the auditor of state a detailed verified statement of such receipts. * *"

I know of no provision of law which permits the return of fees which are received by the board of embalming examiners and which are paid into the state treasury to be returned or refunded and I therefore advise you that your board has no authority to return fees received for registration, examination, licenses by affidavit or reciprocal licenses. It should be said, however, in relation to the fees for a reciprocal license, that while the same is paid for the license, yet I am informed that such fee usually accompanies the application or request for such license. Reciprocal licenses are granted, if at all, without an examination being had therefor and only after the board has determined that the applicant is a regularly licensed embalmer of another state and has been examined by a regular board of embalming examiners on substantially the same subjects and requirements as are demanded by the board of this state and that such applicant shall have obtained an average grade of not less than seventy-five per cent in such examination. If the fee accompanies such application or request for such reciprocal license and is held by the board or an officer thereof while the investigation as to the qualifications of such applicant is being made, such fee is so held by the board or an officer thereof not in any official way, but simply as agent of the applicant during the time of such investigation and subject to be returned to him at his request in case he fails to qualify or to be received officially by the board if the applicant's qualifications are found to be proper; and at such time as it is so officially received it should then be paid into the state treasury as other fees and cannot then be returned or refunded.

Coming now to your second question, you will note again that part of section 1342, which is first above quoted and which provides that before a person may take an examination before the board of embalming examiners he must receive a certificate of registration, and if the board finds the facts set forth in the application to be true, the board shall issue to such applicant a certificate of registration. There is nothing in the statute which provides that a new certificate must be issued before each examination and I can conceive of no good reason why the same should be done. The filing of the application for a certificate of registration gives the board an opportunity to investigate the applicant and his credentials and the fact that he does not pass the examination does not, it seems to me, argue that his qualifications as to moral character, age and general education shall again be inquired into. In other words, it seems to me it would be presumed that there would be no further investigation to be made prior to another examination, and I therefore advise you that the examination fee of $10.00 is all the fee that is required of an applicant who desires to take a second examination.

Coming now to your third question. Attention is called again to that part of section 1343, above quoted, in which it is provided that section 1343, section 1342 and section 1341 of the General Code shall not apply to those persons who were engaged in the preparation of the dead for burial, cremation or transportation, prior to January 1, 1903, provided that such person has had at least three years practical experience, and provided further that such person, prior to January1, 1918, makes an application to the state board of embalming examiners for a license and accompanies such application with a fee of $25.00 and a certificate that he or she was engaged in such practice before January 1, 1903. The statute then provides "and thereupon the state board of embalming examiners shall issue a license to such applicant." Moral character, age, general education, etc., which are made qualifications in the other sections referred to, do not seem to apply to persons who are able to secure a license by affidavit. Such person, however, would be amenable to the provisions of section 1343-2, which reads:

> "The state board of embalming examiners may revoke and void a license obtained by fraud or misrepresentation, or if the person named therein uses intoxicants or drugs to such a degree as to render him unfit to practice embalm-

ing, or has been convicted of a felony subsequent to the date of his license, such revocation may be vacated, reversed or set aside for good cause shown at the discretion of the board."

Answering your third question, then, I advise you that the board cannot refuse a license to one who applies by affidavit under section 1343 G. C. if all the provisions of the General Code have been complied with

Coming now to your fourth question, I advise you that the person who occupies the position of secretary-treasurer of the board cannot sign an affidavit for the arrest of an offender in any official capcaity. If he signs and makes oath to an affidavit, he must do the same in his own personal capacity. In order to identify him there is nothing wrong, except that it is a mere matter of surplusage, to say in the body of the affidavit that such person is the secretary-treasurer of the state board of embalming examiners, and it adds nothing to the affidavit, and in signing the same it must be signed and sworn to personally.

In your fifth question you ask if such secretary-treasurer signs the affidavit personally whether or not he is liable for damages providing the case is decided against him. In answer thereto I advise you that where a person signs an affidavit which is regular and proper in form, and which covers the facts in reference to the complaint, and which is filed before a magistrate having jurisdiction of such matter, and the proper person is arrested, the person who so signs such affidavit is not liable in damages for false imprisonment or malicious prosecution simply because he signs such affidavit, even if there is a failure in such prosecution.

It is held in 19 Cyc., 329, that:

"The law recognizes no distinct privilege on the part of persons who procure the arrest of others; but in the interest of the administration of justice it does not treat the mere giving of information or the executing or filing of a complaint concerning an offense justifying arrest or punishable by imprisonment as causing an unlawful detention so as to impose responsibility in false imprisonment."

In Cooley on Torts, Vol. 1, page 314, the author says:

"One who merely states the facts to a magistrate and signs and swears to a complaint embodying such facts is not liable for false imprisonment."

But in Truesdall v. Combs, 33 O. S. 186, the court holds:

"Where a justice of the peace, without authority of law, issues a warrant of arrest, both he and the person at whose instance he acts are liable in an action for false imprisonment at the suit of the party illegally arrested by virtue of such warrant."

This latter case, however, was disapproved in Robertson v. Parker, 99 Wisc., 659; 67 Am. St. Rep., 889; 75 N. W., 423; wherein the court held that a municipal judge was not liable for erroneously assuming to commit one to prison unless he acted wilfully, maliciously or corruptly in exercising such jurisdiction.

It is held in Cooley on Torts, Vol. 1, page 320, that:

"It is a duty which every man owes to every other not to institute proceedings maliciously which he has no good reason to believe are justified by

the facts and law. Therefore an action, as for tort, will lie when there is a concurrence of the following circumstances: First, a statute or proceeding has been instituted without any probable cause therefor; second, the motive in instituting it was malicious; third, the prosecution has terminated in the acquittal or discharge of the accused."

So that if there has been probable cause in instituting the suit or proceeding and no malice entered therein, there can be no action for damages even though the prosecution terminates in the acquittal or discharge of the accused.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

881.

APPROVAL—CONTRACT BETWEEN FRANK TEJAN, OF DAYTON, OHIO, AND SUPERINTENDENT OF PUBLIC WORKS.

COLUMBUS, OHIO, December 20, 1917.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—You have submitted to this department contract entered into by you with Frank Tejan, of Dayton, Ohio, on October 9, 1917, for furnishing materials, equipment and labor necessary for the enlarging by dredging and cleaning out of the Tuscarawas feeder, in Summit county, Ohio, from the bulkhead of feeder, between certain stations designated, in the sum of $5,213.16, and have also submitted the bond securing the same.

I have examined the contract and bond and finding the form thereof in compliance with law have approved the same.

The auditor of state having certified that there is money available for the payment of the amount called for by said contract, I have this day filed the said contract and bond with the auditor of state and am herewith returning to you the duplicate copies thereof.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

882.

APPROVAL—BONDS—VILLAGE OF SOUTH NEWBURGH.

COLUMBUS, OHIO, December 20, 1917.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

IN RE: Bonds of the village of South Newburgh, Ohio, in the sum of $30,000, for the purpose of paying the village's share of the cost and expense of improving certain determined streets in said village.

I have carefully examined the transcript of the proceedings of the village council and other officers of the village of South Newburgh, Cuyahoga county, Ohio, relating

to the above bond issue, and find said proceedings to be in conformity to the provisions of the General Code relative to bond issues of this kind.

I am therefore of the opinion that bonds properly prepared according to the bond form submitted will, when signed by the proper officers and delivered, constitute valid and binding obligations of said village.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

883.

STATE BOARD OF EMBALMING EXAMINERS—HOW VOUCHERS OF MEMBERS APPROVED.

Vouchers of members of the board of state embalming examiners shall be approved by the board or by the secretary-treasurer under authority so to do having been granted by the board, and shall be countersigned by the secretary-treasurer of the board.

COLUMBUS, OHIO, December 20, 1917.

HON. B. G. JONES, *Secretary-Treasurer, the State Embalming Board, Columbus, Ohio.*

DEAR SIR:—My opinion is requested by you on the following matter:

> "Who should approve the vouchers of members of this board for traveling expenses and per diem. For your information it has been customary for the secretary-treasurer to approve them upon receipt of the board members,daily report."

General Code section 1338 G. C., after providing that on the second Tuesday of July of each year the state board of embalming examiners shall organize and elect from their number a president and a secretary-treasurer, further provides that the secretary-treasurer shall serve during the pleasure of the board and keep a complete record of the transactions of the board, collecting all money and performing any other duties required by the board. It is further provided in the same section that the board shall from time to time make and adopt rules, regulations and by-laws for its government, not inconsistent with the laws of this state and the United States. Two members shall constitute a quorum at a meeting of the board.

General Code section 1339, as found in 107 O. L., page 655, reads:

> "Each appointed member of the state board of embalming examiners except the secretary-treasurer shall receive ten dollars per day and their reasonable and necessary traveling expenses while discharging the actual duties of their office. The secretary-treasurer shall receive an annual salary which shall be fixed by said board, and such necessary expenses as are incurred in the performance of his duties as secretary-treasurer. The fees received under the provisions of this chapter shall be paid into the state treasury to the credit of a special fund. *The salaries and expenses incurred by the board and the members thereof in the discharge of their duties shall be paid by the state auditor on vouchers counter-signed by the secretary-treasurer,* and the state of Ohio shall not be liable for same or be at any expense in this connection beyond the amount received as fees."

Section 242-1, as found in 107 O. L., p. 639, reads in part:

"* * * Whenever in any statute the word 'voucher 'is used, the same shall be held to mean such order and invoice, and the provisions of section 242-1, section 242-2 and section 243 of the General Code shall apply thereto. *All orders and invoices shall be approved by the officer, board, commission or trustee of* an institution issuing the same, but such trustees, board or commission may by resolution or order filed with the auditor of state designate either a chief executive or the secretary or a clerk of such trustees, board or commission to approve the same."

Section 243 G. C., as amended in 107 O. L., 640, provides in part:

"* * * *The auditor of state shall examine each* invoice presented to him, or *claim for salary,* of an officer or employe of the state * * * and if he finds it to be a valid claim against the state and legally due and that there is money in the state treasury duly appropriated to pay it, and that all requirements of law have been complied with, he shall issue thereon a warrant on the treasury of state for the amount found due and file and preserve the *invoice* in his office. * * * "

So that when a member of the state board of embalming examiners files a claim for his per diem and his reasonable and necessary expenses incurred while discharging the actual duties of his office, the first that must be done is that the same must be approved, either by the board or by some one duly authorized by the board to approve the same in its place and stead. The board may, under the provision of section 242-1 G. C., above quoted, designate the secretary of the board to approve such vouchers on behalf of the board and if such designation is so made and the approval is so given by the secretary-treasurer of the board, that act then in effect is the act of the board approving such vouchers. If, however, no rule is made by the board authorizing the secretary-treasurer to approve said vouchers for and on behalf of the board, then I am of the opinion that such per diem and expense accounts are to be presented to the board and should be approved by the board, no less than two of whose members shall be present at a meeting at which such approval takes place. But even though the voucher is approved by the board, or if it is approved by the secretary-treasurer, after being authorized so to do by the board, the secretary-treasurer must still countersign the voucher, as is provided by section 1339 G. C., above quoted. When the same is approved by the board, or is approved by the secretary-treasurer under an authorization by the board, the same then goes to the auditor of state, who shall examine the same and ascertain if it is a valid claim against the state and if it is legally due and if there is money in the state treasury duly appropriated to pay, and if all requirements of law have been complied with, and if the auditor of state finds each and all of the above requirements complied with, then he shall issue a warrant on the state treasurer for the amount thereof and shall file and preserve the invoice, which in this case is the voucher, in his office.

Answering your question then I advise you that the board shall approve all vouchers for per diem and traveling expenses, but under the provisions of section 242-1 G. C. the board may authorize the secretary-treasurer to approve same for and on behalf of the board, and after the same are approved they shall be countersigned, as is provided by section 1339 G. C., by the secretary-treasurer of the board before they are presented to the auditor of state for his examination and warrant.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

884.

DISAPPROVAL—BONDS—STRATTON VILLAGE SCHOOL DISTRICT OF JEFFERSON COUNTY.

COLUMBUS, OHIO, December 20, 1917.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

RE: Bonds of Stratton village school district of Jefferson county, Ohio, in the sum of $25,000.00, to purchase site for and erect a school house in said school district.

I am herewith returning without approval transcript of the proceedings of the board of education and other officers of Stratton village school district relating to the above bond issue. An examination of the said transcript discloses the following defects relating to said proceedings:

1. The date of the meeting of the board of education of said school district at which the resolution was adopted submitting to the electors of said school district the proposition of said bond issue appears only by way of recital in the notice of election, which is set out in said transcript, but there is nothing whatever in said transcript to indicate the character of said meeting. If it be claimed that said meeting was a regular meeting, so much of the minutes in the record of the board of education at some legal meeting should be set out as show the adoption by the board of a rule fixing the dates for the regular meetings of the board as provided by section 4747 of the General Code.

If it be claimed that this meeting was a special meeting, then such facts should be stated in the transcript as affirmatively show that notice of said meeting was given in the manner required by section 4751 General Code.

The transcript shows that apparently all of the members of the board of education were present at this meeting, and this fact probably cures any defect in the legal character of the meeting at which this resolution was adopted, However, a transcript of the proceedings of the board of education relating to a bond issue should set out such facts as will affirmatively show the character of the meeting at which the board of education took action relating to such bond issue.

2. The transcript contains a certificate signed by the clerk of the board of supervisors of elections of Jefferson county certifying the result of the election on the bond issue, and stating that twenty-eight votes were cast in favor of the proposition and eight votes were cast against the same. There is nothing, however, in the transcript to show that the board of education ever made a canvass of the votes cast at such election in the manner required by section 5120 of the General Code. I am inclined to the view that the provisions of this section, insofar as it designates the time at which the board of education shall make such canvass, are directory rather than mandatory. I am equally convinced, however, that under the provisions of said act it is the duty of the board of education to make such canvass and enter the result thereof on the records of the board, and that the board is not authorized to take any further steps relating to said bond issue pursuant to said election until such canvass has been made and the result thereof so entered on its records.

3. I find nothing in the transcript to indicate the date or character of the meeting of the board of education at which it adopted the resolution providing for the issue of the bonds, and what I have said above with respect to the meeting of the board at which it adopted resolutions submitting the proposition of the bond issue to the electors of the school district applies as well to the meeting at which the issue of bonds was provided for.

The transcript likewise reveals that at this meeting all the members of the board were present.

4. The resolution providing for the issue of bonds is fatally defective in this, that it does not contain any provision for an annual tax levy on the taxable real and personal property in said school district for the purpose of paying interest on said bonds and to create a sinking fund for the payment of said bonds at maturity as required by section 11 of article XII of the state constitution.

5. The resolution providing for the issue of bonds recites that there is

"no trustee of the sinking funds for the taxing district issuing such bonds."

but there is nothing in the transcript to indicate whether or not the school district now has an outstanding bonded indebtedness which calls for the appointment of a board of commissioners of the sinking fund of such school district as required in such cases by section 7614 General Code.

6. In addition to the foregoing the transcript is defective in not making a complete statement of the fiscal affairs of said school district, such as would be indicated by a statement of the tax duplicate valuation of taxable real and personal property in said school district, the tax rate for school and other purposes and the manner in which said rates are affected by the limitations of the Smith one per cent. law, etc.

Some of the defects above noted may be corrected on further information. However, in my opinion, the second and fourth objections above noted are fatal to the validity of this bond issue so far as the present legislation of the board of education is concerned, and I am compelled to advise you not to purchase the same.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

885.

MINOR—UNDER TEN YEARS OF AGE—MAY NOT BE EMPLOYED IN, ABOUT OR IN CONNECTION WITH ANY MINE.

The provisions of sections 912, 944 *and* 953 *G. C. do not permit the employment of children under sixteen years of age in, about or in connection with any mine. Such employment is governed by the provisions of section* 13002 *G. C.*

COLUMBUS, OHIO, December 21, 1917.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I have your communication in which you state:

> "Sections 912, 944 and 953 of the General Mining Code of Ohio, in our opinion, very much conflict with section 13002 governing the employment of minors in and around the mines of this state.
>
> Owing to these conflicting sections of the General Code many arguments and differences of opinion have arisen resulting in much confusion at the mines in the past, especially where operators and miners have felt inclined to violate the child labor law.
>
> We have just finished reading proof and have it prepared for the state printer to print 5000 copies of the mining laws.

In order to prevent past experiences we would be pleased to have you advise us in the form of an explanatory note which could be inserted at the head of the above named sections so that they may be the more readily understood by the men at the mines."

The sections, or parts thereof, which must be considered in answering your question are as follows:

"Section 912. * * * The district inspector of mines shall examine the record kept by the mine foreman, of boys under sixteen years of age employed in each mine, and report to the chief inspector of mines, the number of such persons employed in and about each mine, and enforce the provisions of this act relative to their employment.

Section 944. The owner, lessee or agent of a mine shall not employ, or permit to work therein, any boy under fourteen years of age; nor employ or permit to work therein, any boy under fifteen years of age during a term of the public schools, in the district in which he resides. * * *.

Section 953. * * * He shall keep a record of the boys under sixteen years of age employed by him, or by any other person, giving the name, age, place of birth, name and residence of parents, and character of employment. He shall require written evidence from the parent or guardian of each of said minors, that the requirements of the school laws have been complied with. * * *."

It will be noted that none of the above provisions permit the employment of minors.

Section 912 G. C. provides that the district inspector of mines shall examine the records kept of boys under sixteen years of age.

Section 953 G. C. makes it the duty of the mine foreman or the assistant mine foreman, when acting for the mine foreman, to keep a record of boys under sixteen employed by him or by any other person, but neither of the sections expressly authorize such employment. The question whether or not minors of the age mentioned can legally be employed, must be determined from an inspection of other statutes on the subject.

Section 944 supra prohibits the employment of boys under fourteen at any time, and particularly the employment of boys under fifteen, during a term of the public schools in the district in which he resides. Here again is a prohibitive statute, and nothing permissive is therein found. In the absence of any other legislation, it might well be argued that since the prohibition was against boys of a certain age being employed or permitted to work, it would be lawful for boys over the prohibitive age to be so employed.

Sections 912, 944 and 953 are part of an act found in 101 O. L. 52, passed April 5, 1910.

Section 13002 G. C. provides:

"No child under the age of sixteen years shall be employed, permitted or suffered to work in any capacity * * * (11) nor in, about or in connection with any mine, coal breaker, coke oven, or quarry; * * * ."

This section is found in 103 O. L. 864, at p. 909, and was passed on April 28, 1913.

Inasmuch as the section, a part of which was just quoted, is the last expression of the legislature upon the subject of the employment of minors in mines, it is controlling. And even if the provisions of sections 912, 944 and 953 G. C. in any manner

authorized or made legal the employment of minors, those sections would have to give way in favor of the later enactment of the general assembly.

It is my view, therefore, that in order to prevent the recurrence of the past experiences of which you speak, it would be well to insert a foot note to each of the various sections inquired about, as follows:

> "Section 13002 G. C. prohibits any child under the age of sixteen years from being employed, permitted or suffered to work in any capacity in, about or in connection with any mine, coal breaker, coke oven or quarry."

It is therefore my opinion that the provisions of sections 912, 944 and 953 do not permit the employment of children under sixteen years of age in, about or in connection with any mine, but that such employment is governed by the provisions of section 13002 G. C.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

886.

COSTS—INCURRED IN TRANSPORTING PRISONER FROM ONE CITY TO WORKHOUSE IN ANOTHER CITY—HOW PAID.

There is no authority in law for the payment of costs for transportation of prisoners from one city to the workhouse of another city in the same county, where these prisoners have been convicted of a violation of an ordinance. If the prisoner so transported has been convicted of a violation of a state law and a conviction has been had in a justice of the peace court, the county must reimburse the constable for his expense in transporting such prisoner, by virtue of section 3347 G. C. This reimbursement, however, is to include only the expense incurred in the transportation of the prisoner. The constable's personal expense must be paid by him out of his mileage. If the conviction was had in the mayor's court or police court, there is no authority for the payment of the cost of such transportation.

COLUMBUS, OHIO, December 24, 1917.

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

GENTLEMEN:—I have your letter of November 10, 1917, as follows:

> "We are referring you to an opinion of Attorney-General Edward C. Turner, rendered under date of August 5, 1915, recorded in Annual Reports for 1915, Vol. 2, page 1404. We beg to advise you that Stark county has a county work house situated at Canton, Ohio, and in cases wherein prisoners are sent to this work house from Alliance, Ohio, we respectfully request your written opinion upon the following questions:
>
> (1) In cases for violation of statutes, is the cost of transportation to be paid by the county? And in cases for violation of ordinances, is the cost of transportation to be paid by the city of Alliance?
>
> (2) May such transportation, above referred to, include both the cost of transportation of the prisoner together with the actual cost of the conveying officer?"

Section 4132 of the General Code reads:

"The officer having the execution of the final sentence of a court, magistrate, or mayor, shall cause the convict to be conveyed to the workhouse as soon as practicable after the sentence is pronounced, and all officers shall be paid the fees therefor allowed by law for similar services in other cases. Such fees shall be paid, when the sentence is by the court, from the county treasury, and when by the magistrate, from the township treasury."

In the opinion to which you refer (Opinions for 1915, Vol. 2, page 1404), Mr. Turner said:

"Your question is general, but you mention mayors and marshals in stating the same. In order to cover your questiion fully, therefore, it is necessary to deal further with one peculiarity of section 4132 which has not thus far been mentioned. This section is placed in the Municipal Code and properly so because though originally one of the Revised Statutes of general application, it has always been found in a group of sections relating to the powers and duties of municipal officers. Section 4132 itself begins by referring to 'the officer having the execution of the final sentence of a *court, magistrate or mayor.*' There is an evident discrimination here among the court, the magistrate and the mayor, so that a mayor is, in this connection at least, not regarded as either a court or a magistrate. Yet when the section comes to provide for the payment of the fees, there is provision for the method of payment when the sentence is by the court and provision when the sentence is by the magistrate, but if the mayor be, for the purposes of the section, neither a 'court' nor a 'magistrate' then there is no provision for the payment of fees when the sentence is by the mayor. I am informed that the practice has been to regard the mayor as a 'court' and in misdemeanor cases, at least, to allow fees to be paid out of the county treasury. The above cited case of Ketter v. Commissioners, does not afford any assistance in this connection because that was a case involving the fees of the sheriff, and evidently the convictions had been had in the common pleas court.

The exact question thus raised is as to the fees of the marshal and chief of police for execution of a sentence of the mayor's court in misdemeanor cases. These fees are fixed, if at all, by section 4387 with respect to the marshal and by section 4534 with respect to the chief of police, respectively. Both provide that in the one case the marshal and in the other case the chief of police shall receive 'the same fees as sheriff and constables in similar cases.' The fee of the sheriff for serving writs is seventy-five cents for the first name on the writ and twenty-five cents for each additional name and in addition thereto eight cents per mile going and returning. (Section 2845 G. C.) The fees of the constable for similar services are different. (See section 3347 G. C.) Therefore, the sections which attempt to prescribe the fees of the marshal and chief of police as the same as those allowed to sheriffs and constables for similar services are meaningless. In the case of State ex rel Ribble vs. Kleinhoffer, recently decided by the supreme court, analogous language in the statutes relative to the fees of agents of a humane society was held void for uncertainty, and in view of this decision I am of the opinion that no fees are legally taxable to a chief of police or to a marshal in a misdemeanor case, for the services referred to in section 4132 G. C. It seems therefore unnecessary to consider the significance of the omission of the word 'mayor' from the last clause of the section in the face of its inclusion in the first clause thereof. Were it necessary to do so, however, I would be of the opinion that such

omission would make it impossible to pay any fees thereunder out of the county or township treasury when the conviction has been had in a mayor's court."

As was said by Mr. Turner, the fees to constables for services rendered under section 4132 are provided for in section 4337 General Code. That section provides in part:

> "For services rendered, duly elected and qualified constables shall be entitled to receive the following fees: For service and return of copies, orders of arrest, warrant, attachment, garnishee, writ of replevin, or mittimus, forty cents each for each person named in the writ; * * * transporting and sustaining prisoners, allowance made by the magistrate, and paid on his certificate; * * * ."

Under this section a constable may charge the fee allowed therein for serving a mittimus, viz., forty cents, since he must have with him the mittimus or certificate of commitment to serve the same upon the superintendent of the workhouse. He may also receive the mileage provided for in said section. This mileage, however, simply covers his own travel and not that of the prisoner. The provision of the section allowing the constable to be reimbursed for transporting and sustaining the prisoner in such sum as the magistrate allows, I think, is broad enough to cover this case and it is my opinion that the constable may receive reimbursement for transporting and sustaining prisoners conveyed by him from one city to a workhouse in another city of the same county, and such sum may be allowed by the magistrate. This sum when so allowed must be paid to such constable from the county treasury.

In the opinion rendered August 5, 1915, above noted, this department held that no fees could be allowed marshals or chiefs of police for services in transporting prisoners from one city to a workhouse in another city in the same county, neither do I know of any provision of law authorizing the payment of any transportation of such prisoners when conveyed by the marshal or chief of police to such workhouse.

When prisoners are sentenced to the workhouse for the violation of village ordinances, they must be conveyed by either the chief of police or marshal, depending upon whether or not the conviction has been had in the police court or the mayor's court.

In view of the statement above, to the effect that there is no provision of law for the payment of any fees to these officers for this service or any provision of law covering the payment of transportation of prisoners to the workhouse by them, I would advise you that in cases of violation of ordinances I know of no authority for the payment of cost of transportation of prisoners from the city of Alliance to the workhouse in Canton, Ohio. If the prisoner had been convicted of a violation of a state law and the conviction has been had in the justice of the peace court, the county must reimburse the constable for his expense in transporting such prisoner by virtue of section 3347, above quoted. If the conviction was had in a mayor's or police court, I know of no authority for the payment of any transportation.

Answering your second question, I beg to advise, as stated above, there is but one instance when the transportation of prisoners from Alliance, Ohio, to the Canton workhouse may be paid, viz., when conveyed by the constable in state cases. Section 3347 G. C., upon which this authority is based, provides that the constable may receive for "transporting and sustaining prisoners the allowance made by the magistrate and paid on his certificate." This, to my mind, includes only the expenses incurred in the transportation of the prisoner and the constable's expenses must be paid by him out of his mileage.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

887.

BOARD OF EDUCATION—TERM OF PERSONS ELECTED TO FILL VACANCIES.

Under section 4748 G. C., in cases where the board of education elects persons to fill vacancies, these persons so elected will hold office for and during the term for which the members, in whose places they were appointed, would have held under their election. In such cases section 10 G. C. does not apply.

COLUMBUS, OHIO, December 24, 1917.

HON. CHARLES G. WHITE, *Prosecuting Attoruey, Batavia, Ohio.*

DEAR SIR:—I have your communications of November 21 and December 3, 1917, containing certain facts upon which you ask my opinion as to the law. The facts, briefly stated, are as follows:

> "In November, 1915, two men were elected as members of the school board at Edenton, Ohio, one of said members elected being Arthur Wolf, who at the time of his election was not a resident of said school district, but afterwards became a resident by virtue of a transfer of territory from one district to another.
>
> At the January meeting of the board, before Mr. Wolf qualified, the board of education declared a vacancy because of the fact that Mr. Wolf could not have been elected when not a resident of the district. The said board then proceeded to elect Mr. Wolf to fill the vacancy.
>
> The other member elected in 1915 qualified, but later resigned, and one by the name of Cramer was appointed to fill the vacancy which occurred more than thirty days prior to the election in November, 1917.
>
> In the fall of 1917 the ballots called for the election of three members of said board of education, but no names were printed on the ballots. There was a lively contest in this election and many voters voted for five members of the board, three for the long term and two presumably to take the place of Messrs. Wolf and Cramer."

The question arises as to whether the two men elected for the short term, as it was called, will be entitled to qualify on the first Monday in January next, or whether these men, viz., said Wolf and Cramer, will continue to be members of the board until the first Monday in January, 1920.

In order to arrive at the correct answer, we will note the provisions of two sections of the General Code.

Section 10 G. C. reads in part as follows:

> "When an elective office becomes vacant, and is filled by appointment, such appointee shall hold the office until his successor is elected and qualified. Unless otherwise provided by law, such successor shall be elected for the unexpired term at the first general election for the office which is vacant that occurs more than thirty days after the vacancy shall have occurred. * * * ."

Under this section the successors to Wolf and Cramer would be elected at the November, 1917, election for terms to expire the day preceding the first Monday in January, 1920; that is, the two members who were voted for at the last election for

a short term would be the proper ones to qualify at the meeting of the board in January.

However, it must be noted that this provision of the section would apply unless there is some other provision of law relative thereto. The language "unless otherwise provided by law," as found in section 10, makes it very evident that said election was intended by the legislature to be general and to apply only in those cases in which there is no special provision in reference to the matters therein set out.

The question then is, is there any other provision of law as to how long appointees upon a board of education, to fill vacancies, shall hold their positions, or, in other words, when shall their successors be elected?

Section 4748 G. C. provides as follows:

> "A vacancy in any board of education may be caused by death, non-residence, resignation, removal from office, failure of a person elected or appointed to qualify with in ten days after the organization of the board or of his appointment, removal from the district or absence from meetings of the board for a period of ninety days, if such absence is caused by reasons declared insufficient by a two-thirds vote of the remaining members of the board, which vote must be taken and entered upon the records of the board not less than thirty days after such absence. Any such vacancy shall be filled by the board at its next regular or special meeting, or as soon thereafter as possible, by election for the unexpired term. A majority vote of all the remaining members of the board may fill any such vacancy."

In this section we find the provision that:

> "Any such vacancy shall be filled by the board at its next regular or or special meeting, or as soon thereafter as possible, by election *for the unexpired term.*"

Here we find a provision different from that which is found in section 10 G. C.—a provision which especially applies to members of a board of education. Hence it is clearly evident that it must control. The provision in said section 4748 is clear to the effect that said Wolf and Cramer, being appointed or elected by the board to fill the vacancy caused by the resignation of one member of the board and a vacancy declared relative to another member, were appointed or elected by the board of education to fill out the terms for which the two men were elected in 1915; that is, to the first Monday in January, 1920.

Hence there were no short terms to be filled in November, 1917, because the terms of Wolf and Cramer had not yet expired and would not expire until the first Monday in January, 1920; and the only persons duly elected were the three who received the highest number of votes at the election, who with Wolf and Cramer will constitute the board on and after the first Monday in January, 1918.

The above is clearly the law as applied to the facts in the case before us.

There are two matters to which I might call attention in passing. One is that the question might be raised as to whether a board of education has the authority in law to declare a vacancy to exist in the board. The proposition might be advanced that if Wolf was not elected as a member of the board of education in November, 1915, and therefore did not qualify for said position, under section 4745 G. C. one of the members whose term would have expired on the first Monday of January, 1916, would hold over, because of the fact that no one had been elected and qualified to take his place. Section 4745 G. C. provides that members of the board of education shall begin their term on the first Monday in January after their election and shall hold office

for four years and until their successors are elected and qualified. Therefore if Wolf was not elected in 1915 and did not qualify under this section, one of the members in office at the time of the election would hold over until some successor was elected and qualified.

However, inasmuch as no member of the old board presumed to hold over and as every one acquiesced in the action of the board in declaring a vacancy and in electing Wolf to fill the vacancy, Mr. Wolf is, to say the least, a de facto officer and the opinion hereinbefore stated is therefore correct. At any rate, the suggestion I have just made, relative to section 4745 G. C., would not in any event inure to the benefit of the two men who were voted for at the election in 1917.

The second matter to which I desire to call attention is that if there were five men voted for in November, 1917, without any designation as to whether they were voted for to fill a short or long term, the three men receiving the highest number of votes would be the newly elected members of the board. But if three men were voted for to fill a long term and two men for a short term, the three men voted for to fill the long term would be elected, irrespective of whether they received a greater or less number of votes than did the two men for the short term. But I gather, from reading between the lines of your communications, that the three men who were presumably running for the long term received the highest number of votes, and therefore would be the newly elected members of the board.

On September 6, 1917, I rendered an opinion to Hon. Henry W. Cherrington, prosecuting attorney, Gallipolis, Ohio. (No. 596), in which I discussed matters somewhat similar to the one under consideration, and am therefore enclosing a copy thereof to you.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

888.

COUNCIL—MAY COMPEL MUNICIPAL GAS OR ELECTRIC PLANT TO FURNISH GAS OR ELECTRICITY TO MUNICIPALITY FREE OF CHARGE.

It is within the discretion of council of a municipality to require a gas or electric plant owned and operated by such municipality, to furnish gas or electric current free of charge to such municipality for any and all municipal purposes.

COLUMBUS, OHIO, December 24, 1917.

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

GENTLEMEN:—Under recent date you submit the following statement of facts and question:

> "Section 3963 General Code plainly provides what water shall be furnished by a municipal water works without charge. We are conversant with the opinion of the attorney-general which holds that a municipal electric light plant may either furnish current for street lighting purposes without charge against the corporation, or if council deems fit, council may appropriate moneys in payment of same.
>
> QUESTION: May a municipally owned electric light or gas plant furnish current or gas free of charge for any other municipal purposes over and above street lighting?"

The opinion to which you refer was given to your department by me under date of March 20, 1917, and is opinion No. 128. The question therein considered was as to the right of the board of trustees of public affairs of a village, which owns and operates a municipal lighting plant, to furnish current for street lighting without charge. It was held that the trustees had such right.

The opinion referred to applied only to villages and to the lighting of streets. Your present question applies to all municipal purposes and to cities as well as to villages.

Section 3963 General Code, to which you refer, provides the purposes for which water may be furnished without charge by a waterworks plant owned by a city or village. It does not apply to gas or electric plants owned by a municipal corporation.

The statutes covering the question now asked and authorities were considered in the above opinion and need not be quoted or cited herein. The conclusion of that opinion is as follows:

> "The principle seems to be well sustained that a municipality owning a water works system may furnish water for municipal purposes free of charge.
>
> There would not seem to be any reason why the same rule should not apply to municipal light plants.
>
> In view of the foregoing statutory provisions and of the general principles of law applicable to the furnishing of free service by a municipal utility to the municipality itself, I am of the opinion that the board of trustees of public affairs of villages which own and operate municipal lighting plants should furnish current for street lighting without charge, if the council of said village requires the same to be done, and that the village council in the exercise of its discretion may require all the expenses of the municipal lighting plant, both for service furnished the municipality itself and private consumers therein, to be paid out of funds received as electric light rentals from private consumers."

This conclusion is broad enough to, and does, answer the question now submitted.

It is therefore within the discretion of council of a municipality to require a gas or electric plant owned and operated by such municipality, to furnish gas or electric current free of charge to such municipality for any and all municipal purposes.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

889.

CHILDREN'S HOME—HOW EXPENSE OF EDUCATION OF INMATES THEREOF, WHO ARE NOT RESIDENTS OF SCHOOL DISTRICT IN WHICH HOME IS LOCATED, IS PAID.

1. *In complying with the provisions of section 7678 G. C. (107 O. L. 61), the auditors of the various counties, other than the one of the county in which the children's home is located, will deduct from the amounts to be credited to the various school districts of the county any amount that may be due for educating the children in the home who were residents of said district for the six months immediately preceding the semi-annual settlements, and then will forthwith draw their warrants, in favor of the auditor of the county in which the home is located, for the amounts that may be due said district.*

2. *However, if the certified statement is received after the auditor has made his semi-annual distribution to the various school districts, then he will hold said statement until the next semi-annual distribution, at which time he will deduct the proper amounts for so educating the children in the home, and forthwith draw his warrant in favor of the proper auditor for the amount so due the district in which the home is located.*

COLUMBUS, OHIO, December 24, 1917.

HON. T. F. HUDSON, *Prosecuting Attorney, Springfield, Ohio.*

DEAR SIR:—I have a communication addressed to you by Hon. R. W. McKinney, auditor of Clark county, in which he asks for a construction of section 7678 G. C. (107 O. L. 61), and especially with reference to the word "forthwith."

In order to more fully understand section 7678, we will consider the provisions of sections 7676 and 7677 G. C., in the same act, and also section 2602 G. C.

Section 7676 provides in part as follows:

> "The inmates of a county, semi-public or district children's home shall have the advantage of the privileges of the public schools. * * * ."

The section then provides that this education must be given them either in the home or in the schools of the district in which said home is located.

Section 7677 reads as follows:

> "On or about the first day of February and of August the superintendent of the school district in which the inmates of a county, semi-public or district children's home is located shall furnish the county auditor a detailed report showing the average per capita cost, of conducting a school at such home, or the average per capita cost, except for improvement and repairs, of all the elementary schools in such district in case such inmates attend such a school, for the preceding six months. Such report shall also give the names and former residence of all inmates in attendance at school, the duration of attendance, and such other information as the county auditor may require to carry out the provisions of the next section."

Section 7678 G. C., also in said act, of which a construction is asked, reads as follows:

> "Section 7678. A child who is an inmate of a county, semi-public or district children's home and who was previously a resident of the school dis-

trict in which such home is located shall be entitled to an education at the expense of such school district, but any child who was not a resident of such school district shall be educated at the expense of the school district of its last residence. Any child who was not a resident of the school district within which such home is located prior to admission or commitment to such home, shall be educated at the expense of the district of its last residence. The county auditor upon receipt of the above report from the board of education shall, before making a semi-annual distribution of taxes collected, estimate the amounts chargeable to the various school districts for tuition of inmates of such home, and shall transfer to the proper school funds such amounts. In case there are inmates from another county, the county auditor of the county in which the home is located shall certify the amount to the auditor of the county of such children's residence who shall forthwith issue his warrant on treasurer of the same county for such amount, and shall proceed to apportion the proper amounts to the various school districts of such county in the manner described above."

It will be seen, from the provisions of the last quoted section, that the cost and expense of educating the children of a home must be paid by the district in which the children were residents at the time they were committed or admitted to the home. The method of doing this is set out in said section 7678, which provides that the county auditor, before making a semi-annual distribution of taxes collected, shall estimate the amounts chargeable to the various school districts for tuition of inmates of such home, and shall transfer such amounts to the proper school funds. This provision has reference to the cost of educating the children of the home who are residents of the same county in which the home is located.

It is further provided in said section, in case there are inmates from another county, that the auditor of the county in which the home is located shall certify the amount to the auditors of the county of such children's residence, and then said auditors shall proceed to apportion the proper amounts to the various school districts of their respective counties *"in the manner described above,"* that is, in the manner in which the auditor of the county in which the home is located apportions the amounts to the various school districts of that county. Provision is also made that the auditors of these counties shall forthwith issue their warrants on the treasurers of these counties, for whatever amount is due from the counties.

Section 2602 G. C. reads in part as follows:

"The auditor shall open an account with each township, city, village, and special school district in the county, in which, immediately after his semi-annual settlement with the treasurer in February and August of each year, he shall credit each with the net amount so collected for its use. * * * ."

With these sections in mind, we will now map out the course to be followed relative to paying the cost and expense of the education of children committed or admitted to county, semi-public or district children's homes.

1. On or about the first day of February and August the superintendent of the school district in which the home is located must give a detailed report to the county auditor in reference to the cost, the number of pupils, their names, their residences, and all the information that may be needed to enable the county auditor to compute the cost and expense of educating the children in the home.

2. In so far as the cost and expense of the children who were residents of the same county as that in which the children's home is located, at the time they were

admitted or committed to the home, is concerned, the county auditor would proceed as follows:

When he gives credit to each of the school districts of the county for the amount of money collected for its use, he will deduct from the amount which is due the respective districts of the county the amount, if any, which was expended for the education of the children in the home who were residents of the district at the time they were committed or admitted to the home, and the total of these various amounts he will place to the credit of the district in which the home is located; that is, he will do this every six months. This will balance the accounts of the various school districts located in the county.

3. In taking care of the cost and expense of educating the children of the home who were residents of counties other than the one in which the home is located, the county auditor will certify to the auditor of each county the amount of money spent in the education of the children in the home who were residents of said county at the time they were committed or admitted to the home. Then the auditors of these counties will proceed in the same manner and apportion the cost and expense as did the auditor of the county in which the home is located; that is, each county auditor, in February and August, in crediting the different school districts of the county with the amount of money collected for their use, will deduct from each district the amount, if any, expended for the education of the children of said district who are residents of the home, and place these amounts to the credit of the district in which the home is located.

4. The auditors of the various counties shall then draw their warrants for such amount, on the treasurers of the counties, and forward the same to the proper officer of the county in which the home is located.

Mr. McKinney's questions are:

> "Does the word 'forthwith' mean after the semi-annual settlement has been made? I have at hand requisitions from the auditors of Madison and Logan counties, made upon us after the last settlement. Shall I issue warrants for the same, charging the amounts against the proper school districts of this county, thus creating over-drafts, or shall I hold these vouchers until the time of the next semi-annual apportionment of taxes?"

The evident intention of the legislature, in enacting the above quoted sections, was to the effect that the various auditors of the counties other than the one in which the home is located would receive the certified statement from the auditor of the county in which the home is located, as to the amount of tuition due from each county, in time to enable them to deduct the amounts due from each school district of their counties at each August and February settlement for the tuition expenses of educating the children of the various districts for the six months preceding the first of August and the first of February.

If the certified statement is received in time to enable the auditors so to do, then the auditors of the various counties must deduct the proper amounts from the amounts to be credited and distributed to the districts of the county, and immediately or forthwith draw their warrants in favor of the auditor sending the certified statement. In other words, as soon as the auditors of the different counties have deducted the various amounts, for the education of the children of the districts of their counties, prior to making their semi-annual distribution, they must immediately draw their warrants for the said amounts in favor of the auditor of the county in which the home is located.

But suppose the auditor of the county in which the home is located sends his certified statement to some county auditor so late that the auditor of the county does not get it until after he has distributed the amounts due the various school districts

of his county; then what shall he do? Shall he draw his warrant forthwith in favor of the auditor sending the statement, or shall he wait until the next semi-annual distribution of funds among the school districts of his county?

The statutes above quoted are clear to the point that the money necessary to take care of the education of the children in the home shall not come from any fund of the county other than that to which the school districts of the county are entitled from taxation each half year.

Hence it is my view that if the certified statement covering the tuition for any six months, or such part thereof as represents the school attendance, is not received by any auditor in time to enable him to make the proper deductions at any semi-annual distribution for the six months immediately prior to said distribution, he will hold the statement until the next semi-annual distribution, at which time he will make the proper deductions, and then immediately or forthwith draw his warrant in favor of the proper auditor.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

890.

ANESTHETICS—ONE WHO RECEIVES BOARD, LODGING, ETC., FOR ADMINISTERING—IS IT TO BE CONSIDERED PRACTICING MEDDICINE.

One who receives board, lodging, laundry, instruments, uniforms, and sometimes allowances for incidental expenses for administering anesthetics is to be considered practicing medicine under General Code section 1286.

COLUMBUS, OHIO, December 24, 1917.

HON. HOWELL WRIGHT, *Member 25th Senatorial District, Cleveland, Ohio.*

DEAR SIR:—You request my opinion as follows:

> "In opinion No. 528 you held that 'the practice of medicine as defined by our laws, applies to any person who uses the words and letters above mentioned (Doctor, etc.) or who administers for a fee or compensation, a drug or medicine.', but in opinion No. 377 you held that: 'The receipt of board, lodging, laundry, uniforms, instruments or allowance for incidental expenses by holders of intern appointments' cannot 'be considered as a practice of medicine within the meaning of section 1286 General Code.'
>
> You define a fee or compensation as used in that section to be 'something more than merely repaying one for the expense he has been put to in the service of another, or given him with a view of saving him from expense while in the service of another. A fee or compensation implies a net gain of something of value, money, over and above such expense.'
>
> I desire to ask your opinion whether a nurse receiving merely board, lodging, laundry, instruments, uniforms and sometimes allowance for purely incidental expenses, for administering an anesthetic, is practicing medicine under General Code section 1286."

In your inquiry answered by my opinion No. 377, you ask:

> "Can board and lodging or board and lodging plus any one of the items enumerated in my letter of January 12th, given to an intern in exchange or return for his services rendered in a hospital as such, be properly considered a fee or compensation of any kind, direct or indirect?"

That part of your letter of January 12th, in which you refer to "items enumerated," reads as follows:

> "*Hospitals have different plans for compensating interns for services rendered.* Practically all hospitals give board and lodging and laundry. In addition some provide a stipulated number of white uniforms each year. Some make cash allowances for incidental expenses, while certain others give in addition to board and lodging certain instruments such as a stethoscope, hammer, scissors, etc."

In the last above quotation you admit that whatever is received by an intern from the hospital is received by way of compensation, when you use the language "hospitals have different plans for compensating interns for services rendered," and then proceed to enumerate the different articles which a hospital furnishes to such interns. Upon consideration, however, of the question as to whether or not such articles would be considered a fee or compensation, I held in said opinion that:

> "Board, lodging, laundry, instruments, uniforms and allowance for incidental expenses, given to holders of intern appointments, cannot be construed to be salary under the resolution of the state medical board, or the receipt of the above mentioned items cannot be considered as a practice of medicine within the meaning of section 1286 G. C."

That is to say, in the rendition of said opinion I took into consideration the fact that there were many, many duties which would be performed in and about a hospital by interns, which, while they would not be considered prescribing, advising and recommending to patients, yet would be administering or dispensing appliances, applications, treatments, etc., but I did not conceive then, neither can I now conceive, how those persons who manage and operate a hospital could entrust to unskilled assistants, who simply work for board and lodging, the performance of such serious matters as administering anesthetics, performing surgical operations or doing those things which require special skill and much learning. I am taking it that each particular case must be decided upon its own facts; that is to say, if in one hospital the nurses and interns are permitted to perform services which require particular skill and learning of that degree necessary to secure a certificate from the state medical board, and the only fees or compensation received are allowance for incidental expenses, uniforms, instruments, laundry, lodging and board, and if the same is being done with the apparent purpose of evading the law, then and in that case I would have no hesitancy in saying that the articles and incidentals received would be considered a fee and compensation for the performance of such services. On the other hand, if in another hospital an intern or nurse is permitted to do only those things which require only a small amount of schooling and of that degree not necessary to secure a license to practice medicine and surgery in the state, and for such services such intern or nurse would receive board, lodging, laundry, instruments, uniforms and allowance for incidental expenses, then and in that event I would hold the same were not fees and compensation as required by section 1286 G. C.

In opinion No. 528 I held that the giving of the various drugs, to produce anesthesia when surgical operations are being performed, constitute the practice of medicine under the provisions of the medical laws of this state and I herein and hereby re-affirm the conclusion reached in said opinion. If when the legislature enacted the statutes in relation to the practice of medicine it intended to exempt interns and nurses in hospitals who were employed and compensated with only board, lodging, laundry, instruments, uniforms and sometimes allowances for incidental expenses, then the legislature could have said so when it enacted section 1287, which provides that the chapter shall not apply to a commissioned medical officer of the United States army, navy or marine hospital service in the discharge of his professional duties, or to a regularly qualified dentist, when engaged exclusively in the practice of dentistry, or when administering anesthetics or to a physician or surgeon residing in another state or territory who is a legal practitioner of medicine or surgery therein, when in consultation with a regular practitioner of this state, nor shall this chapter apply to a physician or surgeon residing on the border of a neighboring state and duly authorized under the laws thereof to practice medicine and surgery therein, whose practice extends within the limits of this state; nor as provided by section 1288, that the chapter shall not apply to osteopaths.

Answering your question specifically, then, I advise you that if a nurse receives board, lodging, laundry, instruments, uniforms, and sometimes allowances for purely incidental expenses for administering anesthetics, it is to be considered a practicing of medicine under General Code section 1286 G. C.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

891.

COUNCIL—MAY ISSUE NOTES—TO EXTEND TIME OF PAYMENT OF OBLIGATION OF MUNICIPALITY—WHEN IT FIRST DETERMINES BY RESOLUTION THAT SUCH OBLIGATION IS VALID AND BINDING —NOTES PAYABLE FROM SINKING FUND.

The council of a municipality may borrow money and issue notes of the municipality for a period of one year or longer, under authority of section 3916 *General Code, to extend the time of payment of an obligation of the municipality, when council first determines by resolution that such obligation is a valid and binding obligation of the corporation as provided in section* 3917 *General Code.*

Where a municipal corporation has borrowed money and issued notes extending the time of payment of an indebtedness of such corporation under authority of section 3916 *General Code, such notes are payable from the sinking fund of such corporation provided for under authority of section* 4506 *General Code.*

COLUMBUS, OHIO, December 24, 1917.

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

GENTLEMEN:—Under recent date you asked for an opinion upon the following questions:

"1. Can a municipality legally issue notes for a period of one year or longer, under authority of section 3916 General Code?

2. If so, are such notes legally payable by the sinking fund?"

Section 3916 General Code to which you refer reads:

> "For the purpose of extending the time of payment of any indebtedness, which from its limits of taxation the corporation is unable to pay at maturity, or when it appears to the council for the best interest of the corporation, the council thereof may issue bonds of the corporation or borrow money so as to change but not to increase the indebtedness, in such amounts, for such length of time and at such rate of interest as the council deems proper, not to exceed six per cent per annum, payable annually or semi-annually."

This section authorizes council to "issue bonds or borrow money." In the commercial world when a private individual borrows money his liability is usually evidenced by a note executed by him.

The above section was under consideration by Hon. U. G. Denman, attorney-general, in an opinion to Hon. Frank A. Baldwin, under date of July 25, 1910, and reported in the Annual Report of the Attorney-General for 1910-1911, page 938. After quoting from said section 3916, he says:

> "It is not necessary under this section, as is apparent from the express terms thereof, to issue bonds. Notes may be issued to take up the notes previously issued, and which have become due."

In an opinion rendered by Hon. Timothy S. Hogan, attorney-general, under date of April 5, 1913, to Hon. G. T. Thomas, Vol. II of the Report of the Attorney-General for 1913, page 1485, the syllabus reads:

> "Under sections 3916 and 3917 General Code when council has validly entered into an agreement of compromise of a claim against the city and has issued bonds for the purpose of paying such claim which bonds they are unable to pay on account of taxation limitations, they may either issue notes or bonds for the purpose of extending the time of payment of such indebtedness."

After consideration of the provisions of sections 3916 and 3917 General Code I agree with the above conclusions of my predecessors.

Section 3916 General Code authorizes council to issue bonds or borrow money "for such length of time" as it deems proper.

The council of a municipality may borrow money and issue notes of the municipality for a period of one year or longer, under authority of section 3916, General Code, to extend the time of payment of an obligation of the municipality, when council first determines by resolution that such obligation is a valid aad binding obligation of the corporation as provided in section 3917 General Code.

Your second question is as to the authority of the trustees of the sinking fund to pay such notes issued under authority of section 3916 General Code.

Section 4506 General Code provides:

> "Municipal corporations having outstanding bonds or funded debts shall, through their councils, and in addition to all other taxes authorized by law, levy and collect annually a tax upon all the real and personal property in the corporation sufficient to pay the interest and provide a sinking fund for the extinguishment of all bonds and funded debts and for the payment of all judgments final except in condemnation of property cases, and the taxes so raised shall be used for no other purpose whatever."

The sinking fund provided for herein is "for the extinguishment of all bonds and funded debts." A debt the time of payment of which has been extended by the issuance of notes under authority of section 3916, General Code, would be a funded debt of the municipality within the terms of section 4506 General Code.

Section 4507 General Code provides in part:

> "In each municipality there shall be a board, designated as the trustees of the sinking fund, which shall have the management and control of such sinking fund. * * * ."

Section 4517 General Code provides:

> "The trustees of the sinking fund shall have charge of and provide for the payment of all bonds issued by the corporation, the interest maturing thereon and the payment of all judgments final against the corporation, except in condemnation of property cases. They shall receive from the auditor of the city or clerk of the village all taxes, assessments and moneys collected for such purposes and invest and disburse them in the manner provided by law. For the satisfaction of any obligation under their supervision, the trustees of the sinking fund may sell or use any of the securities or money in their possession."

This section apparently limits the authority of the sinking fund trustees to the "payment of all bonds issued by the corporation, the interest maturing thereon and the payment of all judgments final," except in condemnation cases.

Under section 4506 General Code, supra, the sinking fund is created, among other purposes, for the payment of the "funded debts" of the municipality, and by virtue of section 4507 General Code the trustees of the sinking fund "shall have the management and control of such sinking fund." It is clearly the intent of these sections that funded debts should be paid from the sinking fund and that the trustees of the sinking fund should have the management and control of such fund. The mere failure to insert the words "funded debts" in section 4517 General Code will not deprive the trustees of the sinking fund of authority to pay the funded debts of the municipality from the sinking fund.

Where a municipal corporation has borrowed money and issued notes extending the time of payment of an indebtedness of such corporation under authority of section 3916 General Code such notes are payable from the sinking fund of such corporation provided under authority of section 4506 General Code.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

892.

TEACHER—WHO HAS TAUGHT IN STATE 35 YEARS AND IN PUBLIC SCHOOLS OF COUNTY 11½ YEARS AND CONTRIBUTED TO PENSION FUND—ENTITLED TO TEACHER'S PENSION.

A teacher who has taught in this state for thirty-five years and in the public schools of a county eleven and one-half years and has contributed to the teachers' pension fund in the district where such fund is created for seven years and eight months, is entitled to a teacher's pension under section 7891 G. C.

COLUMBUS, OHIO, December 24, 1918.

HON. PERRY SMITH, *Prosecuting Attorney, Zanesville, Ohio.*

DEAR SIR:—In your letter of recent date you submit for my opinion the following statement of facts:

> "Professor W. C. B. has been engaged, continuously, as superintendent of the Zanesville schools from January 1, 1910, to August 31, 1917.
>
> He was not re-employed by the board of education and during May of this year the board of education employed another person to take up the duties of said superintendent beginning September 1, 1917. Mr. B. was applicant for the re-employment and did not resign and his application was before the board at the time they re-employed the other party.
>
> The city of Zanesville is in Muskingum county, Ohio, and there is a school teacher's pension fund in said district created by the resolution of the board of education of said district and Mr. B. was a contributor to this fund continuously from the time it was established. Mr. B. has been teaching school in Ohio continuously for 35 years next preceding this date and has taught in public schools of Muskingum county, including his services in the city of Zanesville eleven and one-half years.
>
> Mr. B. is claiming the same under General Code 7891 and other sections of the same act. From this statement of facts I would like to have your opinion whether Mr. B. is entitled to pension or not."

Your inquiry involves the determination of the conditions under which a teacher may receive pension, if at all, when such teacher fails to be re-employed by a board of education.

Teachers' pensions are provided for in Chapter IX, Title V, part 2 of the General Code.

Section 7858 thereof provides that when the board of education of a school district, by resolution, which resolution must be adopted by a majority vote of the members of such board, declares that it is advisable to create a school teachers' pension fund for that school district, such pension fund shall then be so created and shall be under the management and control of a board to be known as "a board of trustees of the school teachers' pension fund" for such district.

Section 7877 G. C. provides that when the board of education of a school district has so declared the advisability of creating a school teachers' pension fund, its clerk shall notify each teacher in the public schools and high schools, if any, of the school district, by notice in writing of the passage of such resolution, and shall require the teachers to notify the board in writing within thirty days from the date of such notice whether they consent or decline to accept the provisions of law for creating such a fund.

Section 7880 G. C. provides:

"Such board of education of such school district, and a union, or other separate board, if any, having the control and management of the high schools of such district, may each by a majority vote of all the members composing the board on account of physical or mental disability, retire any teacher under such board who has taught for a period aggregating twenty years. One-half of such period of service must have been rendered by such beneficiary in the public schools or high schools of such school district, or in the public schools or high schools of the county in which they are located, and the remaining one-half in the public schools of this state or elsewhere."

Section 7881 G. C. provides:

"The term 'teacher,' in this chapter, shall include all teachers regularly employed by either of such boards in the day schools, including the superintendent of schools, all superintendents of instruction, principals, and special teachers, but in estimating years of service, only service in public day schools or day high schools, supported in whole or in part by public taxation, shall be considered."

Section 7882 G. C. reads:

"Any teacher may retire and become a beneficiary under this chapter who has taught for a period aggregating thirty years. But one-half of such term of service must have been rendered in the public schools or in the high schools of such school district, or in the public schools or high schools of the county in which the district is located, and the remaining one-half in the public schools of this state or elsewhere."

Section 7883 G. C. provides:

"Each teacher so retired or retiring shall be entitled during the remainder of his or her natural life to receive as pension, annually twelve dollars and fifty cents for each year of service as teacher, except that in no event shall the pension paid to a teacher exceed four hundred and fifty dollars in any one year. Such pensions shall be paid monthly during the school year."

Section 7884 G. C. provides:

"No such pension shall be paid until the teacher contributes, or has contributed, to such fund a sum equal to twenty dollars a year for each year of service rendered as teacher, but which sum shall not exceed six hundred dollars. Should any teacher retiring be unable to pay the full amount of this sum before receiving a pension, in paying the annual pension to such retiring teacher, the board of trustees must withhold on each month's payment twenty per cent thereof, until the amount above provided has been thus contributed to the fund."

Section 7891 G. C. provides:

"A teacher who resigns, upon application within three (3) months after such resignation takes effect, shall be entitled to receive one-half of the total

amount paid by such teacher into such fund. If at any time a teacher who is willing to continue in the service of the board of education is not re-employed or is discharged before his term of service aggregates twenty years, then to such teacher shall be paid back at once all the money he or she may have contributed under this law. But if any teacher who has taught for a period aggregating twenty years is not re-employed by the board of education, such failure to re-employ shall be deemed his retiring, and such teacher shall be entitled to a pension according to the provisions of this act."

By the above quoted sections three conditions may arise under which teachers may receive pensions. If the board of education of the school district which has created a pension fund by a majority vote thereof, retires any teacher who has taught for a period of twenty years *on account of physical or mental disability*, then such teacher may receive a pension provided for in said chapter, if one-half of said period of twenty years' service has been rendered by such teacher in the public schools or high schools of such school district, or in the public schools or high schools of the county in which such district is located, and the remaining one-half in the public schools of this state or elsewhere; that is to say, if a teacher is found by a board of education to be disabled, either physically or mentally, the board of education may retire such teacher and if such teacher has taught for twenty years in the public schools, one-half of which time shall have been spent in the public schools of the county in which such district is located and the other half in the schools of this state or elsewhere, then such teacher may receive pension as provided in said chapter.

In your case no physical or mental disability exists. The teacher was an applicant for a re-employment and without any such finding of physical or mental disability such teacher failed to be re-employed. Another teacher was employed in his stead and it cannot be said that on account of the failure of the board to so re-employ said teacher that it therefore follows, as a matter of law, that such teacher is physically or mentally disabled.

It is held in Venable vs. Schaffer, 7 O. C. C., (n. s.) 337, that:

"All terms should be given a fair interpretation, without favor, *and where one does not come within the express terms, there is no reason to strain them to include such person.*"

In your case it would be necessary to strain the facts to bring the teacher within the provisions of section 7880, and hence I must conclude that he could not receive pension under the provisions of said section.

Section 7882 G. C. provides that any teacher may retire and become a beneficiary under this chapter who has taught for a period aggregatiug thirty years and it is suggested that if the teacher in your case does not come within the provisions of section 7880, then such teacher might be considered within the terms of section 7882 because he has taught in the schools of Ohio continuously for thirty-five years next preceding the date of your letter.

Said section 7882 provides that one-half of such term of thirty years' service must have been rendered in the public schools or in the high schools of the school district from which such teacher expects to receive pension, or in the public schools or high schools of the county in which such district is located, and the remaining half in the public schools in this state or elsewhere. Only seven years and eight months time was served by said teacher in the schools of the district and eleven and one-half years in the county in which said district is located. Manifestly, then, said teacher cannot receive pension under the provisions of said section 7882.

So that, I advise you that the teacher not being able to come within the provisions of either section 7880 or 7882, is not entitled to a teacher's pension as far as those two sections are concerned.

Section 7891 G. C. provides if at any time a teacher who is willing to continue in the service of the board of education is not re-employed or is discharged before his term of service aggregates twenty years, then to such teacher shall be paid back at once all the money he or she may have contributed under this law, and that *if any such teacher, who has taught for a period aggregating twenty years, is not re-employed by the board of education, such failure to re-employ shall be deemed his retiring and such teacher shall be entitled to a pension according to the provisions of this act.* Nothing is said in said section that the teaching experience necessary to make up the term of twenty years shall have been rendered in the district in which the failure to re-employ occurred, and from the fact that the amount of service to be rendered in the district is mentioned in sections 7880 and 7882 before a teacher is entitled to pension, it is to be presumed that it was intentionally omitted from section 7891 G. C. It is entirely within the province of the board of education to ascertain the length of time a person has taught school prior to the time such person is employed by such board and if a board employs a person who has taught a long number of years, and, as in your case, fails to re-employ such person, I take it the legislature intended that a failure to re-employ shall be deemed to stand in the place of a finding of disability, as provided by section 7880, and such teacher is then entitled to the provisions of said chapter. In your case the teacher has taught more than twenty years and the board did fail to re-employ such teacher, but instead of re-employing him said board employed another. Nothing, it seems to me, could bring said teacher clearer within the provisions of section 7891.

I therefore advise you that under the statement of facts in your letter the teacher, W. C. B., is entitled to pension as provided by said chapter.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

893.

APPROVAL—BONDS—JEFFERSON TOWNSHIP RURAL SCHOOL DISTRICT.

COLUMBUS, OHIO, December 26, 1917.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:— IN RE: Bonds of Jefferson township rural school district, in the sum of $14,000.00, for the purpose of equipping elementary grade school buildings in said school district.

I have carefully examined the transcript of the proceedings of the board of education and other officers of Jefferson township rural school district relating to the above bond issue, and find said proceedings to be in accord with every essential requirement of the provisions of the General Code of Ohio relative to bond issues of this kind.

I am, therefore, of the opinion that properly prepared bonds will, when signed by the proper officers and delivered, constitute valid and subsisting obligations of said school district.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

894.

APPROVAL—SALE OF CANAL LANDS IN DAMASCUS TOWNSHIP, HENRY COUNTY, OHIO.

COLUMBUS, OHIO, December 27, 1917.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your communication of December 21, 1917, in which you enclose, in duplicate, record of proceedings leading up to the sale of a portion of the abandoned canal lands, located in Damascus township, Henry county, Ohio, to Charles H. Bolley.

I have carefully examined said proceedings and find them correct in form and legal, and I am of the opinion that the sale of said lands would inure to the best interests of the state of Ohio.

I therefore approve the sale and in testimony thereof am endorsing my approval on the resolution incorporated in the proceedings above referred to, and am forwarding the record of proceedings to Hon. James M. Cox, governor, for his consideration.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

895.

APPROVAL—FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN FAYETTE, MERCER AND MONROE COUNTIES.

COLUMBUS, OHIO, December 27, 1917.

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

DEAR SIR:—I have your communication of December 20, 1917, enclosing for my approval the final resolutions on the following improvements:

Fayette County—Sec. "d and e," Dayton-Chillicothe road, I. C. H. No. 29.
Fayette County—Sec. "f, g, h," Dayton-Chillicothe road, I. C. H. No. 29.
Mercer County—Sec. "C," Celina-Wabash road, I. C. H. No. 264.
Monroe County—Sec. "F," Barnesville-Woodsfield road, I. C. H. No. 104.

I have carefully examined said final resolutions, find the same correct in form and legal and return them to you with my approval endorsed thereon, in accordance with the provisions of section 1218 G. C.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

896.

APPROVAL—BONDS—SHAKER HEIGHTS VILLAGE SCHOOL DISTRICT.

COLUMBUS, OHIO, December 27, 1917.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

IN RE: Bonds of Shaker Heights Village school district, in the sum of $250,000.00, for the purpose of purchasing a site for and erecting and furnishing school house thereon and purchasing real estate for playgound for children.

I have carefully examined the corrected transcript of the proceedings of the board of education and other officers of Shaker Heights village school district relating to the above bond issue, and find said proceedings to be in accord with the essential requirements of the General Code of Ohio relative to bond issues of this kind.

The only irregularity of any kind in the proceedings is that presented by the fact that the board of education of this school district canvassed the vote of the electors on the proposition of issuing said bonds and entered the result thereof on its records at a regular meeting of the board held November 7, 1917, said date being the day after the election on said bond issue proposition. Section 5120 General Code provides that in school elections the board of education shall canvass the vote of such election on the second Monday after the election. I am of the opinion that the provision of the section of the General Code just noted, in so far as it prescribes the time when the board of education shall canvass such vote, is directory rather than mandatory and that the proceedings are not fatally defective, notwithstanding the board may canvass such vote at a legal meeting other than one held at the time prescribed in said section.

Finding said defect in these proceedings not to be fatal to the validity of the bond issue, and not finding any other objection of any kind to the proceedings of the board of education and other officers of the school district relating to this bond issue, I am of the opinion that properly prepared bonds covering said issue will, when the same are properly executed and delivered, constitute valid and binding obligations of said school district.

I have not been able to approve in all respects the bond form submitted as a part of the transcript and have on my own initiative prepared a bond form covering this bond issue which I am mailing to the legal counsel of said school district with instructions to have same printed at once.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

897.

BOARD OF EDUCATION—MAY PERMIT THE USE OF SCHOOL PROPERTY FOR HOLDING GRANGE MEETINGS.

A board of education has a right upon request and upon the payment of the proper janitor fees to permit the use of any school house and the rooms therein and the grounds and other property under its control, when not in actual use for school purposes, for the use of holding grange meetings. The fact that the grange holds secret sessions will not prevent the above general proposition of section 7622-3 from applying.

COLUMBUS, OHIO, December 27, 1917.

HON. MILTON HAINES, *Prosecuting Attorney, Marysville, Ohio.*

DEAR SIR:—Your statement of facts upon which you ask my opinion is as follows:

"On page 607 of the Laws of Ohio, Vol. 107, we find the following law passed by our last legislature:

'Section 1. That section 7622-3 of the General Code of Ohio be amended to read as follows:

Sec. 7622-3. The board of education of any school district shall, upon request and the payment of the proper janitor fees, subject to such regulation as may be adopted by such board, permit the use of any school house and rooms therein, and the grounds and other property under its control, when not in actual use for school purposes, for any of the following purposes:

1. For giving instructions in any branch of education, learning or the arts.

2. For holding educational, civic, social or recreational meetings and entertainments, and for such other purposes as may make for the welfare of the community. Such meetings and entertainments shall be *non-exclusive* and open to the general public.

3. For public library purposes, as a station for a public library, or as reading rooms.

4. For polling places, for holding elections and for registration of voters, for holding grange or similar meetings.

Sec. 2. That original section 7622-3 of the General Code be and the same is hereby repealed.'

In our county there is a grange organization that claims under the provisions of this act they are entitled to the right of holding their regular *secret* sessions in the auditorium of the school building. Being much in doubt as to whether the clause 'shall be non-exclusive and open to the general public' applies to and affects such a meeting, I am writing you for an opinion and construction of this law."

Inasmuch as you have quoted the entire section in which the language is found upon which you desire a construction placed, it will not be necessary to repeat it in its entirety, and I shall refer to only those parts which need special consideration.

When section 7622-3 was amended in 107 O. L., 607, there were two changes made. First, the word "may" was changed by the amendment to "shall" in the phrase "the board of education * * * shall, etc.," and the other phrase is a new one which appears in the amended section for the first time and reads:

"Upon request and the payment of the proper janitor fees."

Said section 7622-3 in substance provides that the board of education of any school district shall permit the use of any school house and the rooms therein and the grounds and other property under its control, for certain purposes outside of school work. The section also provides that a request must be made of the board for such use and that the proper janitor's fees must be paid, that such use can only take place at such time as the same is not actually used for school purposes and that the certain uses are restricted to those things set out in said section.

One of the uses to which said property may be subjected is "for holding grange or other similar meetings," and opinion No. 168, rendered by this department to Hon. D. M. Cupp, prosecuting attorney of Delaware county, which opinion was rendered, April 5, 1917, will be found of assistance in arriving at a conclusion to your question.

After reviewing the legislation which led up to the enactment of said section, as it appeared prior to the last amendment referred to by you, and making it plain that I was not passing upon the constitutionality of the law in its entirety, I reached in said opinion No. 168 the following conclusion:

> "I can gather but one intention from said language and that is that it was the intention of the legislature to permit the board of education of any school district, subject to such regulation as might be adopted by the board, to permit the use of any school house and rooms therein and the grounds and property under its control, when not used for school purposes, to be used for holding grange meetings."

When said opinion was rendered said section 7622-3 read in part: "The board of education * * * *may*," but as amended in 107 O. L., 607, as above noted, it now reads in part: "The board of education * * * shall." The effect of the change from "may" to "shall" is ordinarily to change the statute from being directory to that of being mandatory.

Lewis' Sutherland on Statutory Construction, Vol. 2, page 1155, says:

> "The word 'shall' in its ordinary sense is imperative. When the word 'shall' is used in a statute and a right or benefit to any one depends upon giving it an imperative construction, *then that word is to be regarded as peremptory.*"

In speaking of the word "shall," the author says:

> "As used in statutes the word is generally mandatory."

and it would seem to me that where the only change in the statute is the changing of directory language to language which is mandatory that the legislature must necessarily have meant that the statute should have such mandatory construction.

Answering your question, then, I advise you that following said opinion No. 168, a copy of which I am enclosing to you herewith, and from the fact that the language of of said section 7622-3 was changed from that which is directory in its nature to that which is mandatory in its nature, I must advise you that the grange organization of your county has a right, under the provisions of said act, to hold their regular sessions in the auditorium of the school building and that the clause "shall be non-exclusive

and open to the general public" does not so modify or change the effect of said mandatory language in reference to grange meetings as to prevent the same. As stated in opinion No. 168, I hereby again advise you that I am not passing upon the constitutionality of the act in its entirety.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

898.

BOARD OF EDUCATION—MAY NOT EXTEND A TEACHER'S CONTRACT FOR ONE OR MORE YEARS—WHEN BOARD MAY EMPLOY TEACHER—"MAJORITY VOTE" DEFINED.

A board of education of a village school may not extend a teacher's contract one or more years, but may enter into a new contract not to exceed three years, by agreement between the board of education and the teacher, and the new contract will stand in the place of and be a substitute for the old one.

The present board of education cannot enter into a contract with a teacher, extending the present term, because the term must begin within four months after the date of the appointment.

A board of education may employ a teacher only after such teacher has been nominated therefor by the district superintendent of the supervision district in which the school for which such teacher is employed is located, except by a majority vote.

"Majority vote" in this instance means a majority of the full membership of the board.

COLUMBUS, OHIO, December 27, 1917.

HON. HARRY S. CORE, *Prosecuting Attorney, Ottawa, Ohio.*

DEAR SIR:—In your letter of November 21, 1917, you request my opinion on the following:

> "In the matter of employing teachers for the grades and high school in a *village* school district, may the board of educatoin, with authority under the law, extend the contract one or more years by agreement of the board of education and the teacher?
>
> May the present board of education enter into a contract with the teacher, extending their present contract one year, making the same binding upon the board of education taking office January 1, 1918?"

General Code section 7705 reads in part:

> "The board of education of each *village,* * * * school district shall employ the teachers of the public schools of the district *for a term not longer than three school years, to begin within four months of the date of appointment.* The local board shall employ no teacher for any school unless such teacher is nominated therefor by the district superintendent of the supervision district in which such school is located except by a majority vote. In all high schools and consolidated schools one of the teachers shall be designated by the board as principal and shall be the administrative head of such school."

That is, under the above quoted section the board of education of the village school district to which you refer has the right to employ the teachers of the public schools of such district and "public schools," as therein referred to, would include the grade schools and the high schools referred to by you. But, it is provided that the term must begin within four months of the day of the appointment and the term shall not extend for a period of more than three years. Section 7691 G. C. provides that no person shall be appointed as a teacher for a term less than one year except to fill an unexpired term and that the term shall begin within four months of the date of the appointment. Section 7689 G. C. provides that the school year shall begin on the first day of September each year and shall close on the 31st day of August of the succeeding year, and I am of the opinion that the one year referred to in section 7691 and the three years referred to in section 7705 mean school years instead of calendar years and that the term of employment is meant to begin at the beginning of the school year. Manifestly, then, a teacher whose term would begin on September 1st in any year, to be hired within four months of that date would have to be hired after May 1st of the calendar year in which the term would begin.

If, then, a teacher has been hired for a term of three years and is serving the first year of his term, I am taking it that you intend to inquire if such teacher could enter into a contract within the year, or say after May 1st of the calendar year, for a term to begin the first day of the following September and for a term of three years from that time. That is, can a new contract be substituted for the old one? It is perfectly proper for the parties to a contract to change the terms of such contract as long as the change is not in any manner a violation of law. If the board of education and a teacher, for instance, desire the term to be three years from the first day of the following September instead of two years, they have a right to enter into a new contract covering the three year period, which new contract would be an abrogation or abandonment of the old contract and a substituting of the new. It would not be proper to change the salary, even during the term, without there be a new consideration.

It was held in Ward vs. Board of Education, 21 O. C. C., 699, that:

> "Although Revised Statutes section 4017 (General Code 7690) authorizes boards of education to increase the salaries of public school teachers during the term for which they are appointed, where a teacher has been appointed for a definite term at a fixed salary, an increase of such salary during such term without a change of duties and with no new contract, will not give such teacher a right of action to recover therefor."

That is, it would be necessary to substitute a new contract for the old one in order that any change in salary be effected and that simply permitting the term to remain the same and endeavoring to increase the salary, without a change in the duties, would be such a change as would be ineffective, because there would be no consideration for the change. But I do not understand that your question falls in that class. I am taking it that you desire first to inquire if a new contract can be entered into which will be a substitute for and stand in the place of the old one and which new contract changes the term of the old one. In answer thereto I advise you that the same can be done.

Secondly, I understand that you mean to inquire whether the board of education which is now in power can make such new contract or can make such extension of the term. This manifestly cannot be done because the length of time which is required by the statute when the term shall begin after the same is entered into is such as will prohibit the present board from entering into the new contract which in effect extends such period of time. In other words, it will be necessary for the board of education which is in power on May 1st of the calendar year in which the term begins to make such change, if any change is so made.

It must also be remembered that section 7705 G. C. provides "that the local board shall employ no teacher for any school unless such teacher is nominated therefor by the district superintendent of the supervision district in which such school is located, except by a majority vote." That is, before the local board of education and the teacher are permitted to enter into a contract of employment, whether it be for an original term or it amounts to an extension of an existing term, the district superintendent of the supervision district must first nominate such teacher for the position covered by the proposed employment contract. If such district superintendent refuses to make such nomination, "majority vote" as used in this instance means the majority of the full membership of the board of education and not merely the majority of those members who happen to be present at the particular meeting at which such agreement is sought to be entered into.

Answering your questions, then, in the order in which you ask them, I advise you that a board of education of a village school may not extend teacher's contracts one or more years, but may enter into a new contract the term of which shall not exceed three years, and this may be done by agreement between the board of education and the teacher, and the new contract will stand in the place of and be a substitute for the old one.

The present board of education cannot enter into a contract with a teacher, extending the present term, because the term must begin within four months after the date of the appointment.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

899.

CLERK—OF MUNICIPAL COURT OF ZANESVILLE—APPOINTED BY JUDGE OF SAID COURT.

1. *The clerk provided for in the act of the legislature creating a municipal court of the city of Zanesville, Ohio,* (107 *O. L. 722 et seq.*) *must be appointed by the judge of said court.*

2. *The mayor of the city of Zanesville has no authority under the provisions of section* 218 *of the Zanesville charter, to appoint the clerk of the municipal court.*

COLUMBUS, OHIO, December 29, 1917.

HON. PERRY SMITH, *Prosecuting Attorney, Zanesville, Ohio.*

DEAR SIR:—I have your communication in which you ask an opinion upon the following state of facts:

> "The municipal court of the city of Zanesville goes into effect January 1, 1918, and there is some doubt as to whether the mayor elect of the city of Zanesville or the judge elect of said court has the power of appointing the clerk, but the statute (Vol. 107, section 24, page 728), states that the clerk shall be chosen without stating who shall appoint, but gives the judge of said court the power to fill vacancies therein."

The act establishing a municipal court for the city of Zanesville, Ohio, and fixing the jurisdiction thereof, providing for a judge thereof and other necessary officers, and defining their duties, is found in 107 O. L. 722 et seq.

Section 1 ofthe act reads as follows:

"That there be, and hereby is created a court of record for the city of Zanesville, Muskingum county, Ohio, to be styled 'The Municipal Court of the City of Zanesville, Ohio,' with jurisdiction as herein and hereinafter fixed and determined."

Section 2 of said act provides the qualifications, term and salary of the judge.

The succeeding sections in detail specify the jurisdiction and procedure in such court.

Section 24 provides:

"A clerk for said municipal court shall be chosen and shall receive such compensation payable out of the treasury of the city of Zanesville as the city council may prescribe. Deputies to the clerk shall be designated as hereinafter provided in this act."

Section 25 prescribes the powers and duties of the clerk.
Section 27 provides for a bailiff who "shall be appointed by the judge of such court."

Sections 33, 34, and 35 of said act provide:

"Section 33. Whenever the incumbent of any office created by this act shall be temporarily absent or incapacitated from acting, the judge shall appoint a substitute who shall have all the qualifications required of the incumbent of the office. Such appointee shall serve until the return of the regular incumbent, or until his incapacity ceases. In case said judge shall be incapacitated from sitting in any case, or by reason of absence or inability be unable to attend sessions of said court, the mayor of the city may appoint some attorney having the qualifications required by this act, to act in his stead until said judge is able to resume his said position.

Section 34. The municipal court shall be the successor of the police court of the city of Zanesville, and the courts of any justices of the peace for Zanesville, and all proceedings, judgments, executions, dockets, papers, moneys, property and persons subject to the jurisdiction of said police court of the city of Zanesville and said courts of any justice of the peace for Zanesville township on December 31, 1917, shall be turned over to the municipal court herein created; and thereafter the cause shall proceed in the municipal court as if originally instituted therein, the parties making such amendments to their pleadings as required to conform to the rules of said court.

Section 35. The judge of the municipal court shall be subject to the same disabilities and may be removed from office for the same causes as the judges of the court of common pleas. The vacancies arising from any cause shall be filled as prescribed for the filling of vacancies of police courts."

Under this act the legislature has seen fit to create "a court of record for the city of Zanesville, Muskingum county, Ohio," and styled it "The Municipal Court of the City of Zanesville, Ohio," and the provisions of the act are similar in many respects to the provisions of like acts creating municipal courts in other municipalities of the state, except that no provision is expressly made prescribing how the clerk of said court is to be chosen.

Some of the legislative acts creating municipal courts expressly provide for the election of the clerk, fixing his term, etc., while some few place the appointment of the clerk in the hands of the judge or some other appointing power. The legislature did enact that a clerk of said court "shall be chosen," but did not prescribe the manner of his choosing.

In the charter adopted by the city of Zanesville on November 2, 1915, will be found certain sections seeking to establish a municipal court.

Section 212 of the charter reads:

> "There is hereby created and established a municipal court of the city of Zanesville, and the offices of the judge and clerk of said court. Said court shall be styled the 'Municipal Court' and shall be a court of record."

Section 213 of said charter prescribes the jurisdiction of the court.
Section 214 prescribes the qualifications and term of the judge of said court.
Section 215 fixes his salary and further provides that:

> " * * * All fines prescribed as a penalty for the commission of any offense, and all costs assessed, whether in said municipal court or in any other court of record to which such offender may be bound and in which he is finally tried, shall be paid into the city treasury to the credit of such fund as may be directed by the city council."

Section 216 prescribes how a vacancy in the judgeship should be filled.
Section 217 provides for the duties of the clerk.
Section 218 reads as follows:

> "The clerk of the municipal court shall be chosen by the mayor, from the eligible list of the classified service under the civil service provisions of this charter."

Section 225 of said charter, which is the last section of the subdivision entitled "Municipal Court," reads as follows:

> "The municipal court shall be established, and the offices of judge and clerk thereof shall be created upon the conferring by the general assembly of Ohio upon said municiapl court, of all the powers and jurisdiction of justices of the peace and the police court of the city of Zanesville, together with all rights of appeal and error from said tribunals."

Under the terms of section 225 of said charter, the establishment of the municipal court, as well as of the offices of judge and clerk thereof, was to be subject to the conferring by the general assembly upon said municipal court of all the powers and jurisdiction of justices of the peace and the police court of the city of Zanesville, together with all rights of appeal and error from said tribunals.

Now, the municipal act as found in 107 O. L. 722 et seq., did not purport to impose any powers or jurisdiction upon a proposed charter municipal court of the city of Zanesville. The act in question was, as before stated, similar to like enactments creating municipal courts in other municipalities, and no reference is found in the legislative act referring in any manner to the proposed municipal court under the charter provisions.

True, the legislative municipal court is made the successor of the police court of the city of Zanesville. Under section 3 of the above act the court is given the same jurisdiction in criminal matters and prosecution for misdemeanor or violation of ordinances as heretofore had by the police court of Zanesville and any justice of the peace, and in addition thereto certain civil jurisdiction. But it appears to me that if the legislature intended in any way to vivify or give life to said municipal court, under the charter, by some sort of enabling act, reference would have been made in the act to such charter court.

I might say in passing that the provisions of section 213 of the charter, giving jurisdiction in all criminal cases to the charter court, would be in conflict with the holding of Judge Smith of the court of appeals, First district, in a recent case where the constitutionality of the Middletown charter municipal court was in question.

It is my view that the provisions of the charter of the city of Zanesville, regarding the municipal court therein provided for, are each and all of no effect, because the legislature as yet has not attempted to do the very thing that section 225 of the charter makes a prerequisite to the establishment of the municipal court and the offices of judge and clerk thereof.

So it is my holding that section 218 of the charter, prescribing that the clerk of the municipal court shall be chosen by the mayor, is no authority to the mayor in the present case.

An examination of the various sections of the legislative act evidences a legislative intent of giving certain powers of appointment to the judge of the court established. The title of the act is:

> "To establish a municipal court for the city of Zanesville, Muskingum county, Ohio, and fix the jurisdiction thereof, provide for a judge thereof and other necessary officers, and define their duties, * * * ."

The judge is given the power to appoint the bailiff. He is likewise given the power to appoint a substitute for the incumbent of any office created by this act, who is temporarily absent or incapacitiated from acting.

Under the reasoning of our supreme court, in a case involving the right of that court to appoint its clerk, it can well be argued that the judge, owing to the powers and duties specifically prescribed by the act creating the court, is authorized to appoint the clerk, who shall be chosen for such court. In said case, styled State ex rel. v. Graves, 91 O. S. 23, Shauck, J., speaking of the clerk of that court, says at p. 24:

> "He is vested with no discretion in any respect. He is only an arm of the court for issuing its process, entering its judgments and performing like duties which the court itself might perform. His services are employed only for the more convenient performance of those functions of the court which are clerical in their nature. It is only in an arbitrary or secondary sense of the word 'officer' that it can be applied to him. From the nature of his duties and his relation to the court, the power to appoint a clerk when necessary to the convenient and efficient exercise of its functions is inherent in the court, as are the like powers to punish for contempt, to appoint and remove members of the bar and to grant ancillary injunctions in the exercise of its jurisdiction in order that the status of a subject in controversy may remain unchanged, so that its jurisdiction when exercised will be effective. These powers inhere in the court without special grant, either in constitution or statute, because they are all implied in every conception of a court when courts are created by the constitution."

True, the learned judge was speaking of the clerk of that particular court, which is the court of last resort in Ohio. Yet the rule is not limited, for Cyc., Vol. II, at p. 723, lays down the general proposition that a court, as a court of record, possesses the inherent right to provide such attendants and assistants as are a necesssary means of conducting its business with reasonable dispatch.

In State ex rel. v. Graves, supra, at p. 25, will be found the following language, referring to the clerk of the supreme court:

> " * * * the duties of the clerk of the court are the duties of the court itself and embraced within the grant of judicial power. This is obvious, not only from the character of his duties and his relation to the tribunal, but from the practice in the federal courts and the courts of the states where the subject is not affected by special provisions. * * * ."

Then the court refers to the claim that the constitutional provision found in Art. IV, Sec. 16 included the clerk of the court in question. This section reads as follows:

> "There shall be elected in each county, by the electors thereof, one clerk of the court of common pleas, who shall hold his office for the term of three years, and until his successor shall be elected and qualified. He shall, by virtue of his office, be clerk of all other courts of record held therein; but, the general assembly may provide, by law, for the election of a clerk, with like term of office, f or each or any other of the courts of record, and may authorize the judge of the probate court to perform the duties of clerk for his court, under such regulations as may be directed by law. Clerks of courts shall be removable for such cause and in such manner as shall be prescribed by law."

Concerning this contention, Judge Shauck, at p. 26 of the opinion in State ex rel. v. Graves, supra, says:

> "The subject of this provision obviously is courts of the counties. * * * The phraseology of the provision is doubtless affected in part by the provisions of the constitution of 1802, which made the supreme court a court in every county of the state by the express provision that it should in every year hold a session in each county of the state."

The opinion concludes with the observation that the court has ample authority without any aid from the legislature, to appoint a clerk *"in the absence of valid provisions providing for his selection in another mode."*

The direct question whether or not the clerk of the court of common pleas is by virtue of his office clerk of a municipal court was raised in the case of O'Malley v. De Vald & Dietz Co., 57 W. L. B. 158. In this case it appeared that by legislative act a municipal court was provided for Cleveland, the act providing that the clerk of said court should be elected. The claim was made that the clerk so elected was not the clerk of the court, on the ground that the legislative provision for the election of a clerk was in contravention of Art. IV, Sec. 16, supra. The first paragraph of the syllabus in this case reads:

> "While the municipal court of Cleveland is a court of record, yet Art. IV, Sec. 16, of the constitution, which provides that the clerk of the court of common pleas shall hold his office for a term of three years and shall be, by virtue of his office, clerk of all other courts of record held in his county, refers only to county courts and does not make him the clerk of the municipal court."

At p. 159 Beebe, J., says:

> "Manifestly, the first part of Art. IV, Sec. 16, of the constitution, was never intended to apply to city or municipal courts. A special grant of authority to provide by law for the election of clerks of other courts of record is authority to provide for clerks of 'such other courts inferior to the supreme court as the general assembly may from time to time establish' under Art. IV, Sec. 1, of the constitution, and is part of the same general scheme.
>
> Nor is there any reason that appeals to us why the clerk of the municipal court and the common pleas court should be the same person. If this were so, we should be confronted by the freak situation of a clerk of a county court, resident perhaps of the village of Bedford, elected by the electors of Bedford and other townships, holding the office of clerk of the municipal or city court of Cleveland. This surely was not the intent of the framers of the constitution and is entirely contrary to the policy of the constitution and laws of Ohio."

This case seems to have gone no further than the court of trial, which was the municipal court of Cleveland, but the reasoning therein found I think is conclusive upon the question.

At p. 161 in the last mentioned citation, the court uses the following language:

> "Given the power to create courts, there is, by necessary implication, full authority to provide for such machinery and officers as are necessary to carry on the business of such courts, and to enable them to perform the functions for which they are created.
>
> A clerk to issue papers and perform the ministerial acts of a court is as necessary to the existence of a court as is the judge. The very nature of claim set up in this opinion—that there being no legally elected and acting clerk, the court has no jurisdiction to entertain and try this action—shows how vital a part of a court the clerk is. The claim reduced down to the fewest words is: 'No legally elected clerk; no court.'
>
> Instead of that, the converse of the proposition is true. Authority to create a court; authority to provide for a clerk for same."

I have no hesitancy in concurring with the court in the above case on the propositions therein decided.

The legislature in the act creating the Zanesville municipal court of course could have provided for the election of a clerk of that court and fixed the term of his office. It had full authority so to do. But reading the act in question from its four corners, an intent appears that the clerk of the municipal court so created shall be chosen by some one, instead of being elected, and to my mind there is sufficient in the act, read in its entirety, to conclude that the appointing power was the judge of the court so created.

In section 11 of the act (107 O. L. 726) it will be noted that the judge of this m nicipal court has conferred upon him:

> " * * * all powers which are now or may hereafter be conferred upon the court of common pleas or the judge thereof, * * * or are necessary for the exercise of the jurisdiction herein conferred and for the enforcement of the judgments and orders of the court."

The general assembly in other acts creating municipal courts has placed the appointment of the clerk of said court sometimes in the hands of the judge of the court and at another time in the hands of some other appointing power.

Assuming the right of the legislature to provide for the appointment in the manner that it has in some instances done, I do not think that even an entire absence to make provision under the act creating the Zanesville court could possibly leave the court without a clerk.

Under the doctrine laid down by our supreme court in State ex rel. v. Graves, supra, the court would have an inherent right to appoint its clerk.

Coming then to your specific question, from all the foregoing it is my opinion that the clerk provided for under the act of the legislature creating the municipal court of the city of Zanesville (107 O. L. 722 et seq.) must be appointed by the judge elect of said court, and that the mayor of the city of Zanesville has no authority to make said appointment.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

900.

TOWNSHIP TRUSTEE—WHEN CANDIDATE FOR SAID OFFICE, WHO RECEIVES LARGEST VOTE, DIES ON ELECTION DAY—DUTY OF JUSTICE OF THE PEACE TO APPOINT QUALIFIED PERSON.

1. *Where M., who was serving as township trustee and whose term of office would have expired on January 1, 1918, was a andidate for re-election at the November,* 1917, *election, but died on the day of the election, having received a sufficient number of votes to elect him to the office for which he was a candidate, it was the duty of the justice of the peace holding the oldest commission in the township to appoint a qualified person to fill out the unexpired term.*

2. *Such appointee will be the incumbent at the time the new term would have begun had M. lived, with a right to remain until his successor is elected and qualified.*

3. *Such successor will be elected at the regular election for trustee in November,* 1919.

COLUMBUS, OHIO, December 29, 1917.

HON. BENTON G. HAY, *Prosecuting Attorney, Wooster, Ohio.*

DEAR SIR:—Under recent date you submit the following facts for an official opinion:

> "M, who was serving as township trustee and whose term of office expired January 1, 1918, was a candidate for re-election at the election held November 6, 1917, but died on the day of election about an hour after the opening of the polls. He received the third highest number of votes, receiving more votes than G, who was the fourth highest of the candidates, there being three to be elected.
>
> The justice of the peace who held the oldest commission appointed a person to fill out the unexpired term of M. Another justice of the peace on January 1, 1918, will have the oldest commission.
>
> Will there be a vacancy in the office of trustee on January 1, 1918, at which time the new term of M, had he lived, would begin, or will the appointee for the short term hold over until the general election in November, 1919?"

Section 3262 G. C. provides as follows:

> "When for any cause a township is without a board of trustees or there is a vacancy in such board, the justice of the peace of such township holding the oldest commission, or in case the commission of two or more of such justices bear even date, the justice oldest in years, shall appoint a suitable person or persons, having the qualifications of electors in the township to fill such vacancy or vacancies for the unexpired term."

Under the above section, the vacancy occurring by reason of the death of M on November 6 was properly filled by the justice of the peace who held the oldest commission, and the person so appointed under that section is to fill such vacancy "for the unexpired term."

Since M died on election day and received the third highest number of votes and would have been elected had he lived, as to the office for which M was voted for, there was no election.

The sole question, as stated by you, is, will there be a vacancy in the office of trustee on January 1, 1918, the beginning of the new term, or will the appointee, appointed by reason of the death of M on November 6, 1917, hold over until his successor is chosen at the general election in November, 1919?

I think the case cited by you, of State ex rel. v. Speidel, et al., 62 O. S. 156, is decisive of the question. The first paragraph of the syllabus reads:

> "When the candidate for an office for whom a majority or plurality of votes was cast at the election, dies on the election day and before the polls are closed, the candidate for the same office receiving the next highest number of votes is not thereby elected; nor has he thereby acquired any right to be inducted into the said office."

In this case Buvinger was a candidate for re-election to the office of sheriff, and died on election day. Walker was appointed for the unexpired term of Buvinger. Speidel was appointed by the commissioners on the supposition that there would be a vacancy in said office on the first Monday of January.

The court at p. 160 says:

> "In order that we may not be misunderstood, it may be added that there was no vacancy in the office of sheriff of Clermont county on the first Monday in January, 1900. The death of Buvinger did not create a vacancy in his term which would have begun in January, 1900, assuming that he was duly elected, because he did not live to be installed in his second term. *State ex rel. v. Dahl, et al.*, 55 *Ohio St.* 195. Walker was the incumbent at the time when that term would have begun had Buvinger lived, with the right to remain until his successor was elected and qualified. There could be no vacancy then, unless Walker should die, resign, or be lawfully removed for cause. *State ex rel. v. Wright*, 56 Ohio St., 540. Therefore ,the county commissioners, in appointing Speidel, acted altogether without authority; and Speidel can have no right to act as sheriff."

Under the authority of the above case it is my opinion that there will be no vacancy in the office of trustee on January 1, 1918, and that the appointee now filling the remainder of the old term of M will hold the office until the successor is elected and qualified at the election to be held in November, 1919.

I agree with you that the opinion found in Vol. I of the Opinions of the Attorney-General for 1915, p. 354, seems to be at variance with the ruling of the supreme court in State ex rel. v. Speidel, supra. That case seems not to have been considered and the opinion is based on the provision of section 2561 G. C., on the theory that it makes provision otherwise and so comes within the exception in section 8 G. C. No similar provision is found referring to trustees. Section 3265 G. C., providing what shall be deemed a declination of the office of trustee, only applies after a person receives notice of his election or appointment.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

901.

TOWNSHIP TRUSTEE—BOND—WHEN THERE IS NO JUSTICE OF THE PEACE TO APPROVE SAME—MAY ENTER UPON HIS DUTIES UPON FILING SAME WITH TOWNSHIP CLERK.

1. *In case there is no justice of the peace to approve the bond of a township trustee, he should enter into a bond with two good and sufficient sureties and file the same with the township clerk for record. By so doing said trustee would be authorized to enter upon the the duties of his office and no vacancy would be created in said office.*

2. *In case there were justices elected at the last election to fill the vacancies in the office of justice of the peace, the same principle as set out in branch one hereof would apply.*

COLUMBUS, OHIO, December 29, 1917.

HON. J. L. HEISE, *Prosecuting Attorney, Circleville, Ohio.*

DEAR SIR:—I have your communication of December 8, 1917, which reads in part as follows:

> "Section 3269 G. C. provides that the bond of a township trustee shall be approved by a justice of the peace of the township in which the bond is given. One township of this county has no justice of the peace now serving and none was elected this fall. What official can approve the bonds of the trustees of this township?
>
> Another township of this county has no justice of the peace serving at the present time, but two justices were elected in that township this fall. What official can approve the trustees' bonds in this township?"

Before answering your questions directly, I would like to suggest that there ought to be no vacancy in the office of justice of the peace of any township in your county.

Section 1714 G. C. provides as follows:

> "If a vacancy occurs in the office of justice of the peace by death, removal, absence for six months, resignation, refusal to serve, or otherwise, the trustees within ten days from receiving notice thereof, by a majority vote, shall appoint a qualified resident of the township to fill such vacancy, who shall serve until the next regular election for justice of the peace, and until his successor is elected and qualified. The trustees shall notify the clerk of the courts of such vacancy and the date when it occurred."

Under this section the trustees of any township of your county, in which there is a vacancy in the office of justice of the peace, ought to proceed to fill the same by appointing some qualified resident of the township for said office, and this would be my advice.

Inasmuch as there is a vacancy in the office of justice of the peace in one or more of the townships of your county, at this time, and as this state of affairs may continue to exist up to the 1st day of January, 1918, I will consider your question upon its merits.

Your communication really embodies two separate and distinct matters, one in which there is a vacancy existing in a certain township of your county, for which office no justice of the peace was elected at the last election, and the other in which there is a vacancy existing at the present time, but for which vacancy two justices of the peace were elected at the last election and will therefore presumably take their office on the 1st day of January, 1918.

We will first consider the question relative to the township in which there is a vacancy and for which no justice of the peace was elected at the last election.

Section 3269 G. C. reads in part as follows:

> "Before entering upon the discharge of his duty, each township trustee shall give bond * * * . Such bond shall be approved by a justice of the peace of the township in which the bond is given."

Section 3270 G. C. provides in part as follows:

> " * * * Such original bond or new bond shall be deposited with the township clerk and recorded by him."

Section 3265 G. C. provides as follows:

> "If after receiving notice of his election or appointment, a person elected or appointed to a township office fails to take the oath of office and give bond within the time required by law, he shall be deemed to have declined to accept, and the vacancy shall be filled as in other cases."

The question is as to the course a trustee ought to pursue under the sections above quoted, in a case where there is no justice of the peace in a township and therefore no one to pass upon the sufficiency of the bond of said trustee. So far as I know, there is no provision of law which will take care of a situation such as you suggest; that is, in the event there is no justice of the peace to pass upon the sufficiency of the bond, there seems to be no other officer designated who can perform this duty which devolves upon a justice of the peace. Neither do I know of any decision of the courts in which a question of this kind has been judicially determined.

However, in State ex rel. Ackerman v. Dahl, 65 Wis. 510, there is a decision which to some extent at least would bear upon the matter now under consideration. The fourth branch of the syllabus reads:

> "The wilful and unjust refusal of the officer required to approve the official bond of a person elected or appointed to an office, to give it his approval, can not deprive such person of his office or create a vacancy therein."

In the opinion on p. 521, the court reasoned as follows:

> "The person who has been elected or appointed to an office and who does all that is required of him by law to enable him to hold the office, can not be deprived of such office by any wilful or unjust refusal of the person or

officer, who is required to approve his bond, to give it his approval. If such a rule is to prevail, then the officer whose approval of an official bond is required may in any case by such wilful and unjust refusal create a vacancy in an office."

At the time this decision was rendered there was a provision of law in Wisconsin as follows:

"The neglect or refusal of any officer elected or appointed or reelected or reappointed to any office to give or renew his official bond or to deposit the same in the manner and within the time prescribed by law" shall create a vacancy.

The court used the following language in reference to this provision:

"Under this provision, when the officer has done all he can possibly do to comply with the law in this respect, it can hardly be said that he has neglected or refused to give and deposit his bond when he has been prevented from so doing by an unlawful act or wilful refusal on the part of some other officer to perform a duty imposed upon him in regard to such official bond."

It seems to me the reasoning of the court in this case could be made to apply to the facts in the case under consideration. If the township trustees elected to office at the last election do all in their power to comply with the law, they would be justified in entering upon the duties of their office and no vacancy could be said to exist; that is, if they give a bond and are not able to have the same approved because there is no justice of the peace in the township, they would be warranted in filing the same with the clerk of the township, and by so doing there would be no vacancy in the office and they would be authorized in law to enter upon the discharge of the duties of their office.

There is a case reported in 25 O. S. 567, styled Kelly et al. v. State of Ohio, which tends in the same direction as the holding in the Wisconsin case. In the second branch of the syllabus the court held as follows:

"The provision of the statute requiring the indorsement of the certificate of the prosecuting attorney upon the bond of the treasurer is merely directory, and the want of such indorsement does not invalidate the bond."

On p. 577 in the opinion the court say:

"The objection that the bond was not accepted and approved is not founded in fact. It was oral y accepted by two of the commissioners, and that in our judgment is sufficient. The better practice undoubtedly is to put the acceptance in writing, or to enter it on the journal, but we know of no law making it indispensable.

The law requiring the certificate of the prosecuting attorney to be indorsed on the bond is merely directory, and the want of such a certificate by no means avoids or invalidates the bond."

From all the above it is my opinion that if the township trustees elected did all in their power to comply with the law, namely, entered into a bond with two good and sufficient sureties, resident of the township, and file the same with the township clerk, they will be authorized to enter upon the duties of their office and there could be no vacancy declared in the same.

However, I desire to suggest in passing that in the event there should be a justice appointed to fill the vacancy in said township at any time during the terms of office for which the township trustees were elected, they should then have said justice approve the bonds in accordance with the provisions of section 3269 G. C., above quoted.

Answering your second question, namely, what the township trustees elected should do in a township in which there is no justice of the peace, but for which office two persons were elected at the last election, I will advise as follows:

It is my opinion that the principles above set forth should also control in this case; that is, the trustees elected should file their bonds with the clerk in accordance with law. Then in the event either of the justices elected should qualify, the bonds should be taken to him for approval and then refiled with the clerk of the township.

It might be well, in both of the above cases, for the clerk to note on the bonds the reason they are filed without approval, viz., that there is no justice of the peace in the township to approve same.

While the question is not directly connected with the matters about which you inquire in your communication, yet it might be asked whether the sureties and the principal on a bond not approved by the proper officials would be liable in case of a default in the principal; or, in other words, is the approval of the bond such a vital part of the same that the persons signing the bond are not liable unless the approval of the proper officials is stamped thereon? I will briefly consider this question.

Throop in his work on Public Officers, Section 183, lays down the following proposition:

> "But as respects the sureties' liability, the approval is not deemed in law a part of the bond; and, in an action upon the bond, the sureties are not entitled to oyer of the approval."

This proposition laid down by Throop seems to be well substantiated by the decisions of the courts.

In Clark et al. v. State, 7 Blackf. (Ind.) 570, the court say:

> "In debt on a sheriff's bond, the defendants are not entitled to *oyer* of the approval of the bond by the judges; such approval being no part of the bond."

In the opinion on p. 571 the court say:

> "The approval by the judges is no part of the bond. That was a collateral matter wholly independent of the execution of the bond, and equally accessible to the defendants as to the plaintiff."

In The People v. Edwards, et al., 9 Calif. 286, the court say:

> "The defect in the approval of a sheriff's bond can not be set up as a defense in an action on said bond against the sureties. The object of the law in requiring the approval is to insure greater security to the public, and it does not lie in the obligors to object that their bond was accepted without proper examination into its sufficiency by the officers of the law."

In Eustis v. Kidder, 26 Me. 97, the court say:

> "The constable does not incur such penalty by serving a writ, if he has conformed in all respects to the provisions of Revised Statutes, chapter 104,

section 35, relative to giving bond, saving that the approval of the selectmen of the town has not been endorsed thereon, that provision being merely directory to them."

On page 100 in the opinion the court say:

"It is not essential to the validity of the bond that the approval of the selectmen should be endorsed upon it. That provision is directory to them and intended to be beneficial to the constable by affording evidence that his sureties have been adjudged to be sufficient and also to those who might become interested in the bond, by showing that such adjudication had been formal and deliberate. A provision merely directory can not constitute a part of the contract, which may be enforced, should the officers required to perform such duty neglect it."

In Westerhaven v. Cline, 5 Ohio Rep. 136, our own supreme court touched upon this matter in its opinion, although it did not directly decide it. In the opinion on p. 139 the court say:

"The law requires that a constable shall give bond with sureties, to be approved of by the trustees of the township. This law ought to be complied with, but we are not prepared to say that if a bond be delivered to a township clerk and by him filed away, that such bond would not be obligatory, without proof of its having been approved by the trustees."

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

902.

CONTAGION HOSPITAL—RIGHT OF A MUNICIPALITY TO PURCHASE LAND AND ERECT BUILDING FOR SUCH PURPOSE—HOW SAME SHOULD BE OPERATED—LEGALITY OF RESTRICTION IN DEED.

1. *A municipal corporation has no authority in law, either express or implied, to lease lands upon which to erect a contagion hospital, excepting as set out in the second branch of the syllabus. The lands must be secured by purchase.*

2. *A ninety-nine year lease, renewable forever, partakes so much of the nature of a deed of purchase when considered with a view to the objects and purposes for which the lands are leased, as to make the same legal.*

3. *A municipality would have no authority to erect a contagion hospital upon land secured by it in conformity with the first and second branches of the syllabus herein and then to contract with a private institution for the operation and management of the same.*

4. *A condition in the deed of purchase to the effect that the lands so purchased shall revert to the grantor when no longer used for the purposes of a contagion hospital would be legal.*

COLUMBUS, OHIO, December 31, 1917.

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

GENTLEMEN:—I have your communication of recent date to which you attach a letter received by you from the city solicitor of Lorain, Ohio, in which he asks an answer in reference to four queries which he sets forth in his letter. Your communication reads as follows:

"We are enclosing herewith communication from the city solicitor of Lorain, Ohio, which contains a statement of facts, and a number of questions, as well as a brief of the solicitor's opinion upon such questions. In keeping with the same, we respectfully request your written opinion upon the questions Nos. 1, 2, 3, and 4, as herein contained."

The letter from the city solicitor sets out the facts fully upon which the questions are based, but for the purposes of this opinion the statement of the questions themselves will be sufficient. They read as follows:

"1. Has the city of Lorain the right to construct a permanent building for a contagious hospital on leased land?

2. Would the term of years of the lease have anything to do with the city's right, as above stated, as to whether for one or ninety-nine years?

3. Has the city the authority to construct such a building either on leased land or on real estate purchased by it for such purpose and contract with any private institution for the proper operation thereof?

4. Has the city the right to purchase a portion of the land in question with a condition in the deed that in the event such land is not used as a contagious hospital then the same shall revert to the grantors?"

Before answering your questions specifically it will be well for us to note the general propositions which underlie the questions submitted by you. Section 3646 General Code contains the general grant of power to municipalities to do the things about which the city solicitor inquires in his communication. This section reads as follows:

"To provide for the public health, to secure the inhabitants of the corporation from the evils of contagious, malignant and infectious diseases, and to purchase or lease property or buildings for pest houses, and to erect maintain and regulate pest houses, hospitals and infirmaries."

There is not much in the history of this section which will aid us in arriving at the conclusion as to what answer should be given to the queries submitted, yet it might be well to note the history of this section briefly.

In 96 O. L. 24, the matter which afterwards became the above quoted section read as follows:

"To provide for the public health; to secure the inhabitants of the corporation from the evils of contagious, malignant and infectious diseases, and to erect, maintain and regulate pesthouses, hospitals, and infirmaries."

In 97 O. L. 507, this section was made to read the same as it now stands in the General Code with the exception that the semi-colon was dropped after the word "health," and a comma substituted therefor. It will be noted that the only change made in the section was that the following new matter was added:

"and to purchase or lease property or buildings for a pesthouse."

In looking over the provisions of this section it is fairly evident that the phrases "to provide," "to secure," "to purchase or lease" and "to erect" are phrases which are separate and distinct, each one defining a specific grant of power by the legislature to the municipality.

Let us first note the language which was later added to the said section as follows:

"to purchase or lease property or buildings for pest houses."

It is my opinion that notwithstanding the use of the general word "property" in this phrase it was undoubtedly the intention and understanding of the legislature that this was a specific grant of power in addition to those grants already given and was merely for the purpose of enabling the municipality either to lease or purchase the necessary property for pesthouses, the property being already in condition for use without the necessity of erecting buildings thereon. In other words, the municipality is given power to lease or to purchase buildings suitable for pest houses. Hence this phrase does not embody the idea of building or construction.

The next phrase found in said section reads as follows:

"to erect, maintain and regulate pesthouses, hospitals and infirmaries."

This is a grant of power, as said above, entirely separate and distinct from the grant of power immediately preceding it. This phrase does not say "erect thereon," which would evidently have been the language had the legislature meant to give the municipality the right to lease land or purchase the same with the intention of erecting thereon pesthouses, hospitals and infirmaries.

While this section mentions hospitals and infirmaries, yet it seems evident that the legislature in enacting the latter part of said section had in mind more particularly "pest houses." This is important to keep in mind in view of the further discussion of this question in which I desire to point out that the legislature seems to have distinguished between pest houses and contagion hospitals. Before leaving the question however, of the general powers given to municipalities in the matter of purchasing and leasing ground, I desire to call attention to the provisions of section 3615 General Code, which provides that each of the municipal corporations may acquire property by purchase, gift, devise, appropriation, lease, or lease with the privilege of purchase, for any municipal purpose authorized by law; also to section 3631 General Code, which provides that a municipal corporation shall have power to acquire by purchase, lease, or lease with the privilege of purchase, gift, devise, condemnation or otherwise, and to hold real estate or any interest therein, and other property for the use of the corporation.

Of course it is quite evident that under the provisions of these two sections a municipal corporation would have the power either to purchase or lease land for any municipal purpose whatever that might be authorized by law. But it must be kept in mind that these are general grants of power and are therefore very broad and inclusive.

With this in mind let us turn to the provisions of section 4452 General Code, which reads as follows:

> "The council of a municipality may purchase land within or without its boundaries and erect thereon suitable hospital buildings for the isolation, care or treatment of persons suffering from dangerous contagious disease, and provide for the maintenance thereof. The plans and specifications for such buildings shall be approved by the board of health."

This section seems to be dealing with the exact question you have in mind, namely a contagion hospital, and in this section the legislature in giving power to acquire land upon which to erect such a hospital limits the power of a municipality to the mere matter of purchase and not of leasing.

It is my opinion that the provisions of this section should govern in the matter you have in mind rather than the provisions of section 3615 or 3631, which as said before are general grants of power, and therefore are very broad and inclusive, while in these particular sections we have a specific grant of power for a particular purpose, and the only power that is granted is to purchase real estate.

While it might be held that under the general grant of power given to municipal corporations, and under the grant of power given in section 3646 General Code that a municipal corporation would have power to lease lands upon which to erect a pest house, yet when it comes to erecting a contagion hospital proper it does not occur to me that a municipal corporation has power to do anything other than purchase land for said purpose.

As said before, it seems that the legislature had in mind a distinction between a pest house and a contagion hospital. It is true that when we come to examine the definitions given by lexicographers of these two terms it is pretty difficult to draw a distinction between the two, yet in the common understanding of them there evidently is a marked difference. A pest house is used only for the most virulent kinds of diseases and when we speak of a pest house we generally think of smallpox; while a contagion hospital is used for all persons afflicted with all kinds of contagious and infectious diseases.

That the legislature seemed to have this distinction in mind is clearly evident from the provisions of sections 4370 and 4454 of the General Code. Under the provisions of section 4370 General Code the director of public safety is given the authority to manage, and make all contracts in reference to pest houses; while under the provisions of section 4454 the buildings that are erected as contagion hospitals are placed under the care and control of the board of health. It provides:

> " * * * The board shall appoint all employes or other persons necessary to the use, care and maintenance thereof and regulate the entrance of patients thereto and their care and treatment."

From all the above it is my opinion in reference to the matter which your city has in mind, it would be limited to the matter of purchasing real estate and not of leasing the same.

The second question submitted is as follows:

> "Would the term of years of the lease have anything to do with the city's right, as above stated, as to whether for one or ninety-nine years?"

If the principles above enunciated are sound, then it is my opinion that the city would have no authority to lease land under which lease the time is definitely fixed or is determinable at the option of the lessor. If it were a lease for ninety-nine years, renewable forever, the same would partake so much of the nature of an outright purchase of land that I would see no principle of law which would interfere with such a lease unless the word "purchase" as found in section 4452 would be construed very strictly. If this were done it would exclude the idea of a lease, even though it were for ninety-nine years and renewable forever. But it is my opinion that a court would not place such a strict interpretation upon the word "purchase" as that would exclude a ninety-nine year lease renewable forever.

Therefore, it is my opinion that such a lease would be legal under the provisions of the said two above quoted sections.

The third question submitted is as follows:

> "Has the city the authority to construct such a building either on leased land or upon real estate purchased by it for such purpose and contract with any private institution for the proper operation thereof?"

Of course, in view of the principles above stated, the city would have no authority to erect a building on leased land and contract with a private institution for the proper operation thereof.

The question remaining as whether the city could so erect the building upon purchased ground and turn the management of the same over to a private institution under contract. This matter of managing a contagion hospital is one of the governmental functions of the city, and the courts do not look with very much favor upon farming out or delegating its governmental functions to private individuals. Of course in those matters which are purely done in a proprietary way there is no particular objection to such a procedure, but this would not be done by the municipality in its proprietary capacity, but rather in its governmental capacity, and therefore upon principle I would hold that the management of the institution could not be turned over under contract to a private institution.

Further, section 4454 General Code seems indirectly to be against such a proposition because in this section the board of health is given complete authority over a building erected for the purpose of a contagion hospital, said board being given authority to appoint all employes or other persons necessary to the use, care and maintenance thereof and regulate the entrance of persons thereto and their care and treatment.

From this the legislature seems to have intended that the municipal corporation should manage the contagion hospital through the agency of the board of health of the municipality.

Of course I do not desire to be understood as holding that the board of health could not appoint from a private institution employes or persons necessary to take care of the patients who would enter the hospital, but I am of the opinion that the city would have no authority to enter into a general contract with a private institution to run the hospital for and on behalf of the city.

The fourth question submitted reads as follows:

> "Has the city the right to purchase a portion of the land in question with a condition in the deed that in the event such land is not used as a contagious hospital then the same shall revert to the grantors?"

I know of no provision of law which would prevent such a condition being placed in a deed of purchase. The land is purchased presumably for a specific and definite purpose—namely, to carry out the powers granted under section 3646 General Code, and if the time comes when it is no longer necessary to carry out said powers or when they can be carried out to better advantage in some other manner, than through buildings erected upon the land so purchased, then, in my opinion, no principle of law would be violated in making a provision that the land should revert to the grantor after the same is no longer needed for the purpose for which it was purchased.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

903.

BLANKET CERTIFICATE—NOT IN COMPLIANCE WITH SECTION 3806 GENERAL CODE.

A blanket certificate, therefore, without specifying any amount therein, will not be in compliance with the provisions of section 3806 *General Code. Such certificate should show the amount of money in the treasury which may be subject to the payment of the particular contract.*

COLUMBUS, OHIO, December 31, 1917.

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

GENTLEMEN:—Under date of December 5th, 1917, you submit the following inquiry:

STATEMENT OF FACTS.

"A contract was let in a municipality of the state of Ohio which was worded in such manner as to make the cost of the contract when completed so indefinite that the amount thereof could not be determined at the time of certification by the auditor, who made a certification in blanket form without specifying any amount. After the work was completed it was found that sufficient funds were not on hand to meet the unpaid portion of the contract.

Question—In the certification required under section 3806 G. C. is a blanket certification legal, or is it necessary, in full compliance with said law, that the amount of money should be definitely set forth in such certification as a maximum?"

Section 3806 General Code, to which you refer, reads as follows:

"No contract, agreement or other obligation involving the expenditure of money shall be entered into, nor shall any ordinance, resolution or order for the expenditure of money, be passed by the council or by any board of officer of a municipal corporation, unless the auditor or clerk thereof, first certifies to council or to the proper board, as the case may be, that the money required for such contract, agreement or other obligation, or to pay such appropriation or expenditure, is in the treasury to the credit of the fund from which it is to be drawn, and not appropriated for any other purpose, which certificate shall be filed and immediately recorded. The sum so certified shall not thereafter be considered unappropriated until the corporation is discharged from the contract, agreement or obligation, or so long as the ordinance, resolution or order is in force."

It is provided in this section that "the sum so certified shall not thereafter be considered unappropriated." Unless there was a specific sum set aside for each particular contract, it would be difficult and practically impossible for the city auditor to determine the amount of money which may be unappropriated in any certain fund.

In the case of Village of Carthage v. Diekmeier, 79 O. S., 323, the first branch of the syllabus reads:

"Where a municipal corporation, by sale of its bonds, creates a fund for the improvement of certain streets, and takes the necessary steps to receive and accept bids and to contract separately for the improvement of said streets, the following certificate filed by the clerk of corporation at the time the bid is accepted and the contract executed, to wit: 'I hereby certify

that there is money in the village treasury in the fund from which the above fund is proposed to be drawn for the payment of the village portion of the improvement and not appropriated for any other purpose sufficient to pay for the same. L. Hall, Village Clerk'—is not in compliance with section 2702 (old number) Revised Statutes, in that it is not certified that a specific sum of money required for the contract to improve the streets 'is in the treasury to the credit of the fund from which it is to be drawn, and not appropriated for any other purpose.'"

In this case bonds had been issued and a fund created from which the cost of a number of improvements was to be made. On page 341 of the opinion, Price, J., says:

"Whatever may be the correct view as to the meaning of this statute where a single contract is let, it seems to be a reasonable construction that there be a definite sum certified for each contract where there are several of the same species entered into at the same time to be paid from a theretofore gross fund. It would seem conducive, if not necessary to the safety of each contractor, that a definite sum be certified, because it is on the performance of that act by the village clerk that money to discharge the obligation is set apart and appropriated, and which 'shall not thereafter be considered unappropriated, etc."

It does not appear from the question as to whether or not bonds had been issued to pay for the particular contract or not. Your question is a general one and will apply to all contracts whether paid from a fund created for a single purpose or for a number of purposes.

It is my opinion that section 3806, General Code requires in each instance that a specific sum be designated in the certificate of the auditor of a city or the clerk of a village. Where an amount is not specified, it could hardly be said that there has been a sum certified.

A blanket certificate, therefore, without specifying any amount therein will not be in compliance with the provisions of section 3806 General Code. Such certificate should show the amount of money in the treasury which may be subject to the payment of the particular contract.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

904.

ORDINANCE—WHEN REFERENDUM PERIOD BEGINS WHEN SAME HAS BEEN PASSED OVER MAYOR'S VETO.

Under the provisions of section 4227-2 G. C., (104 O. L. 238), the thirty days referendum period for an ordinance or resolution, which has been passed or adopted by the council of a city and presented to the mayor for his approval or disapproval, and vetoed by him, and later reconsidered by said council and passed over the mayor's veto, begins with the date the ordinance, or resolution was originally filed with the mayor after its first passage or adoption.

COLUMBUS, OHIO, December 31, 1917

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

GENTLEMEN:—We have your recent communication in which you submit for my opinion the following matter:

"We are referring you to an opinion of the Attorney-General recorded in the Annual Reports of 1913, page 345, rendered on section 4227-2 G. C., previous to the amendment of said section as recorded in 104 O. L. 238.

In view of the amended section as it now stands, the council of a municipality on November 22, 1915, passed an ordinance fixing the salary of the members of council. The ordinance was vetoed by the mayor on December 2, 1915, and passed over the mayor's veto December 25, 1915.

Question 1. Does the thirty day I. & R. period begin with the date the ordinance was originally filed with the mayor?

Question 2. If not, when does the I. & R. period begin?"

Section 4227-2, as amended 104 O. L. 238, provides in part as follows:

"Any ordinance, or other measure passed by the council of any municipal corporation shall be subject to the referendum except as hereinafter provided. No ordinance or other measure shall go into effect until thirty days after it shall have been filed with the mayor of a city or passed by the council in a village, except as hereinafter provided.

When a petition signed by ten per cent of the electors of any municipal corporation shall have been filed with the city auditor or village clerk in such municipal corporation, within thirty days after any ordinance, or other measure shall have been filed with the mayor, or passed by the council of a village, ordering that such ordinance or measure be submitted to the electors of such municipal corporation for their approval or rejection, such city auditor or village clerk shall, after ten days, certify the petition to the board of deputy supervisors of elections of the county wherein such municipality is situated and said board shall cause to be submitted to the electors of such municipal corporation for their approval or rejection, such ordinance, or measure at the next succeeding regular or general election, in any year, occurring subsequent to forty days after the filing of such petition. * * * ."

As a general proposition the foregoing section in the first paragraph provides that no ordinance or other measure of a city shall go into effect until thirty days after it shall have been filed with the mayor. The purpose of this provision is disclosed by an examination of the second paragraph of said section, which requires a submission of an ordinance or other measure to the electors of a city for their approval or rejection, when a petition signed by ten per cent of the electors of said city is filed with the city auditor within thirty days after said ordinance or other measure has been filed with the mayor. The purpose of said provision then is to fix a certain period of time in which an ordinance or other measure shall be inoperative and within which the electors may be afforded an opportunity by proper action on their part to have said ordinance or other measure submitted to them for their approval or rejection.

It seems clear that this period of time commences at the time said ordinance is filed with the mayor by the city council.

Section 4234 G. C. reads:

"Every ordinance or resolution of council shall, before it goes into effect, be presented to the mayor for approval. The mayor, if he approves it, shall sign and return it forthwith to council. If he does not approve it, he shall within ten days after its passage or adoption return it with his objections to council, or if council is not in session, to the next regular meeting thereof, which objections council shall cause to be entered upon its journal. The mayor may ap-

prove or disapprove the whole or any item of an ordinance appropriating money. If he does not return such ordinance or resolution within the time limited in this section, it shall take effect in the same manner as if he had signed it, unless council by adjournment prevents its return. When the mayor disapproves an ordinance or resolution, or any part therof, and returns it to the council with his objections, council may, after ten days, reconsider it, and if such ordinance, resolution or item, upon such reconsideration is approved by the votes of two-thirds of all the members elected to council, it shall then take effect as if signed by the mayor. The provisions of this section shall apply only in cities."

This section requires that every resolution or ordinance of council shall, before it goes into effect, be presented to the mayor for his approval or disapproval. This section also provides that if the mayor disapproves an ordinance or resolution, or any part thereof, he shall return it to council with his objections, and council may after ten days reconsider it, and if such ordinance, resolution or item, upon such reconsideration, is approved by the votes of two-thirds of the members elected to council, it shall then take effect as if signed by the mayor.

An examination of this section discloses the fact that an ordinance or resolution is only presented to the mayor or filed with him on one occasion, and that is after its original passage or adoption, and if the mayor vetoes or disapproves the ordinance or resolution he shall return it to council, and if said council upon reconsideration approves it by the required vote, said piece of legislation takes effect as if signed by the mayor.

There is no occasion or requirement made for any additional presentation or filing with the mayor.

It seems clear, then, that the thirty day period in which an ordinance or resolution subject to referendum is inoperative and within which a proper petition may be filed for the submission of said ordinance or resolution to the electors of said city, dates from the time said ordinance or resolution is originally filed with the mayor of said city for his approval or disapproval, and it makes no difference whether said ordinance or resolution is vetoed by the mayor and later reconsidered by the city council and passed over his veto insofar as said thirty day period is concerned.

I, therefore, advise you in answer to your first question that the thirty day referendum period for an ordinance or resolution which has been passed or adopted by the council of a city and presented to the mayor for his approval or disapproval, and vetoed by him, and later reconsidered by said council and passed over the mayor's veto, begins with the date the ordinance or resolution was originally filed with the mayor after its first passage or adoption.

The answer to your second question is taken care of by my answer to your first inquiry.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.